Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 6 ▪ 2019

AROUND THE CORPS

Judge advocates CPT Julia Flores, right, and CPT Jonni Stormo, center, along with SFC Robert Love, left, huddle during a training exercise in Grafenwoehr, Germany, last fall. (Credit: Stefan Hobmaier/AP)

AROUND THE CORPS

A judge advocate's parachute deploys during an airborne operation at Fort Bragg. (Credit: Justin Kase Conder/AP)

Army Lawyer

Editorial Board

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Articles may be cited as: [author's name], [article title in italics], Army Law., [date], at [first page of article], [pincite].

On the cover: Now-CPT Jeri D'Aurelio climbs a rope during her Direct Commissioning Course at Fort Benning, Georgia. (Credit: Dan Torok/TJAGLCS).

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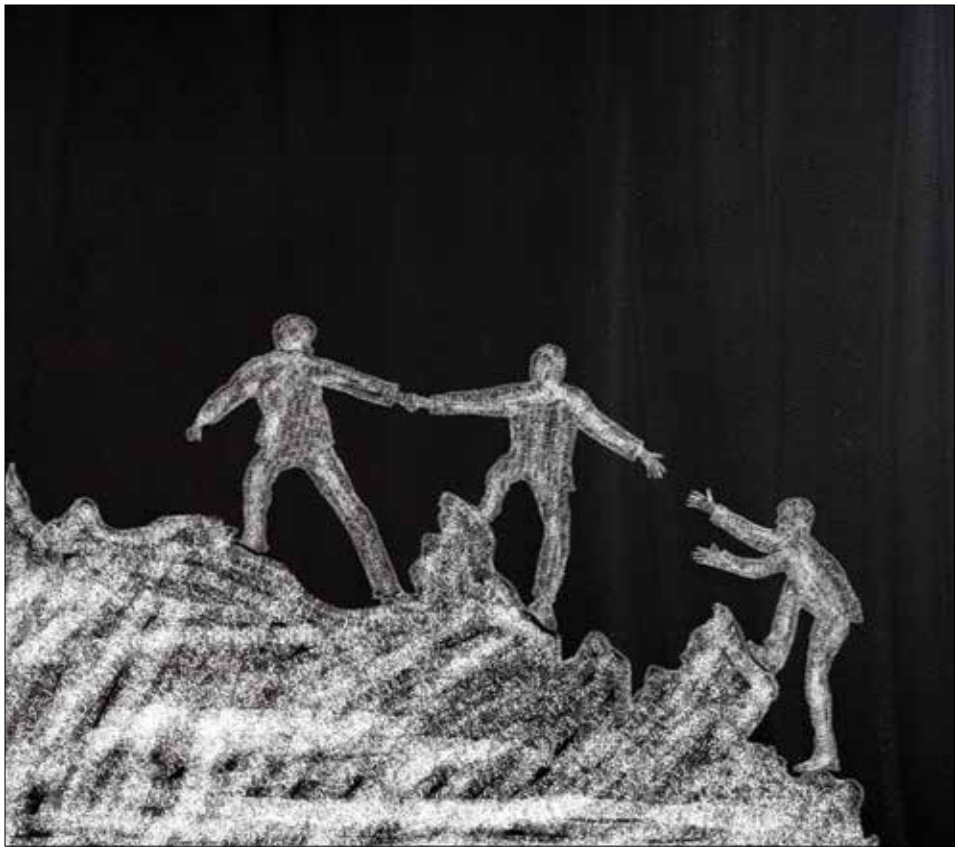


(Credit: istockphoto.com/marrio31)

Court Is Assembled

Resilience Is A Shared Responsibility

By Major General Stuart W. Risch

It is not the strongest of the species that survives, nor the most intelligent, but the one most adaptable to change.[1]
—Leon C. Megginson

Two years ago, the American Bar Association's National Task Force on Lawyer Well-Being released *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.*[2] The report noted that "to be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being."[3] For us, as a Corps, the well-being of every member of our team is absolutely vital. To echo the Chief of Staff of the Army, General James C. McConville: our people are our number one priority.[4]

The Judge Advocate General and I often talk about our Corps's Constants—principled counsel, substantive mastery, servant leadership, and stewardship. We depict each of these as points on our Corps's North Star; leading us as an institution ever-forward, regardless of circumstance. By focusing on our Constants, we best achieve and maintain excellence—both as individuals and as a Regiment.

Rather than being a separate tenet of our Constants, resilience underpins each of them. Delivering principled counsel takes strength and courage, often in opposition to momentum-gathering group-think. You cannot master the practice of law, day in and day out, without the fortitude to push forward beyond the slings and arrows of daily life. Likewise, without resilience, servant leadership is an absolute impossibility. As noted author Eleanor Brownn famously said, "You cannot serve from an empty vessel."[5] Finally, personal and institutional resilience lie at the very core of stewardship. Merriam-Webster dictionary defines resilience as "an ability to recover from or adjust easily to misfortune or change,"[6] and notes that stewardship is "the careful and responsible management of something entrusted to one's care."[7] We are all stewards of our Corps. Stewardship of our Corps demands that we responsibly care for our Regiment, our teammates, and ourselves.

In our line of work, resilience is fundamental. We are in the business of helping commanders, Soldiers, and Family members solve problems. In many cases, we must simultaneously guide our clients through some of the most difficult professional and personal circumstances they may face in life, while also confronting our own personal and professional challenges. We all need to be able to get back up when we get knocked down. And we *will* get knocked down, repeatedly. Resilience allows you to focus on what truly matters and to find a way to get past the incessant noise that surrounds each of us every day. By being ready and resilient—rather than reactive—by striving to take care of ourselves and those around us, we are better positioned to be principled counselors, substantive masters, servant leaders, and effective stewards of our great Corps.

I know, I know—easy to say, but tough for us all to do. Sometimes, we look at others who we believe have achieved

success, and we think that it must have come easily—that perhaps that person does not face the same struggles we do. That is the Iceberg Theory of Success—the idea that everyone sees a person's accomplishments floating on the surface but not all of the struggles, the failures, and the determination that is often deeper and larger, just beneath the surface.[8]

Take the Army Combat Fitness Test (ACFT), for example. We all know someone who is incredibly fit, who will score high on that test, and it is convenient to say, "But it's easy for him! He's a PT beast!" It's also easy to say to ourselves, "It's just harder for me than it is for that person." The truth is, everyone struggles. Everyone has to put in work, whether preparing for the ACFT, a cross-examination, or presenting a new idea to your boss. Resilience is *in* the work. It is also in openly sharing what's weighed you down and letting others know how you overcame or are overcoming the obstacles.

So, how do you cultivate resiliency? I wish I could tell you there was a foolproof method that would work for everyone, but there is no one-size-fits-all solution. You have to find a healthy outlet that works for you. For me, simply put, I rely on my faith, my Family, and my friends. I find that time spent reading a daily devotional, or in prayer, or with my Family or friends is a way to unplug and recharge that works well for me. Exercise helps, too. Finding time to walk away from the daily grind to clear my mind helps me to get back in the game. If you have a particular self-care regimen, share that with your peers and your teams. Talk about what works for you—particularly with people who may be struggling. The pages of this edition of *The Army Lawyer* are dedicated to discussing wellness and resiliency, and we hope you find insight and inspiration from your colleagues, leaders, and professionals sharing their insight, expertise, and experiences.

You simply cannot serve those whom you lead—and we are all leaders, regardless of position—without taking good care of yourself. Right now, take a critical look at yourself and be honest—are you focusing on your well-being? If the answer is "no," then take stock of what needs to change. Not sure what needs to change? Talk to your friends, Family, co-workers, or teammates about how they find balance and resilience in their lives. If you are struggling, consider talking to a chaplain, a licensed clinical social worker, or other professionals embedded in your unit. The resources exist. Please use them. If the answer is "yes," that you regularly focus on your own well-being, that's great . . . but that is only step one. Look around you. Are others on an unsustainable path? Are others having difficulty coping? Are you setting the example by making your wellness a priority? As a leader, colleague, and friend, you must recognize the signs when someone is struggling. Have the courage to intervene and help your "co-counsel," and know what resources are available to help them. As we all know, if you see something, you have to say something.

You must take care of yourselves and each other. Our greatest asset is our people—every member of our Regiment . . . and I am proud to serve with each and every one of you. **TAL**

(Credit: istockphoto.com/marrio31)

Notes

1. *It Is Not the Strongest of the Species that Survives But the Most Adaptable*, Quote Investigator, https://quoteinvestigator.com/2014/05/04/adapt/ (last visited Dec. 8, 2019).

2. National Task Force on Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations For Positive Change 9 (Aug. 14, 2017), http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf [hereinafter Report].

3. *Id.*

4. James C. McConville, 40th Chief of Staff of the Army Initial Message to the Army Team, https://www.army.mil/e2/c/downloads/561506.pdf (last visited Oct. 17, 2019).

5. Eleanor Brownn, http://www.eleanorbrownn.com/ (last visited Oct. 17, 2019).

6. Resilience, Merriam-Webster, https://www.merriam-webster.com/dictionary/resilience?src=-search-dict-hed (last visited Oct. 17, 2019).

7. Stewardship, Merriam-Webster, https://www.merriam-webster.com/dictionary/stewardship?src=-search-dict-hed (last visited Oct. 17, 2019).

8. Steve Mueller, *The Iceberg Theory of Success*, Planet of Success (Mar. 31, 2017), http://www.planetofsuccess.com/blog/2011/the-iceberg-theory-of-success/.

A U.S. Army Soldier fires a .50-caliber machine gun during a live-fire exercise at Grafenwoehr Training Area in Germany in August. (Credit: Army Sgt. Henry Villarama)

News & Notes

Updated *Law of Land Warfare* A Vital Tool for Judge Advocates

By Michael W. Meier

On 8 August 2019, the Department of Defense (DoD) published Army Field Manual (FM) 6-27/Marine Corps Tactical Publication 11-10C, *The Commander's Handbook on the Law of Land Warfare* (Handbook), replacing FM 27-10, *The Law of Land Warfare* (1956). As judge advocates, we have an obligation to provide relevant, understandable, and accessible tools for commanders, Soldiers, and practitioners. This Handbook provides an invaluable tool for Army and Marine Corps commanders and their judge advocates to guide land forces in conducting disciplined military training and operations in accordance with the Law of Armed Conflict (LOAC). The Handbook replaces the outdated FM 27-10, which lacked necessary context and often merely recited a particular rule instead of giving explanation. Field Manual 6-27 is a user-friendly handbook written for commanders and judge advocates in a way that is easily understood and applied across the spectrum of conflict. As our Army and Marine Corps transition from counterterrorism to peer-to-peer or near-peer conflicts, commanders and individual Soldiers and Marines must understand and apply the LOAC to be effective on the battlefield of the future.

Field Manual 27-10 had not been updated in over sixty years, was narrowly scoped (LOAC-focused), and did not fully contemplate or reflect the modern Army experience anymore. The Handbook, however, captures the intervening highlights, including adoption of the Additional Protocols to the Geneva Conventions and other instruments as well as lessons learned over decades of military operations, which add relevancy and legitimacy for today's commanders and warfighters.

One complaint often heard about FM 27-10 is that it merely recited the rule. The Handbook provides an explanation of and guidance for each of the various rules and principles—in the right context. Drawing from treaties to which the United States is a party, customary international law (CIL), the DoD Law of War Manual, and other references, the Handbook describes long-standing U.S. military practice in applying the LOAC across the spectrum of operations. It should prove a valuable tool in the development of complementary doctrine, tactics, techniques, procedures, and training in the years to come.

In addition, the Handbook is more "user-friendly." Commanders cannot and should not have to read a statute or wordy legal treatise to make decisions on the battlefield. Field Manual 6-27 is concise, clear, and user-friendly for field application and non-practitioner utilization. It is written specifically for commanders, judge advocates, and individual Soldiers and Marines, from team leader on up, who will need to understand and apply the LOAC principles. Written to be easily understood by commanders and individual Soldiers and Marines, this clarity will support increased and common understanding, and informed compliance with the LOAC.

Finally, commanders and individual Soldiers and Marines must understand the LOAC to be effective in the diffused battlefield of the future. In a high-intensity

conflict, legal advisors will not be with every decision maker. Field Manual 6-27 is geared to empower those decision makers to understand and apply the LOAC effectively in dynamic, complex environments. It also places the responsibility on commanders to make the LOAC compliance part of their planning and training process—it is in those early stages of planning where legal advisors and leaders have the greatest impact on maximizing LOAC compliance while also accomplishing the mission. Importantly, if our commanders, judge advocates, and individual warfighters are forced to operate in an analog fight, FM 6-27, at only 200 pages, is the perfect portable and comprehensive resource.

Field Manual 6-27 is the culmination of over twenty years of effort by countless attorneys, paralegals, commanders, and Soldiers. The Handbook is not intended to compete with or replace the DoD Law of War Manual. Each publication aims for a different audience. The Handbook incorporates the generational changes institutionalized over the last sixty years and more accurately represents the complexities of current and future battlefields. It serves significantly as one more very valuable tool for our commanders, Soldiers, and practitioners. **TAL**

Mr. Meier is the Special Assistant to the Judge Advocate General for Law of War Matters at the Office of the Judge Advocate General, National Security Law Division.

The Army Electronic Discovery Program Turns One

By Allison A. Polchek

On 2 October 2018, the Judge Advocate General's Corps stood up the Army eDiscovery Program at Fort Belvoir, Virginia (housed within the U.S. Army Legal Services Agency (USALSA) as the eDiscovery Division). One year later, the program has made significant progress in its goal to become a fully robust program that can meet the eDiscovery needs of the Army.

The eDiscovery Team (Team) helps attorneys understand the highly technical eDiscovery issues in their cases so that they can engage opposing counsel, effectively conduct, meet, and confer sessions, and meet their eDiscovery obligations in general. The Team has created workflows to enable practitioners to more efficiently process their cases across the entire continuum of the eDiscovery process—known as the eDiscovery Reference Model (EDRM). In addition, the Team can now process electronic information into a review platform software system, enabling attorneys to more efficiently conduct privilege reviews and use the information to build their cases—a considerable time and cost savings.

The Team has developed a web page that can be accessed on JAGCNet at https://www.jagcnet2.army.mil/Sites/eDiscovery.nsf/home.xsp. This website has many useful references, including our new eDiscovery Manual, with an extensive array of standard operating procedures that will guide attorneys and paralegals as they use eDiscovery Program resources. It also contains a full range of forms and documents, such as legal hold templates, custodian interview sheets, and processes for decrypting emails, which can greatly assist the practitioner in fulfilling eDiscovery obligations. In addition, there is a growing database of tip sheets that will explain topics such as how to deal with zipped files, how to redact using Adobe Acrobat, and other similar issues.

Training is one of the main focuses of the Team's efforts. In August 2019, the Team held a three-day training conference for paralegals, focusing on their critical roles in this process. Building upon that training, the Team has begun conducting monthly training for attorneys and paralegals on such topics as basic eDiscovery concepts (eDiscovery 101), legal holds, and the use of the review platform software.

The eDiscovery Program aspires to even higher goals as it matures. Our most exciting initiative is the development of a comprehensive JAG Corps app that will track cases through the EDRM. This app should ultimately be able to issue and track legal holds, monitor cases from beginning to end, and provide a systemized, legally defensible tracking system. Also, the Team has begun examining new technologies, such as computer-assisted review and search analytics, and is looking to procure a more robust review platform capability to potentially replace the software system we are using now.

We're only getting started. While the focus to date has been to support the USALSA litigating divisions that practice before forums using the Federal Rules of Civil Procedure, we look to expand to all areas of the JAG Corps practice. We are very excited about the future and want you to be a part of it. Whether you have an idea for a tip sheet or a new form, need help with opposing counsel, or anything related to this area, let us know what you need in eDiscovery services. For questions, suggestions, or requests for assistance, contact the Program Director, Ms. Allison Polchek, at allison.a.polchek.civ@mail.mil. **TAL**

Photo 1: SSG Nathan Ramos received the 2019 SGT Eric L. Coggins Award for Excellence. SSG Ramos has won numerous awards and accolades throughout his career, displaying unwavering commitment to excellence in himself, and setting the best example for his Soldiers.

Photo 2: Mr. Mortimer Shea, Director, Soldier and Family Legal Services, and Judge Advocate General's Corps's Senior Civilian, retired after more than forty years of federal service, both in and out of uniform, on 22 August 2019.

Photo 3: BG Gerald Krimbill uncases his general officer flag upon being promoted to Brigadier General on 23 August 2019. BG Krimbill is the Chief Judge for the U.S. Army Court of Criminal Appeals (IMA).

Photo 4: The Honorable Paul Ney Jr., the Department of Defense General Counsel, gave the Hugh J. Clausen Lecture in Leadership to the 2019 WWCLE attendees. His lecture was entitled, "Influencing Academia and the Culture Through Principled Legal Leadership."

Photo 5: After a week of presentations and continuing legal education, GEN Joseph Martin, the Vice Chief of Staff of the U.S. Army, delivered his perspectives and mentorship to our JAG Corps's most senior leaders.

Photo 6: Major General Alexander Taylor, the Director General of Army Legal Services for the British Army, gave his perspective on comparative law, as well as some insightful words on interoperability in our partnership with Great Britain, at the 2019 WWCLE.

Photo 7: LTG Charles Flynn, the U.S. Army Deputy Chief of Staff G 3/5/7, discusses the "Renaissance in Multi-Domain Operations" during his Army operational update at the 2019 WWCLE.

2019 U.S. Army Judge Advocate Legal Services Awards for Excellence Recipients

Photo 1: Mr. Gary Chura, Fort Leonard Wood, Missouri.

Photo 2: CW2 Michael Rodriguez, U.S. Army Cadet Command, Fort Knox, Kentucky.

Photo 3: Ms. Mary Benzinger, Senior Attorney, Pentagon Joint Legal Assistance Office, Washington, D.C.

Photo 4: SSG Matthew Smith, 8th Theater Sustainment Command, Fort Shafter, Hawaii.

Photo 5: Ms. Mi Kyong Cho, 2d Infantry Division, Camp Humphreys, South Korea.

If

A Judicial Variation on Rudyard Kipling's Famous Poem

by COL Timothy P. Hayes Jr.

If you can keep your counsel talking to their opponents across the aisle,
And encourage negotiation before drafting motions untimely filed;

If you can review EDRs personally, stressing the urgency of a rocket,
And assign one counsel only until the case is on the docket;

If you can demand on-time discovery, and enforce it at each junction,
So that trials aren't delayed by late delivery of production;

If you can ensure requests for experts are presented quickly to the boss,
And, if approved, the contract processed, no matter what the cost;

If you take the proper steps to ensure the safety of our proceeding,
And, while you're at it, double check—safety always bears repeating;

If you can ask your trial judge about the use of MJO,
And attempt to keep the STR from arriving far too slow;

If you can demand the use of Dragon by your reporters when transcribing,
So it doesn't seem, when we read the record, that the Charlie 5 has been imbibing;

Then come your Article 6, you will most surely earn an "A,"
And perhaps you, like Colonel Kent, will be a six-time SJA.

(Credit: istockphoto.com/DNY59)

Azimuth Check

Navigation from the Leadership Center

By Colonel Russell N. Parson and Lieutenant Colonel Patrick L. Bryan

Leadership—the activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization.[1]

This summer, The Judge Advocate General (TJAG), Lieutenant General Charles N. Pede, created the Leadership Center at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. Broadly, TJAG's vision is that the Judge Advocate General's Corps (JAG Corps) further incorporates "legal leadership" into both military legal practice and culture so that we can better support the operational Army and Joint Force. The Leadership Center will develop legal leadership training and education that best supports the Army and JAG Corps missions and our members' roles as dual professionals.

To support TJAG's vision, the Leadership Center developed five lines of effort that will guide the JAG Corps into the future and shape our practice: TJAGLCS training and instruction; field office support; doctrine and policy development; liaison with other entities; and wellness. Those lines of effort acknowledge the dual roles of JAG Corps leaders and will enable relevant and necessary education and training across the military legal enterprise, including in the Judge Advocate Officer Basic Course and Graduate Course, the Noncommissioned Officer Academy, short courses, and Offices of the Staff Judge Advocate. Initially, the main effort is TJAGLCS training and instruction, with priority to the Graduate Course, which will begin its program of instruction in January 2020.

There are many different methods to leading people. Exposure to different types of leadership helps future leaders develop and create their own leadership style. It is important to be self-aware and figure out what works best for your leadership style and those that you lead. The purpose of the *Azimuth Check* is to offer short anecdotes that inspire deeper thought and provide tools to add to readers' leadership rucksacks, ultimately cultivating versatile and adaptable leaders. **TAL**

COL Parson is the Director, Leadership Center at The Judge Advocate's Legal Center and School, Charlottesville, Virginia.

LTC Bryan is the Deputy Director, Leadership Center at The Judge Advocate's Legal Center and School, Charlottesville, Virginia.

Notes

1. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership para. 1-15 (1 Aug. 2012) (C1, 10 Sept. 2012).

Army Mission: To deploy, fight and win our nation's wars by providing ready prompt and sustained land dominance by Army forces across the full spectrum of conflict as part of the joint force.

Army Leadership | Legal Leadership

Dual Professionals

JAGC Mission: Provide principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army.

Principled Counsel is professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions.

Then-Major General Creighton "Abe" Abrams in 1961. (Courtesy: Army-Navy Library Trust Fund)

Understanding People is The Key to Successful Leadership

By Fred L. Borch III

Soldiers are not in the Army, Soldiers are the Army.[1]
—General Creighton W. Abrams

The late General "Abe" Abrams, a distinguished combat commander and former Army Chief of Staff, could have added: "All successful leaders must not only understand this, but must make this truth the focus of their leadership."[2] But, what does it really mean to say that Soldiers are the Army? And, why should this be the focus of leadership?

General Abrams was saying that successful leadership is about understanding what motivates a Soldier to excel in peace and war—and a common denominator shared by all successful leaders in history is knowing your Soldiers and understanding the factors that motivate them.

Motivation is a term that can mean many things to many people; to some, it is a function of positive reinforcement, and is achieved through praise, rewards, or the prestige that comes with increased responsibility. To others, the fear of punishment or other forms of negative reinforcement will motivate a Soldier to do his best. History—and our own personal experience—offers countless examples of both approaches to motivating Soldiers and of the success or failure that resulted from each.

As psychologist Abraham H. Maslow argued in the 1940s, human beings have five basic needs: the need for self-actualization, ego needs, social needs, safety needs, and physiological needs.[3]

1. Self-actualization—the desire to achieve the full potential of one's energies and talents—includes personal development and growth, creativity, and self-realization.
2. Ego needs include self-esteem and the esteem of others; the former includes a Soldier's perception of their own competence and adequacy, while the latter relates to a Soldier's status within the Army, and the extent to which a Soldier is respected.
3. Social needs relate to acceptance and include such intangibles as love, friendship, and a sense of belonging to a team.
4. Those categorized as safety needs include not only safety from violence or injury, but also financial security.
5. Physiological needs address such issues as food, water, sleep, and even sexual fulfillment.[4]

The Army makes it fairly easy to meet at least some of a Soldier's social, safety, and physiological needs, since Soldiers are members of a team, receive regular paychecks and recognition, and are generally well-sheltered, get enough sleep, and eat well. Leaders then must address the needs of self-actualization and esteem as the dominant motivators of men and women in uniform. But, how do we do that?

Motivating Soldiers

First of all, expect the best of your Soldiers at all times. Setting high standards provides the direction that any unit needs, and it gives Soldiers the opportunity to meet or exceed those standards. Make sure that the men and women of your unit understand that their best effort is what you want, but you must set clear goals against which that effort may be measured.

Second, almost all Soldiers thrive on responsibility; give it to them and watch the results. The knowledge that you expect their best, coupled with the responsibility to do the job *their* way, will encourage initiative, creativity, and personal growth. As General George S. Patton put it: "Never tell people how to do things. Tell them what to do, and they will surprise you with their ingenuity."[5] Allowing Soldiers to use their own abilities and talents in this way will enable them to realize their potential and allow them to enjoy the self-esteem, respect of others, and even the positive recognition—in the form of promotion and awards—that come from a job well done.

The third principle is that a leader must take a personal interest in the welfare and safety of every Soldier, both on and off duty. A Soldier who is treated with the dignity and respect they deserve will respond with loyalty to the unit and its commander. Further, being proficient in your job will earn you the trust of the members of your unit; this is one of the most powerful motivating factors, because it means that Soldiers in your care are likely to subordinate their own needs and desires to those of the organization. Once they have become team players, the goals of the team become the priority, and that is what mission accomplishment is all about.

Trust is the fourth and final aspect of human nature that must be understood by those who would be better leaders. The mission of every commander and leader is to get the job done, but because you cannot do the job by yourself, you have to get others to do it. But, to get others to work together to achieve a goal—to get Soldiers to accomplish a mission—you must have their trust and confidence. In other words, men and women must have the trust and confidence in a leader before they will give up their individual needs and desires for the greater good of the team or mission.

How Is this Achieved?

First, a leader must be competent and capable. Assuming, however, that a leader knows their job, what else brings about this crucial trust?

More than anything, this trust and confidence must flow naturally from liking people. Why liking? Because men and woman all know instinctively if someone likes them or not. They know a leader likes them and respects them for who and what they are—and expresses it by taking an interest in their individual careers, problems, health, and welfare—then they react positively to that leader.

Or, in the words of James M. Burt, a World War II Medal of Honor recipient: "Soldiers trust a leader who likes them."[6] Trust is that factor that inspires in a Soldier's heart a desire to do something, even if that thing is not in their best interest. This is why it is said that one must lead by example. Followers must know that you will make decisions and do things even if they are not in your best interest. You cannot ask a Soldier to suffer pain, or physical discomfort, or make a sacrifice, if you would not do the same yourself. Those being led who see a leader take actions that do not personally benefit them trust that leader. Soldiers must know who their leader is—they must be flesh and blood to them; their presence must be seen and felt.

Four Leadership Commandments

In sum, a successful leader must follow these four commandments:

- Set and enforce high standards, but ensure that those you lead know that their best efforts are the key to success.
- Give Soldiers responsibility; they thrive on it.
- Treat everyone with the same dignity and respect that you expect others to exercise when dealing with you.
- Gain your Soldiers respect and confidence by being proficient in your job and showing by your actions that you are concerned for their welfare.

Two Final Points

Some writers argue that young Soldiers in the Millennial and other later generations *require* generous praise of their successes, but I reject the idea that any desire for praise is unique to a particular generation.[7] On the contrary, it is simply human nature for men and women to want gratitude and appreciation for a job well-done. Finally, in the end, understanding human nature means recognizing that fundamental truth about people and what they require. While Maslow insisted that every human being has five basic needs, when it comes to leading people, I'm inclined to agree with psychotherapist Michael Ascuncion's remarks in a recent *New Yorker* magazine article.[8] "There are three needs that all people have," says Ascuncion.[9] "They want to be seen, they want to be heard, and they want to be valued."[10]

All those who would be leaders in our Army today—or leaders in business, industry, or government, for that matter—must understand human nature. This is the key to successful leadership. Understanding people is critical to inspiring in an individual's heart a desire to do what must be done—from the smallest task to the most important mission. **TAL**

Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.

Notes

1. Lewis Sorley: Thunderbolt: General Creighton Abrams and the Army of His Times 188 (1992). Creighton W. Abrams was one of America's great Soldiers. During World War II, General George S. Patton reportedly said: "I'm supposed to be the best tank commander in the Army, but I have one peer—Abe Abrams. He's the world's champion." *Id.* at 95-96. General Abrams was serving as Army Chief of Staff when he died of cancer in 1974. *Id.* at 375. He was 59 years old and had served as a general officer for eighteen of his thirty-eight years in the Army. *Id.* General Abrams's sons continued their father's tradition of soldiering, including General Robert B. Abrams (currently the Commanding General, UNC/CFC/USFK), General (retired) John N. Abrams (former TRADOC commander, now deceased), and Brigadier General (retired) Creighton W. Abrams III (currently the Executive Director, Army Historical Foundation).

2. *Id.*

3. Saul McLeod, *Maslow's Hierarchy of Needs*, Simply Psychology (May 21, 2018), https://www.simplypsychology.org/maslow.html. American psychologist Abraham H. Maslow (1908-1970) first developed the theory that all human beings have five basic needs. He argued that these needs must be satisfied if an individual was to achieve "self-actualization." *Id.*

4. *Id.*

5. James Kelly Morningstar, Patton's Way 14-15 (2017).

6. Interview with Lieutenant Colonel James M. Burt (Mar. 1994).

7. *See e.g.*, Martha M. Newman, *Decoding Millennial Lawyers*, 82 Texas Bar J. 639 (2019); Susan Smith Blakely, *Mind the Gap*, ABA J., Sept.-Oct. 2019, at 22.

8. Michael Schulman, *The Force is With Them*, New Yorker 31 (Sept. 16, 2019).

9. *Id.*

10. *Id.*

J. Robert Oppenheimer, left , credited with being the "father" of the atomic bomb, stands with then-Major General Leslie R. Groves at the Trinity test site in New Mexico. Groves was the director of the Manhattan Project. The Trinity test was the first test of an atomic bomb. (Courtesy: Atomic Heritage Foundation)

Lore of the Corps

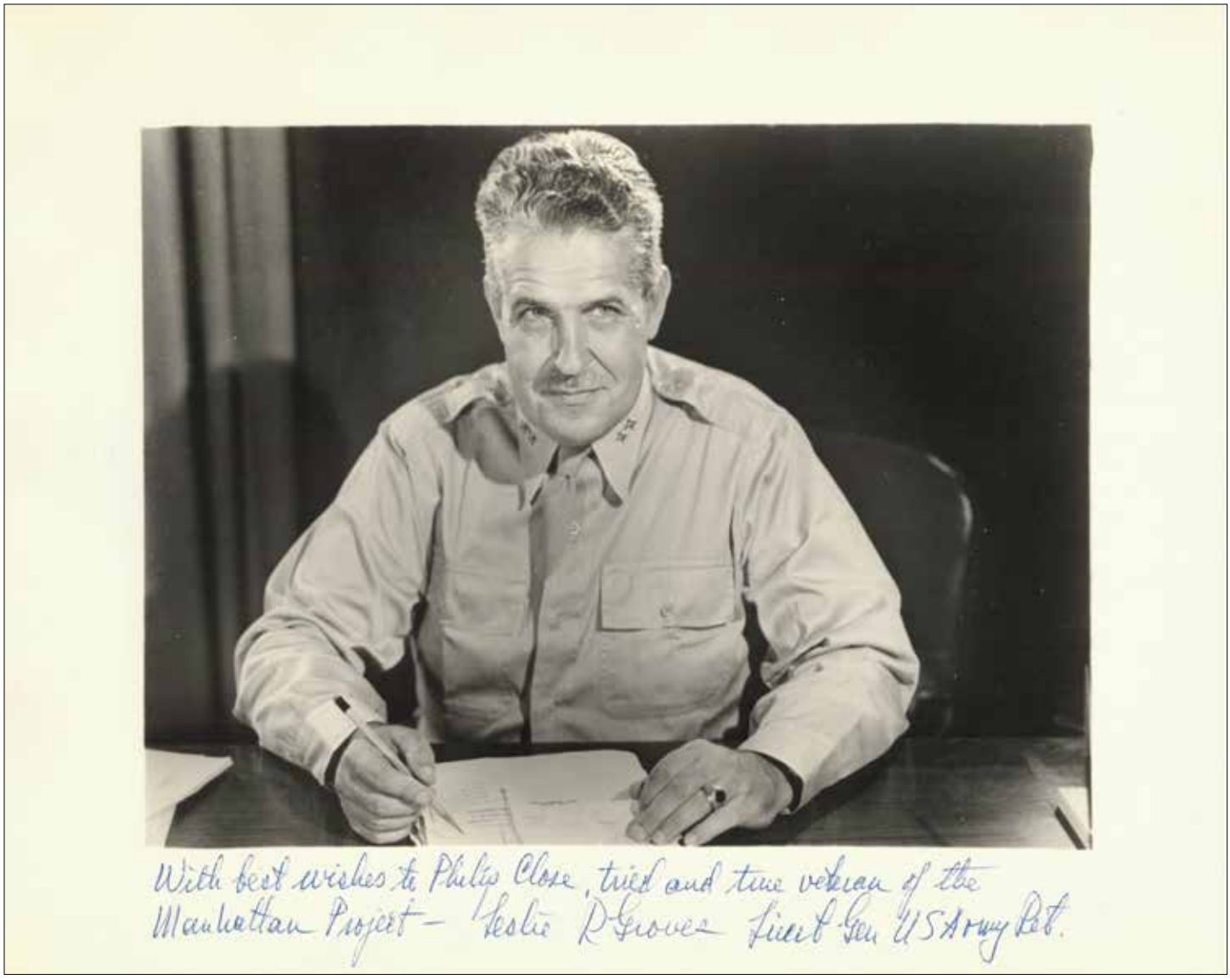
An Army Lawyer and the A-Bomb

By Fred L. Borch III

As 2020 marks the 75th anniversary of the end of World War II, it is time to reflect on the weapon that ended that war and changed the world forever: the atomic bomb. While Americans today and everyone living on this planet have learned to live with—if not ignore—the existence of nuclear weapons, it was truly a shocking event for many adults when the United States dropped the fission bomb "Little Boy" on Hiroshima on 5 August 1945. The devastation wrought by the 8,000-pound bomb—in the form of a mushroom-shaped fireball emitting radiation and heat rays—reduced thousands of buildings to ashes and ultimately killed thousands and thousands of men, women, and children. When a B-29 dropped "Fat Man" on Nagasaki four days later, the power of atomic weapons was evident to all, and the Japanese surrendered.[1]

While mostly forgotten today, producing this new weapon had been a prodigious undertaking. Major General Leslie R. Groves, who had already achieved fame in overseeing the construction of the Pentagon in just sixteen months, was in charge of all atomic bomb production efforts. Ultimately, Groves coordinated the efforts of factories, laboratories, and mines in thirty-nine states, Africa, and Canada.[2] Code-named the *Manhattan Project*, all basic bomb design and assembly took place at Los Alamos, New Mexico, under the leadership of physicist Robert J. Oppenheimer. A second—and no less important—*Manhattan Project* site was at Oak Ridge, Tennessee.[3] At this location, scientists worked on obtaining the uranium isotope 235 (U235) necessary to build a bomb. The theory was that enormous amounts of energy would be released with the fission (splitting) of the nuclei of U235.[4] Consequently, building a device with as little as ten pounds of U235 could deliver explosive power equivalent to several thousand tons of dynamite.[5]

No one could be certain that these ideas about splitting an atom would really work, much less that nuclear fission could be controlled. In fact, some scientists believed that "the first atom to be split would ignite a chain reaction that would consume the entire universe."[6] In any event, from the time President Roosevelt approved a super-secret crash program to build atomic bombs in the summer of 1941, until August 1945, when the two bombs detonated, some 600,000 men and women worked in some way with the *Manhattan Project* at a cost of



A signed photograph of General Leslie R. Groves. The inscription reads, "With best wishes to Philip Close, tried and true veteran of the Manhattan Project – Leslie R. Groves, Lieut Gen US Army Ret." (Courtesy: Fred Borch, Regimental Historian)

an unprecedented $2 billion.[7] This made the project the most sophisticated large-scale effort ever undertaken in human history. By comparison, the Greek historian Herodotus wrote that the Great Pyramid required 100,000 men working for twenty years, and the building of the Great Wall of China may have involved 1,000,000 men.[8]

Among these thousands of *Manhattan Project* workers was at least one judge advocate, First Lieutenant (1LT) Philip J. Close. A graduate of the University of Chicago Law School, Close had been a trial lawyer in a law firm in Kansas City, Missouri, from 1934 to January 1944, when he was drafted into the Army at the age of thirty-two. After basic training, Close qualified as a military policeman. He completed eight weeks of training in military government at the Provost Marshal General's School at Fort Custer, Michigan, and was promoted to corporal (CPL) in September 1944.[9]

Realizing that he preferred to use his skills as a lawyer in the Army, CPL Close decided to apply to Officer Candidate School (OCS) at The Judge Advocate General's School, then located on the campus of the University of Michigan in Ann Arbor. After being informed that the application process was highly competitive, CPL Close looked for ways to enhance his chances of success. He wrote to the senior partner in his old law firm in Kansas City and, through the senior partner, obtained the support of politicians in the area, including then-Senator Harry S. Truman. Whether this political support was the deciding factor will never be known, but when CPL Close submitted his application for OCS, it was accepted.[10] He subsequently completed the seventeen-week OCS and basic military law course of instruction and commissioned as a second lieutenant, Judge Advocate General's Department, on 11 January 1945.

Close reported to the Manhattan Engineer District, Oak Ridge, Tennessee, where he assumed duties as the "Staff

Judge Advocate to the Commanding Officer."[11] According to his military records, in his eleven months of service in that position, Close "supervised and handled all matters of military justice for the command," and he also provided legal assistance and served as a claims officer."[12] First Lieutenant Close certainly had an excellent relationship with his boss, then-Lieutenant General Leslie Groves, as evidenced by the inscription from Groves on a photograph given to him. "With best wishes to Philip Close, tried and true veteran of the Manhattan Project."[13]

Philip Close served honorably and faithfully, but he was profoundly affected by the *Manhattan Project* and the bombs dropped on Hiroshima and Nagasaki. He expressed his heartfelt feelings in a letter written to his parents on 9 August 1945—the day the second bomb destroyed Nagasaki. The letter is worth setting out at some length because it captures what more than a few Americans thought at the time.

Close begins his letter by telling his parents that he and a more senior judge advocate stationed in New York have "really been sitting on a keg of dynamite, or much worse, anticipating the claims and litigation that might result" from the testing of the atomic bomb at Alamogordo on 16 July 1945.[14] "Under considerable pressure," he continues, "I [also] prepared the legislative recommendations that will serve as an initial start toward congressional action to preserve and control the use of atomic energy. Rumor has already indicated that a board would be appointed to produce and control it."[15] According to 1LT Close, he had "to grind out" his legal work "in haste before the impact and real significance of the discovery became apparent."[16] By this "impact and real significance," Philip Close almost certainly means the events of 5 and 9 August 1945.[17]

In the remainder of his letter to his parents, then-thirty-three-year-old Close expresses his deepest feelings about this new weapon. When one remembers that the highly classified nature of the *Manhattan Project* meant that 1LT Close was unable to write even one word to his parents about the work being done at Oak Ridge, the words and phrases in his letter take on a special meaning. Additionally, the letter is an important window into the *zeitgeist* of the day because it reflects how an Army lawyer who had been part of the *Manhattan Project* understood that the bombing of Hiroshima and Nagasaki was a watershed event in history.

As you say in your [earlier] letter [to me], it is an awesome, awful, terrible thing. I say without exaggeration that man has reached or is shortly within reach of the point where all earthly civilization can be obliterated. This is considerable cause for sober thought. Sadly enough, there are only a comparative handful of people in the world who realize this or are stunned with it. History is enough teaching and basis for the realization that if we can do it others can. I draw hope from the fact that it may make war too horrible to contemplate and too ridiculous to be engaged in.

[Author's note: While the United States had a monopoly on nuclear weapons technology in 1945, 1LT Close's "if we can do it others can" foreshadows the Soviet Union's development of an atomic weapons program in the 1940s and 1950s.]

I am impressed but not elated. I am relieved but not enthused. My relief stems from the fact that Providence has permitted us to accomplish a goal which if sooner reached by our enemies would in fact have obliterated the nation. I am not given to exaggeration but I say with due deliberation that it is the greatest discovery of all time. There is no basis for comparison with any other discovery of man.

The destructive power of a mere pinch, or spoonful, produces for thousands of feet, violent and recurring explosions in chain fashion, searing heat, and electrically or electronically charged air which kills and disintegrates all in its path. The ground becomes molten, like lava, and drives with a glaze of porcelain or glass. The air remains charged with electricity (for how long after, we, or at least I, do not know), so that the place or site of explosion remains uninhabitable.

[Author's note: When 1LT Close writes of "electricity," he means "radiation." At the time, no one understood the impact of radiation on the environment, much less upon human beings].

It seems quite unreal to be telling you of it, as I have had it locked in my mind for so many months, disclosure of the least bit of information having been heretofore punishable by court-martial. Among other things, I have been the Military Justice Officer for the whole district, entrusted with initiating and recommending courts-martial. The pressure of this secrecy, in addition to the pressure of work, have weighed upon us heavily to the point of near mental exhaustion at times.

[Author's note: The secrecy surrounding the *Manhattan Project* was so great that even Vice President Harry S. Truman did not know about the efforts to build the atomic bomb until President Roosevelt was dead and Truman, now the Chief Executive, had a "need to know."][18]

Nagasaki has this morning disappeared from the map. Buildings and people in the immediate vicinity are not blown to bits but disintegrate and vaporize, if you can imagine such a thing. On the outer extremities, all living tissue and material, organic and inorganic, is seared to destruction beyond recognition.

[Author's note: Over 100,000 died in Hiroshima and Nagasaki. Temperatures at ground zero reached 5,400 degrees Fahrenheit; most structures were destroyed by fire or blast. At Hiroshima, for example, all but 6,000 of the city's 76,000 buildings disappeared.][19]

. . . .

Unquestionably Japan will surrender or be destroyed. Also, unquestionably, Russia's abrupt entry into the war was in my opinion solely due to the atomic bomb. It would not normally have occurred so soon. I can visualize Truman telling the others at Potsdam what he could and would do and I can visualize Stalin, a cold clear thinker, pooh-pooh-ing the statement as fantastic and saying he would wait and see. He needed no further sales talk after Monday August 6th.

[Author's note: Today, there is much historical controversy over the reasons for the Soviet Union's declaration of war on Japan; Philip Close's belief that Stalin took action "solely due to the atomic bomb" is inaccurate. Additionally, scholars today know that Stalin knew about the *Manhattan Project* long before he met with Truman and Churchill at Potsdam.][20]

I say to you Mother and Dad that you have never known me to go on so, at great length. I am shaken by the whole thing, not impulsively or inconsiderately, but intelligently and reasoningly, and this three days after the original disclosure. It is not a mere event in a war but it is an epoch, the ultimate results of which we cannot now foresee or predict. It may, and I hope will, be soon turned to constructive good rather than destructive evil. I am endeavoring to translate my thought to you and convey an appreciation of its significance.

. . . .

But now I want to come home. I want to be home and stay home. I want to enjoy my family. I want to do and enjoy simple things in a normal, simple fashion.

Your loving son, Phil[21]

First Lieutenant Close was not alone in his feelings about the atomic bomb and the danger that nuclear weapons posed to humanity. As the world nears the seventy-fifth anniversary of the end of World War II, and seventy-five years since an atomic weapon was last used in war, much of the fear has dissipated with the passage of time. In fact, as early as the 1960s, Americans were able to satirize, if not laugh, about nuclear war. Actors Peter Sellers, Slim Pickens, and George C. Scott (who would later achieve fame in *Patton*) starred in Stanley Kubrick's "political satire black comedy film" *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*, which made fun of Cold War fears of nuclear war between the United States and the Soviet Union.[22] The actual title of the movie says it all. The movie was released in 1964 and received rave reviews from both critics and the public; popular film critic Roger Ebert called it "arguably the best political satire of this century."[23] Yet not even twenty years had passed since judge advocate Phil Close had written his poignant letter to his parents in which he expressed deep-seated fears about the future.

As we enter the third decade of the twenty-first century, 1LT Philip Close's experiences as a judge advocate in the *Manhattan Project* are worth reading about, even though he and most likely all of those men and women who were part of this human endeavor have died. As for Close, he was honorably discharged from active duty on 29 December 1945 at Fort McPherson, Georgia. He then returned to Kansas City, Missouri, where he again took up the practice of civilian law. Philip J. Close died in 1963 at the age of 52.[24] **TAL**

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Notes

* The author thanks Ms. Janet Close Ewert for her help in preparing this article about her father.

1. "Little Man" referred to President Franklin D. Roosevelt. The Oxford Companion to the Second World War 530, 773 (I.C.B. Dear et al. eds., 1995) [hereinafter Oxford Companion]. "Fat Man," the nickname given to the second atomic bomb, referred to Prime Minister Winston Churchill. *Id.*

2. Patrick Feng, *Lieutenant General Leslie R. Groves, Jr.*, On Point, Spring 2016, at 18.

3. While Los Alamos and Oak Ridge arguably were the most important Manhattan Project locations, engineers and scientists in the United States also worked on the atomic bomb at Berkeley (California), Hanford (Washington), Milwaukee (Wisconsin), Detroit (Michigan), Chicago and Decatur (Illinois), and New York (New York). For more on the project, *see* Richard Rhodes, The Making of the Atomic Bomb (1986).

4. Oxford Companion, *supra* note 1, at 773.

5. *Id.*

6. Don Demark, *Manhattan Project, in* Historical Dictionary of the U.S. Army 296 (2001).

7. Oxford Companion, *supra* note 1, at 773.

8. *Id.*

9. War Department, Adjutant General's Office Form No. 55, Enlisted Record of Philip J. Close, 11 January 1945.

10. Interview with Ms. Janet Close Ewert, 1LT Close's daughter (Sept. 18, 2019) [hereinafter Ewert Interview].

11. War Department, Adjutant General's Office Form 100, Separation Qualification Record, Philip J. Close.

12. *Id.*

13. *Id.*

14. Letter from Philip J. Close to Mr. and Mrs. Close (9 Aug. 1945) (on file with author).

15. *Id.*

16. *Id.*

17. *Id.*

18. David McCullough, Truman 377-78 (1992).

19. Max Hastings, Retribution: The Battle for Japan 477 (2008).

20. *Id.* at 445-47, 480-81, 488.

21. Hastings, *supra* note 19.

22. *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb,* IMDb, https://www.imdb.com/title/tt0057012/ (last visited Oct. 2, 2019).

23. *Dr. Strangelove,* RogerEbert.com, https://www.rogerebert.com/reviews/great-movie-dr-strangelove-1964 (last visited Oct. 2, 2019).

24. Ewert Interview, *supra* note 10.

AROUND THE CORPS

Members of the Fort Bragg SJA office prepare to take off for an airborne operation last October. (Credit: Justin Kase Conder/AP)

(Credit: istockphoto.com/peshkov)

Practice Notes

Effectively Presenting Digital Evidence

By Colonel Charles L. Pritchard Jr.

If we continue to [use] our technology without wisdom or prudence, our servant may prove to be our executioner.[1]
—General Omar Bradley

Digital evidence continues to make its way into court-martial presentations with varying degrees of success. Military courtrooms have modernized (and continue to modernize[2]) to maximize trial practitioners' ability to persuade the factfinder.[3] Yet, courtroom technology is simply the medium for conveying that which is of paramount importance to the trial: the evidence. Sometimes, trial practitioners focus on whether to use a horse-drawn cart, a bus, or a limousine without considering how many people the conveyance will hold; whether the right passengers are on board; whether someone got on or off without their knowledge; and where the pick-up and drop-off points are. In these instances, use of digital evidence and its technological carrier can be the "executioner" of a trial practitioner's case rather than a thought-provoking enhancement of the case.

This article explores issues with handling digital evidence in the courtroom and, to a lesser extent, the technology that conveys it. This is not a how-to article for the use of courtroom technology,[4] and it attempts to be more than a basic guide to evidence handling.[5] The article explores foundation, admission, publication, argument, and deliberation issues. The issues are developed through a hypothetical attempted premeditated murder case and are framed in a suggested methodology for thinking about digital evidence. If counsel use the suggested framework, they can reduce and possibly eliminate the routine practice of creating digital stumbling blocks and thus present persuasive digital evidence.

Consider the following scenario:

Specialist (SPC) Brown is charged with attempted premeditated murder of her husband, Mr. Brown. Specialist Brown lured her husband into the woods behind their house under the auspice of a birthday treasure hunt at the end of which Mr. Brown would find his present. Along a path in the woods, SPC Brown set up a swinging log trap. When Mr. Brown reached a certain clue along the path, SPC Brown cut a rope releasing the swinging log in order to crush him against a tree. The log crashed into the left side of his chest, fracturing ribs, puncturing his heart, and collapsing his lung. Mr. Brown crawled back to the house and called 911. He told the 911 operator that a bicycle rider crashed into him when he was crossing the street. Later, he told police about the log. Specialist Brown will testify that she was a battered spouse and was peremptorily defending herself. She has the bruises to prove it. During SPC Brown's video-recorded Criminal Investigation Command (CID) interview, she denied injuring her husband. She also said he cheated on her twice, but she reluctantly admitted to cheating on him as well. The pertinent evidence includes a hard-copy photo of Mr. Brown's chest bruise, a CD with digital pictures of SPC Brown's bruises, a CD with the 911 audio, and a DVD with the video-recorded CID interview.

The trial and defense counsel in the hypothetical are armed with digital evidence, but are they prepared to establish a legal basis for its use, handle it with technical and oral savvy, ensure others who are required to handle it can do so, project it properly to everyone who needs to see and hear it, preserve it for the record, and argue it with effect? If they think about the digital evidence using the following methodology, the answers will be yes.

A Methodology to Prepare for the Use of Digital Evidence

Because digital evidence relies on courtroom technology, which has multiple points of potential failure, trial practitioners should not treat digital evidence the same as traditional evidence. So, what must trial practitioners consider about digital evidence when preparing their cases? Asking (and answering) the following questions about each item of digital evidence will help them get it right.

Why Do You Need It?

This is a different question from "why do you want it?" First, ask, "why do you need it at all?" Then, ask, "why do you need it in that form?" The first question invokes the standard relevance and necessity concerns,[6] but it also forces you to think about technical foundation and admission issues. The defense counsel in the hypothetical wants to introduce the CD with digital photos of the accused's bruising to help establish the battered spouse defense. Assuming all the photos are admissible, the entire CD can be admitted as one exhibit—a relatively straightforward foundation for substantive evidence.

However, the defense counsel also wants to impeach Mr. Brown's trial testimony that the accused set a trap for him by using the portion of the 911 audio where Mr. Brown said he was hit by a bicycle. This CD is not admissible in its entirety for its substance,[7] so the foundation is trickier. The defense counsel knows that a prerequisite to introducing extrinsic evidence of a prior inconsistent statement for impeachment purposes is an evidentiary confrontation with the declarant.[8] So, rather than introducing this in the defense case-in-chief (necessitating having a case-in-chief and permitting recall of an adverse witness during the defense case), the defense counsel instead cross-examines Mr. Brown about the prior statement. If Mr. Brown cannot remember making the prior statement, is the CD available to refresh his recollection?[9] Is the audio a "writing" per Military Rule of Evidence (MRE) 612?[10] If so, does this open the door for the trial counsel to admit other portions of the audio relating to Mr. Brown's testimony? Are there portions of the audio that are irrelevant or privileged? If so, how are those portions to be deleted or redacted? Beyond these legal issues, the defense counsel must be prepared to play only that portion of the audio that establishes the prior statement and provides enough context for Mr. Brown to authenticate the 911 call.[11] The defense counsel should have previously queued the audio to the prior statement, have the courtroom technology on which it will be played already prepared, and have practiced publication beforehand. Assuming Mr. Brown still cannot remember making the prior statement or disavows it, the defense counsel must be prepared to introduce that portion of the audio as extrinsic evidence of the prior inconsistent statement. But, mechanically, how is this accomplished? Does the military judge admit the entire CD (by marking the exhibit sticker on the CD itself) with a record caveat that only certain time-hacks in the audio are actually admissible? Does the military judge maintain the CD as a "for Identification" exhibit while permitting the defense counsel to play the admissible portion to the members and giving a limiting instruction? You should be prepared to answer these questions before the military judge asks them.

If you want the digital evidence for its substance, the mechanics can get more complicated. The trial counsel wants to introduce the portion of the accused's CID video interview where she says her husband cheated on her for its substance under MRE 801(d)(2)[12] as a non-hearsay statement or under MRE 803(3)[13] as proof of the accused's motive. Assume that there are portions of the interview the trial counsel does not want to introduce (e.g., unhelpful statements or aggressive CID interrogation tactics). The defense counsel invokes the rules of completeness[14] and demands that the government admit the rest of the video except for a part where the accused admits to having an extramarital affair.[15]

The military judge rules that fairness dictates admission of more than the trial counsel offered but not as much as the defense requested and that the portion about the affair is inadmissible. Assume there are now four admissible sections of video all separated in time from one another, and consider the mechanics of admission again. The DVD contains substantive evidence, so the panel members can consider that evidence during deliberations. Again, does the military judge admit the DVD and provide written guidance to the panel members about what they may and may not watch during deliberations? Does the military judge permit the trial counsel to play the admissible portions for the members, but not allow the members to take the DVD with them during deliberations and tell them they can request to reopen the court to re-watch those portions? Must the trial counsel have the video copied onto a second Prosecution Exhibit DVD and edited to contain only the admissible portions? If the latter, does the trial counsel have the editing capability readily at hand so as not to unduly delay the proceedings?

If the foundation and admission of the digital evidence involves the creation of a new exhibit, does the courtroom have the capability to create the new exhibit? For example, the trial counsel wants to display the image of Mr. Brown's chest bruise on the witness-stand touchscreen monitor and have a bruise expert draw on the image to indicate the point of impact. The trial counsel uses a software program to select a pen feature and a color, and directs the expert to circle a part of the bruise. Now that this new exhibit is created, how does the trial counsel offer it for admission? Is it admitted as an altered digital file? Does the touchscreen software (which is likely separate than the Art program) have the ability to "freeze" and save the altered image? Does the courtroom have a networked printer to which the trial counsel can send the altered image? If the trial counsel is not prepared to answer these questions, the digital evidence may unravel the government case rather than enhance it.

The second "why do you need it" question—i.e., "why do you need it in its digital form?"—is simply a cost-benefit analysis. It is tempting to receive digital evidence from its custodian and accept the evidence as tendered. When the CID Special Agent hands the trial counsel the DVD, the natural tendency is to plan to play it for the panel members. But why digital? You should, after asking the first "why do you need it" question, balance the technical and mechanical difficulty in admitting the digital evidence with its possible non-digital alternatives. If the trial counsel wants to prove Mr. Brown's injuries, should the trial counsel play the 911 audio of Mr. Brown's labored breathing or, alternatively, have Mr. Brown testify to his injuries? What more does the defense counsel achieve by having the pictures of the accused's bruises on a CD rather than as printed, color pictures?

If the digital evidence is not more persuasive than its non-digital alternative, you should balance the difficulties of admitting each and pick the version that enhances smooth case presentation. Even where the digital evidence is clearly more powerful than its alternative, the anticipated technical and mechanical difficulties in admitting it may cause you to decide the juice is not worth the squeeze. Take the above example about the CID video interview. Seeing and hearing the accused say she had a motive to kill might be more persuasive than reading the same words on paper. But, given the admission and deliberations difficulty mentioned above, does a transcription or a summary[16] of the interview make case presentation smoother? Perhaps not, but if you do not ask why you need evidence in digital form, you have not performed this cost-benefit analysis or thought coherently about effective case presentation.

Once you have consciously decided to use the evidence in its digital form and are prepared for the mechanics of foundation, admission, and deliberations, you must determine whose help you need and who might present an obstacle.

Whom Do You Need to Tell?

You cannot effectively handle digital evidence by yourself. Others who have a stake in the courtroom and the proceedings will become stumbling blocks to your effective presentation if you surprise them in the middle of trial with digital evidence and the courtroom technology necessary to present it.

First, tell the court reporter and courtroom administrator (if one exists). These individuals can help ensure the courtroom technology works and is prepared for use. During trial, the courtroom administrator, if briefed beforehand, can assist you in quickly setting up, turning on, and moving the technology necessary to display the digital evidence.[17] The court reporter, whose primary duty is to ensure the proceedings are recorded accurately, has a vested interest in a smooth presentation of evidence. If court reporters know what is coming next, they will be more effective. They may even offer you alternatives to digital evidence or to the presentation technology that you had not considered.

Next, consider telling opposing counsel. While not specifically required by the Rules of Court,[18] you are likely to avoid the *quid pro quo* objection—that is, you surprise me with your presentation style, and I will surprise you with an objection. Even if it does not preclude the objection, pretrial notice to opposing counsel may engender a collegial reciprocity where opposing counsel gives you pretrial notice of their objection. Your goal should be to avoid unnecessary interruptions to your case or, at the least, to be prepared for known or anticipated interruptions. This is one way to do that.

Finally, tell the military judge. While the Rules of Court do not require this, you should consider it non-negotiable. If you surprise the military judge with courtroom technology or complicated issues involving digital evidence, you are certain to interrupt your smooth case presentation. The military judge will promptly excuse the panel members to "take up a matter" with you. There are several reasons other than smooth presentation to notify the military judge before trial. First, if you intend to make your opening statement or closing argument digitally (e.g., using a PowerPoint slideshow, scrolling through digital photographs on CD or displaying them on an overhead projector, or playing a video), the military judge needs to review your presentation for obvious issues that will be difficult to "unring." For example, a digital opening statement that includes embedded substantive evidence could expose the members to inadmissible evidence that is incurable by an instruction.[19]

Some curable examples are an opening statement that includes improper argument or a closing argument that misstates the law. In the first example, you prevent the military judge from performing evidentiary gatekeeping.[20] In the latter two, you unnecessarily interrupt your presentation with an objection (from your opponent or the military judge *sua sponte*), argument on the objection, and a curative instruction. Seeing the issue for the first time during trial, the military judge is likely to excuse the panel members and require you to display your entire statement or argument for review anyway. The second reason to notify the military judge before trial is to establish who holds the "kill switch." If an audio or video exhibit is playing, who has the ability to stop it because of an objection or at the military judge's direction? Does the military judge let the proponent operate the kill switch? Does the military judge do it? Does the court reporter have the controls? If so, does the court reporter know when to stop the playback? Is it when an objection is entered? Is it when the military judge directs? Without this prior coordination, an audio or video exhibit is likely to keep playing for some amount of time, possibly exposing the panel members to inadmissible evidence.

Your goal is to ensure your case presentation conveys what you want it to convey to the factfinder. You do not want to convey the impression that you do not know what you are doing or that your case is out of your control. Identify those court-martial participants that you need to recruit for the limited purpose of ensuring your digital evidence presentation is smooth. Once you have done that, you must anticipate how effectively the digital evidence will be received.

Who Needs to See/Hear It?

Many times, trial practitioners are their own stumbling blocks during their presentation of digital evidence. They create stumbling blocks for two reasons: they do not broadcast the evidence to everyone who

needs to see or hear it or they broadcast it to more people than are permitted to see or hear it; and they fail to preserve the record with their or their witnesses' references to the contents of the digital evidence. Any of these stumbling blocks will require intervention by the military judge and interrupt your presentation. If you ask this subsection's question, you should avoid creating your own presentation stumbling blocks.

First, consider the various categories of people in the courtroom, and then determine which of those groups must be able to perceive the evidence and which are not permitted to perceive it. The military judge must be able to perceive everything you are doing to properly rule on objections and to *sua sponte* prevent inadmissible evidence from reaching the factfinder. If you are conveying your digital evidence through courtroom technology, ensure the military judge can perceive it instantaneously and in the form you want it admitted. In the hypothetical, when the trial counsel displays the color picture of Mr. Brown's bruise on an overhead projector, the colors on the screen should not be significantly different than on the picture itself. Further, the screen should be located where the military judge can see it without having to move. When the defense counsel tries to refresh Mr. Brown's memory of his prior inconsistent statement using the 911 audio, the military judge must be able to hear it simultaneously with the witness, the court reporter, opposing counsel, and the accused. The author presided over one case in which the audio on the original recording was so poor that it could not be heard through speakers. However, it could be heard using headphones. The court recessed and the military judge, opposing counsel, the accused, and the witness separately listened to the recording using headphones. On the record, each stated they had listened to the audio and heard it. Then, the examining counsel continued with the refreshing recollection examination. Although burdensome, this method permitted the military judge to perceive the digital evidence "simultaneously" with the other trial participants for the purpose of gatekeeping.

The court reporter should be able to perceive the digital evidence as well. The court reporter is not merely transferring oral words to written words when creating the record. Rather, the court reporter is creating the eyes and ears of the non-trial participants: the convening authority and the appellate courts. They are annotating the record to show non-verbal actions and events.[21] If they cannot perceive the digital evidence, the record is less complete and less helpful.

Opposing counsel and the accused must be able to perceive the digital evidence simultaneously with the proponent, the proponent's witness, and the panel members (if admitted and published). Counsel must be capable of objecting to evidence in a timely fashion.[22] Further, if the accused cannot perceive the evidence, there may be a Fifth Amendment Due Process violation.[23] If there are no monitors on counsel tables and a projection screen is placed where the accused cannot see the evidence, the trial counsel must be prepared to either move the screen or request the military judge's permission to have defense counsel and the accused move to a place where they can perceive the evidence. This should be built into your presentation and not be an afterthought.

The witness must be able to perceive the digital evidence. Further, if the proponent intends for the witness to perform a demonstration with or on the evidence, the witness should have practiced the demonstration before trial. The witness must be familiar not only with the evidence itself, but with the courtroom technology that will serve as its carrier. The witness should not be leaving the witness stand, drawing on an overhead overlay, using a telestrator pen, using their finger to mark on a touchscreen, or demonstrating on a Smart Board for the first time during trial. That is a sure way to undermine your smooth evidence presentation.

The panel members should not perceive the digital evidence until it has been admitted.[24] Additionally, some admissible evidence may not be shown to the panel members, but may be read to them.[25] Consider again the discussion of non-substantive and substantive evidence concerning the 911 audio and the CID video interview from the above section. The defense counsel wants to refresh Mr. Brown's recollection of his prior inconsistent statement to the 911 operator by playing the CD for him. Normally, witness recollections are refreshed using writings that the witnesses read silently to themselves, thereby avoiding exposure of the inadmissible evidence to the factfinder. Here, there is no way for Mr. Brown to review the 911 audio without exposing the panel members to it as well. The members must be excused, and Mr. Brown's recollection must be refreshed during an Article 39(a),[26] UCMJ, session.

A similar result occurs when laying a foundation for the CID video interview. Given the military judge's ruling that four separate sections of the video are admissible, the trial counsel must be vigilant in ensuring the panel members only perceive the admissible portions when the video is played. If the digital evidence does not involve audio (e.g., digital photos or a police body-cam video with no sound), it is possible to lay a foundation for it without excusing the members. If the witness, military judge, counsel, and the panel members all have individual audio/visual monitors, the proponent could disable the members' monitors as well as the large courtroom screens while laying the foundation. Because the members cannot see or hear the inadmissible evidence, they need not be excused. Once the proponent successfully lays the foundation, the military judge may permit publication of the admitted evidence to the members' monitors (and the courtroom screens). You must understand when your presentation of digital evidence will require excusal of the panel members and seamlessly weave the excusal request into your case. Failure to do so will at least cause the military judge to interrupt your presentation or, at worst, cause a mistrial because you exposed the panel members to inadmissible evidence that an instruction will not cure.

Spectators in the gallery should be able to perceive the evidence. If you display evidence the public cannot see, there is an argument that the public has been excluded from the trial.[27] Normally, the public does not witness every piece of evidence in a court-martial. However, if the parties choose to publish evidence and the public cannot view or hear it, have they been effectively excluded?[28] Has public access been

"limited" or "reduced"?[29] Does this violate the accused's constitutional right to a public trial?[30] Do you want to deal with that issue in the midst of your presentation? Avoid this potential interruption by ensuring the public can see what it should be able to see. On the other hand, you should ensure the public does not see sensitive evidence that has not been admitted and is not being published. Be wary of what the spectators sitting behind you can see on your table or your monitor. The public should not see pictures of the alleged victim's sexual assault forensic examination or autopsy that have not been made a formal part of the trial.[31]

Finally, the record must be able to perceive the evidence. You must accurately describe the digital evidence and its components and properly refer to interactions with the digital evidence. In the hypothetical, the defense counsel attempts to lay a foundation for the CD containing digital photos of the accused's bruising. The defense counsel inserts the CD into a device that allows the witness, the military judge, and trial counsel to see the photos, then clicks on a file name. This displays a photo, and the defense counsel asks the accused, "Do you recognize this picture?" The military judge then stops the defense counsel and asks, "Counsel, what are you showing the witness?" The defense counsel invited this interruption because they failed to identify a component of the digital evidence for the record. The defense counsel should have identified what they were doing with the marked evidence, i.e., the CD. The defense counsel should have said, for example, "I am placing Defense Exhibit A for Identification into the courtroom DVD player and am double-clicking on the file named 'Bruise Number 1.'[32]"

The same is true when the defense counsel publishes the digital photos to the panel members using the courtroom screens or monitors. In addition to identifying the components of the digital evidence, you must also accurately describe witness interactions with it. This is true whether the evidence is digital or not. However, the courtroom technology you choose for the interaction may demand additional description. For example, the trial counsel who wants the bruise expert to draw on the image of Mr. Brown's chest bruise might say the following: "Dr. Expert, please take this red digital stylus and draw on the image displayed on the Smart Board an outline around the part of the bruise indicating point of impact; the witness complied"; or "I am using the Art program to select the red color and the pen feature for the touchscreen in front of you; please use your finger to draw . . . . I am now using the freeze and save feature in the Touchscreen program and printing to the courtroom printer." Do not assume the technological carrier will preserve the record for you. Practice saying what you and your witness are doing with the evidence and you will avoid forcing the panel members to watch you struggle through multiple interruptions.

Understand the mechanics of introducing your digital evidence; minimize interruptions to your presentation by notifying those who would otherwise be surprised; ensure you have the required courtroom technology; know when, how, and to whom you are going to expose the evidence; and then prepare for the worst.

What Is Your Plan B?

In answering this question, you should pay heed to the warning that "[a]ll technology should be presumed guilty until proven innocent."[33] Effective case presentation depends largely on how much control you can exert over that process. Most of the advice in this article centers on exerting control over your case by minimizing unwanted interruptions. The use of courtroom technology cedes a certain measure of control to the vagaries of its fallibility. This question asks whether you are expecting the unexpected and are prepared for it. What happens when the digital photo files on your exhibit are corrupted and will not open during trial? What if the disk itself is corrupted? What if the corrupted disk shuts down the courtroom computer? What if the courtroom technology on which you were relying fails? What if it produces a distorted or discolored picture when clarity and color are important? What if it displays a picture or video without the accompanying sound? What if it plays sound but shows no picture? What if the Smart Board or touchscreen monitor is merely being temperamental and only displays parts of drawings the witness makes on them? Can you use an "erase" feature in the software to correct it? Will the record be complete if you do that? If so, how do you preserve that action for the record? What will you do if the technology in the deliberations room that the panel members must use to review the digital evidence fails?

There are certainly more questions that could be asked. But, which ones are pertinent to your case? You should know the answer if you have already answered the questions in the previous subsections of this article. You know what digital evidence you are introducing and the mechanics and technology required to display it effectively. For each piece of evidence, each technological carrier, and each method of introduction, ask what could go wrong. In determining this, you will have completed the first step of the time-tested Army risk management process: Identify the Hazards.[34]

While there are various ways you could address Murphy's Law with respect to your digital evidence, you should consider the very process that your panel members use for their operations. First, identify the possible problems. Second, assess the possible problems.[35] This involves determining the likelihood of occurrence and the severity of the risk if it occurs and a conclusion as to the most severe, likely problems.[36] Third, develop plans to mitigate the likelihood that the problems will occur and to mitigate the interruption to your case if they do occur,[37] determine whether the controls are effective (including cost-effective),[38] and determine where your mitigation measures will fall short (i.e., where you accept risk).[39] Fourth, implement your mitigation measures.[40] An important feature of this step is to communicate the mitigation measures to those who need to help you implement them and those who may be surprised by them.[41] Finally, evaluate your control measures and assess whether they are effective or whether you need to make changes.[42]

Conclusion

The author has seen some very effective uses of digital evidence in courts-martial, but has seen many more instances where trial practitioners trip themselves with such evidence. Sometimes, it is not clear

why counsel decided to use digital evidence rather than its traditional counterpart. Other times, it is clear that counsel did not practice their presentation of digital evidence, the witness's manipulation of the evidence, or their publication of the evidence. Many times, the military judge or opposing counsel interrupt the proponent's presentation because they are surprised by the manner in which the evidence is presented. Sometimes counsel display the digital evidence to the wrong people at the wrong times or fail to show it to the right people at the right times. On other occasions, counsel are clearly unprepared for technological failures.

These trial practice stumbling blocks are only natural, because digital evidence presents a host of issues unique from traditional evidence. The trial practitioner who knows the potential issues before trial, plans for them, practices, and has a fallback plan is the trial practitioner who minimizes or eliminates the stumbling blocks and presents the case smoothly and effectively. Trial practitioners would be wise to remember the following rules of technology: the first rule is that digital evidence applied to an efficient case will magnify the efficiency; the second is that digital evidence applied to an inefficient case will magnify the inefficiency.[43] Trial practitioners can use digital evidence to magnify the efficiency of their cases by asking the four questions presented in this article. **TAL**

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Notes

1. General Omar Bradley, U.S. Army, Armistice Day Speech (Nov. 11, 1948), *in* 1 Collected Writings of General Omar N. Bradley (U.S. Gov't Printing Office 1967).

2. *See* Memorandum from Lieutenant General Flora D. Darpino, U.S. Army Judge Advocate General, to all Army Judge Advocate General's Corps leaders (Sept. 9, 2015) (on file with author) (establishing the "baseline technology architecture expected of modern military courtrooms" and directing staff judge advocates to identify and rectify shortfalls).

3. *See* David A. Schlueter, Stephen A. Saltzburg, Lee D. Schinasi & Edward J. Imwinkelried, Military Evidentiary Foundations, § 1-8[1], n.21 (5th ed. 2013).

4. See the following for very good primers on this topic: Federal Judicial Center, Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial (2012), https://www.fjc.gov/sites/default/files/2012/CTtech00.pdf; Nat'l Inst. of Justice, Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors (2007), https://www.ncjrs.gov/pdffiles1/nij/211314.pdf.

5. *See* Lieutenant Colonel Wendy P. Daknis, *A View from the Bench: The Care and Keeping of Documents: Proper Handling and Use of Documentary Exhibits at Trial*, Army Law., June 2011, at 44 (providing a good guide to evidence handling in courts-martial).

6. Manual for Courts-Martial, United States, Mil. R. Evid. 401, 403 (2019) [hereinafter MCM]; Manual for Courts-Martial, United States, R.C.M. 701 (2019).

7. Assume no hearsay exception applies.

8. MCM, *supra* note 6, Mil. R. Evid. 613.

9. *See* MCM, *supra* note 6, Mil. R. Evid. 612.

10. *Id.*

11. MCM, *supra* note 6, Mil. R. Evid. 602, 901(b)(1).

12. MCM, *supra* note 6, Mil. R. Evid. 801(d)(2).

13. MCM, *supra* note 6, Mil. R. Evid. 803(3).

14. MCM, *supra* note 6, Mil. R. Evid. 106, 304(h).

15. Assume the defense seeks to exclude this under MRE 404(b). MCM, *supra* note 6, Mil. R. Evid. 404(b).

16. Military Rule of Evidence 1006 might permit the introduction of the CID Special Agent's Investigative Summary of the interview if the interview was too long to "conveniently" watch in court. MCM, *supra* note 6, Mil. R. Evid. 404(b).

17. This would require the military judge's permission per rule 9.2. U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial (1 Jan. 2019) (hereinafter Rules of Court).

18. *Cf.* Rules of Court, *supra* note 17, r. 17.4 (requiring counsel to show their exhibits to opposing counsel before trial).

19. *See* MCM, *supra* note 6, Mil. R. Evid. 103(e) (military judge must prevent inadmissible evidence from reaching the members).

20. *See* MCM, *supra* note 6, R.C.M. 801(a)(4) (requiring the military judge to rule on all interlocutory questions and issues of law).

21. While not required, court reporters also often record when witnesses cry, when a panel member raises a hand, when the military judge motions for counsel to continue, etc. *See, e.g.*, United States v. Pauly, 2008 CCA Lexis 292, 8 (A.F. Ct. Crim. App.). While such actions can be subject to interpretation, the trial and defense counsel and the military judge have an opportunity to correct mistakes in those annotations. U.S. Dep't of Army, Reg. 27-10, Military Justice para. 5-56 (11 May 2016) (Interim 1 Jan. 2019).

22. *See* MCM, *supra* note 6, Mil. R. Evid. 103(a)(1) (requiring an objection as predicate proof of error).

23. U.S. Const. amend. V.

24. *See supra* note 17.

25. *See, e.g.*, MCM, *supra* note 6, Mil. R. Evid. 803(5) (recorded recollections).

26. UCMJ art. 39(a) (2016) (permitting court-martial sessions without panel members).

27. Members of the public have a First Amendment right to attend criminal trials. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980). *See also* United States v. Story, 35 M.J. 677, 678 (A.C.M.R. 1992) (error to exclude public because of anticipated sexually explicit nature of evidence).

28. *See* MCM, *supra* note 6, R.C.M. 806(b)(1), (2).

29. *See* MCM, *supra* note 6, Discussion R.C.M. 806(b)(1).

30. U.S. Const. amend. VI.

31. This could be an unauthorized disclosure of agency records and improper trial publicity under Army regulations. *See* U.S. Dep't of Army, Reg. 25-55, The Department of the Army Freedom of Information Act Program ch. IV, para. 4-50 (1 Nov. 1997); U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers app. B, rules 3.6(a)(3), (d), (e) (28 June 2018).

32. The file names should not suggest the nature of the evidence if the witness needs to identify and authenticate it.

33. This quote is widely attributable by internet sources to David Ross Brower, who was a prominent environmentalist and executive director of the Sierra Club.

34. *See* U.S. Dep't of Army, Pam. 385-30, Risk Management ch. 2 (2 Dec. 2014) [hereinafter DA Pam 385-30].

35. *Id.* ch. 3.

36. *Id.* paras. 3-3, 3-4, 3-6.

37. *Id.* para. 4-2a.

38. *Id.* para. 4-2b.

39. *Id.* paras. 4-3, 4-4. In this case, the potential interruption of your case presentation is no longer unexpected and your reaction to it will more likely demonstrate control if not actually exerting it.

40. *See* DA Pam. 385-30, *supra* note 34, para. 5-1.

41. *See supra* section *Whom Do You Need to Tell?;* DA Pam. 385-30, *supra* note 34, para. 5-2.

42. *See* DA Pam. 385-30, *supra* note 34, ch. 6.

43. These rules are paraphrased from a quotation widely attributed by internet sources to Bill Gates.

U.S. military honor guardsmen invert drinking glasses during the prisoner of war/missing in action ceremony at the 50th Annual Oklahoma National Guard Leadership Conference and Military Ball in Tulsa, Oklahoma. (Credit: U.S. Air Force Master Sgt. Mark Moore)

Practical Advice for Military Balls

By Major Jonathan J. Wellemeyer

The brigade commander calls you into their office to share some news: the annual brigade ball will occur three months from today. Having recently taken command, the goal is to improve the brigade's esprit de corps with maximum participation by offering low ticket prices. The commander expects to use members of the S6 section to provide assistance with the audio visual equipment that will be used to play music during the event. Additionally, the commander wants to assign Headquarters and Headquarters Company (HHC) personnel to perform the color guard and to operate a courtesy shuttle service to mitigate alcohol-related accidents. Finally, the commander plans to invite a deputy commander (O-7) from a nearby installation to serve as the military ball's guest speaker, and would also like to provide the speaker with a gift following their remarks. The brigade commander and deputy commander share a mentor-mentee relationship. As you get up to leave, the commander adds that they've appointed an S4 captain to lead the planning committee, and that they expect you to work with the committee to ensure maximum publicity before the military ball, as well as to provide any legal advice on issues that arise during preparation for the ball.

It's inevitable. At some point in your career, you will provide legal advice about your unit's military ball. To the undiscerning eye, military balls share the ceremonial underpinnings of an official Army event—guest speakers, formal dress uniforms, toasts, and color guards. In reality, military balls are hybrid events because they are unofficial functions[1] that embody official components. Further, the employees that comprise the committees formed to plan and execute these events are private organizations that are treated as non-federal entities (NFEs).[2] These distinctions will impact how you advise your unit, and your success will depend on your understanding of the relevant rules, as well as your proactivity during the planning process.

Through the lens of the above hypothetical, this article analyzes common legal issues you may encounter during the military ball planning process. Specifically, this article will address how the planning committee may seek to lower ticket prices through fundraising; discuss examples of logistical support the unit might provide during the event's planning and execution; explore the ramifications of including a guest speaker, and some of the rules for providing the guest speaker with a token

of appreciation for their remarks; and address how to correctly publicize event details without running afoul of the rules governing improper command endorsements. While this article cannot possibly address all the issues that might arise, it will help you anticipate common scenarios and provide a starting point for when you find yourself advising your commander on this time-honored—and unofficial (mostly)—Army tradition.

Fundraising

In order to meet the commander's intent and keep ticket prices low, the planning committee will likely ask your advice on the permissibility of holding a fundraising event—such as a bake sale—within the brigade's headquarters or some other high-traffic area within the unit's footprint. As a starting point, Army employees are prohibited from fundraising in their official capacity for a non-federal entity (NFE) or NFE event.[3] Further, while the brigade commander may authorize limited logistical support for the military ball, the commander is prohibited from providing personnel to conduct NFE-related "fundraising and membership drive events."[4] Therefore, the committee cannot conduct any fundraising events for the military ball within the brigade footprint.

One alternative is for the committee to request permission to hold the bake sale outside of the commissary or Post Exchange or to conduct a similar event at an off-post location. Committee members may fundraise in their *personal capacity*, provided they do not solicit from a subordinate or any person known to be a prohibited source.[5] Regardless, you must remind the committee that they cannot use their official titles to promote the fundraising activity or do anything that would imply command endorsement of their fundraising event.[6]

Event Support

While the commander's fundraising options are limited, the commander has more flexibility to direct brigade resources in support of the event. For example, the use of brigade equipment may be authorized to support the execution of the military ball if the following requirements are met:

1. The support does not interfere with the performance of official duties or detract from the brigade's readiness;
2. There is a community interest, Department of Defense (DoD) public affairs interest, or a military training interest served by the support;
3. DoD association with the event is appropriate;
4. The event is of interest to the brigade;
5. The brigade is willing to provide similar support to comparable events sponsored by other similar NFEs;
6. The support is not restricted by statute; and
7. Admission to the event reasonably covers the cost of the military ball or the portions of which the brigade resources participate.[7]

Here, the commander has the authority to provide limited logistical support in the form of the brigade's internal equipment. Therefore, the commander can authorize the use of the brigade's audio-visual equipment during relevant portions of the military ball (e.g., the playing of music and the national anthem), and the unit's flags, streamers, and rifles for the purpose of conducting the color guard. Further, the commander can task qualified members from the brigade's S6 section to transport, set up, and operate the audio visual equipment during all portions of the military ball, and can assign HHC personnel to perform duties of the color guard or other ceremonial functions (e.g., toasts, master of ceremony).[8]

As for the commander's desire to provide a courtesy shuttle operated by brigade personnel and using brigade non-tactical vehicles (NTVs)—this type of logistical support is impermissible where it would be for the purpose of transporting military ball participants attending the event in their personal capacity. In place of a courtesy shuttle, judge advocates should advise the planning committee to emphasize alternatives such as public transportation and designated driver plans, or encouraging attendees to spend the night at the military ball location (assuming the event occurs at a hotel, or within walking distance of one).[9] Conversely, the NTVs may still be used for the purpose of transporting the audio-visual equipment, color guard equipment, and the personnel tasked with using this equipment, since these activities would directly support the execution of the commander's limited logistical support determination under the Joint Ethics Regulation (JER).[10]

Guest Speaker Implications

Since most portions of a military ball are categorized as "unofficial," the commander cannot require members of the brigade to buy a ticket to attend. Further, the commander's authority to compel attendance is limited to the "official" portions of the event. Here, this means that the brigade commander can require the attendance of brigade personnel during the remarks provided by the deputy commander guest speaker because the speaker will attend the event in uniform and give a speech in his official capacity. Despite the official nature of the guest speaker's remarks, the inclusion of an official speech will not convert the entirety of the military ball into an official event.[11] Judge advocates must be comfortable advising on this distinction.

Gifts

The brigade commander's ability to provide the deputy commander with a token of appreciation after the speaker's remarks is restricted by the relevant gift rules under the Code of Federal Regulations (CFR).[12] This requires a multi-part analysis. As a general rule, DoD employees cannot accept gifts from employees receiving less pay where the employees are in an official subordinate-superior relationship and where no pre-existing personal relationship between the two employees justifies the gift.[13]

Here, the token of appreciation is likely permissible. First, the brigade commander and the guest speaker are not in an official subordinate-superior relationship[14] because the guest speaker is the deputy commander at a nearby installation and therefore outside of the brigade commander's supervisory rating chain. Second, since the facts indicate that the brigade commander and guest speaker share a mentor-mentee relationship, it is possible that their relationship qualifies as a personal one.[15]

If we change the facts slightly—by assuming that the brigade commander and the guest speaker share an official subordinate-superior relationship—then one of the

CFR's enumerated exceptions must apply.[16] One such exception permits a subordinate employee to give a gift to an official superior, provided the gift is given on an "occasional basis"[17] and has an aggregate market value under ten dollars.[18] Under these circumstances, a judge advocate will want to advise the commander of these limitations and suggest gifts that would likely satisfy these requirements, such as a plaque or memento of de minimis value. Finally, judge advocates will want to consider advising about the possibility of providing the guest speaker with an item of "little intrinsic value" that is "intended primarily for presentation," since these items are excluded from the definition of a gift under the JER.[19]

Event Publicity

The planning committee will want to publicize relevant details via email and social media. Under the JER, the brigade can use Public Affairs Office (PAO) channels to publicize information "of common interest" via official communication methods.[20] This means that, in coordination with the unit PAO, the brigade can publicize information on email or social media, provided the information does not appear to be an endorsement of the event by the command (implicitly or otherwise). Judge advocates should work with the PAO and the planning committee to include disclaimer language that mitigates the possibility of an implied endorsement.

Conclusion

As a judge advocate, commanders will likely ask you questions about military balls at some point in your career. Success in addressing these questions hinges on both your proactive involvement during the planning process and your understanding of the relevant rules. Your role as the legal advisor puts you in the unique position to keep your commander and the planning committee from straying outside of permissible conduct. Your understanding of the rules and involvement with the planning process from the beginning will pay dividends.

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Notes

1. *See Advisory 10-03 April 2, 2010,* U.S. Dep't. of Def. Standards of Conduct Off. (June 11, 2018), https://ogc.osd.mil/defense_ethics/ethics_counselors/resources/advisories/2010_03_advisory.html; *see also Guidance Regarding DoD Participation in a Military Ball Sponsored by a Non-Federal Entity*, Dep't. of Def. Standards of Conduct Off. (Apr. 14, 2004), https://ogc.osd.mil/defense_ethics/resource_library/military_ball_guidance.pdf.

2. *See* U.S. Dep't of Def., 5500.7-R, Joint Ethics Regulation (JER) § 300(a) (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER] (permitting voluntary Department of Defense (DoD) employee participation in non-federal entity (NFE) activities when participation is outside the scope of official position).

3. *See* JER, *supra* note 2, § 210(a) (stating that DoD employees are prohibited from endorsing NFE fundraising events in their official capacity); *see also* 5 C.F.R. § 2635.202 (2019) (noting that executive branch employees may not solicit or accept gifts given because of the their official position).

4. JER, *supra* note 2, § 211(a).

5. 5 C.F.R. § 2635.808(c) (2019).

6. *See* JER, *supra* note 2, § 209.

7. *Id.* § 211(a).

8. *See id.* (providing that the commander can require "the services of DoD employees necessary to make proper use of the equipment").

9. *See Information Paper: DoD Support of and Participation in Military Balls*, Off. of the Staff Judge Advocate Fort Knox, Ky. 3 (Dec. 11, 2008), https://home.army.mil/knox/application/files/7715/6623/5549/Military_Ball.pdf [hereinafter *Military Ball Information Paper*].

10. JER, *supra* note 2, § 211(a).

11. *Military Ball Information Paper*, *supra* note 9, at 2.

12. 5 C.F.R. § 2635.301-304 (2019).

13. 5 C.F.R. § 2635.302(b).

14. *See* 5 C.F.R. § 2635.303(d) (defining official superior as "an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee").

15. *See* 5 C.F.R. § 2635.302(b).

16. *See* 5 C.F.R. § 2635.304.

17. *See* 5 C.F.R. § 2635.304(a) (2019) (noting that an occasional basis includes occasions on which gifts are typically given).

18. 5 C.F.R. § 2635.304(a)(1) (2019).

19. 5 C.F.R. § 2635.203(b)(2) (2019). Example 1 under this rule notes that a situation where an employee receives a glass paperweight engraved with the employee's name and the date of the employee's speech is an example of an item of little intrinsic value provided for presentation purposes. *Id.*

20. *See* JER, *supra* note 2, § 208.

Navigating the Murky Waters of the Former Spouses Protection Act

By Major Gavin G. Grimm

Whether it be due to the regular deployment schedules, long hours in the field, or any of the other normal daily stressors that accompany military life, the concept of divorce is not foreign to service members. What is unique to military divorces, however, is that for decades, courts across the country have struggled to deal with reaching equitable solutions about how to divide retirement pay between the military spouse and their ex-spouse. The historic lack of uniformity from state to state led Congress to take action. In 1982, it passed the Uniformed Services Former Spouses Protection Act (USFSPA).[1] It is well-recognized that a case out of California saying that retirement pensions could *not* be treated as divisible marital property was the turning point that led to enactment of attempted clarification from Congress.[2] The passage of the USFSPA was not an attempt to direct states as to *how* to divide retirement pensions as marital property, or even that they *had* to. It merely became law that they *could* do so.

States accepted the USFSPA as the standard for dealing with divisible retirement pay, and most military spouses became familiar with it, as well as how it would apply to them upon dissolution of their marriage. Or, so they thought. Over time, some ambiguity developed, as interpretations of the USFSPA gave state courts great latitude when it came to the way they chose to divide military pensions. Although it was clear the pensions could be treated as divisible marital property, many jurisdictions took their own unique positions with

regard to how to handle disability payments that were due the retired service member. These varying interpretations can arguably be derived as the intent of the USFSPA, which states, in part, that "a court may treat disposable retired pay payable to a member . . . as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[3] The passage of the USFSPA, originally seen by Congress as a solution, instead quickly became a source of dispute, especially when contemplating the interrelation of the pension and disability benefits.

Disability Benefits

The following is a basic explanation of how disability benefits work for the purposes of a military retiree: Once the service member receives a disability rating from the Department of Veterans Affairs (VA), they may begin receiving monetary benefits. In the event that the service member is also receiving a regular pension based upon retirement for length of service, the service member must waive a portion of their regular pension commensurate with their disability payment if they wish to receive this money. Essentially, any retiree who is eligible to receive disability payments after receiving a disability rating from the VA may opt to relinquish all or part of their retired pay so they may receive another benefit (disability pay, in this instance). Most members will opt to waive only so much of their retired pay as is equal to the amount of disability compensation to which they are entitled.[4] The incentive to initiate this waiver is that all of the disability payments, unlike normal retirement pensions, are completely exempt from all federal and state income taxes.[5] The requirement to waive part of a retirement pension prevents what is often known as "double dipping," which is (in most cases) prohibited.[6]

It is worth noting that there does exist an exception to the standard for retirees who carry a VA disability rating of 50% or higher. These individuals are enrolled in the Concurrent Retirement and Disability Payments (CRDP) program, which authorizes them to collect their full retirement pension *and* the full disability payments they rated.[7] Despite this being the exception to the rule, a surprisingly large number of people fit this scenario. As of 2016, the Department of Defense estimates over half a million military retirees are enrolled in the CRDP.[8] Contrast this with another 400,000 retirees who also collect disability from the VA, but do not rate a high enough percentage to qualify for the CRDP.[9]

The background for how disability payments work for retirees is important to understand for this discussion, because soon after the passage of the USFSPA, these disability payments began getting lumped into the giant pile of divisible marital property by state courts that didn't seem to understand the act. The USFSPA defined disposable retirement pay as "the total monthly retired pay to which a member is entitled . . ." less certain exempted amounts, such as overpayments or money to be paid as forfeitures from a court-martial.[10] These "certain exempted amounts" mentioned in the USFSPA include disability payments. It refers to all retired service members receiving disability payments, regardless of if they are medically retired as a result of their disability[11] or if they are retired for length of service but have a proven and rated service-connected disability qualifying them for payments under the disability program.[12] Despite the fact that we have federal statutes directing that disability payments are *not* to be considered part of disposable retirement property, the legislative history of USFSPA and disability cases are strewn with cases where courts have done just that.

Indemnification

The first big case that really tested whether or not disability payments could be included as divisible martial property reached the United States Supreme Court in 1989. Air Force Major Gerald Mansell was getting divorced from his wife. He signed a marital dissolution agreement (MDA) which said he would "pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits."[13] Whether or not this was intentionally written into the MDA by Mrs. Mansell's attorney to test the boundaries of legal interpretation is unknown. Major Mansell, who knew he would be getting a disability rating from the VA, did agree to it. A few years later, Maj. (Ret.) Mansell petitioned the state court in California to amend the MDA to strike the language regarding the disability payments. California refused, and the case made its way to the Supreme Court, which held it was an unenforceable provision for Mrs. Mansell to lay claim to Maj. (Ret.) Mansell's disability payments and reversed the California courts. Mrs. Mansell's arguments that her ex-husband intentionally lowered his payments by waiving a portion of his retirement pension and that he agreed to this deal so he should be bound by it, fell upon deaf ears. Seemingly, the initial interpretation of disposable retirement property found in the USFSPA excluding disability payments seemed to be on solid ground after the decision in *Mansell*. But, that changed just a few years later.

The real problem that began to arise was when the following scenario, or one very similar, would develop. Consider: service member and spouse begin divorce proceedings, and in the MDA, the civilian soon-to-be-ex-spouse is awarded something to the effect of "one-half of all retirement pay to which the service member is/will be entitled." Note, there is no specific mention of disability payments as we saw in *Mansell*. Simply language that one-half of "all retirement pay" will be split. The service member retires and for years, each month, 50% of the retirement pay goes directly to the former spouse. So far, so good. Five years after retiring, the service member goes to the VA and is told they have a 30% disability rating and are entitled to additional disability money. Because the rating is below 50%, they are ineligible for the CRDP. As a result, they elect to waive a portion of their monthly pension so they can collect that same amount in the form of tax-free disability payments.

Now, for purposes of using nice, clean, round numbers, let's assume the service member is entitled to $200 per month in disability payments, given the 30% rating.[14] That means the service member is forfeiting $200 per month from their regular retirement pension, half of which has been going to their spouse each month for several years. Because they waived that money, the monthly retirement payment will decrease by $200 each month, thus decreasing the ex-spouse's share by 50% of

$200, or $100 per month. The ex-spouse soon notices that they are receiving $100 less per month. Money which the service member waived, intentionally and knowingly, to receive tax-exempt money. The ex-spouse petitions the court to take action to make them whole. The court rules that the service member's election to reduce the pension to receive disability payments is an unlawful unilateral modification of the MDA and directs them to indemnify the ex-spouse in an amount equal to what they were previously receiving. Essentially, the service member is directed to supplement the ex-spouse's monthly payments out of pocket.[15]

The court claims that the ex-spouse has "a vested interest in . . . her portion of those benefits as of the date of the court's decree. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse."[16] The careful distinction to understand here is that at no point does the court direct the retiree to make these indemnification payments using funds received via disability payments. In fact, they do the opposite. In this particular case, the court felt so strongly that they hadn't run afoul of *Mansell* that they purposely included language that "[o]n remand, the trial court shall give effect to its decree without dividing Mr. Johnson's disability pay."[17] The problem with this ruling is that it creates a *de facto* indemnification order which will, in reality, cut into the retiree's disability payments. Very recently, this dilemma was finally addressed by the Supreme Court with more authority than we saw in *Mansell*.

A Solution: Finally?

The last and most recent USFSPA/pension/disability/indemnification case to reach our highest Court, decided in the summer of 2017, was when a petitioner from Arizona was granted certiorari. When John Howell and his wife Sandra began their divorce proceedings in 1992, he was about one year from retiring from the Air Force. At the time, he had no idea that he'd ever receive any disability payments and agreed to an MDA which awarded Sandra "as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins."[18] For thirteen years, John made his normal payments to Sandra at a rate of 50% of his normal retirement pension. In 2005, John received a 20% disability rating from the VA and elected to waive a portion of his retirement to receive the VA disability pay. Immediately, Sandra's monthly payments decreased by approximately $125 per month, and she petitioned the Arizona state court to enforce their original agreement to make her whole. Both the Arizona court of appeals and the Arizona Supreme Court agreed with Sandra, and a rule consistent with *Johnson*, directing that John make Sandra whole and cover the $125 per month. They did not indicate how this money should be paid, and were careful to tiptoe around the issue of disability payments, but nonetheless directed payment.

When the case reached the Supreme Court, they reversed in an 8-0 decision,[19] saying that "state courts cannot vest that which (under governing federal law) they lack the authority to give."[20] The point was that under existing federal law, disability benefits are generally non-assignable.[21] Further, Justice Breyer, in his majority opinion, confirmed the belief that orders to indemnify ex-spouses in these disability situations are indeed *de facto* orders which impermissibly cut in to VA benefits. He wrote that the Court won't be swayed "by describing the family court order as an order requiring John to 'reimburse' or to 'indemnify' Sandra, rather than an order that divides property. The difference is semantic and nothing more."[22]

Conclusion and the Way Ahead

There were warnings in the *Howell* decision that foreshadowed what we can expect in the future of military divorce cases. Justice Breyer noted that although it was impermissible to order division of military disability pay as martial property, it is certainly conceivable that MDAs will begin to reflect these judicial interpretations in anticipation of disability payments. Service members in this situation, facing both retirement and divorce, who anticipate receiving a disability rating from the VA, may be subject to less than favorable MDAs that attempt to account for these anticipated offsets. This could be accounted for by way of tangible personal property, cash, investments, or other assets. Military family law practitioners and legal assistance attorneys need to be aware of the recent changes to how these laws have been interpreted and stand ready to advise clients of the best ways to be prepared for divorce when disability payments are a stark reality. **TAL**

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Notes

1. Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1982).

2. *See* McCarty v. McCarty, 453 U.S. 210 (1981).

3. 10 U.S.C. § 1408(c)(1).

4. *See* Military.com, *Waiver of Retired Pay*, Military.com, https://www.military.com/benefits/military-pay/waiver-of-retired-pay.html (last visited Nov. 7, 2019).

5. *Id.*

6. 38 U.S.C. § 5304 (2018).

7. National Defense Authorization Act of 2004, Pub. L. No. 108-136, § 641, 117 Stat. 1511 (2003).

8. *See* Kristy N. Kamarck, Cong. Research Serv., R40589, Concurrent Receipt: Background and Issues for Congress (2019), https://fas.org/sgp/crs/misc/R40589.pdf.

9. *Id.* at 1, *citing* DOD Office of the Actuary, FY2017 DOD Statistical Report on the Military Retirement System 199 (July 2018).

10. 10 U.S.C. § 1408 (4)(A).

11. 10 U.S.C. § 1201(b).

12. 10 U.S.C. § 1201(3)(b).

13. Mansell v. Mansell, 490 U.S. 581, 586 (1989).

14. These figures are in no way an accurate estimate of what a retiree with 30% disability would actually receive, but are merely numbers chosen by the author for illustrative purposes.

15. *See* Johnson v. Johnson, 37 S.W.3d 892 (2001).

16. *Johnson*, 37 S.W.3d at 897-98.

17. *Johnson,* 37 S.W.3d at 898.

18. Howell v. Howell, 137 S.Ct. 1400, 1404 (2017).

19. In a decision that was 8-0, "BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case." *Id.*

20. *Howell*, 137 S.Ct. at 1400.

21. 38 U.S.C. § 5301(a)(1).

22. *Howell*, 137 S.Ct. at 1406.

No. 1

Resilience

(Credit: istockphoto.com/PeopleImages)

The Critical Character Attribute of Empathy

By Brigadier General Joseph B. Berger and Major Courtney M. Cohen

My[1] first rater didn't have it. Nor did my senior rater. Fortunately for me, one of my rater's counterparts (MAJ L) did, and his empathic support made all the difference in my transition into the Judge Advocate General's (JAG) Corps. The ability of MAJ L back at division headquarters to connect with me, two hours away, in a small, remote branch office, and provide the informal empathic leadership our small team needed was invaluable.

The reality was that my rater—the Officer in Charge (OIC) of our small office—was in a miserable place in his life. And by default or design, he was taking it out on all of us. Every single day, while simultaneously failing to set the example, let alone any example, in everything from basic client support and fundamental staff work to any semblance of physical training, the team was suffering. The command's leadership noticed, and our office was collectively being penalized as a result. The Staff Judge Advocate (SJA) either didn't know or didn't care—neither was excusable.

Major L was my OIC's graduate course classmate. He was assigned to the division headquarters and knew the background. I turned to him for help. Rather than simply saying, "Well, that stinks," and feeling sorry for me, he made the critical leap from mere sympathy to empathy that marks an effective leader. That deeper understanding enabled MAJ L to not only help me personally survive, but also help the team excel. By understanding the underlying causes of frustration, he was able to intervene where appropriate and empower me to navigate what felt like a minefield. Phone conversations became regular, and he took the time, more than once, to make the nearly four-hour round trip—sharing the hardship and reinforcing the leader attribute of presence.[2] Going beyond merely helping me meet my own needs, he demonstrated an understanding of how the OIC's actions and decisions affected the team.

As the title indicates, empathy is a critical character attribute under the Army's Leadership Requirements Model.[3] While certainly a metric of some value, the simple fact that a Google search for "leadership and empathy" returns about 49.7 million hits is telling. Hits range from describing empathy as an "essential leadership skill"[4] to categorizing it as a "tool for effective leadership,"[5] and even going so far as to define it as "the most important leadership skill"[6]—all before you scroll past the first screen. Beyond a Google search, articles and studies regularly identify empathy as one of, if not *the* most important leadership traits in successful organizations.[7] But, as clear and effective as anything you may find through a search or studies, our own doctrine provides the perfect analysis tool.

Our doctrine defines empathy as a "realization that leads to a deeper understanding" and says that it occurs when leaders "genuinely relate to another person's situation, motives, or feelings."[8] You must form personal bonds with your team. And, you must go beyond proverbially "placing yourself in their shoes." Share and relate to their hardships and frustrations. Building connection through common understanding and relatable speech and gestures challenges leaders more than simply positioning themselves to share hardships alongside subordinates. In addition to potentially eating or sleeping under the same physical conditions as troops in

a field exercise or deployment, leaders must also convey empathy by recalling times when they have had a similar emotional reaction to an event the subordinate is experiencing now. Empathy will make us feel less alone in times of difficulty and give access to a new level of excitement and joy in successes. And those successes will be the team's successes. We'll spend almost one-third of our lives at work[9]—we should make connections and live our authentic lives there.

Empathy, of course, does not appear overnight just because the Army mandates it so. In fact, research has found that "empathy is most lacking among middle managers and senior executives: the very people who need it most because their actions affect such large numbers of people."[10] The good news is that leaders' current capacity for empathy is not fixed; rather, willing leaders can grow empathy over time.[11] Simply talking about the importance of empathy can grow empathy![12]

Leaders must develop within themselves a certain foundation that will allow them to unlock more empathic skills. When speaking to others who have endured similar experiences of a "bad boss," a lack of self-awareness is frequently cited for the basis of the boss's ineffectiveness. Leaders cannot expect to "genuinely relate" to others if they are blind to themselves.[13] Self-awareness allows leaders to understand not only their own motivations and tendencies, but also how that behavior affects and influences others.[14] Self-awareness serves as a medium through which leaders build adaptability, effectiveness, and trust. One challenge is the classic disconnect between how one views oneself, and how one really is. Many people think they are self-aware, but doctrine acknowledges that "even though they ***should*** be self-aware, not all leaders are."[15]

Leaders who practice humility and self-reflection, ask for and accept feedback from superiors, peers, and subordinates, and hold themselves accountable for their "performance, decisions, and judgment" are on the path to self-awareness.[16] We must be willing to ask ourselves hard questions, acknowledge our weaknesses, and address them. One of the best questions to trigger self-reflection is to ask yourself—especially when making a big decision or in disagreeing with someone—"What if I'm wrong?"

Upon practicing a healthy dose of self-awareness, the next step is to employ self-regulation, the act of adjusting thoughts, feelings, and actions to close the gap between the actual and the desired self.[17] Together, self-awareness and self-regulation create the emotional pause that allows a leader to actively listen and relate to others, when the leader's first, self-unaware instinct may be to launch into a mission-focused tirade or disconnect from a teammate going through a hard time or celebrating a momentous occasion.

Once leaders are able to create the emotional pause, they must fill the void with something that will actually message empathy to others. Even when well-intentioned, unsuccessful attempts at empathy come off as pitying sympathy or, worse, placating or even patronizing insincerity. Sympathy often resembles a spectator's observation of another's experience. "Rarely, if ever, does an empathic response begin with, 'At least . . .'"[18] or "Don't be silly . . . ." Statements like these fuel disconnection and highlight that the vulnerable person's experience diverges from the norm, while the listener remains in a safe position of power and normality. Empathy, on the other hand, is allowing yourself to experience others' emotions with them. Four defining attributes of empathy are:

- Taking others' perspectives;
- Minimizing judgment (very challenging!);
- Recognizing others' emotions; and
- Communicating understanding of others' emotions and perspective.

No matter the similarity or difference in backgrounds, leaders can tap into past experiences triggering familiar emotions and then express, "I understand how you feel, and I don't blame you for feeling X."[19] This successful expression of empathy fuels connection, building trust, and team cohesion.[20]

To avoid the pitfalls of superficial sympathy and to achieve the connection of empathy, leaders must communicate authentically. Authentic communication is thoughtful and deliberate. Rather than saying everything that comes to a leader's mind, authentic leaders adapt their speech and gestures to the organization and even to the person.[21] Rather than doing so to "'messag[e]' the right talking points," authentic leaders are simply attuned and sensitive to their actions' effects.[22] They are not rigid in their perceptions of themselves or expect others to accommodate counter-productive leadership techniques or personality flaws. Instead, authentic leaders humbly acknowledge personal flaws and weaknesses, seeking understanding and growth.[23]

An authentic leader is adept at expressing this vulnerability to their subordinates and within their organization. Judge advocates are familiar with feeling the professional vulnerability of delivering candid advice that differs from what the boss wants to hear or relates to incredibly sensitive matters.[24] Judge advocates gain credibility to commanders and thus become exceedingly valuable to them, and other clients, through the ability and willingness to offer this forthright advice, even when there is discomfort in the delivery.[25] Some may call this "principled counsel."[26] Leaders will similarly develop trusting relationships within their organizations when they practice vulnerable authenticity.[27] Daring to deliberately step into the discomfort of being your genuine, imperfect self with an aim toward growing cohesion within your organization is no less principled and, sometimes, pays greater dividends, in the creation of a self-perpetuating organizational culture of both deep trust and high performance.

Our Corps values leaders who both understand and are willing and able to be themselves, while being sensitive to how their words and actions affect those around them and the organizational environment. Developing the self-awareness and self-management skills necessary to become authentic will positively influence how leaders communicate with those in their organizations. If authenticity is a leader's sincere presentation of himself to others, empathy is the inverse. By growing empathic capacity, leaders improve their ability to appropriately receive and respond to authenticity in others. Combining authenticity and empathy helps leaders develop

a holistic approach to the personal side of leadership.

There is, of course, risk in being too empathic, leading to deterioration of mission accomplishment. Empathy practiced in a vacuum can be dangerous. Focusing on developing interpersonal skills is important to creating a positive working environment, but leaders must use caution to avoid becoming the "affable non-participant" leader, described as "interpersonally skilled and intellectually sound, but incapable of taking charge, making decisions, providing timely guidance, and holding subordinates accountable."[28] Communicating directly, authentically, and empathically in difficult situations is the truest test of leadership. Leaders, especially majors and those regularly communicating with the most junior members of our Corps, *must* master balancing directness with compassion. In other words, "saying what you think while also giving a damn about the person you're saying it to."[29] Through this type of communication, leaders will better position themselves to achieve the mission, improve the organization, and develop themselves and their subordinate leaders.[30]

Doctrine details the leadership qualities and abilities expected of Soldiers. While compelling, this guidance is merely theory. Growing and maintaining this value-driven force is entirely dependent on the buy-in of local commands, units, and offices. How these leadership concepts filter through the ranks and how subordinate organizations execute them will determine how well leaders lead and how well they develop future leaders. It is incumbent on all leaders in our Corps to hold yourselves accountable and offer empathy to those surrounding you.

Twenty years later when MAJ L, now-COL L, was retiring, he was not in the best place, personally or professionally. I had the privilege of being in a position to be the empathic person who could try to make a difference as he transitioned. I hope I did half as well for him as he did for me. **TAL**

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Notes

1. Any statements in the first-person narrative point of view are from Brigadier General Joseph Berger.

2. *See generally* U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession (31 July 2019) [hereinafter ADP 6-22].

3. *See generally* ADP 6-22, *supra* note 2.

4. Prudy Gourguechon, *Empathy Is an Essential Leadership Skill—And There's Nothing Soft About It*, Forbes (Dec. 26, 2017), https://www.forbes.com/sites/prudygourguechon/2017/12/26/empathy-is-an-essential-leadership-skill-and-theres-nothing-soft-about-it/#18a65b362b9d.

5. William A. Gentry, Todd J. Weber, & Golnaz Sadri, *Empathy in the Workplace, A Tool for Effective Leadership*, Center for Creative Leadership (Apr. 2015), https://www.ccl.org/wp-content/uploads/2015/04/EmpathyInTheWorkplace.pdf.

6. Harvey Deutschendorf, *5 Reasons Empathy Is the Most Important Leadership Skill*, Fast Company (Dec. 6, 2018), https://www.fastcompany.com/90272895/5-reasons-empathy-is-the-most-important-leadership-skill.

7. Ernest J. Wilson III, *Empathy Is Still Lacking in Leaders Who Need It Most*, Harv. Bus. Rev. (Sept. 21, 2015), https://hbr.org/2015/09/empathy-is-still-lacking-in-the-leaders-who-need-it-most; Annie McKee, *If You Can't Empathize with Your Employees, You'd Better Learn To*, Harv. Bus. Rev. (Nov. 16, 2016), https://hbr.org/2016/11/if-you-cant-empathize-with-your-employees-youd-better-learn-to; William G. Pagonis, *Leadership in a Combat Zone*, Harv. Bus. Rev. (Dec. 2001), https://hbr.org/2001/12/leadership-in-a-combat-zone ("To lead successfully, a person must demonstrate two active, essential, interrelated traits: expertise and empathy.").

8. ADP 6-22, *supra* note 2, para. 2-23.

9. Karl Thompson, *What Percentage of Your Life Will You Spend at Work*, Revise Sociology (Aug 16, 2016), https://revisesociology.com/2016/08/16/percentage-life-work/.

10. Wilson, *supra* note 7.

11. McKee, *supra* note 7; Pagonis, *supra* note 7 ("In my experience, both [expertise and empathy] can be deliberately and systematically cultivated; this personal development is the first important building block of leadership.").

12. Johanna Shapiro, *How Do Physicians Teach Empathy in the Primary Care Setting?*, 77 Acad. Med. 323, 326 (2002), https://cloudfront.escholarship.org/dist/prd/content/qt4wt3n93w/qt4wt3n93w.pdf?t=nhtkov; Forbes Coaches Counsel, *11 Ways Leaders Can Develop Empathy*, Forbes, (Jan. 13, 2017), https://www.forbes.com/sites/forbescoachescouncil/2017/01/13/11-ways-leaders-can-develop-empathy/#4417c53137b6.

13. ADP 6-22, *supra* note 2.

14. *Id.*

15. *Id.* para. 1-31 (emphasis added).

16. *Id.* para. 6-15.

17. *Id.* para. 6-19.

18. Dr. Brené Brown, *Empathy in RSA Shorts*, YouTube (Dec. 10, 2013), https://www.youtube.com/watch?v=1Evwgu369Jw.

19. Theresa Wiseman, *A Concept Analysis of Empathy*, 23 J. of Advanced Nursing 1162–67 (1996).

20. Brown, *supra* note 18.

21. William W. George, *The Truth About Authentic Leaders*, Harv. Bus. School Working Knowledge (July 6, 2016), https://hbswk.hbs.edu/item/the-truth-about-authentic-leaders.

22. *Id.*

23. *Id. See* Bill George, Authentic Leadership (2003).

24. Brigadier General Charles N. Pede, *Communication is the Key—Tips for the Judge Advocate, Staff Officer and Leader*, Army Law., June 2016, at 4, 8.

25. *Id.*

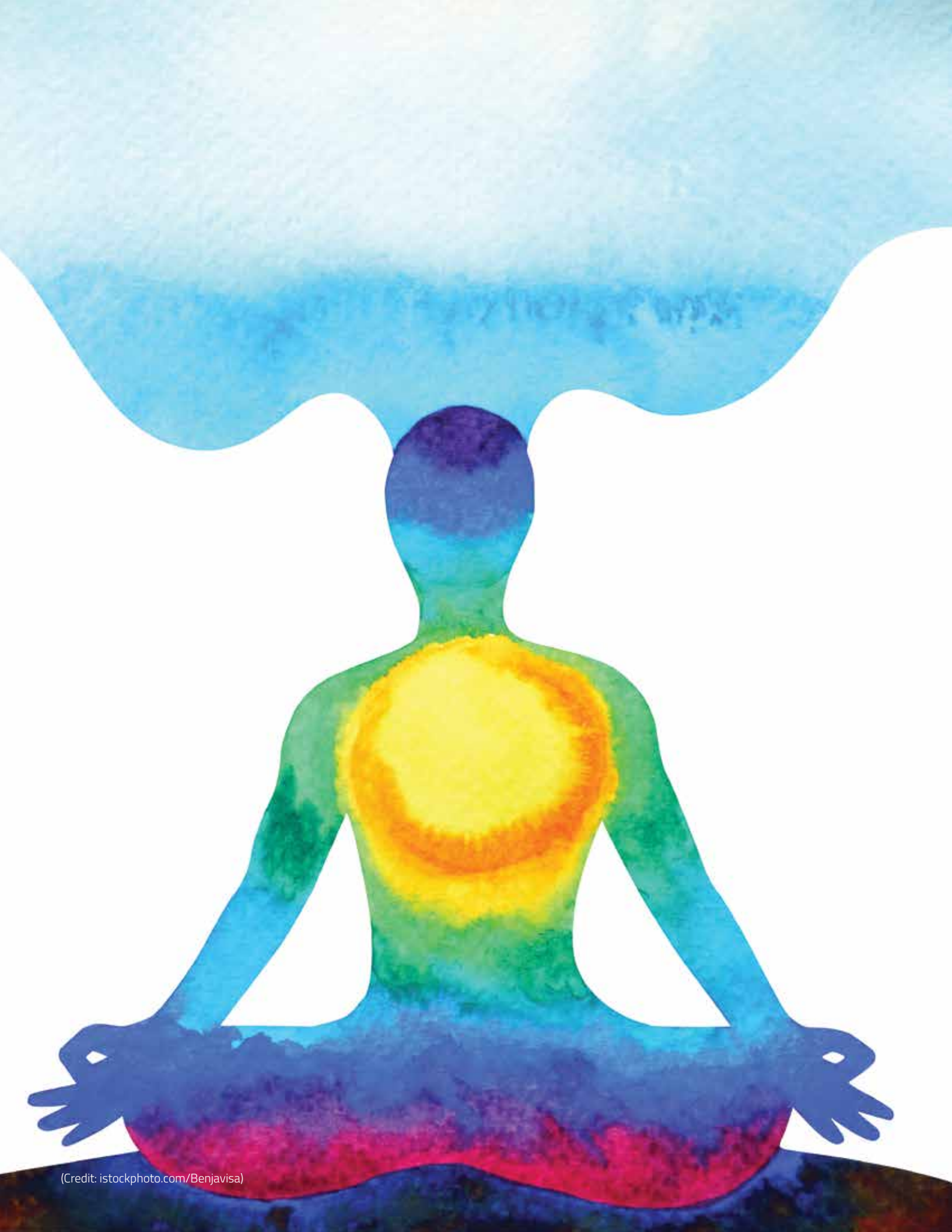
26. Brigadier General Charles N. Pede, *Principled Lawyering*, Army Law., July-Aug. 2018, at 7.

27. Brené Brown, Daring Greatly 1-2 (2013); Pagonis, *supra* note 7 (Self-awareness "allows you to be real—in my experience, a vital contributing factor in effective leadership.").

28. U.S. Dep't. of Army, Reg. 600-100, Army Profession and Leadership Policy para. 1-10(a) (5 Apr. 2017).

29. Kim Scott, *Why You Can't Skimp On Radically Candid Performance Development Conversations*, Radical Candor, https://www.radicalcandor.com/blog/why-you-cant-skimp-on-radically-candid-performance-development-conversations/ (last visited Oct. 24, 2019).

30. Radical Candor, https://www.radicalcandor.com/ (last visited Nov. 7, 2019).



(Credit: istockphoto.com/Benjavisa)

People First, Including You

The Importance of Self-Care

By Lieutenant Colonel Aimee M. Bateman

Lawyers work hard and, like us, they're human, many of them.[1]

In General James C. McConville's "Initial Message to the Army Team," the 40th Chief of Staff of the Army signed off with, "People First—Winning Matters—Army Strong!"[2] He made it clear that cultivating the human dimension through teambuilding, training, and respect is a "sacred obligation" required for success on the battlefield.[3] We may interpret this as saying that we, as leaders, must put *other* people first. However, it is just as crucial to remember that each and every one of us *are* people first, before we are Soldiers, officers, attorneys, or leaders. It is a simple fact. Lawyer jokes aside, we are not machines, and we are not impermeable to stress and mental injuries. It is impossible "to build cohesive teams that are highly trained, disciplined, and fit"[4] if you do not first take care of yourself. This article will cover the basics of self-care and implore you to be the best example of such, not only for your personal well-being, but for the sake of overall mission readiness. It will also highlight recommendations from "*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*," a report from the National Task Force on Lawyer Well-Being.[5] Everyone in our Corps is a stakeholder and a leader. This is a call to action for each and every one of you.

The "What" and "Why" of Self-Care

If we take a moment to be honest with ourselves, it is unlikely any one of us is truly a "T"[6] in self-care, or can ever be. The National Task Force on Lawyer Well-Being (Task Force), defines lawyer well-being as, "[a] continuous process in which lawyers strive for thriving in each dimension of their lives."[7] Unfortunately, many Soldiers and Civilians in our formations merely survive rather than thrive on a daily basis. How many of us in leadership positions are doing the same?

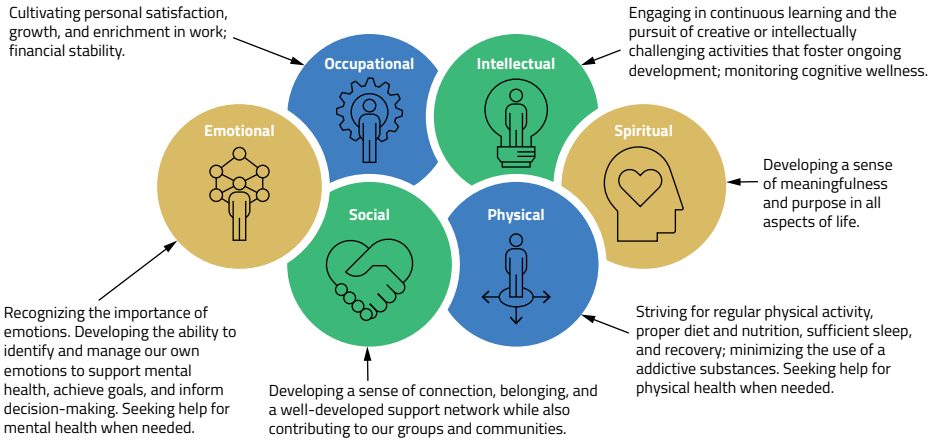
When leaders eschew practicing self-care, it can be disastrous for an organization. A leader who is sleep-deprived, depressed, anxious, or otherwise unwell is much more likely to display what is collectively described as "counterproductive leadership."[8] Such poor leadership includes insulting or belittling individuals; losing temper and being unapproachable; poorly motivating others; and withholding encouragement.[9] "Counterproductive leadership behaviors prevent establishing a positive organizational climate and interfere with mission accomplishment, especially in highly complex operational settings."[10] Therefore, we must dispel any misconception that taking the time to take care of yourself when you are in a leadership position is selfish; it is quite the contrary. Whatever short-term gains you might achieve through counterproductive leadership techniques employed in a state of exhaustion and stress will "have a damaging effect on the organization's performance and subordinate welfare."[11]

The "How" of Self-Care

To be clear, *this is about the well-being of all legal professionals*, even though "the majority of lawyers . . . do not have a mental health or substance use disorder."[12] In addition to diagnosable mental health conditions, low job satisfaction, disengagement, and impaired cognitive functioning prevent lawyers and paralegals from doing their best work. In order to meet the mission and "[p]rovide principled

Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:



counsel and premier legal services,"[13] all judge advocates and paralegals must excel across all domains and dimensions.

Among the myriad resources available, the Task Force's report, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" ("Report") is exemplary and will be the focus of the rest of this note.

The above graphic from the Task Force's report further defines lawyer well-being.[14]

As Army leaders, these dimensions should feel familiar to us. The Army defines "Comprehensive Solider and Family Fitness" through "Five Dimensions of Strength: physical, emotional, social, spiritual, and family."[15] What our regulation fails to capture is the occupational and intellectual dimensions, which are absolutely critical to our psychological health as attorneys and paralegals. Simply being a Soldier is stressful, and our dual profession creates a unique set of circumstances going beyond what most individuals must navigate in order to thrive in all dimensions. Being an attorney frequently means being adversarial; it often means being alone and isolated. In many instances, we succeed by pointing out the mistakes of others and working tirelessly, sometimes relentlessly, to minimize our own.

Our most high-risk personnel are our litigators. The corollary population in the law enforcement community is the U.S. Army Criminal Investigation Division Command (CID), which now has a "Wellness Program." This program "consists of embedded wellness teams within the battalions and the Defense Forensic Science Center (DFSC))."[16] This newly instituted program grew out of the acknowledgement that "repeated exposure to traumatic investigative situations and associated investigative materials can significantly affect psychological well-being, as well as cause strain to family relationships, reduce resilience, and negatively impact readiness."[17]

As we implement the Military Justice Redesign (MJR)[18] and create dedicated litigation billets, leaders must be aware that any gains in competency achieved through a more specialized practice might quickly deteriorate through psychological strain and injury. As stated in the CID information paper, "Research has shown that cases involving child victims, specifically abuse and child pornography, have a significant impact on psychological functioning either in isolated instances or though repeated exposure. Furthermore, prolonged exposure can have a significant impact on family relationships by way of increased conflict, overprotectiveness, and decreased intimacy."[19] Certainly, this research applies just as much to litigation teams dealing with those same types of cases.

If you are a leader implementing the MJR, I encourage you to talk to the experienced Trial Defense Service and Special Victim litigators at your installation. They can give you a contemporary perspective on the emotional, physical, and psychological strain that comes with being an "unteathered trial team" that carries a case from "investigation to trial."[20] During my time as a brigade trial counsel, the relationships I developed with the command teams at the company, battalion, and brigade levels provided a sense of community and balance in my life. Do not sell short the potential effects of removing those who litigate cases for the command from the command. Now more than ever, all leaders must have a plan in place "for minimizing lawyer dysfunction, boosting well-being, and reinforcing the importance of well-being to competence and excellence in practicing law."[21]

A Call to Action

> *[T]o meaningfully reduce lawyer distress, enhance well-being, and change legal culture, all corners of the legal profession need to prioritize lawyer health and well-being. . . . Each of us shares responsibility for making it happen.*[22]

The entire Report of the National Task Force on Lawyer Well-being is a must-read. It provides a roadmap for improving the readiness of your organization through active engagement. A great place to start is the "Recommendations for All Stakeholders" section of the Report.[23]

Among the thirteen recommendations are:

- Acknowledge the problems and take responsibility.[24]
- Leaders should demonstrate a personal commitment to well-being.[25]
- Facilitate, destigmatize, and encourage help-seeking behavior.[26]
- Build relationships with lawyer well-being experts.[27]
- Foster collegiality and respectful engagement throughout the profession.[28]
- Begin a dialogue about suicide prevention.[29]

Each of these topics lends themselves to their own practice note or leader professional development training. Therefore, I recommend you take the time to read the entire Report, reflect on where you are in your personal journey toward multi-dimensional well-being, and then begin the transformational process within your organization.

Conclusion

Each of us can take a leadership role within our own spheres to change the profession's mindset from passive denial of problems to proactive support for change. We have the capacity to make a difference.[30]

I am proud to be part of such an accomplished and resilient community of practice. However, we cannot "outwork" the fact that we are humans. Respect that limitation and use your humanity to your advantage: connect with your clients; show compassion and concern for those you lead; and dare greatly. Be well, and continue this conversation. **TAL**

LTC Bateman is the Regional Defense Counsel for U.S. Army Trial Defense Service, Great Plains Region, Fort Leavenworth, Kansas.

(Credit: istockphoto.com/Benjavisa)

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19. Information Paper, *supra* note 16, para. 3.b.

20. Risch et al., *supra* note 18.

21. Report, *supra* note 5, at 11.

22. *Id.* at 12.

23. *Id.* at 12-21.

24. Report, *supra* note 5, at 12.

25. *Id.*

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- National Suicide Prevention Hotline – Available 24/7: Chat at https://suicidepreventionlifeline.org or call 1-800-273-8255
- Directory of all Lawyer Assistance Programs: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/
- Lawyers Depression Project (an online support group for attorneys): https:// www.knowtime.com
- Additional National Mental Health Resources: https://www.americanbar.org/groups/lawyer_assistance/resources/links_of_interest/

(Credit: istockphoto.com/Aerotoons)

Preventing Burnout in the JAG Corps

By Major Rebecca A. Blood, Ph.D.

Army Strong.[1] This concept has been ingrained in Soldiers for the last twelve years. It communicates the idea that Soldiers are the best of the best, that they can endure anything, they can accomplish anything, and that they are unstoppable. While this message is intended to be empowering, it also conveys an unintended message to troops: because you are the best of the best, you should place the mission first and put your distress to the side; address the distress later, once the mission is complete. While the Army is a formidable opponent, it is a collective; it is only solid as a team of individuals and as strong as its weakest link. Maintaining the fighting force is not accomplished by ignoring stressors and being able to "do it all"; rather, it is achieved by focusing on the individual in order to contribute to the greater mission.

According to a 2016 report by the Deployment Health Clinical Center, 26.4% of active duty Army members were diagnosed with a mental health disorder.[2] That means nearly one in four Soldiers presented to a medical provider and was given a diagnosis such as adjustment disorder, depression, anxiety, or posttraumatic stress disorder. The Soldiers who sought services represent the full spectrum of occupational specialties. It is not only those working the "front line" in combat arms positions seeking treatment; rather, those looking for treatment include many administrative positions as well. In the last decade, the Army has bolstered its behavioral health resources, placing a psychologist and social worker in each brigade, establishing a free-standing embedded behavioral health clinic within the unit footprint. In addition to these proximate resources, Soldiers have the option to seek services at the installation hospital or receive an off-post referral.

Burnout

While the Army has made a pointed effort to increase the accessibility of behavioral health resources, there has been little focus on the concept of burnout. Burnout is a response to the interpersonal stresses of work with people who are in emotionally demanding situations.[3] Compassion fatigue is the development of posttraumatic stress symptoms subsequent to frequent exposure to sexual assault survivors.[4] Burnout and compassion fatigue are examples of vicarious traumatization.[5] In other words, it is the stress that results from working with individuals and hearing cases that involve traumatic situations and material. Symptoms resulting from compassion fatigue and burnout are commonly observed among doctors, nurses, and therapists. Anyone who works in a "helping profession," such as medical providers or in the legal system, is at increased risk of developing symptoms. Other risk factors for developing compassion fatigue include increased empathy with the client, decreased social support, increased workload, working with child victims, and prior personal history of trauma.

While the majority of the research focuses on helping professionals such as therapists or police officers, there have been several studies examining an attorney population. One study discovered that attorneys showed significantly higher rates of compassion fatigue and burnout than behavioral health providers or social service workers.[6] It was posited that the higher rates

(Credit: istockphoto.com/enisaksoy)

were attributed to higher caseloads and little education regarding trauma and its effects.[7] Individuals in the Judge Advocate General's (JAG) Corps are not typically the Soldiers who are seeking behavioral health services. What prevents judge advocates from seeking services is unclear. One could opine that it is due to available time, stigma, fear of career-impacting negative consequences, or simply not having the requisite information.

The JAG Corps is a unique population. Simply due to status as a military member, attorneys are at increased risk of developing compassion fatigue symptoms. In addition, unlike civilian counterparts practicing in the private sector, military attorneys are not typically afforded the opportunity to select their cases. Additionally, given that sexual assault crimes are frequently litigated, exposure to sex crimes heightens the risk even further. Whether in the role of trial counsel, defense counsel, special victim prosecutor, or special victim counsel, attorneys are continuously exposed to difficult material in case files. Repeated exposure to sex crimes or child pornography can lead to an accumulation of material that is difficult to process. Furthermore, attorneys who are directly interacting with victims of sex-related crimes may begin to internalize the emotional response and symptoms of the victim.

Signs of Burnout

Learning to recognize the signs of burnout is one of the first steps in combating the development of symptoms. Signs of approaching burnout include being overly cynical, increased irritability, decreased energy, decreased motivation, decreased work satisfaction, and feeling disillusioned about work.[8] Burnout can place an individual at increased risk for developing post-traumatic stress symptoms.[9] That means an attorney who is experiencing burnout and also repeatedly working with sex crimes cases is at risk for developing vicarious traumatization. The effects may not be readily apparent. Some of these experiences may include:

- Aligning with one side of the bar over another
- Feeling hopeless and helpless
- Having a negative outlook
- Experiencing difficulty engaging in intimate interactions with a partner
- Having less patience with family

Quite often, the symptoms will appear gradually and, as a result, they may be more difficult to identify.

Mitigation

Research also identifies "learned helplessness" as an issue specific to the attorney population.[10] Learned helplessness is when a person has a sense of powerlessness, after enduring repeated aversive stimuli beyond their control.[11] To some extent, you have little control over the size and type of your caseload. It may feel "pointless" to seek therapy to address work-related stress. Imagine that each client or each case (in addition to any other stressors in your life) is a pebble. If you continue to put these pebbles in your "bucket," at some point, the bucket will be unable to hold all of the pebbles. By addressing even the smallest of pebbles, enough that they do not remain in the bucket, you will be able to better manage the unavoidable stressors in your life. Taking (and making) the time to process this difficult material is an initial step in mitigating any long-lasting effects. Even though the Army has taken steps to de-stigmatize behavioral health, the stigma and myths about therapy persist. Therapy is merely a process of sharing stressors with an objective person. It can alleviate negative symptoms and lessen the burden on the individual. Many Soldiers choose to seek off-post therapy with non-DoD providers, as this can provide an additional layer of confidence and trust with regard to confidentiality.

The next point may sound routine; however, most Soldiers struggle with the concept of self-care. Engaging in enjoyable activities is essential to the practice of self-care. Exercising, using leave, taking vacations, spending time with family, reading, gaming, spending social time with friends—these are all important to maintain a balanced life. Engaging in just an hour of enjoyable activities every week can help to combat any negative effects from the repeated work with trauma and difficult material.

Further, using humor can moderate the effects of vicarious traumatization. "Gallows" humor is a term that has been researched for years due to its prevalence amongst emergency rescue workers and providers in emergency room departments.[12] One can be horrified at case material, but find the absurdity in the details. For example, in our office, there was a case involving a man who had a body in his car trunk, but was focused on ordering "delicious" breadsticks. That case is now referred to as the "breadsticks case." Was the crime itself terrible? Of course it was. However, when you are faced with only the most horrific crimes, you must find a way to deal with the difficult material. There is a delicate balance between being sensitive to difficult material and using humor as a coping method, but humor, appropriately used, can aid with the processing of terrible and tragic events. Overuse or inappropriate use of gallows humor can also be a sign of burnout. If you find your colleagues' humor deviating into a disrespectful area, it could be time to pull your colleague aside and check in.

Early identification and mitigation of the effects of burnout and vicarious traumatization will result in increased life satisfaction. It could also result in increased career longevity and increased day-to-day efficiency. Being able to recognize the signs in oneself, as well as with colleagues, is paramount to the effectiveness of the Corps. Further, bonding together and having these conversations with your colleagues are the best ways to combat compassion fatigue. Being Army Strong does not translate to being able to do it all; rather, knowing your limitations and implementing self-care is the valued lesson. If you find yourself or a peer unable to cope with the stressors, reach out to one of the behavioral health folks in your footprint. Even if you do not want to meet with the behavioral health personnel in your unit, they can certainly provide you with alternative resources. Remember, the Army is a collective, a group of individuals with shared goals, and we are all here to help guide each other through this long and strange journey. **TAL**

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The Effects of Stress

By Chaplain (Major) Jeff Sheets

"I'm stressed, Chaplain." And so the conversation begins. As an Army chaplain, I often hear this phrase, coming from those in line units to those who spend much of their time behind a desk.

Yet, stress is not always bad; it depends how it affects the individual. A certain event can affect one individual positively while that same event can have a negative effect on another. In his article "Resilience as a Dynamic Concept," Michael Rutter lays out this simple concept.[1] He says, "Exposure to stresses or adversities may either increase vulnerabilities through a sensitization effect or decrease vulnerabilities through a steeling effect."[2] In other words, stress can either weaken (increase vulnerabilities) or strengthen an individual (have a "steeling" effect).

As a legal professional, you face different stressors that can have either a debilitating effect or a steeling effect. One of the keys in developing resiliency is recognizing when stress or a stressor begins to take you down this negative path.

Opportunities abound for stress to have this eroding effect in and out of the courtroom. The emotional investment in a trial that ends in defeat, the pressure of too much work with too little time, and being beholden to multiple bosses with sometimes competing interests all play a part. It is common to experience significant vicarious trauma by direct or indirect exposure to graphic pictures, testimony, and other unsettling aspects of investigations and trials. It is normal for these experiences to bother people, and some things are hard to "un-see" or "un-hear."

Other stressors may occur at the tactical level. A combat deployment may leave negative emotional residue from those involved with ground combat operations to those primarily involved with operations from the relative safety of a tactical operations center. For example, those involved in targeting are not exempt from emotional or mental trauma, especially when the operation goes awry or upon seeing graphic aerial footage of the aftermath of a strike, whether or not it went as planned. Residual guilt or grief associated with taking a life, no matter how justified, is common.

Then, there is day-to-day stress that cuts across all professions: long work days, relationship issues, financial problems, parenting concerns, and career direction, just to name a few. Sometimes it is the accumulation of smaller burdens that begin to weigh an individual down.

So what to do? Many resources and approaches to dealing with stress and trauma are available for Soldiers. A resource that almost every Army judge advocate and paralegal have at their disposal is their unit chaplain. An Army chaplain's role is to "perform or provide and coordinate religious support to the Army."[3] If a chaplain is not able to perform the support needed, then they will "coordinate to provide for required ministrations which they cannot personally perform."[4] This might entail assisting with the coordination of a chaplain that is of the client's faith, navigating behavioral health resources if the client needs or wants to explore this option, or searching for another approach to support the client's needs. However, the chaplain cannot command or force a client to utilize another resource; the client is always in control of their choices.

Additionally, chaplains have confidentiality backed by military law and Army regulation. Military Rule of Evidence 503, Communications to Clergy, General Rule Of Privilege states, "A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience."[5] Army Regulation 165-1, para. 4-4 additionally states,

> A privileged communication is defined as any communication to a chaplain or chaplain assistant given as a formal act of religion or as a matter of conscience. It is communication that is made in confidence to a chaplain acting as a spiritual advisor or to a chaplain assistant aiding a spiritual advisor. Also, it is not intended to be disclosed to third persons other than those to whom disclosure furthers the purpose of the communication or to those reasonably necessary for the transmission of the communication.[6]

If an individual goes to a chaplain and establishes confidentiality ("chaplain, can we talk privately and confidentially"), that conversation remains confidential. The chaplain may not share the communication with a commander, a supervisor, or anyone else.[7] Additionally, a chaplain does not have to keep a physical record of a counseling session. Sometimes a chaplain *does* keeps notes (which they must keep locked away), such as in the instance of multiple counseling sessions with the same client, but no rule *requires* note-keeping. Personally, I always ask permission before I write anything down in a counseling session, and if the client is not comfortable with that, I do not take notes.

(Credit: istockphoto.com/LucaZola)

A Lawyer's Dilemma

Some people challenge the extent of confidentiality. A question sometimes asked is this: "What about going to a chaplain with a burden that involves classified, privileged, or sensitive information?" Lawyers are rightly concerned with following the rules of professional responsibility governing their conduct and not revealing information that could violate those rules. If lawyers would like to seek a chaplain's guidance on stress or other issues that may entail referencing or directly speaking to the chaplain about privileged information, they can share what is bothering them without going into the details (such as specific names or events) that may potentially compromise their own professional obligations.

Course of Action

Get to know unit chaplains by stopping by their offices or asking them to do PT (yes, make them literally sweat!). When experiencing difficulty, ask a chaplain if they would be willing to consult, professional to professional, on some matters. Most chaplains have office hours, but many, if not most, can also meet when it best suits the client, even if that means outside the normal workday or at a location outside the chaplain's office such as a coffee shop or chapel.

Lastly, the chaplain can be a resource for clients and their Families, as long as they are considered Department of Defense dependents. Judge advocates can direct their clients to their respective unit or instillation chaplain as a confidential outlet.

Conclusion

As judge advocates and paralegals face stress, they have two options: will stress steal some resiliency or will it have a "steeling" effect? If the stress of life is having a negative effect, speaking to an Army chaplain is one of the many resources a Soldier can turn to in those moments. **TAL**

Chaplain (MAJ) Sheets is the Command Chaplain at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

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Judge advocate CPT Jeri D'Aurelio during one of her Ninja Warrior competitions. (Courtesy: Jeri D'Aurelio)

Functional Fitness Can Be Fun

By Captain Jeri L. D'Aurelio

Most people would probably imagine functional fitness as CrossFit, slamming a sledge hammer on a tire or throwing barbells around a gym, but I have learned to take a far more abstract approach to fitness. I have never been one to follow a traditional training regimen—I develop creative workouts that are fun and have yielded great results for me. Without any formal education in fitness, I can only speak from my experience and the impact fitness has had throughout my life.

Many skills from Ninja Warrior are directly transferrable to military applications, which have opened doors to new opportunities in my military career, such as Airborne and Air Assault School. For example, I do a core workout geared toward Ninja Warrior that involves tossing a medicine ball while balancing on a large exercise ball. That core strength significantly helped me successfully perform parachute landing falls repeatedly throughout Airborne School. The constant laché-ing (swinging across a gap between obstacles), rope climbing, and upper body demands of Ninja Warrior training had a direct impact on my ability to climb ropes and pull risers on a T-11 parachute during Air Assault and Airborne Schools, respectively.

In the fall of 2018, I deployed to Afghanistan with an amazing legal team from 4ID. As with most deployed Soldiers, we all had fitness goals to strive for during our time in Afghanistan. One of the female JAG captain's fitness goal was to do an unassisted, static pull-up. Even though everyone had different goals, fitness became our office-wide bonding mechanism. The time and location to work out was discussed daily, so even if we worked out separately we still held each other accountable to complete a daily workout. In the main Office of the Staff Judge Advocate, they would play a song every hour, on the hour, prompting everyone to do an exercise for the entirety of the song before returning to work. These exercises included things like push-ups on our helmets, overhead presses with body armor, and tricep dips on the office chairs. As the Chief of Client Services, I was in a separate building where we had our own unique daily challenges. I encourage anyone reading this to try some of the challenges:

1. Fold a piece of paper in half, put it on the ground, and stand on one foot while you bend down and pick up the paper with your mouth (no part of the non-weight-bearing leg can touch the ground).
2. Put your nose and toes against the wall and do a squat until your legs bend to at least a ninety-degree angle (nose and toes must stay against the wall at all times).
3. Lie on top of a sturdy table and climb around the bottom of the table to get back to the top position (no part of your body can touch the ground).

These hourly workouts and daily physical challenges not only gave our brains short breaks throughout the day, they also had an undeniable team-building effect. Our main office started making a schedule for daily workouts over the lunch hour. Before you knew it, the impact of fitness was obvious across the formation! It is a stress reliever, boosts energy, builds confidence, brings people together, and can lead to so many opportunities both within and outside of the Army.

Starting a consistent workout schedule can be very difficult, especially if you are someone who exercises infrequently. It is essential to make time during your busy schedule to do something that is uncomfortable and challenges you mentally and physically. In the beginning, progress can feel like a moving goal post. You may not see

CPT D'Aurelio on one of the obstacles competing on American Ninja Warrior. (Courtesy: CPT D'Aurelio)

results right away, but with a little patience, improvements will increase exponentially and create a wave of motivation. This is where the supportive community comes into play—sometimes it takes someone else pointing out small improvements to make you realize you are achieving success. I remember during our first month in Afghanistan, when that same female JAG captain completed her first dead-hang pull-up, I jumped in excitement! That is such a huge accomplishment and something that was out of reach only one month earlier. After she got one, I could see a seismic shift in her confidence at the gym. By the fourth month, she was doing *sets of five* dead-hang pull-ups throughout her daily workout and now consistently scores the maximum on the Army Physical Fitness Test.

Functional fitness is not only a stress reliever and energy booster, it opens opportunities both inside and outside of the Army. There is no need to invest in special equipment or supplements that promise to boost your success—a simple exercise each day is the first step toward success. Before you know it, you will run past that goal and continue on to the next! **TAL**

CPT D'Aurelio is a trial defense attorney at Joint Base Elmendorf-Richardson, Alaska.

The JAG Corps's Ninja Warrior

An Interview with Captain Jeri D'Aurelio by Sean P. Lyons

Captain D'Aurelio is currently a Trial Defense Service attorney in Alaska. She has competed in multiple seasons of Ninja Warrior. Below is a recent interview The Army Lawyer conducted with her about her path to being five-time selection to the show.

How did you get into Ninja Warrior competition?: I grew up climbing on everything. I built a very simple treehouse that could only be reached by rope. You had to sit on this horizontal stick and hoist yourself up with just your arms by pulling down on the other end of the rope. It was quite a climb. I was a competitive gymnast from about age 2 until I was 12. My parents saw it as something that would teach us what it means to be dedicated at a very young age and would also help us in developing full body coordination. They got us all into it for that aspect, but then my sister and I sort of took off and ran with it. We probably trained about five hours a day. We homeschooled and "co-opted" with other gymnasts so we could train on a schedule that worked.

What other sports did you do?: In high school, I played soccer, ran track and cross-country, and competed in wrestling, among numerous other Junior Reserve Officer Training Corps (JROTC) sports. In college, I competed in triathlons and did a few half marathons and 100-mile bike races. Right after college, I took a year off to get licensed in skydiving. Now, I mainly rock climb and snowboard.

Are you an adrenaline junky?: People say that, but I don't think so. I am careful by making sure I'm aware of the risk involved and then taking the smartest approach. Sometimes that means more training, more research, or even just better gear. I just want to experience what life has to offer.

When did you decide to join the Judge Advocate General's (JAG) Corps?: In high school, I did Army JROTC and loved it. I went to the University of Texas at Dallas and studied criminology, and decided afterward to go to law school. While I was in school (at Southern Methodist University), I saw that someone from the JAG Corps was coming for field screening interviews. Still not knowing what I wanted to do with my life, my career counselor told me to sign up and just ask questions. Major Patrick Crocker interviewed me, and that interview was eye-opening. I mean, I was hooked. I knew coming out of the interview that this is what I wanted to do with my law degree.

You have been on Ninja Warrior for five seasons. Do people treat you like a celebrity?: I try to keep them separate as much as possible, doing the Ninja competitions versus my work in the Army. At first, I told my leaders that I was just doing obstacle competitions when I'd take leave, and they were like, "Uh, OK. Whatever." But then the more seasons I competed in, the harder it was to keep it quiet. Just within the last year or so, people have started recognizing me. But, I did a pretty good job at not bringing it up. When I was deployed to Afghanistan, the gate guards from the Bosnian Army recognized me. I guess Ninja is really popular over there. That's the first time a lot of the 4th Infantry Division (4ID) Soldiers I worked with even learned about it; the foreign soldiers outed me.

Are you going to compete again in any more Ninja competitions?: I will be applying for a sixth season. Last season, when I fell on the eighth obstacle, it was the farthest I'd made it on a course. In the Cincinnati region, I was thirteenth all-around (men and women), out of roughly 120 competitors. Applications for the new season are due early December, but we only find out if we have been chosen to compete a few weeks before the competition. They only take thirty percent of return competitors, so we will see. There are so many awesome competitors out there. But if I am accepted, I will start really gearing my training towards Ninja-like movement.

AROUND THE CORPS

A HMMWV carrying judge advocates follows a line of military vehicles to an exercise in Grafenwoehr, Germany, last fall. (Credit: Stefan Hobmaier).

(Credit: istockphoto.com/Michał Chodyra)

No. 2

A New Paradigm for Plea Agreements Under the 2016 MJA

By Lieutenant Colonel (Retired) Bradford D. Bigler

The Military Justice Act of 2016 (2016 MJA)[1] made sweeping changes to the Uniform Code of Military Justice (UCMJ). One of the most significant procedural revisions came from new statutory plea agreement authority. While prior plea agreements relied on a convening authority's promise to exercise clemency in exchange for the accused's plea, the 2016 MJA provides a convening authority, pursuant to a plea agreement, the ability to limit the sentence adjudged directly.[2]

The concept of a clemency-based agreement bolsters much of the robust plea agreement case law developed over the past sixty years. But the near complete evisceration of clemency powers accomplished by the 2016 MJA, together with new plea agreement authority, threatens to disrupt decades of military justice practice in subtle, yet profound ways. In light of this coming revolution in practice, new theoretical guideposts are necessary.

This article aims to provide a new operational paradigm, based on contractual performance analysis, to expose the depth and breadth of changes to plea agreement practice. Rather than a simple critique of the law, this article endeavors a systematic analysis and comparison of the legacy and the new plea agreement systems through the prism of performance order, giving the reader a robust mental approach to stitch together the many procedural changes into a single theoretical tapestry. This article will also walk through a fictitious scenario to demonstrate how different decisions by the government and the accused can produce different issues and outcomes.

This article will take a close look at the legacy system through the lens of clemency authority, revealing how clemency has affected our understanding of the plea agreement system and presaging how a move away from a clemency-based system may influence practice under the 2016 MJA. Provisions of the 2016 MJA plea agreement system will also be laid out. This article will deep-dive into the new system, demonstrating predictable friction points, and offering ways to avoid or resolve them. Finally, it will conclude with advice to convening authorities and judges on how to navigate within the new paradigm.

Evaluation of the Legacy System: Performance by the Accused, then Performance by the Convening Authority

In the legacy military justice system, an agreement between the convening authority and the accused attaches upon beginning of the accused's performances—generally through the entry of a guilty plea.[3] After accepting the plea, the court-martial conducts

presentencing proceedings and sentences the accused.[4] After sentencing, the case returns to the convening authority, who performs by disapproving any portions of the sentence that exceed the limitations specified in the agreement.[5]

The preceding paragraph presents a simplified view of trial procedure to make a point on performance order: first the accused, then the convening authority. This order of performance arose by virtue of a statutory scheme that gave the convening authority the last say over an accused. It also gave rise to five significant corollaries that are now doctrine. They are discussed in turn below.

Independent Sentencing, then Clemency

Perhaps most significantly, the legacy system order of performance enables the military judge to sentence independent of the agreement.[6] Because the convening authority performance is in the form of clemency, the court is free to sentence as the evidence and conscience dictate. Under this model, the accused obtains the benefit of the lesser of the court's sentence and the pretrial agreement. For example, if the pretrial agreement contains a clause in which the convening authority agrees to approve no more than two years of confinement, but the accused receives a sentence to three years of confinement, then the convening authority may approve only two years of the sentence. The accused benefits from a one year reduction in sentence. On the other hand, if the same case results in a sentence to only one year, then the accused will serve only one year. Clemency action would be irrelevant, because there is no sentence in excess of the agreement.

Because the entirety of the convening authority performance takes place after the court-martial, the court need not know the contents of any sentence limitation until after the sentence is announced. After the sentence is rendered, the judge will briefly inquire into the limitation in the agreement to ensure the accused's understanding and a meeting of the minds about the limitation.[7]

Protection for an Accused Once Performance Begins

The legacy system order of performance dictates additional protections for an accused who has initiated, but not completed performance.[8] A convening authority may withdraw at any point, but once the accused "begins performance of promises contained in the agreement,"[9] the convening authority is no longer free to withdraw from the agreement.[10]

The agreement between the accused and the convening authority creates a problem seen in unilateral contracts—ones that can only be accepted by performance.[11] These types of contracts create an issue where the offeree (in this case, the accused) has started performance, but has not fully completed performance. In a true unilateral contract, the offeror would be free to withdraw from the agreement even if the offeree had nearly completed performance.[12] This legal "problem" occurs in every legacy plea agreement because it is inherent in the system: the convening authority *must perform last*, after the accused has completed performance. There is no provision for a convening authority to perform stepwise.

If the accused has started performance—perhaps by entering into a stipulation of fact—but has not completed performance on other terms of the agreement, what protections does an accused have from a convening authority who would withdraw from the agreement? The law protects a performing accused by binding the convening authority to perform once the accused begins performance.[13]

Built in Protection for the Convening Authority upon the Accused's Withdrawal

The flip side of the unilateral contract problem is that it provides built in protections for the convening authority where the accused abandons the agreement. The accused may withdraw from the agreement at any point, even after acceptance of plea.[14] The convening authority generally is entitled to retain the benefits of the accused's performance if the accused withdraws.[15] While the accused may withdraw from the agreement at any time, the accused's options for "undoing" his past performance begin to narrow as time goes on. For example, if an accused testifies against another Soldier, pursuant to an agreement, but then later decides to withdraw from the agreement, the convening authority would still have the benefit of the earlier testimony. Thus, an accused who abandons the agreement will generally leave the convening authority in no worse position than without the agreement.

Perhaps the most significant alteration of the accused's ability to "undo" the previously taken actions occurs at announcement of sentence.[16] If the accused successfully withdraws from the agreement before announcement of sentence, he would ordinarily be permitted to withdraw his plea as well, and the case would be set for trial.[17] However, if the accused withdraws from the agreement after announcement of sentence, the accused would not be able to withdraw the plea.[18] Regardless when (or why) the accused withdraws from an agreement, the withdrawal releases the convening authority from the obligation to grant clemency under the agreement.[19] Thus, an accused is likely to withdraw from an agreement only where undesirable terms remain to be performed,[20] or where there is nothing to be gained from remaining in the agreement.[21]

While the convening authority obtains the benefit of whatever the accused has performed before withdrawal, the convening authority also loses nothing from an accused's withdrawal, no matter when it occurs. Even if the accused withdraws from the agreement while the ink is still wet, the convening authority "loss" is mere prospective performance. In the context of a court-martial, this is no loss at all. While an accused's withdrawal may make the case more difficult to prove, the government's ultimate interest in ensuring justice through due process remains unharmed.

Protection for the Convening Authority on the Accused's Failure to Perform

The legacy system order of performance also protects a convening authority if the accused simply fails to perform. A failure of performance is qualitatively different than a formal withdrawal, though the protections for the convening authority are similar. In a failure to perform, the accused breaches the agreement because of inability or unwillingness to complete the terms of the agreement. Protections of the convening authority extend even when the failure to perform is after the sentence has been adjudged. For example, consider an accused

who agrees to conform his behavior to certain standards while awaiting the convening authority's clemency decision. If the accused were to engage in misconduct after the court-martial was complete but before the convening authority's clemency action, the convening authority would be free to withdraw from the agreement because the accused is in breach.[22]

At this point, the independent sentence adjudged by the court is a significant protection for the convening authority. There need not be any re-sentencing hearing; rather, the convening authority may simply decline to exercise clemency, and the sentence as adjudged stands.[23] Thus, the order of performance protects the convening authority's interest in judicial economy.

Post-trial Agreements Possible

Finally, the order of performance makes possible a post-trial agreement between the accused and the convening authority. While such agreements are not common, several cases have demonstrated the legal possibility of post-trial agreements. In *United States v. Dawson*, the accused released the convening authority from the pretrial agreement, in exchange for a new agreement in which the convening authority agreed not to prosecute new charges.[24]

After trial, and before action, the accused may modify the pretrial agreement, "so long as the accused has the assistance of counsel, the modification is the product of a fully informed and considered decision, and it is not the product of a coercive atmosphere."[25] While it is unclear how far *Dawson* extends, it is clear that the order of performance is what makes such agreements possible.

The five features of the legacy system discussed above do not exist in a vacuum; rather, they exist because the statutory clemency system creates an environment conducive to their existence. The legacy system provides no independent authority for a convening authority to direct the sentence of a court-martial. Therefore, the only bargaining chip a convening authority has is clemency action. Moreover, a judge must sentence in a vacuum because the law provides no legitimate authority for a convening authority to direct the sentence of a court-martial; in fact, if anything, Article 37, UCMJ, would prohibit influence over the judicial acts of a court-martial.[26] Once the agreement is formed, the law protects the accused, who performs first, and must be able to rely on the promises of the convening authority. In turn, the convening authority is assured of obtaining the benefit of the bargain because if the accused withdraws or otherwise fails to perform after announcement of sentence, the convening authority generally gets to keep the benefit.

Plea Agreements Under the 2016 MJA

A Brief History of How We Got Here

In recent years, the once robust powers of clemency have suffered a near total collapse that started with the case of *United States v. Wilkerson* and concluded with the 2016 MJA changes. In *Wilkerson*, a convening authority overturned the sexual assault conviction of an Air Force lieutenant colonel.[27] The case enjoyed significant publicity,[28] and resulted in a 2014 revision to the UCMJ that sharply limited clemency authority in non-plea agreement cases.[29]

While the amended clemency rules allowed a "carve out" specifically for pretrial agreements, the damage was done.[30] The 2016 MJA replaces the post-trial clemency process with a sleek new "entry of judgment" model that gives judges control over the post-trial process, and convening authorities optional, token clemency authority.[31]

In place of clemency powers, the 2016 MJA supplies the convening authority a powerful new tool to issue a direct limit on the sentence of the court-martial. The new system requires the convening authority to perform *first*—before trial—by issuing a direct limitation effective against the court-martial deliberative process.

Convening Authority Power to Limit the Court-Martial—The New Statutory Authorities

With the brief history in place, we now turn to a discussion of the 2016 MJA provisions governing plea agreements. Article 53a of the 2016 MJA allows a convening authority to agree to a "limitation[] on the sentence" a court-martial may adjudge.[32] The language of the statute as implemented in Rule for Court-Martial (RCM) 705 allows the convening authority and the accused to agree to "limitations on the maximum punishment, . . . the minimum punishment, and . . . the minimum and maximum punishments."[33] In order to facilitate the limitation, sentencing occurs with knowledge of the terms of the agreement.[34]

To facilitate this, the military judge will be informed of the plea agreement terms, to include any sentencing limitation.[35] In cases where sentencing is to be before a panel, the plea agreement is not disclosed to the members unless the accused requests disclosure.[36] However, just as in the case of the military judge, the sentence the members may impose will be limited—the members "shall vote on a sentence in accordance with the sentence limitation."[37] In practice, the members may simply be informed of any maximum or minimum without referring to the agreement itself.

The plea agreement limits are not binding until after the military judge has accepted the agreement.[38] Once the military judge accepts the agreement, it is binding on all parties and the court-martial.[39]

The new Article 53a, UCMJ, requires military judges to exercise a gatekeeping role. The judge is obligated to reject agreements when the terms have not been accepted by both parties,[40] or when the accused does not understand the agreement.[41] The military judge does have limited authority under the accompanying rules to reform such agreements,[42] but "may not participate in discussions" regarding the agreement.[43] Moreover, the military judge must reject terms that are "prohibited by law"[44] or are "contrary to, or inconsistent with, a regulation prescribed by the President . . . ."[45]

Finally, the military judge must reject terms that violate mandatory minimum provisions for certain sex-related offenses.[46] The relevant offenses are listed at Article 56(b)(2), UCMJ, and include rape,[47] sexual assault,[48] rape of a child,[49] sexual assault of a child,[50] as well as attempts,[51] and conspiracies to commit such offenses.[52] The relevant mandatory minimum for these offenses is a dismissal or dishonorable discharge.[53]

Two significant exceptions allow judges to accept plea agreements for less than the mandatory minimum. First, the

military judge may accept a plea agreement that provides for a bad conduct discharge.[54] Second, the military judge may accept a plea agreement free of *any* mandatory minimum where the trial counsel recommends the sentence in exchange for "substantial assistance by the accused in the investigation or prosecution of another person . . . ."[55]

Evaluation of the 2016 MJA System: Performance by the Convening Authority, Then Performance by the Accused

Even with the thumbnail sketch presented so far, it should be obvious that the new plea agreement rules represent a significant paradigmatic shift from the legacy system. In the legacy system, the convening authority performed *last*—i.e., by granting clemency as agreed. The new system requires the convening authority to perform *first*—before trial—by issuing a direct limitation effective against the court-martial deliberative process.

What may not be obvious is how this shift affects other aspects of performance by the government and the accused. First, the convening authority now has a heightened obligation to understand trial process and the rights of the accused in order to set up the deal correctly. Second, the convening authority's new powers over sentencing means that the convening authority will need to observe some reasonable boundaries to avoid intruding upon the province of the court. Third, and finally, the military judge will have greater gatekeeping and policing obligations to ensure the agreement does not fail for public policy reasons. Each will be discussed in turn below.

The Convening Authority's Obligation to Understand Trial Rights and Processes

Under the legacy system, the convening authority did not need a sophisticated understanding of the accused's rights or trial processes. After hearing the sentencing evidence, the court-martial adjudged an "all in" punishment—thus providing a scaffold upon which clemency could act. While some understanding of the judge's sentencing options was important, the plea agreement and the sentencing procedure ran parallel and independent of each other. The court-martial did not need to work with the convening authority, and the convening authority did not need to work with the court-martial. Thus, while it was possible a convening authority could enter into a poorly negotiated agreement, the risk of entering into a legally insufficient agreement was attenuated.

Under the 2016 MJA, the convening authority now has much more opportunity to botch the agreement because the convening authority may *directly* limit[56] the maximum punishment, the minimum punishment, or both.[57] The practical effect of prospective performance is that the convening authority must have a solid understanding of the 2016 MJA trial processes to ensure that the limitations agreed to will be effective.

The Convening Authority Must Understand the Impact of Forum Choice

The first significant process the convening authority must understand is forum selection. Forum selection occurs when the accused selects by whom he wishes to be tried. The two possible forums are before military judge and before a military panel. The right to select forum is common to both the 2016 MJA and the legacy system; however, under the 2016 MJA, the election has a much more significant effect on the sentencing procedures. [58]

Under the 2016 MJA, if the accused elects sentencing by a military judge, the sentence will be segmented. This means that the judge must determine any appropriate confinement or fines on a per specification basis.[59] If there is no confinement or fine to be awarded for the specification, the judge will so state.[60] Moreover, once all confinement has been adjudged, the military judge must determine which confinement terms will be served consecutively and which will be served concurrently.

The sentencing rules provide certain factors for the judge to consider in making that determination: whether the specifications "involve[] the same victim and the same act or transaction"; whether the plea agreement speaks to the issue; whether the specifications are unreasonably multiplied; whether the total sentence is justified on the merits of the case;[61] and whether, in a special court-martial, the sentence must be adjusted to meet the maximum confinement authorized. Given these considerations, confinement for some specifications may run concurrently, while for other specifications it may run consecutively.

While sentences to a fine and confinement are segmented, the remainder of the sentence is unitary.[62] This means that the remaining portions of the sentence will be adjudged on an "all in" basis, rather than on a specification-by-specification basis. For example, if the accused were to receive a punitive discharge, the military judge would not specify the offense(s) upon which the discharge was adjudged.

If the accused instead elects sentencing by a panel, the procedures are much simpler. As under the legacy system, the panel will simply adjudge a "single sentence" for all the specifications of which the accused is found guilty.[63] There is no sentence segmentation, and there is neither authority nor procedure for a panel to adjudge confinement in consecutive or concurrent terms.

The Convening Authority Must Understand When Sentencing by a Judge Is Available

The default sentencing forum is before military judge.[64] The accused is entitled to elect a panel for sentencing only if he has been convicted of an offense by a panel.[65] Otherwise, the accused will be sentenced by military judge. Rule for Court-Martial 1002(b) obliges the military judge to determine "[i]n a court-martial consisting of a military judge and members, upon the announcement of findings . . . whether the accused elects sentencing by members in lieu of sentencing by the military judge."[66] While the Rule goes on to note that the "military judge shall determine the sentence" unless a timely election has been made,[67] the Rule does not re-state the explicit requirement under Article 53(b)(1)(A), UCMJ, that the military judge is the default sentencing authority, and does not re-state the specific conditions under which the accused may elect sentencing by a panel.

Unfortunately, the ambiguous wording in RCM 1002 appears to have complicated the plain language of the statute. In fact, the Army's current *Military Judge's Benchbook* provides that an accused may elect sentencing by a panel regardless whether the

accused has been convicted of any offense by the panel.[68] Both the confused wording of RCM 1002 and the *Benchbook* provisions appear to rest on a legacy-influenced understanding that a court-martial must *assemble* as a pre-requisite to sentencing the accused.[69]

This article will endeavor to provide a more nuanced understanding of how the 2016 MJA rules governing assembly, forum, and court-martial composition makes clear that the option to elect sentencing by a panel is only available where a panel has convicted an accused of an offense.

We begin with assembly. Under both legacy and 2016 MJA systems, assembly is the bookend to the convening action. When an authorized person[70] selects members, the court-martial *does not exist* until those members have been assembled by the military judge to hear charges referred to it.[71] Upon assembly, the court may be said to be "composed" of members or, alternately, a military judge. In the context of an accused's elections on court-martial composition, the term "forum" is frequently used.

Article 16, UCMJ, defines the court-martial in terms of the membership required to compose a court-martial.[72] The compositional requirement is so vital that both the legacy and the 2016 MJA systems provide a default forum if the accused should fail to elect one. Under the legacy system, the default forum was trial before a court-martial consisting of officers.[73] Thus, for example, if the accused were to voluntarily absent himself after arraignment, and before electing a forum, the trial could continue in absentia before a panel consisting of officer members. By contrast, under the 2016 MJA, while there is no default to a panel composed of officers,[74] if there is no election by the accused, the court-martial will consist of the members selected by the convening authority.[75] Under both systems, once the members are assembled, the members are required to be at every session of court, except as outlined in Article 39(a), UCMJ.[76]

Article 39(a), UCMJ, provides authority for the military judge to receive the plea of the accused, and to conduct an inquiry into the plea outside the presence of the members.[77] Further, provided the accused is provident, the military judge will generally enter the finding during the Article 39(a) session.[78]

Under the legacy system, the accused could not be sentenced without assembling the court, because Article 39(a), UCMJ, did not provide any authority for a military judge to do so. Instead, even in cases where the accused pleaded guilty to all specifications, the accused was required to make a forum election that carried through to sentencing. For example, consider an accused who elected a court-martial before enlisted members at the arraignment, and then immediately entered a plea of guilty. In that circumstance, the military judge would hold an Article 39(a) session outside the presence of the members, during which he would conduct an inquiry into the plea and enter findings. After entry of the findings, the military judge would call for the members and assemble them to determine the sentence. By contrast, if the accused elected trial before military judge, then the military judge would assemble himself as the court-martial prior to sentencing the accused. In either scenario, the accused's entry of a plea waived trial on those specifications, and it was not until sentencing that the forum election had any effect. A legacy system influenced understanding of the requirements for assembly and forum election—perhaps coupled with a desire to extend every possible protection to the accused—thus, likely accounts for a muddled application of the sentencing forum rules under the 2016 MJA.

An amendment to Article 39(a) under the 2016 MJA upends the traditional guilty plea requirement for assembly prior to sentencing. The amendment provides that *the judge can sentence the accused at an Article 39(a) session.*[79] The significance of this provision is hard to overstate; in a case where the accused has pleaded guilty to all offenses, the military judge will sentence the accused *without a forum election from the accused.* By contrast, where a court-martial has been assembled with members and has found the accused guilty, the accused's sentencing election effectively provides that the panel not be released before sentencing and adjournment of the court-martial.

The new Article 39(a), UCMJ, authority is especially significant when read in concert with Article 53(a), UCMJ. Article 53(a), UCMJ, is clear that an accused will be sentenced by a judge alone, unless the accused is "convicted of an offense *in a trial* by general or special court-martial consisting of members" and elects a panel. The converse is that if the accused pleads guilty to all offenses, there will be no trial on any issue of guilt, much less a trial before members.[80] Under the 2016 MJA, the entire availability of a panel hinges solely on the question of whether there is a triable issue of *guilt.* If there is, and the panel finds the accused guilty, then the accused may elect to be sentenced by that panel. If, however, there is no triable issue of guilt, then the accused must be sentenced by military judge.

This reading is in concert with the language of the statute originally proposed by the Military Justice Review Group (MJRG). That language would have made judge-alone sentencing mandatory in every non-capital case.[81] While there is no meaningful legislative history to explain why Congress retreated from this position in the 2016 MJA, it may be inferred by the plain language actually adopted in Articles 39(a) and 53, UCMJ, that Congress intended the exception for a narrow subset of facts: where a panel finds the accused guilty of an offense and the accused requests sentencing by that panel.

The accused may elect to continue a contested case before the same panel that has found him guilty. But if there was no trial (e.g., because the accused pleads guilty), then *the court will never assemble and the accused will be sentenced by the judge who received his pleas.*

Given the state of the law, and the currently fraught application of it, practitioners would be wise to ensure the plea agreement contains a mutual understanding of forum selection. The exact form of the agreement is less important than is language wherein all parties understand that sentencing will be before military judge alone. Second, while it may be technically possible in some circumstances that a panel could be *legally* available in a plea agreement case—for example, in a mixed plea scenario—the form of the agreement and the sentencing rules differ so drastically based on forum that it would be advisable to ensure that sentencing by judge alone is specifically stated in the agreement.

Which Sentencing Regime Will Be in Effect?

Whether the legacy or 2016 MJA rules apply depends on the date of commission of the crimes to be sentenced. The simplest cases will be ones where *all* specifications occurred either before or after the effective date of 1 January 2019. In these cases, the relevant procedures in effect at the time of the commission of the offenses will apply.

When the accused faces a mix of specifications committed *both* before *and* after the effective date, or if there are continuing offenses alleged that "bridge" the effective date, the rules provide that the legacy procedures will apply, unless the accused elects the 2016 procedures.[82] Only one sentencing regime will apply, regardless when the offenses were committed.[83]

In bridging cases, practitioners should include a term addressing whether the legacy or 2016 MJA rules will apply. If there is to be no election of the 2016 MJA procedures, the best practice would be to include a provision for the accused to affirmatively waive the election. The form of the agreement should include a unitary sentence agreement, and the case should proceed entirely under the legacy clemency based rules.[84]

If the parties wish to proceed under the 2016 MJA sentencing procedures, the accused should agree to make that election as part of the agreement, and the agreement format should reflect the election. The agreement should tailor the sentence limitations on a specification-by-specification basis if the forum will be judge alone, while the agreement should include a unitary sentence if the accused is entitled to and elects a panel.

While the recommendations expressed above may sound straightforward to apply, the application can become quite complicated, depending on the case. To help flesh out the types of issues that may arise in "thinking forward" to sentencing, we will walk through different permutations of a hypothetical case: *United States v. Smith.*

United States v. Smith: A Fictitious Scenario

Suppose we have a case where Private Smith leaves Fort Swagg without authority. About six months later, while driving on post, he is apprehended by a military police officer (MP), and returned to military control. During the traffic stop, the MP asks him if he was "military." Private Smith tells him, "Not now, I'm not." The trial counsel drafts charges with one specification of absent without leave (AWOL) terminated by apprehension, and one specification of false official statement. While the defense agrees the accused was AWOL, they do not agree that Private Smith gave a false statement. Rather, the defense contends he was commenting on his unfortunate circumstance of having been apprehended, and expressing his expectation that he would be disciplined and thrown out of the military. Unable to reach an agreement on the false official statement, the government and the defense nevertheless agree to a guilty plea on the AWOL offense, and to a sentence of no fewer than two months and no more than six months of confinement. The agreement does not specifically address the false official statement, or whether the sentence limitation applies to the false official statement. The agreement also has no term regarding the election of a military judge.

A trial proceeds, the accused is found provident in his plea, and the judge accepts the agreement. The government now elects to proceed on the remaining charge.

Under the legacy system, an agreement to "leave out" forum selection and a contested specification would have been an unremarkable (though inefficient) arrangement. However, under the 2016 MJA, a partial plea agreement is not only inefficient, it may fail. To illustrate, let us consider the different permutations that could occur due to the agreement's silence.

First permutation: The accused elects trial by judge alone on the contested charge, and is found not guilty of the false official statement. Under these facts, the judge will sentence the accused solely on the offenses subject to the agreement.[85] On its surface, the agreement appears sufficient because it tells the judge all he needs to know—in this case, the minimum and maximum term of confinement. However, on closer inspection, the agreement is silent as to other possible terms of the punishment. For example, may the judge sentence the accused to forfeitures? Is the agreement a limitation only on the *confinement term* such that any other authorized punishment may be adjudged? For example, is the judge free to sentence the accused to a punitive discharge? Or is the agreement a limitation on the *entire sentence* such that no other authorized punishment may be adjudged? Under that reading, the accused may, at a maximum, be sentenced to no more than six months of confinement, with no other punishment. If the parties do not agree on how to read the agreement, the agreement fails for a meeting of the minds.

Second permutation: The accused elects trial by judge alone on the contested charge, but this time he is found guilty of the false official statement. The only new question presented here is whether the confinement limitation applies only to the AWOL offense, or if it applies to the total sentence for both offenses. Under the 2016 MJA, the judge must segment confinement and fine terms for each individual specification.[86] Additionally, the judge must determine whether confinement is to run consecutively or concurrently,[87] but the agreement is unclear about what the judge should do. If the agreement applies only to the AWOL offense, then the judge could sentence the accused for the false official statement completely free of the plea agreement limitations, exposing the accused to far more punitive liability. If the agreement applies to both offenses, then the judge would need to reverse-engineer the sentence to ensure that confinement is no fewer than two months, and no more than six.[88] To the extent inquiry into the agreement discloses controverted terms, the judge must either conform the agreement to the understanding of the accused (with agreement of the trial counsel), or else permit the accused to withdraw the plea.[89]

Third Permutation: In this variation, the trial counsel again elects to prosecute the contested specification. This time, the accused elects trial by a panel, and is found not guilty of the false official statement. Under the 2016 MJA, the accused is ineligible to elect panel sentencing because he has not been found guilty of an offense by a panel.[90] The default rule of military judge sentencing would apply. In this case, the judge would sentence the accused under the terms of the agreement, but the same structural concerns as in the first permutation above would come into play.

Fourth Permutation: In this scenario, the accused again elects trial by a panel. This time, he is found guilty of the false official statement. If the accused declines to elect sentencing by a panel, the default sentencing rules would apply and the military judge would sentence the accused. The same considerations listed above would apply.

Alternately, the accused could elect sentencing by the panel following separate procedures. Unlike a judge, the panel has authority only to deliver a "single sentence."[91] The panel cannot segment the sentence, and therefore the panel need not determine whether the confinement is to be served consecutively or concurrently.

In the *Smith* hypothetical, despite the apparent simplicity of the agreement, the judge would still need to determine whether the agreement represents the total limitation on the sentence, or whether the parties intended it to be only a limitation on the AWOL term. In the event the term was intended to apply solely to the AWOL term, the term would likely be unenforceable, because there is no mechanism to determine how much of a "single sentence" adjudged by the members was attributable to the AWOL. For example, if the panel adjudged eight months of confinement, there would be no way to determine how much confinement was attributable to the AWOL (which was required to be no less than two months, and no more than six), and how much was attributable to the false official statement.

Recap: Principles to Consider in "Thinking Forward" Toward Sentencing

The hypothetical case of *United States v. Smith* exposes many issues that could trap the unwary. Unfortunately, it likely represents just a few of the potential issues that could arise. While it would be impossible to forecast all possible "issue" scenarios, several easily foreseen issues with corresponding "best practices" follow:

First, practitioners should include a term as to forum selection. Sentencing before a military judge raises very different issues than sentencing before a panel. While the scenario in *United States v. Smith* illustrates one way an unexpected forum selection may complicate practice under the 2016 MJA, it is by no means the only way. A discussion of the 2016 MJA panel selection and empanelment rules is beyond the scope of this article; however, the practitioner should know the new rules would pose an unwelcome additional cost to judicial economy.

Second, practitioners should carefully consider any mandatory minimums that may apply and specifically address those in the agreement. Article 56, UCMJ, provides that punishment for certain sex offenses must include a dismissal or dishonorable discharge.[92] However, Article 53a, UCMJ, provides limited circumstances under which a plea agreement may mitigate the mandatory minimum.[93] For example, if the trial counsel intends to recommend no mandatory minimum on the basis of substantial assistance by the accused, then the agreement should specify the parties' agreement as to what the government's obligation is.[94] Even where the parties do not contemplate that the agreement could affect the mandatory minimum, a term to that effect may be a best practice.[95]

Third, practitioners should take care to ensure that, for each offense, every lawful punishment has been addressed. To avoid unwieldy agreements, one possible practice would be to lay out the desired limits on a per specification basis, and then address all remaining punishment terms with a blanket statement such as, "[a]ny other lawful punishment may be adjudged in the discretion of the military judge." This term would enable a judge more freedom to sentence an accused in addition to whatever else was in the agreement.[96] Failure to include such a term could result in a situation similar to that arising in the *Smith* hypothetical, where it was unclear from the agreement whether the judge had any limit on his discretion with regard to unaddressed, but otherwise authorized, punishments.

Another possible practice would be to address all remaining terms with a blanket statement *preventing* the judge from adjudging any other punishment. If this provision were to be used, however, the agreement would need to address any applicable mandatory in order to avoid any argument about whether the government has obligated itself to perform on a limitation of the mandatory minimum.[97]

Fourth, practitioners should be careful to ensure that any conditions on referral do not impact the jurisdiction of the court-martial. Article 18(c), UCMJ, provides that a general court-martial has jurisdiction over certain sex offenses, and other attempts to commit such offenses.[98] An agreement to refer any of the covered offenses to a special court-martial would fail for lack of jurisdiction.[99]

Fifth, practitioners should exercise particular care in cases involving conspiracies to commit named sex-related offenses. Article 56(b)(2), UCMJ, contains a list of offenses subject to mandatory minimums.[100] This list is identical to that in Article 18(c), UCMJ, *except* that it includes the additional offense of conspiracy to commit the named sex-related offenses. Because the relevant mandatory minimum in such a case (dishonorable discharge) can only be adjudged by a general court-martial, the case must be referred to a general court-martial.[101] However, in cases where the only offense giving rise to a mandatory minimum is a conspiracy to commit a covered sex offense, and the agreement includes a sentence limitation specifying a bad conduct discharge, then the case could be referred to a special court-martial.[102]

Sixth, practitioners should include a term addressing an election on sentencing rules where there are offenses subject to both legacy and 2016 MJA rules. As discussed earlier in this article, under RCM 902A, a court-martial cannot have mixed sentencing rules. In cases where the convening authority has referred offenses subject to legacy rules along with other offenses subject to the 2016 MJA rules, the legacy sentencing rules will apply unless the accused elects the new rules.[103] Given that the election of the new rules would result in an agreement that would look very different from one under the old rules,[104] the agreement should expressly address the election and structure the agreement to accommodate it.

To conclude, practitioners must "think forward" to sentencing because the plea agreement is a direct limitation on the sentence the court delivers. Unlike the legacy system, where the plea agreement is for a clemency modification of the sentence, practitioners under the new system

will need to ensure that the convening authority's sentencing direction reflects the understanding of the parties and is legally possible. Next, discussion will turn to how a direct sentencing limitation intersects with current statutory and case law designed to ensure justice and keep improper influence out of the tribunal.

Unlawful Command Influence and the Problem of the "Empty Ritual"

Under the 2016 MJA, the convening authority has the power to limit a judge's sentencing authority, but such power runs into limits imposed of other doctrines. Recall that under the 2016 MJA, a plea agreement can provide a limit on the maximum sentence, the minimum sentence, or both. Based on a plain reading of the statute, a convening authority and an accused may bargain for an exact sentence which would apply without regard to the sentencing case.

To illustrate how this could work, we return to the *Smith* hypothetical. Assume that the parties reach an agreement to dismiss the false official statement in exchange for a term of confinement on the AWOL offense that is no more than six months and no less than six months. Additionally, the parties agree that a bad conduct discharge will be adjudged,[105] and that no other punishment may be adjudged in the case. Would an agreement such as this raise any legal issues?

Two doctrines may have an impact on this agreement: unlawful command influence (UCI) and the doctrine requiring a "complete presentencing proceeding."[106] Each will be handled in turn.

Unlawful Command Influence

The possibility of direct limitation of the sentence sets up an interesting question about how it would be interpreted in light of the doctrine preventing adjudicative phase UCI. [107]

The prevention of UCI is crucial to the military justice system.[108] Article 37, UCMJ, states that "[n]o person . . . may attempt to coerce, or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case."[109] The cases have interpreted this clause to prohibit improper influence during the adjudicative phase of trial, whether the influence actually occurs or occurs only in appearance.[110] Apparent UCI exists when an objective, disinterested observer with knowledge of all the facts would harbor a significant doubt about the fairness of the court-martial proceedings.[111] Once evidence of UCI has been raised, the burden falls on the government to prove beyond a reasonable doubt either that the predicate facts did not occur, the facts do not constitute UCI, or the facts do not prejudice the proceeding.[112]

It may be tempting to dismiss the application of Article 37, UCMJ, to plea agreements because the language of Article 53a *explicitly allows* a convening authority to directly limit the sentence of the court-martial. Thus, a strict reading appears to allow sum certain agreements such as the one in the *Smith* hypothetical. Indeed, one might even argue that part of the purpose of Article 53, UCMJ, was to give convening authorities more direct control over the sentencing process.

A quick dismissal of UCI concerns would be a mistake for three reasons. First, Article 37, UCMJ, is a systemic check on other articles. Under the legacy system, Article 37, UCMJ, was deployed in the plea agreement context to protect the sentencing authority from influence by a convening authority's agreement to exercise Article 60, UCMJ, clemency powers.[113] Under the legacy system, the convening authority's exercise of power was purely retrospective, and acted upon an adjudged sentence. Yet, Article 37, UCMJ, ensured judicial independence in formulating the sentence, and insulated the judge from the future acts of the convening authority by preventing disclosure of the agreement until after the sentence was announced. While Article 53a, UCMJ, changes the role a convening authority plays in the plea agreement context, there is no reason to believe that Article 37, UCMJ, will play any less systemic role than it historically has. All of the same doctrines of fairness—and the appearance of fairness—will likely apply even more forcefully under the 2016 MJA, for the military judge will now have direct knowledge of the limitations issued by the convening authority. It is even more likely that Article 37, UCMJ, will be applied more strictly in the 2016 MJA system because the order of performance has changed—the convening authority performs in directing the court even before it has heard the evidence or deliberated on a sentence.

Second, the language of Article 53a, UCMJ, is unlikely to be interpreted by an appellate court without at least some historical analysis of the text. The original formulation proposed by the MJRG would have provided much stronger objective guidance—in the form of sentencing parameters—to a military judge in evaluating a plea agreement. The original formulation provided that "the military judge may reject [the plea agreement] only if it proposes a sentence that is both outside the sentencing parameter and plainly unreasonably."[114] This provision would have operated as a limit on the military judge, but also on convening authority power. In essence, the convening authority would know that to be accepted, the agreement would need to fall within the parameters, if any, and must not be plainly unreasonable.

Neither the "plainly unreasonable" language nor the sentencing parameters made it into the 2016 MJA; however, the rest of the statute authorizing direct limitations did. In place of that language, courts are instead to look to whether the agreement is unlawful or violates the promulgated rules.[115] Appellate courts seeking to determine just what Congress intended when striking those limits, and in what way violates the law, will (and should) most certainly turn to Article 37, UCMJ, for guidance.

Finally, practitioners would do well to realize that the body of legal thought underlying plea agreements contains much disagreement over the proper role of such agreements in society. The bodies of thought can be loosely lumped into two categories: those who believe that plea agreements should be limited or abolished because they are a fundamentally unfair exercise of state power,[116] and those that support plea agreements as an exercise in freedom of contract.[117] While these two bodies of thought may exist at polar extremes, they are likely to inform case law evaluating Article 53a, UCMJ.

Few would disagree that *United States v. Care*[118] and its progeny skew towards a

paternalistic view of the law as regards a Soldier attempting to enter a guilty plea.[119] With Article 53a, UCMJ, now providing the convening authority direct opportunity to limit the sentencing authority, provided the accused agrees, it is likely that the appellate case law will reflect a struggle between those jurists who subscribe to a freedom of contract paradigm, and those who believe the judiciary should be a check on command authority. It is likely that the strong streak of pre-existing (paternalistic) legal thought is likely to play a role in couching Article 53a, UCMJ, within the broader context of Article 37, UCMJ, limitations against UCI.

Returning to how the *Smith* hypothetical might be evaluated in light of UCI concerns, this deal may raise an issue of apparent unfairness. Essentially, the agreement between the convening authority and the accused have fixed the sentence in such a way that the judge is powerless to further shape it, even after receiving all the evidence at the sentencing hearing.

The court may then look at whether the facts constitute UCI and whether they prejudice the proceeding. The government will no doubt contend that the convening authority could not have committed UCI because Article 53a, UCMJ, authorizes such deals. The defense will argue, however, that while a convening authority certainly has the authority to limit the court-martial, Article 37, UCMJ, still acts as a limit on the convening authority's exercise of that power. Secondly, the defense will argue that the agreement prejudiced the accused because it prevented the accused from benefiting from an independent military judge because the judge would have examined the limitation before having heard the sentencing evidence or argument.

Ultimately, a court is likely to evaluate the deal under the rubric of apparent UCI—what would a reasonable member of the public think about the proceeding? Courts would likely look at whether the crime was of such a magnitude, or the aggravation evidence so strong, as to demonstrate the agreement was a good one for the accused.

Of course, there are two ironies likely to limit such cases: first, the government would be unlikely to deal for a low "sum certain" cap in a strong case; and second, supposing there were such an agreement, the government might lose whatever efficiency-related benefits it hoped to achieve by a "sum certain" cap in having to justify the agreement with evidence entered into the record.[120]

The "Empty Ritual" Problem and "Complete Presentencing Proceedings"

A second problem with a "sum certain" type plea agreement is that it has a tendency to render the trial "an empty ritual."[121] Although the doctrine appears facially similar to UCI, this doctrine has its foundation in public policy concerns rather than Article 37, UCMJ. In *United States v. Davis,* the plea agreement called for the "appellant to request trial by military judge alone, enter into a confessional stipulation, [and] 'call no witnesses and present no evidence . . . during the case on the merits.'"[122] The Court of Appeals for the Armed Forces (CAAF) found that the agreement violated public policy, but found that the accused was not entitled to relief because the accused had no evidence to present anyway.[123]

Although the holding in *Davis* may appear limited only to cases involving confessional stipulations, the court noted that "[a] fundamental principle underlying this Court's jurisprudence on pretrial agreements is that 'the agreement cannot transform the trial into an empty ritual.'"[124] The court pointed out that RCM 705 prohibits terms in a plea agreement that "deprive[] the accused of . . . the right to complete presentencing proceedings"[125] derived from the basic public policy protections against an "empty ritual" announced in *United States v. Allen.*[126]

Applying this rationale to the *Smith* hypothetical, there are multiple issues that a "sum certain" agreement could raise. Suppose that the parties arrived at the bad conduct discharge and the six-month confinement agreement after reviewing what they concluded would be admissible in the presentencing proceedings. Suppose, for example, the government's evidence against Private Smith included a string of failures to report,[127] for which he had received punishment under Article 15, UCMJ.[128] Suppose the accused had also received several counseling statements for disrespecting his superior officers.[129] The rules would permit the government to introduce the circumstances of the apprehension, to include the alleged false statement, on sentencing.[130] Finally, suppose the government had evidence that Private Smith's unit deployed shortly after the accused went AWOL, and that the person who replaced Private Smith died conducting a mission that Private Smith otherwise would have performed. The government believes this would be admissible as aggravation evidence.[131]

Suppose the defense has evidence that the accused only left because his mother was sick and had recently lost her job. Further, they could call members of the unit to testify that he was a good Soldier, and that they would serve with him again if they had the chance. The accused got a job as a construction worker while he was AWOL, evidence which the defense believes will show the accused has strong rehabilitation potential.

Suppose that both the government and defense offer and obtain admission of all evidence discussed above. As agreed, the military judge sentences the accused to six months of confinement and a bad conduct discharge.

This scenario appears to provide a full sentencing proceeding—after all, the accused got what he had bargained for, and there was a full sentencing case presented to the judge. And yet, on the basis of *Davis*, the accused may nonetheless have a strong appellate argument that the sentencing proceeding was an "empty ritual." After all, he had no reasonable expectation that the judge would consider and be able to act on the mitigation evidence he presented. Thus, he may argue that the "no less than" limit and the bad conduct discharge requirement should have been held invalid because of their tendency to render the proceedings an "empty ritual." The defense would argue that those terms were impermissible as a matter of public policy, and ask the court to negate those limits and then either reassess the sentence, or return the case for resentencing.

Suppose instead that the parties decide not to present any evidence at sentencing.[132] The parties rely on the agreement and argue to the judge that, because he has accepted the agreement, he is bound to the terms whether or not the parties

present any sentencing evidence. The judge agrees that this is a correct interpretation of Article 53a, UCMJ, and sentences the accused in keeping with the agreement.

On appeal, the accused may maintain a two-pronged argument. First, he may argue that his defense counsel was ineffective because he did not submit any evidence in mitigation. He may argue that his defense counsel should have told the judge he had authority to reject the agreement and sentence according to his conscience.[133] Thus, he could argue that the agreement amounted to nothing more than a six-month cap on the sentence, for if the judge had rejected the agreement, he surely would have sentenced the accused to a lesser punishment. He may argue that but for the failures of his defense counsel, he would have been sentenced to a lesser punishment.[134] He could also supplement his argument with the fact that the government put on no evidence.

Second, he could argue that the presentencing hearings were an "empty ritual" and that he was denied a complete presentencing hearing by operation of the agreement. Even though there was no evidence presented during the sentencing case, he may argue that he would have presented the evidence but for the "sum certain" agreement.

Is a "sum certain" agreement practically advisable? Given the potential for appellate issues, and the attendant loss of judicial economy, practitioners should avoid the allure of such agreements. Instead, practitioners should strive to ensure that the judge has a meaningful decision to make upon sentencing. Doing so eliminates the concern that the proceeding is an "empty ritual."

Unfortunately, just how much sentencing leeway is necessary to avoid the UCI and the "empty ritual" problems is not something that can be decided by bright line rule. Nevertheless, this author proposes that a good indicator of whether the judge has a meaningful decision is if the agreement provides the defense sufficient motive and opportunity to influence the sentence in some significant way.

The wise practitioner will think carefully before agreeing to a "sum certain" deal, or one in which the agreement is narrowly prescribed. Practitioners might instead look to barter limitations on a per specification basis (e.g., "I will agree to limit Specification 1 to no less than x years confinement, if you agree to limit specification 2 to no more than y years confinement."). Practitioners could also broaden a facially "sum certain" agreement by agreeing to wide judicial latitude on whether the confinement will be served concurrently or consecutively. Practitioners could also agree to a "sum certain" as to one specification, but agree that another specification may be sentenced according to broader limits. Practitioners might also agree to a "sum certain" as to a particular part of the sentence (e.g., forfeitures), while leaving open another part of the sentence (e.g., confinement). In all this, the practitioner must carefully "think forward" to how these limits may play out during sentencing, and to whether there is sufficient judicial freedom to avoid raising the UCI and "empty ritual" problems.

Practitioners should avoid the temptation to justify them. No doubt such agreements would seem to enhance judicial economy, and might even appear to enhance justice in cases where it is clear the accused is getting a good deal. Moreover, practitioners might point out that a "sum certain" agreement is similar to an agreement by a civilian prosecutor to recommend a certain sentence. These arguments are apt to lead astray. Our system is a statutory one in which the convening authority holds an immense power imbalance over the accused, and potentially over the court. Indeed, even the court-martial cannot exist apart from the authorization of the convening authority.[135] With that kind of power already in the hands of the convening authority, the convening authority should be hesitant to exercise too much authority over the sentence where it might appear to undermine the independence of the trial judiciary.

Heightened Military Judge Responsibilities

The 2016 MJA introduces additional implied responsibilities on military judges. Just as the opportunity for direct limitation of the court-martial introduces the opportunity for convening authority overreach, so too does it introduce the requirement for the trial judiciary to zealously guard the province of the court. The prospective nature of a plea agreement under the 2016 MJA raises two specific issues the military judge should be tracking. First, the judge has an increased obligation to serve as gatekeeper. Second, the judge has a heightened obligation to police performance of the terms of the agreement.

Gatekeeping Role of the Military Judge

The gatekeeping role of the military judge is a traditional one. Judges have a "sua sponte duty to insure [sic] that an accused receives a fair trial."[136] In the plea agreement context, judges have the duty to ensure the accused is giving a plea that is "provident"—that is, wise.[137] *United States v. Care* imposes a judicial obligation of inquiry that arises from the concern that the accused has limited bargaining power as against the convening authority.[138] *Care* was decided in the context of a system in which the convening authority had no direct influence over the sentence adjudged; in a new system where the convening authority has authority over the sentence ab initio, the judge has that much more obligation to police the agreement.

Articles 53a(b)(4) & (5), UCMJ, impose a judicial obligation to reject agreements that are inconsistent with the law or with the Rules for Court-Martial. While this authority affirms the gatekeeping role of the military judge, it is not helpful to a judge trying to determine when to exercise that role.

Judges should inquire into plea agreements while keeping the provisions of Article 45, UCMJ, at the forefront of their thinking. Under Article 45, UCMJ, the accused may not enter a plea "improvidently." In modern practice, the "providence" required in Article 45, UCMJ, and the *Care* inquiry have become synonymous. However, in light of practice in a new system in which judges will see terms never before tested, judges will have to return to the root meaning of "improvident"—unwise—*and interpret the plea agreement itself* within that framework. In short, judges should be alert to terms that would make it unwise for an accused to enter a plea.

In the legacy system, the judge's inquiry as to the terms of clemency only looked at whether the parties agreed as to the

meaning of the terms. Under the 2016 MJA, judges have an obligation to look more searchingly at the sentence limitation to determine whether the accused is pleading providently. In fact, it is entirely possible that the limitations themselves could make the plea improvident—i.e., unwise. Where there are potential issues, judges should take care to get the facts on the record, and rule as to any issues explicitly.

Judges also need to be on the lookout for terms that violate public policy.[139] While there is no exhaustive list of provisions that would be void for public policy reasons, a good rule of thumb is that any agreement that results in unfairness, or the appearance of unfairness in the case, or any agreement which tends to undermine the ability of the court to administer justice, will be void for public policy reasons.[140]

Finally, under RCM 705(b)(1), judges are reminded to reject involuntary agreements and terms that deprive the accused of certain fundamental rights to counsel, due process, issuance of a challenge to jurisdiction; a speedy trial; complete presentencing proceedings; and complete and effective exercise of post-trial and appellate rights.

To exercise their gatekeeping role, RCM 910 provides the judge authority to reject agreements. Under that rule, a judge shall "issue a statement explaining the basis for the rejection; and allow the accused to withdraw any plea; and inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment."[141] Because much of the plea and plea agreement inquiry aims to protect the accused from himself, it is likely that a rejection of the agreement may stem from terms the judge wishes not to enforce against the accused. Upon learning the reasons for rejection, the prudent accused may decide to persist in the plea and obtain the benefit of a more favorable sentencing outcome than contemplated in the now-rejected agreement.

Heightened Obligation to Police Performance

A new role arising under the 2016 MJA is the judge's obligation to police any post-trial performance terms. Under the legacy system, performance failures of the accused could be addressed by the convening authority at action. For example, consider an agreement where the accused agreed to "good behavior" through convening authority action. If the accused got into trouble after the court-martial, the convening authority could simply refuse to exercise the clemency contemplated in the plea agreement, and approve the full sentence of the court-martial. The same would be true of any term in which performance was to occur after announcement of the sentence.[142]

Under the 2016 MJA, the sentencing relief is in the agreement itself. If the accused fails to perform on a post-trial obligation, the convening authority no longer has any means to protect himself. Unlike the legacy system, there is no "fall back" sentence of the judge that was not influenced by the agreement. The sentence of the judge now reflects the terms of the agreement, rather than what the accused would have gotten without the agreement.

The Rules for Court-Martial provide for post-trial motions and proceedings.[143] There are no procedures specifically addressing how a judge is to proceed when an accused has breached a term post-announcement of the sentence. Nevertheless, if the government wishes to withdraw from the agreement based on a breach, the judge will need to conduct an Article 39(a) session to permit the government to withdraw from the agreement. If the accused persists in his plea of guilty, the judge may proceed to a rehearing on the sentence, this time free from the terms of the agreement.

To sum up, the military judge's obligation to stand as gatekeeper must rise equal to the convening authority's heightened power over the proceedings, just as the military judge's obligation to police an accused's performance after announcement of sentence must provide support to the convening authority in amounts equal to his reliance risk.

Conclusion

The 2016 MJA made significant revisions to the military justice system. Some of the changes are obvious. What is not so obvious is how those changes reflect fundamental shifts within the system itself. Practitioners who wish to succeed must recognize the limits of their experience under the legacy system—no matter how long and distinguished—for it is not simply the *rules* that have changed, it is the *system itself*. The changes to the plea agreement system represent a significant shift away from a clemency-based model to a prescriptive system in which the convening authority has power, pursuant to a plea agreement, to direct the sentence of the court-martial. The changes will have significant ripples. Some changes are easily understood and foreseen. Other changes are hidden in plain sight, waiting for enterprising lawyers to find them and shape the law for decades to come. **TAL**

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Notes

1. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter 2016 MJA].

2. 10 U.S.C. § 853a (2016). Unless otherwise specified, all versions of the statutes and accompanying rules cited in this article are those passed under the 2016 MJA. The version in effect prior to passage of the 2016 MJA will be denoted as "Legacy."

3. *See* Manual for Courts-Martial, United States, R.C.M. 705(d)(4) (2016) [hereinafter 2016 MCM] (preventing convening authority after the accused "begins performance of promises contained in the agreement"). *See also*, U.S. Dep't of Army, Pam. 27-9, Military Judge's Benchbook, Chapter 2 (2014) [hereinafter Benchbook] (providing a detailed trial script). The accused might also perform by entering into a stipulation of fact or by doing some other bargained-for action. This chronology purposely oversimplifies the process to make clear the order of performance.

4. *See generally*, 2016 MCM, *supra* note 3, R.C.M. §§ 1001-11 (establishing sentencing procedures).

5. *See generally*, 2016 MCM, *supra* note 3, R.C.M. §§ 1101-14 (establishing post-trial processing procedures leading up to clemency action).

6. *See, e.g.,* 2016 MCM, *supra* note 3, R.C.M. 910(f)(3) ("[T]he military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced."); 2016 MCM, *supra* note 3, R.C.M. 910(h)(3) ("After sentence is announced, the military judge shall inquire into any parts of the pretrial agreement which were not previously examined by the military judge.").

7. *Compare* 2016 MCM, *supra* note 3, R.C.M. 910(f)(3) (requiring disclosure of the entire agreement, save any limitations, before the plea is accepted) *with* 2016 MCM, *supra* note 3, R.C.M. 910(f)(4) (obligating the judge to inquire to ensure the accused understands the agreement and the parties agree to the terms).

8. Significantly, whether the convening authority was bound at all by an accused's performance was not a foregone conclusion in the early days of pretrial agreements. *See, e.g.*, Major Charles W. Bethany, The Guilty Plea Program 1 (Apr. 1959) (unpublished LL.M. thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's Legal Center and School Library) (posing the question of whether a convening authority is bound by the accused's performance).

9. 2016 MCM, *supra* note 3, R.C.M. 705(d)(4)(B).

10. 2016 MCM, *supra* note 3, R.C.M. 705(d)(4)(B).

11. *See, e.g.*, Restatement of Contracts § 12 (1932). *See also*, *Carlill v Carbolic Smoke Ball Company* 1 QB 256 (1893). In that case, the court held that a contract was created where a company offered a sum of money to anyone who contracted the flu after completing their prescribed treatment. The claimant, who had completed the treatment, thereafter got sick with the flu and claimed the money.

12. The typical law school contracts hypothetical explains the issue thus: suppose someone offered you $100 to walk across the Brooklyn Bridge. By the nature of the offer, acceptance only occurs on performance. Suppose that you are now just yards away from completing the task when the offeror reconsiders and withdraws the offer. At that point, finishing those last few yards may give you some personal satisfaction, but it will not earn you the $100.

13. *See, e.g.*, United States v. Dean, 67 M.J. 224 (C.A.A.F. 2009). In that case, the amendment of a witness list pursuant to an agreement, along with other things, constituted beginning of performance. *Id.*

14. 2016 MCM, *supra* note 3, R.C.M. 705(d)(4)(A).

15. If there has never been a meeting of the minds, the accused and convening authority will be returned to status quo ante. *See*, *e.g.*, United States v. Dunbar, 60 M.J. 748 (2004) (finding no agreement where the government and accused disagreed as to the meaning and effect of the sentence limitation, and setting aside the findings and sentence). In this case, the government would not be able to retain any of the benefits of the accused's guilty plea. *See generally* 2016 MCM, *supra* note 3, Mil. R. Evid. 410(a)(4) (prohibiting the use of a guilty plea that "did not result in a guilty plea or [was] later withdrawn").

16. 2016 MCM, *supra* note 3, R.C.M. 910(h).

17. *See, e.g.*, UCMJ art. 45(a) (2018) ("If an accused . . . sets up a matter inconsistent with his plea . . . a plea of not guilty shall be entered in the record and the court shall proceed as though he had pleaded not guilty."); 2016 MCM, *supra* note 3, R.C.M. 910(h)(1) (the military judge may, as a matter of discretion, permit an accused to withdraw a plea before announcement of the sentence). An accused may withdraw a plea after announcement of sentence in certain limited circumstances casting doubt on the guilty verdict. *See, e.g.*, United States v. Olson, 25 M.J. 293 (C.M.A. 1987).

18. *Cf.* United States v. Olson, 25 M.J. 293 (C.M.A. 1987) (holding the accused could withdraw his plea after announcement of sentence where it was clear from the case that his entry of plea was not knowing and voluntary due to a reasonable mistake as to the terms of the agreement).

19. *See*, *e.g.*, United States v. Bulla, 58 M.J. 715 (C.G. Ct. Crim. App. 2003) (finding that on the facts of the case, the convening authority was justified in withdrawing from the agreement and approving the sentence as adjudged where the accused violated a misconduct provision).

20. An example may be where there is an agreement to cooperate in another case.

21. An example may be where the sentence as adjudged is less than the limitation expressed in the agreement.

22. *Bulla*, 58 M.J. at 715.

23. *See, e.g.*, United States v. Tester, 59 M.J. 644 (A. Ct. Crim. App. 2003) (convening authority may decline to exercise clemency where accused violated post trial conduct provisions and the convening authority went through appropriate procedures).

24. United States v. Dawson, 51 M.J. 411 (C.A.A.F. 1999). *Dawson* relies heavily on the fact that the agreement concerned matters outside the control of the court-martial—namely the decision as to the disposition of new offenses, and the decision whether to conduct vacation proceedings. *Dawson* cites a "tunnel of power" metaphor proposed by Judge Sullivan in *United States v. Boudreax*, 35 M.J. 291 (CMA 1992) for the proposition that the authority of a convening authority over certain post-trial actions (in this case, vacation proceedings) fall within the "portion of [the tunnel] under the control of the command structure," and that therefore a court-martial is not the deciding or reviewing authority. United States v. Dawson, 51 M.J. 411, 413 (C.A.A.F. 1999).

25. United States v. Parker, 62 M.J. 459 (C.A.A.F. 2006) (citing United States v. Pilkington, 51 M.J. 415, 416 (C.A.A.F. 1999)).

26. UCMJ, art. 37(a) (2016).

27. *Court Reporter's Chronology in the case of United States v. Lieutenant Colonel James H. Wilkerson*, Information Access Policy & Compliance Branch, https://www.foia.af.mil/Portals/22/documents/Library/Investigations/Wilkerson-Case/AFD-130403-023.pdf?ver=2016-09-13-105133-637 (last visited Oct. 3, 2019).

28. *See e.g.*, Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. Times (Nov. 26, 2014).

29. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954 (2013) (restricting power to grant clemency over certain offenses).

30. Military Justice Review Group, Report of the Military Justice Review Group, Part I: UCMJ Recommendations 486 (2015), http://ogc.osd.mil/images/report_part1.pdf [hereinafter MJRG Recommendations].

31. UCMJ, arts. 60a(a)-(b) (2018). Even then, the convening authority has limited clemency authority over sentences of confinement, discharge, or death.

32. UCMJ, art. 53a(a)(1)(B) (2018).

33. Manual for Courts-Martial, United States, R.C.M. 705(d)(1) (2019) [hereinafter 2019 MCM].

34. *See generally*, 2019 MCM, *supra* note 33, R.C.M. 910(f).

35. 2019 MCM, *supra* note 33, R.C.M. 910(f)(3) ("[T]he military judge shall require disclosure of the entire agreement before the plea is accepted.").

36. 2019 MCM, *supra* note 33, R.C.M. 705(f).

37. 2019 MCM, *supra* note 33, R.C.M. 1009(d)(6).

38. Rule for Court-Martial 910(f)(5) does not specifically require acceptance of the plea prior to acceptance of the agreement; however, that should be understood from the context. 2019 MCM, *supra* note 33, R.C.M. 910(f)(5). Rule for Court-Martial 910(f)(5) provides that the "military judge shall announce on the record whether the plea and the plea agreement are accepted" after the plea agreement inquiry is complete. *Id.* The agreement inquiry requires only that the military judge has ensured "the accused understands the agreement and that the parties agree to the terms of the agreement." 2019 MCM, *supra* note 33, R.C.M. 910(f)(4)(A). However, the acceptance of the plea agreement generally follows the factual basis inquiry. *See* 2019 MCM, *supra* note 33, R.C.M. 910(e); U.S. Dep't of Army, Pam. 27-9, Military Judge's Benchbook (1 Sept. 2014) (Unofficial Version 18.0, dtd 14 Feb. 2018), at 14-29. While the order of operations was not crucial under the legacy system, order is highly important under the 2016 MJA. That is because successful entry of the plea is required to give the agreement binding effect upon the military judge's acceptance. Interpreting this provision otherwise would have the absurd result of binding the parties to perform under the explicit language of Article 53(d), UCMJ, even before the accused has admitted his guilt.

39. UCMJ, art. 53a(d) (2018); 2019 MCM, *supra* note 33, R.C.M. 1002(a)(2) ("If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement.").

40. UCMJ, art. 53a(b)(1) (2018).

41. UCMJ, art. 53a(b)(2) (2018).

42. 2019 MCM, *supra* note 33, R.C.M. 901(f)(4)(B).

43. UCMJ, art. 53a(a)(2) (2018).

44. UCMJ, art. 53a(b)(4) (2018).

45. UCMJ, art. 53a(b)(5) (2018). The provisions of Article 53(a)(b)(4) and (5) were adopted in Section 531(d), National Defense Authorization Act for Fiscal Year 2018. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No.115-91, § 531(d), 131 Stat. 1283, 1384 (2017). While these amendments do not provide explicit interpretive guidance on what is "prohibited by law" or "inconsistent" with regulations, how it might be applied will be discussed later, *infra* Heightened Military Judge Responsibilities.

46. UCMJ, art. 53a(b)(3)-(c) (2018).

47. UCMJ, art. 56(b)(2)(A) (2018).

48. UCMJ, art. 56(b)(2)(B) (2018).

49. UCMJ, art. 56(b)(2)(C) (2018).

50. UCMJ, art. 56(b)(2)(D) (2018).

51. UCMJ, art. 56(b)(2)(E) (2018).

52. UCMJ, art. 56(b)(2)(F) (2018).

53. UCMJ, art. 56(b)(1) (2018). With the exception of conspiracy, only a general court-martial has jurisdiction to hear the listed offenses. UCMJ, art. 18(c) (2018). While not a focus of this article, the astute practitioner will recognize the apparent oversight and advise the convening authority to refer the case to a general court-martial where the charges warrant a court-martial. *See* UCMJ, art. 34 (2018); 2019 MCM, *supra* note 33, R.C.M. 601(d).

54. UCMJ, art. 53a(c)(1) (2018).

55. UCMJ, art. 53a(c)(2) (2018).

56. Both the legacy and the 2016 MJA systems use the same language of "limitation." *Compare, e.g.*, 2016 MCM, *supra* note 3, R.C.M. 910(f)(3) (preventing the

military judge from reviewing any "sentence limitation") *with* UCMJ, art. 53a(a)(1)(B) (2018) (discussing a "limitation on the sentence" as an appropriate subject of a plea agreement). However, a closer reading of the legacy rule makes it clear that the convening authority is not executing a direct limitation on the sentence. *See* UCMJ, art. 60(c)(4)(C) (2016) (discussing the convening authority's powers to grant clemency if called for in a pretrial agreement).

57. 2019 MCM, *supra* note 33, R.C.M. 705(d).

58. The legacy rules provided a straightforward sentencing procedure that does not change regardless whether the accused elects sentencing by a military judge or by a panel. Under that system, the court-martial sentenced the accused to a unitary, all-in punishment containing the term of confinement, punitive discharge, forfeitures, or other parts of the sentence. 2016 MCM, *supra* note 3, R.C.M. 1002(b).

59. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2).

60. *Id.*

61. *See* 2019 MCM, *supra* note 33, R.C.M. 1002(f), which provides a list of factors to ensure that the "court-martial shall impose a sentence that is sufficient, but not greater that necessary, to promote justice and to maintain good order and discipline in the armed forces."

62. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2)(C).

63. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(1).

64. UCMJ, art. 53(b)(1)(A) (2018) ("Except as provided in subparagraph (B), . . . if the accused is convicted of an offense in a trial the military judge shall sentence the accused.").

65. *See* UCMJ, art. 53(b)(1)(B) (2018) ("If the accused is convicted of an offense by general or special court-martial *consisting of a military judge and members* and the accused elects sentencing by members under section 825 of this title (article 25), the members shall sentence the accused."); UCMJ, art. 25(d)(1) (2018) ("Except [in capital cases], the accused in a court-martial *with a military judge and members* may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.") (emphasis added).

66. 2019 MCM, *supra* note 33, R.C.M. 1002(b)(1).

67. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2).

68. Benchbook, *supra* note 3 (Guilty Plea Inquiry under "Scripts").

69. *See* 2019 MCM, *supra* note 33, R.C.M. 911 Discussion ("Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (*see* UCMJ art. 29, R.C.M. 505, 902, 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (*see* Article 16, R.C.M. 903(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for members (see Article 25(c)(2), R.C.M. 903(d)).") (citations in original).

70. *See* UCMJ, art. 22 (2018) (granting general court-martial convening authority); UCMJ, art. 23 (2018) (granting special court-martial convening authority); UCMJ, art. 24 (2018) (granting summary court-martial convening authority).

71. The accused may always request trial by judge alone in lieu of trial before the members. *See* UCMJ, art. 16(b)(3) (2018); UCMJ, art. 16(1)(B) (2016).

72. *See*, *e.g.*, UCMJ art. 16(1)(A) (2016) (defining a general court-martial as composed of a military judge and at least five members); UCMJ art. 16(2)(A)-(B) (2016) (defining a special court-martial as composed of at least three members or of a military judge and at least three members); UCMJ art. 16(b)(1) (2018) (defining a general court-martial as consisting of a military judge and eight members); UCMJ, art. 16(c)(1) (2018) (defining a special court-martial as consisting of a military judge and four members).

73. Legacy Article 25(a) provided that any commissioned officer is eligible to serve on a court-martial if the convening authority has selected the commissioned officer to serve as a member. *See generally* UCMJ, art. 16 (2016). Under Legacy Article 25(d)(1), an enlisted accused may elect enlist members, provided that he has done so prior to assembly of the court martial. UCMJ, art. 25(d)(1) (2016). Additionally, if the accused has elected trial by a military judge before the court-martial has assembled, then the military judge may hear the case if the request is approved. *See* 2016 MCM, *supra* note 3, R.C.M. 903(c)(2).

74. Under the 2016 MJA Article 25(c)(2), the accused may elect trial before a court-martial composed entirely of officers or composed of at least one-third enlisted members. UCMJ, art. 25(c)(2) (2018). If the accused makes no election, the default composition of the court-martial will be the members selected by the convening authority under Article 16, UCMJ. *Id.*

75. *See* MCM, *supra* note 33, R.C.M. 903(a)(2) Discussion.

76. *Compare* UCMJ, art. 39(a) (2018) ("[T]he military judge may . . . call the court into session without the presence of the members [in limited enumerated circumstances]."), *with* UCMJ, art. 39(a) (2016) (same).

77. *Compare* UCMJ, art. 39(a)(3) (2016) (permitting a military judge to hold an arraignment and receive the pleas of the accused); UCMJ, art. 39(b) (2016) (permitting a military judge authority to perform other procedural functions authorized by the President under Article 36 [the Rules for Courts-Martial]); 2016 MCM, *supra* note 3, R.C.M. 910(f) (establishing procedures for the military judge to receive the pleas); 2016 MCM, *supra* note 3, R.C.M. 910(g) (providing authority for the military judge to enter a finding of guilty on the basis of an accepted plea) *with* UCMJ, art. 39(a)(3) (2016) (providing a military judge authority to hold arraignment and receive the pleas of the accused); UCMJ, art. 39(a)(5) (2016) (providing a military judge authority to perform other procedural functions authorized by the President under Article 36 [the Rules for Courts-Martial]); 2019 MCM, *supra* note 33, R.C.M. 910(f) (establishing procedures for the military judge to receive pleas).

78. *Compare* 2016 MCM, *supra* note 3, R.C.M. 910(g) (providing authority for the military judge to enter a finding of guilty on the basis of an accepted guilty plea) *with* 2019 MCM, *supra* note 33, R.C.M. 910(g) (providing authority for the military judge to enter a finding of guilty immediately at an Article 39(a) session on the basis of a guilty plea).

79. UCMJ, art. 39(a)(4) (2018) (providing authority to "conduct[] a sentencing proceeding and sentenc[e] the accused in non-capital cases"). Not only does the provision contemplate the possibility of having a "court-martial" that never actually assembles, but in contested member cases, it also contemplates releasing the assembled court-martial before sentencing. *Id.* Under the legacy system, the release of the assembled members only occurred at adjournment.

80. 2019 MCM, *supra* note 33, R.C.M. 910(c) (requiring that the military judge inform the accused, among other things, of "the right to be tried by a court-martial," and that "if the accused pleads guilty, there will not be a trial of any kind as to the offenses to which the accused has so pleaded").

81. MJRG Recommendations, *supra* note 30, at 477-78.

82. 2019 MCM, *supra* note 33, R.C.M. 902A.

83. 2019 MCM, *supra* note 33, R.C.M. 902A(a).

84. Note that the version of Article 60, UCMJ, in use depends on the dates of the *earliest* offense for which the accused was sentenced. Exec. Order No. 13,825 § 6(b), 83 Fed. Reg. 9,889 (Mar. 1, 2018). Thus, where there are multiple offenses crossing the effective date, the astute reader will recognize that clemency powers remain available to the convening authority and may serve as a foundation for a plea agreement.

85. Article 53(b)(1)(A) provides a default rule that the military judge "shall sentence the accused." UCMJ, art. 53(b)(1)(A) (2018). Under Article 53(b)(1)(B), the accused may elect sentencing by members where "the accused is convicted of an offense in a trial . . . by members." UCMJ, art. 53(b)(1)(B) (2018).

86. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2)(A).

87. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2)(B).

88. The 2016 MJA provides new sentencing factors for the purpose of "imposing punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces," UCMJ, art. 56(c) (2018); 2019 MCM, *supra* note 33, R.C.M. 1002(f). While "reverse engineering" is not one of the factors, the Rules for Court-Martial at least provides some authority for a judge to consider the plea agreement when determining whether confinement terms will run concurrently or consecutively. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(2)(B). The problem raised in this scenario is that a judge would be determining confinement using an agreement that is facially collateral to at least one of the offenses. *See* 2019 MCM, *supra* note 33, R.C.M. 705(d)(2) (providing that a plea agreement with limitations on confinement "shall include separate limitations, as applicable, for each charge or specification").

89. 2019 MCM, *supra* note 33, R.C.M. 910(f)(4)(B).

90. UCMJ, art. 53(b)(1)(B) (2018).

91. 2019 MCM, *supra* note 33, R.C.M. 1002(d)(1).

92. UCMJ, art. 56(b) (2018).

93. Article 53a(c)(1) provides that a "military judge may accept a plea agreement that provides for a sentence of bad conduct discharge." UCMJ, art. 53a(c)(1) (2018). Additionally, pursuant to an agreement, the trial counsel can recommend less than the mandatory minimum in exchange for "substantial assistance" by the accused. UCMJ, art. 53a(c)(2) (2018).

94. For example, the agreement could provide that the trial counsel will recommend the judge not apply the mandatory minimum. In a different case, the agreement could include a stronger term specifying not only that the trial counsel will make the recommendation, but that the judge will sentence free of the mandatory minimum.

95. An example of such a term might provide: "No term in this agreement shall be interpreted as having any effect on a mandatory minimum punishment." The agreement could also include a severability clause.

96. 2019 MCM, *supra* note 33, R.C.M. 1003(b)(1). Practitioners should understand that a term like this would also enable a judge to sentence an accused to more onerous punishments, like hard labor without confinement. *See* 2019 MCM, *supra* note 33, R.C.M. 1003(b)(6) (permitting sentence to confinement and hard labor without confinement in the same case, under certain circumstances). A more defense-friendly version of a blanket provision might state, "The military judge may adjudge no punishment except as expressly provided in this agreement."

97. *Cf,* United States v. Lundy, 60 M.J. 52 (C.A.A.F. 2004) (the accused arguing that the punishments triggering suspension by operation of law must also be suspended, and the court finding that the accused was entitled to specific performance).

98. The offenses listed are: violation of Article 120(a) or (b), violation of Article 120b, or an attempt to commit such an offense. These offenses are rape or sex assault, where penetration has occurred.

99. In this case, an accused would be well served to argue for specific performance.

100. UCMJ, art. 56(b)(2) (2018).

101. UCMJ, art. 18(c) (2018).

102. UCMJ, art. 53a(c) (2018).

103. 2019 MCM, *supra* note 33, R.C.M. 902A(a).

104. Remember that under the old rules, an "all in" punishment term would apply regardless of forum election. However, under the new rules, the default is for sentencing by a military judge. The agreement would thus need to cover limitations for each and every specification if the accused elected the new rules.

105. This term would be unlawful under the legacy system. *See*, e.g., United States v. Libecap, 57 M.J. 611 (C.G. Ct.Crim. App. 2002) (agreement to request a bad conduct discharge was void as against public policy). It would also be a bad idea under the 2016 MJA. *See infra The "Empty Ritual" Problem and "Complete Presentencing Proceedings."*

106. 2019 MCM, *supra* note 33, R.C.M. 705(c)(1)(B).

107. Several doctrines have arisen to help courts handle instances of unlawful command influence. The first doctrinal division concerns the phase of the case during which the impacts of the unlawful influence is felt. The two phases are known as the accusatory phase and the adjudicative phase. A classic example of accusatory phase unlawful command influence is when a superior influences a subordinate to forward a case that they may not have otherwise forwarded. The second doctrinal division concerns the type of harm done. Actual unlawful command influence is influence that results in an action violating the provisions of Article 37, UCMJ. UCMJ, art. 37 (2018). Apparent unlawful command influence concerns itself with whether a disinterested member of the public, knowing all the facts, would lose confidence in the justice system. United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017).

108. Unlawful command influence is a "mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

109. UCMJ, art. 37 (2018).

110. *See, e.g.*, United States v. Boyce, 76 M.J. 242 (C.A.A.F. 2017); *see also* Lieutenant Colonel John L. Kiel, Jr., *They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing With Apparent UCI,* Army Law., Jan. 2018, at 19.

111. *Boyce,* 76 M.J. at 249.

112. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999); United States v. Simpson, 58 M.J. 368, 373–78 (C.A.A.F. 2003).

113. MJRG Recommendations, *supra* note 30, at 483 (noting that the "confluence . . . of Articles" 60 and 37 explain much of the legacy pretrial agreement system).

114. *Id.* at 487.

115. UCMJ, arts. 53a(b)(4)&(5) (2018).

116. *See, e.g.,* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas,* 88 Cornell L. Rev. 1412, 1414 (2003) (criticizing plea bargaining as "marvelously designed to secure conviction of the innocent"); Steven P. Grossman, *An Honest Approach to Plea Bargaining,* 29 Am. J. Trial. Adv. 101, 103 (2005) (arguing that "differential sentencing between defendants who plead guilty and those who go to trial is, in large part, punishment for exercising the right to trial."); Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil,* 70 Marq. L. Rev. 615 (1987) (arguing to abolish plea bargaining).

117. *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract,* 101 Yale L.J. 1909, 1910 (1992) (arguing that plea agreements are "paradigmatic bargains of the sort we routinely enforce in other contexts").

118. United States v. Care, 40 C.M.R. 247 (1969).

119. *See, e.g.,* United States v. Parker, 10 M.J. 849, 851 (N.C.M.R. 1981) (likening the *Care* inquiry to "running the gauntlet").

120. While the government might lessen this burden by entering into a stipulation of fact with the defense, the defense may not wish to stipulate to aggravating facts because they could harm the accused should the sentence be reassessed on appeal.

121. United States v. Davis, 50 M.J. 426 (C.A.A.F. 1999).

122. *Id.* at 427.

123. *Id. See also* United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977) (holding that a confessional stipulation is acceptable where there is no agreement not to raise defenses or motions).

124. United States v. Davis, 50 M.J. 426 (C.A.A.F. 1999) (citing United States v. Allen, 8 U.S.C.M.A. 504, 507, 25 C.M.R. 8, 11 (1957)).

125. 2019 MCM, *supra* note 33, R.C.M. 705(c)(1)(B).

126. United States v. Allen, 8 U.S.C.M.A. 504 (C.M.A. 1957).

127. Essentially, the accused was late to work. This is a violation of Article 86, UCMJ. UCMJ, art. 86 (2018).

128. Admissible under R.C.M. 1001(b)(2). 2019 MCM, *supra* note 33, R.C.M. 1001(b)(2).

129. These statements would not be admissible, except perhaps to rebut something the defense put on. *See* 2019 MCM, *supra* note 33, R.C.M. 1001(b).

130. 2019 MCM, *supra* note 33, R.C.M. 1001(b)(4).

131. *See* 2019 MCM, *supra* note 33, R.C.M. 1001(b)(4).

132. Of these two scenarios, this seems the most likely to occur, given that it would yield the most efficient trial.

133. *See* UCMJ, arts. 53a(b)(4)-(5) (2018); 2019 MCM, *supra* note 33, R.C.M. 910(f)(7) (establishing rules for rejecting a plea agreement).

134. *See* United States v. Harpole, 77 M.J. 231 (C.A.A.F. 2017) (test for ineffective assistance of counsel requires deficient counsel performance and resulting prejudice).

135. *See* UCMJ, arts. 16, 25 (2018).

136. United States v. Watt, 50 M.J. 102, 105 (C.A.A.F. 1999).

137. *See* UCMJ, art. 45 (2018).

138. *See generally*, United States v. Care, 40 C.M.R. 247 (1969).

139. *See, e.g.,* United States v. Edwards, 58 M.J. 49 (C.A.A.F. 2003) ("To the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and not enforced.").

140. *See, e.g.*, United States v. Weasler, 43 M.J. 15 (C.A.A.F. 1995) (knowing and intelligent waiver of accusatory phase UCI not against public policy); United States v. Smith, 44 M.J. 720 (A. Ct. Crim. App. 1996) (contingent sentences where accused would have to pay $100,000 fine or else face an additional fifty years of confinement was void for public policy); United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999) (waiver of motion to obtain sentencing credit for unlawful pretrial punishment does not violate public policy); United States v. Edwards, 58 M.J. 49 (C.A.A.F. 2003) (agreement not to raise, during the accused's unsworn statement, potential unconstitutional conduct by investigating law enforcement officers did not violate public policy); United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (agreement to waive members did not violate public policy); United States v. Libecap, 57 M.J. 611 (C.G. Ct. Crim. App. 2002) (agreement to request a bad conduct discharge was void as against public policy); United States v. Thomas, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (provision preventing the accused from accepting clemency violated public policy); United States v. Sunzeri, 59 M.J. 758 (N-M. Ct. Crim. App. 2004) (provision preventing testimony of witnesses violated public policy); United States v. Cassity, 36 M.J. 759 (N-M. Ct. Crim. App. 1992) (provision encouraging counterintuitive sentencing argument violated public policy); United States v. Forrester, 48 M.J. 1 (C.A.A.F. 1998) (agreement not to waive defenses did not violate public policy where it was not overly broad and where there were no defenses raised during providence or sentencing).

141. 2019 MCM, *supra* note 33, R.C.M. 910(f)(7).

142. Another common example would be an agreement to cooperate in the prosecution of a second accused.

143. 2019 MCM, *supra* note 33, R.C.M. 1104.

AROUND THE CORPS

Members of an OBC run group scurry up the stairs leading to the back of the Rotunda on the Grounds of the University of Virginia near TJAGLCS. (Credit: Chris Tyree)

(Credit: istockphoto.com/megamix)

No. 3

Defamation Litigation in Army Sexual Assault Prosecutions

By Captain Michelle B. Kalas

Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech.[1]
—Benjamin Franklin

As the putative victims of sexual assault feel empowered to come forward and seek justice,[2] countervailing interests impel alleged perpetrators to assert their legal rights as well. Recent changes to the Article 32 hearing have made it a less fruitful source of discovery for defense counsel,[3] and other sources of discovery for defense counsel are limited under the Rules for Courts-Martial.[4] In addition, the stigma of a sexual assault accusation, even without criminal charges being brought or a criminal conviction, can have a devastating impact on a Soldier's military career and reputation.[5] As a result, defamation actions[6] brought by those accused of sexual assault have become more commonplace,[7] both as a potential tool for discovery[8] and a mechanism to adjudicate the guilt or innocence of the alleged perpetrator in the absence of a criminal prosecution.[9] Rarely does a defamation lawsuit solely serve the purpose of providing compensation for damages, assuming the alleged perpetrator is found not guilty under the standard of civil tort law.[10]

Putative victims in two high profile Army sexual assault cases have been sued for defamation, one for writing a blog post about her alleged sexual assault and one for simply reporting it to the Army, making this trend relevant for military justice practitioners.[11] Given that defamation actions are usually taken by civilian lawyers on a contingency fee basis and therefore do not require an initial financial outlay on the part of the plaintiff,[12] these numbers can be expected to increase. However, all military justice practitioners need to be aware of the second- and third-order effects of these civil actions, governed by state tort law and often brought concurrently with criminal prosecutions as a result of the short statute of limitations for defamation actions.[13] The initiation of a meritless defamation lawsuit solely to intimidate a victim with invasive discovery and the cost of litigation can potentially derail a criminal prosecution or, at the other extreme, backfire on the alleged perpetrator.

This article will examine the First Amendment issues raised in this context from the perspective of the special victims' counsel (SVC). Later, discovery and evidentiary issues raised by collateral defamation litigation and its potential impact on disposition from the perspective of the trial counsel will be discussed. This article will also explore some specific considerations that defense counsel should address when representing the alleged perpetrator, resulting in the final takeaways for all military justice practitioners.

What Special Victims' Counsel Need to Know

Special victims' counsel are legal assistance attorneys who provide zealous advocacy for victims of sexual assault throughout the military justice process, and "represent the best interests of their clients, even when the clients' interests do not align with the Government's interest."[14] Only active duty Soldiers, their dependents, retirees, and, under certain circumstances, Reserve Soldiers, their dependents, and Department of the Army Civilian employees are entitled to SVC representation.[15] However, the Special Victim Prosecutor Witness Liaison (SVPWL) can help putative victims of sexual assault who are not eligible for SVC representation access local resources available outside the Army, such as certain pro bono legal services discussed herein.[16]

Anti-SLAPP Law

Prosecuting sexual assaults is a challenge, since the most egregious offenses usually occur in private without third party witnesses and without necessarily producing any corroborating physical evidence. A majority of military sexual assaults involve an imbalance of power and/or rank between the parties,[17] and a significant number involve alcohol use by the putative victim,[18] both of which negatively impact the credibility of the putative victim. Putative victims can have a good-faith belief that their accusations of sexual assault are true, even if the crime cannot be proven beyond a reasonable doubt at trial.[19] However, reporting a sexual assault that does not result in a criminal conviction leaves the putative victim exposed to potential civil liability if the alleged perpetrator decides to bring an action for defamation under state tort law.[20]

Putative victims are entitled to the protection of the First Amendment of the U.S. Constitution. Otherwise, the criminal justice system would grind to a halt, as citizens would rightly fear to report potential crimes for law enforcement investigation. A report of sexual assault to law enforcement by its nature seeks government redress, i.e., favorable government action; thus, it is protected by the petition clause of the First Amendment as long as it is not baseless.[21] Any statement regarding the alleged sexual assault made in good faith to a third-party is likewise protected by the free speech clause of the First Amendment, as the issue of sexual assault in the military has become a matter of public concern.[22]

However, trial courts are loathe to enforce federal constitutional rights based on interpretation of federal constitutional case law alone.[23] As a result, an increasing number of state legislatures have passed, or are considering, statutes designed to deter, quickly resolve, and punish those who file meritless lawsuits intended to chill the exercise of First Amendment rights, also known as "strategic lawsuits against public participation" (SLAPPs).[24] The intimidating effect of SLAPPs is the significant cost of defending the litigation, which generally cannot be recovered even if the defendant eventually prevails, and the invasive nature of discovery in civil litigation.[25]

These state laws, called anti-SLAPP statutes, offer varying degrees of protection for putative victims who exercise their First Amendment speech and petition rights by legislating procedural hurdles that make it more difficult for an alleged perpetrator to bring a meritless defamation or other tort claim under state law.[26] Anti-SLAPP statutes generally utilize a motion to dismiss (or strike)[27] or follow existing civil procedure for a motion to dismiss or summary judgment,[28] provide for the expedited hearing of such motions,[29] stay or significantly curtail discovery until the anti-SLAPP motion is decided by the court,[30] and award attorney fees and costs to anti-SLAPP movants if they prevail on the motion.[31]

The most broadly drafted anti-SLAPP statutes protect both speech and petition rights, in all forums, whether public or private.[32] Other anti-SLAPP statutes only protect petition rights,[33] some only in a government proceeding.[34] Most anti-SLAPP statutes do include a fee-shifting provision in the event the movant prevails, which addresses the most chilling aspect of SLAPPs, i.e., the cost of attorney's fees.[35] However, about half of all states either provide no statutory anti-SLAPP protections for putative victims[36] or else existing statutory protection is extremely limited.[37]

The Westfall Act and Other Defenses

The primary concerns of the putative victim will usually be the financial cost of fighting the civil litigation and stopping it in its tracks as soon as possible. If the putative victim is being sued solely on the basis of a report to the Army as a federal employee or Soldier, they are arguably accorded absolute immunity from any civil liability under the Westfall Act.[38] The process to invoke Westfall Act protection is to request certification by the Attorney General of the United States (through the chain of command and Army Litigation Division) that the federal employee or Soldier was acting within the scope of his or her office or employment at the time of the report.[39] If the Attorney General certifies the scope of office or employment, then an Assistant United States Attorney will remove the case to federal court and substitute the United States for the federal employee or Soldier at no cost.[40] If the Attorney General declines to certify the scope of office or employment, the putative victim can remove the case to federal court and petition the court to find and certify that they were acting within the scope of their office or employment, but they would need to retain civilian counsel to do so.[41] In either event, the defamation case is removed to federal court, if not brought in federal court, and the United States is substituted as the party defendant.[42]

Other potential defenses are more limited in scope and require the putative victim to retain civilian counsel to assert on their behalf. If the putative victim is not a federal employee or Soldier and/or if they reported to state law enforcement, they generally only receive qualified immunity under state law for reporting to state law enforcement, unless state law follows the Restatement (Second) of Torts section 588 and provides absolute immunity.[43] In addition, any other communication made as part of, or related to, the putative victim's report of sexual assault, for example to a lawyer, chaplain, victim advocate, etc., cannot serve as the basis of a defamation claim if the communication is otherwise subject to absolute or qualified immunity and/or inadmissible as evidence due to an evidentiary privilege.[44]

It is critical for SVCs to advise their clients about potential civil liability for speaking to anyone about the sexual assault other than the Army's reporting chain, law enforcement, and any third-parties

described above. The alleged perpetrator may still bring suit, regardless of any potential privilege and/or immunity. However, the putative victim has the best chance of ending a defamation lawsuit in its preliminary stages at a reduced cost, and potentially recovering attorney fees under any applicable state anti-SLAPP statute if their statements are privileged and/or subject to either absolute or qualified immunity. In addition, SVCs should also advise their clients about potential civil liability for speaking to the media, making any post on social media, or blogging about the sexual assault, when the client may not be protected by a state anti-SLAPP statute or such protection may be limited.

Civilian Resources

The most important advice the SVC can give a client is the knowledge that time is of the essence in asserting any potential anti-SLAPP defense under state law, if available. Most state anti-SLAPP laws require that the motion to dismiss (or strike) be filed within thirty to ninety days of service of the lawsuit,[45] which does not give the putative victim much time to retain counsel and file an anti-SLAPP motion. In states where anti-SLAPP laws provide for the recovery of legal fees, the putative victim can be advised to seek the services of a media lawyer, who will have the technical expertise to assert a successful anti-SLAPP motion, since media entities are often sued for libel. A lawyer with subject matter expertise will also have the financial motivation under a fee-shifting statute to represent a client who may otherwise lack the financial means to pay for legal services. In addition, some non-profits serving victims of sexual assault, such as the Victim Rights Law Center in Massachusetts and Oregon and the Ohio Alliance to End Sexual Violence, provide referrals for pro bono representation in defamation lawsuits.[46]

What Trial Counsel Need to Know

With client consent, the SVC should make the trial counsel aware of any pending civil litigation against the putative victim, especially defamation claims, for the reasons discussed below. The trial counsel should also be aware that any civil litigation brought by the putative victim against the alleged perpetrator relating to or involving the sexual assault charges, such as filing for a victim protective order or divorce, raises some of these same issues. If a putative victim is not eligible for SVC services, the SVPWL can refer them to local resources outside the Army that may be able to provide pro bono legal assistance.

Discovery and Evidentiary Issues

Discovery in civil litigation is extremely broad, invasive, and largely unfettered by judicial oversight.[47] Trial counsel should be aware that it provides defense counsel with the opportunity to obtain impeachment evidence regarding the putative victim through depositions and testimony at trial or during a hearing.[48] It also provides defense counsel with the opportunity to go on a fishing expedition and uncover evidence about the putative victim that would otherwise not likely be subject to discovery through subpoena and/or a request for procurement in a court-martial.[49] In a court-martial, it is easier to argue in support of a ruling regarding admissibility and/or the procurement of a witness once relevant evidence is in the defense's hands than to demand broad discovery with regards to evidence that possibly exists.[50] Even if a criminal case is pending, the putative victim may not be able to obtain a stay in the civil case, depending on the controlling law where the civil case is brought.[51]

On the flip side, the interrogatories, sworn statements, depositions, and/or testimony (whether at trial or during a hearing) of the alleged perpetrator in the defamation action can potentially be introduced as substantive and/or impeachment evidence in a court-martial.[52] In addition, although accuseds' right to invoke their Fifth Amendment rights while in custody or during the court-martial cannot be used against them, alleged perpetrators' silence in a civil lawsuit can be used to draw an adverse inference against them and, with regards to any fact that is later asserted in a court-martial, can also be used as impeachment evidence.[53] As a matter of equity, the Fifth Amendment is a shield, not a sword to be used in civil litigation.[54] In addition, the plaintiff in a civil action is less likely to be successful when arguing that the pending criminal case justifies a stay.[55]

Effect on Case Disposition

Since the putative victim faces the very real risk of financial ruin in the face of a defamation lawsuit, win or lose, trial counsel should be aware that the putative victim will be less likely to support any administrative remedy short of a court-martial. The putative victim will likely desire a remedy with either the binding effect of collateral estoppel or issue preclusion under state law that provides admissible evidence in the civil litigation.[56] If the alleged perpetrator is found to have committed the sexual assault by a preponderance of evidence in an enlisted separation action with specific enough findings, this will likely support the putative victim's affirmative defense of substantial truth in the civil action, as discussed further below.[57] If the alleged perpetrator is an officer, there is no criminal or administrative action short of a court-martial that can potentially cut off the putative victim's liability. An officer separation does not necessarily require that the findings be supported by a preponderance of the evidence, and an officer can potentially resign in lieu of elimination without any factual findings.[58]

As noted above, proving the truth of an allegation of sexual assault carries a high cost to the putative victim, in both time and money, and requires the putative victim to be deposed and take the stand. The argument that an administrative separation will spare the victim the emotional trauma of testifying in court does not carry any weight if the putative victim is being sued for defamation. A founded law enforcement investigation will not help the putative victim avoid liability for a defamation claim, since the investigative report is inadmissible hearsay.[59] The putative victim must attack, as a factual and legal matter, the alleged perpetrator's claim that the allegations are defamatory.[60] Substantial truth is an affirmative defense to defamation under state tort law, requiring putative victims to prove their allegations by a preponderance of the evidence.[61]

What Defense Counsel Need to Know

There are cases of false accusation in which a civil defamation suit is merited and the competing First Amendment rights of the alleged perpetrator must be respected. However, any seasoned defense counsel worth their salt knows that, even in light of the strongest possible evidence, there are criminal defendants who will steadfastly assert their innocence and insist they have been falsely accused.[62] Alleged perpetrators of this mindset will likely desire to file a civil defamation suit in order to, in their minds, clear their name and make a false accuser pay. Defense counsel should be aware of the second- and third-order effects outlined above and the additional pitfalls discussed below when advising the alleged perpetrator of a sexual assault with regards to the potential benefits and risks of initiating civil litigation against the putative victim.

Joint Representation

In cases where a civil defamation suit is merited, defense counsel should limit the scope of any conversations with civilian civil counsel to military justice matters in which the defense counsel would be considered an expert consultant, in order to ensure the preservation of the attorney-client privilege for evidentiary purposes.[63] Defense counsel can make civilian civil counsel aware of unique features of the military justice system and opportunities to put evidence before the convening authority for consideration that would otherwise be inadmissible in a court-martial. Defense counsel should not provide any specific guidance with regards to discovery requests in the collateral civil litigation. This would provide grounds for an abuse of process counterclaim by the putative victim against the alleged perpetrator asserting that the civil ligation was brought solely to obtain discovery for the collateral court-martial, which could allow the putative victim to pierce the attorney-client privilege.[64]

Civilian civil counsel can receive the benefit of defense counsel's expertise regarding the military justice process, and then tailor the scope and timing of discovery requests in the defamation lawsuit accordingly. However, the best practice is for the alleged perpetrator to hire a civilian criminal defense lawyer with experience trying courts-martials for the purpose of advising civilian civil counsel regarding the timing and scope of discovery requests in the defamation action. Although this obviously results in additional legal fees, it is the only way to completely ensure the preservation of the attorney-client privilege for evidentiary purposes.

In addition, as an unpaid advocate, defense counsel does not have the inherent potential conflict resulting from the financial remuneration that may flow from successful litigation of a civil tort case on contingency. Defense counsel should therefore be able to provide more balanced and nuanced advice to the alleged perpetrator about the potential pitfalls of civil litigation in the context of a military criminal case than civilian civil counsel may provide. The gravest risk arises from defense counsel's inability to be completely frank with civilian civil counsel about strategy in the criminal case due to the ethical constraints described above. This may result in the left hand not knowing what the right hand is doing. Unbiased advice regarding the potential risks and benefits of a civil tort case is one of the most valuable contributions defense counsel can make in the case of a joint representation with civilian civil counsel.

Pretrial Publicity

Unlike the filings and evidence in a court-martial, all civil litigation is part of the public record upon filing unless specifically sealed by the judge and is freely accessible to the media.[65] The media may only find out about the criminal investigation and prosecution as a result of the pleadings in civil litigation, resulting in negative pretrial publicity about the alleged perpetrator that otherwise may not have occurred. Unlike trial counsel, who are restricted by the rules of prosecutorial ethics as to what they can say to the media about a pending case,[66] and the SVC, who must seek permission from their chain of command to speak to the media,[67] the putative victim's civilian lawyer can comment about what is already on the public record in a relatively unconstrained manner.[68] In that event, defense counsel can respond in a limited manner to any negative pretrial publicity, in order to protect the alleged perpetrator from substantial undue prejudice.[69] However, any more substantive response preferably should come from surrogates, such as a public relations firm hired by friends and family, due to the attribution of any statement made by defense counsel to the alleged perpetrator and the risks of discussing the details of the case with the media.[70]

Civil litigation presents the opportunity for far greater and more factually detailed pretrial publicity than would otherwise be possible, given the rules of legal ethics. The pretrial publicity may have a significantly negative impact on defense counsel's ability to persuade the convening authority to take less punitive action and to line up character witnesses for a trial on the merits and/or supportive sentencing witnesses in the event of a criminal conviction or plea deal.[71] On the other hand, it provides alleged perpetrators with an opportunity to get their story on the record, which, if compelling, may result in leniency by the convening authority or a decision by the putative victim to cease cooperating with the prosecution.[72]

Adverse Inference and Impeachment

As discussed above, the alleged perpetrator's interrogatories, sworn statements, deposition testimony, and testimony at trial or during a hearing in any civil litigation can potentially be used against them at a court-martial during either the case-in-chief and/or as impeachment evidence.[73] In addition, the alleged perpetrator's silence in the civil litigation, when faced with accusations that would be reasonable for them to rebut, can be used at a court-martial as evidence from which an adverse inference can be drawn. And, with regards to any fact they later assert in the court-martial, it can also be used as impeachment evidence.[74] The alleged perpetrator also faces potentially broad and invasive discovery that may uncover evidence supporting the government's case. Defense counsel should have frank discussions with the alleged perpetrator regarding any potential evidentiary issues and make sure the juice is really worth the squeeze when filing defamation litigation against the putative victim.

Sentencing Impact

Defamation litigation can have the most severe potential impact during the sentencing phase of the court-martial, in the event that the alleged perpetrator is convicted or negotiates a plea deal. Defense counsel should advise the alleged perpetrator that if the defamation litigation is found to be an anti-SLAPP lawsuit, the civil court's findings that the defamation litigation completely lacked merit, and was brought for improper purposes, such as to deter the putative victim from testifying against the alleged perpetrator in the court-martial, this provides the government with strong aggravating evidence of additional financial and emotional harm to the putative victim.[75] In addition, attacks on the putative victim made during the civil litigation or in the media can potentially be used by the government to undercut the genuineness of any expressions of remorse by the alleged perpetrator during the sentencing phase, whether the convicted accused takes the stand to testify or simply reads an unsworn statement.[76] Defense counsel must also consider that the putative victim will likely want restitution for legal fees resulting from the civil litigation as part of any plea deal.[77]

Conclusion

Defamation litigation against the putative victims of sexual assault is a growing trend nationwide, not only impacting military sexual assault prosecutions but also producing ripple effects in the larger civilian conversation about sexual assault.[78] In the context of sexual assault prosecutions by the Army, military justice practitioners cannot afford to ignore the larger legal issues arising from defamation litigation against the putative victims of sexual assault. Trial counsel should be prepared to war-game the second- and third-order effects of any such civil litigation, while SVCs and defense counsel should be prepared to advise their respective clients with regards to the potential risks, benefits, and common pitfalls of any such civil litigation. **TAL**

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Notes

1. Benjamin Franklin, Silence Dogood, No. 8 *in* The New-England Courant (1722).

2. *See* Dianna Cahn, *'Where's Our Reckoning?' Military Women Gather Outside Pentagon in #MeToo Protest*, Stars and Stripes (Jan. 9, 2018), https://www.stripes.com/news/where-s-our-reckoning-military-women-gather-outside-pentagon-in-metoo-protest-1.505745.

3. Under the Fiscal Year (FY) 14 National Defense Authorization Act (NDAA), the accused lost substantial due process rights with regards to the Article 32 hearing, which previously was intended to "serve as a means of discovery." *See* Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 Mil. L. Rev. 129, 154–55 (2014). "Before the passage of the [FY 14] NDAA, an Article 32 hearing was a 'thorough and impartial investigation of all the matters set forth therein' and an 'inquiry as to the truth of the matter set forth into the charges.' The NDAA amends Article 32 of the [Uniform Code of Military Justice] to a limited preliminary hearing where there must be a determination of jurisdiction, form of charges, probable cause that a crime has been committed, and recommended disposition. The NDAA further limits the former thorough, impartial, and truth-seeking function of the Article 32 hearing by specifically providing that a victim is not required to testify and will be considered unavailable if she elects not to do so." *Id.*

4. "Pre-referral defense requests for witnesses, depositions, and evidence must go through trial counsel and the convening authority. This forces defense counsel to disclose what would otherwise be confidential information about defense witnesses and theories, which thereby provides trial counsel with more information more quickly than their civilian counterparts." Heidi L. Brady, *Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. Ill. L. Rev. 193, 199 (2016). "Trial counsel has no comparable requirement. Defense counsel may only submit such requests to a military judge after a case has been referred and the convening authority has denied the request. An ex parte procedure, wherein trial counsel would not be present, is not available." *Id.* at 209; *see also* Manual for Courts-Martial, United States, R.C.M. 703(c)(2)(A)-(B)(i-ii) (2019) [hereinafter MCM]. However, the Military Justice Act of 2016 now provides that, beginning 1 January, 2019, military judges and magistrates can make decisions on pre-referral investigative subpoenas and wiretaps. David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1, 48 (2017).

5. *See* Tom Jackman, *Jury Orders Blogger to Pay $8.4 Million to Ex-Army Colonel She Accused of Rape*, Wash. Post (Aug. 11, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/11/jury-orders-blogger-to-pay-8-4-million-to-ex-army-colonel-she-accused-of-rape/.

6. The term "defamation" refers to the torts of both slander and libel under state law, the former being spoken and the latter being written. *See* Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 Harv. Hum. Rts. J. 263, 264–65 (2000).

7. In the context of college sexual assault accusations, which affect a similar age demographic and cause similar consequences, defamation lawsuits are notably increasing. Tyler Kingkade, *As More College Students Say "Me Too," Accused Men Are Suing For Defamation*, BuzzFeed News (Dec. 5, 2017), https://www.buzzfeed.com/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing?utm_term=.vbQ9OQwkb#.xk22PqVMo.

8. *See infra* note 47 and accompanying text for the scope of discovery in civil litigation.

9. "Economic harm is not conceptually essential to the law of defamation. Except in some slander cases, it is not a prerequisite to recovery. Whether a statement is actionable is determined not by asking whether it caused harm, but by a more abstract inquiry into the nature of the words themselves. The threshold question in a defamation case, unlike an economic tort case, is not whether the plaintiff has suffered an economic loss, but whether the statement complained about is 'defamatory.'" David A. Anderson, *Rethinking Defamation*, 48 Ariz. L. Rev. 1047, 1047–48 (2006).

10. *See id.* In several high-profile defamation suits, the plaintiff pursued an essentially uncollectible judgment. *See, e.g.,* Amy Kaufman & Richard Winton, *She Accused Director Brett Ratner of Rape in a Facebook Post. Then He Sued Her for Defamation*, L.A. Times (Nov. 2, 2017, 2:35 PM), https://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-melanie-kohler-lawsuit-20171102-story.html (Hollywood director-producer Brett Ratner did not bring a libel lawsuit against accusers who are wealthy Hollywood actresses; instead he sued a small business owner living in Hawaii); Jackman, *supra* note 5 (Describing the impossibility of ever paying the $8.4 million defamation judgment against her, blogger and stay-at-home mom aged "52, said she was devastated by the verdict and fearful for her family's future. 'I feel like I'm a financial slave for the rest of my life' . . . .").

11. *See, e.g.*, Craig Whitlock, *In the Military, Trusted Officers Have Become Alleged Assailants in Sex Crimes*, Wash. Post (Oct. 19, 2017), https://www.washingtonpost.com/investigations/in-the-military-trusted-officers-became-alleged-assailants-in-sex-crimes/2017/10/19/ec2cf780-ae9a-11e7-be94-fabb0f1e9ffb_story.html; Jackman, *supra* note 5.

12. "Many consumer organizations, public advocates, labor unions, and plaintiffs' lawyers view the United States' system of contingent fees as nothing less than the average citizen's 'key to the courthouse door,' giving all aggrieved persons access to our system of justice without regard to their financial state. . . . Thus, contingent-fee retentions are generally beneficial to tort plaintiffs because they give plaintiffs access to the courts, even the odds of a fair recovery or settlement, and foster confidence in and satisfaction with counsel. Indeed, it is indicative of the contingent-fee contract's role in securing access to the courts and fair settlement values for tort victims that labor unions and consumer advocates usually defend it, while those advocating corporate interests typically attack it—albeit often in terms that profess a pious concern that plaintiffs (their adversaries in the tort system) need to be protected from their own counsel." Elihu Inselbuch, *Complex Litigation at the Millennium: Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 Law & Contemp. Probs. 175, 175, 179 (2001).

13. State defamation law generally provides for a one-year statute of limitations for this tort. *See* Adeline

A. Allen, *Twibel Retweeted: Twitter Libel and the Single Publication Rule*, 15 J. High Tech. L.J. 63, 65-66 (2014).

14. U.S. Army Special Victims' Counsel Program, Special Victims' Counsel Handbook Fourth Edition 1 (9 June 2017) [hereinafter SVC Handbook]; *see also* 10 U.S.C. §1044e (2018).

15. 10 U.S.C. §§ 1044, 1044e (2018); U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program para. 2-5 (21 Feb. 96); U.S. Dep't of Army, Dir. 2017-16, Civilian Employee Eligibility for the Special Victims' Counsel Program (1 May 17).

16. *See* U.S. Dep't of Army, Reg. 27-10, Military Justice paras. 17-3–17-12 (11 May 16).

17. Office of People Analytics data suggests that the active duty Soldiers most commonly experiencing sexual assault are junior enlisted Soldiers assaulted by a Soldier slightly higher than them in the enlisted ranks. "57% of DoD women and 53% of DoD men indicated the alleged offender(s) was (were) in a higher rank than them." Off. of People Analytics, OPA Report No. 2016-050, 2016 Workplace and Gender Relations Survey of Active Duty Members, Overview Report 65 (May 2017). "Army women (19%) were *more likely* than women in the other Services to indicate the alleged offender(s) was (were) ranked E7–E9 . . . . There were no significant differences between Services for men when comparing the rank of the member to the rank of the alleged offender(s)." *Id.* at 66. "Combining those who indicated the alleged offender(s) was (were) their immediate supervisor or someone else in their chain of command (excluding their immediate supervisor), 27% of [DoD] women indicated the alleged offender(s) was (were) in their chain of command." *Id.* at 69. "Combining those who indicated the alleged offender(s) was (were) their immediate supervisor or someone else in their chain of command (excluding their immediate supervisor), 34% of [DoD] men indicated the alleged offender(s) was (were) in their chain of command." *Id.* at 70.

18. Among active duty service members who indicated experiencing sexual assault, forty-eight percent of women and thirty percent of men indicated they had been drinking at the time. *Id.* at 90–91. Sixty-four percent of women and sixty of men who were drinking indicated the alleged offender bought or gave them alcohol to drink. *Id.*

19. The same evidentiary issues that make prosecuting sexual assault difficult also make it difficult to determine whether or not an accusation of sexual assault is factually false. An accusation may simply lack sufficient evidentiary support and/or not meet the legal definition of a sexual assault while still having occurred exactly as the putative victim described. David Lisak, a leading sexual assault researcher, has found false rape reports to be between 2% and 10% of all reports, based on the results of eight methodically rigorous studies. David Lisak, Lori Gardinier, Sarah C. Nicksa, & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318–34 (2010).

20. Even if there is a plea deal for a lesser-included offense, some alleged perpetrators might still bring a defamation suit. *See* Lindsey Bever, *She Called the Man Who Sexually Assaulted Her a Rapist. Then He Sued Her for Defamation.*, Wash. Post (Oct. 4, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/03/i-felt-re-victimized-woman-sued-for-referring-to-the-man-who-sexually-assaulted-her-as-a-rapist/.

21. *See* Protect Our Mountain Environment, Inc. v. Dist. Court of County of Jefferson, 677 P.2d 1361 (Colo. 1984).

22. *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

23. For example, in a defamation suit filed by Hollywood producer-director Brett Ratner against a woman who accused him of rape in a Facebook post, a federal judge denied the defendant's motion to dismiss for failure to state a claim in light of the defendant's free speech rights under the First Amendment of the United States Constitution. *See* Amy Kaufman & Victoria Kim, *Judge Declines to Throw Out Brett Ratner's Defamation Suit Against Woman Who Alleged Rape*, L.A. Times (Feb. 8, 2018), https://www.latimes.com/local/lanow/la-fi-ct-ratner-kohler-hawaii-ruling-20180208-story.html. *But see* Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993); Protect Our Mountain Environment, Inc., 677 P.2d at 1368–69 (holding that suits alleging misuse or abuse of the administrative or judicial processes of government may not state a claim upon which relief can be granted in light of the constitutional right to petition and the defendant can make a motion to dismiss, similar to a motion for summary judgment, which then requires the plaintiff to make a sufficient showing that the defendant's petitioning activities were not immunized from liability under the First Amendment because they were devoid of reasonable factual support or lacked any cognizable basis in law for their assertion and the primary purpose was to harass the plaintiff or to effectuate some other improper objective).

24. "Practically every discussion of anti-SLAPP legislation and litigation begins with an acknowledgement of Professors George Pring and Penelope Canan. In fact, the now ubiquitous term 'SLAPP,' an acronym for 'Strategic Lawsuits Against Public Participation,' was coined by Pring and Canan in the mid-1980s. Their ten-year study of 247 separate lawsuits first identified '[a] new breed of lawsuits . . . stalking America.' These lawsuits, known as SLAPPs, are a pernicious form of meritless legal action intended solely to retaliate against the exercise of petition and speech rights. Pring and Canan's expose of SLAPPs forms the key theoretical justification (and only empirical basis) for an ongoing slew of legislation meant to curb such strategic litigation. At least twenty-nine states, the District of Columbia, and the territory of Guam have enacted some form of anti-SLAPP legislation since Pring and Canan first published their study. Recent lobbying efforts by reporters, citizens' rights groups, and even the American Bar Association aim to pass an anti-SLAPP statute at the federal level to provide broad-based protection for speech and petitioning." Andrew L. Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. Rev. 741, 741–43 (2016). There currently is no federal anti-SLAPP statute, and although some federal circuits apply state anti-SLAPP law under the *Erie* doctrine in cases of diversity jurisdiction, there is currently a split among the circuits on this issue. *See* Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court after Shady Grove*, 114 Colum. L. Rev. 367 (2014).

25. "The goal of a SLAPP is straightforward—silence the opposition. . . . The suit is, by definition, meritless. That is, the filer does not hope to win the suit. The filer does not care about actual redress of the wrongs alleged. The filer only wants to tie up the target's resources in litigation. If the target's emotional and financial resources are dominated by the lawsuit, then she is unable to continue the public debate. So, the filer demands redress into the millions, drags out discovery, and generally makes life miserable until the target either recants or simply shuts up. The filer then quietly withdraws the suit, and continues in whatever public issue or debate sparked the confrontation in the first place. Even after the lawsuit is dropped, the target is left rattled and defeated, unable or unwilling to continue the public fight. What is more, others who may share the target's views on the public issue or debate are intimidated into silence by the prospect of winding up in a multi-million dollar lawsuit with the filer."

Roth, *supra* note 24, at 745–47.

26. *See* Ariz. Rev. Stat. Ann. §§ 12-751–752 (2016); Ark. Code Ann. §§ 16-63-501–508 (2005); Cal. Civ. Pro. Code § 425.16 (West Supp. 2016); Conn. Gen. Stat. § 52–196a (2019); H.B. 1324, 72nd Gen. Assem., 1st Sess. (Colo. 2019); Del. Code Ann. tit. 10, §§ 8136–8138 (2013); D.C. Code Ann. §§ 16-5501–16-5505 (Supp. 2016); Fla. Stat. Ann. § 720.304(4) (West 2015); *id.* § 768.295 (West 2011 & Supp. 2016); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (Supp. 2016); Haw. Rev. Stat. §§ 634F-1–634F-4 (LexisNexis 2012); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); Ind. Code Ann. §§ 34-7-7-1–34-7-7-10 (West 2011); Kan. Stat. Ann. § 60-5320 (2016); La. Code Civ. Proc. Ann. art. 971 (Supp. 2016); Me. Rev. Stat. Ann. tit. 14, § 556 (West Supp. 2015); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2013); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Minn. Stat. Ann. §§ 554.01–554.05 (West 2010 & Supp. 2015); Mo. Ann. Stat. § 537.528 (West Supp. 2016); Neb. Rev. Stat. §§ 25-21, 241–25-21, 246 (2010); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (LexisNexis 2013); N.M. Stat. Ann. § 38-2-9.1 (2016); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (McKinney 2016); Okla Stat. tit. 12, §§ 1430–1440 (Supp. 2014); Or. Rev. Stat. Ann. §§ 31.150–31.155 (2003); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8303 (West 2011); R.I. Gen. Laws §§ 9-33-1–9-33-4 (2012); Tenn. Code Ann. §§ 4-21-1001–4-21-1004, 20-17-101–20-17-110 (2019); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011 (West 2015); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (LexisNexis 2012); Vt. Stat. Ann. tit. 12, § 1041 (Supp. 2015); Va. Code § 8.01-223.2; Wash. Rev. Code Ann. §§ 4.24.510–4.24.520 (West 2005 & Supp. 2016).

27. Ariz. Rev. Stat. Ann. §§ 12-751–752 (2016); Ark. Code Ann. §§ 16-63-501–508 (2005); Cal. Civ. Pro. Code § 425.16 (West Supp. 2016); Conn. Gen. Stat. § 52–196a (2019); H.B. 1324, 72nd Gen. Assem., 1st Sess. (Colo. 2019); D.C. Code Ann. §§ 16-5501–16-5505 (Supp. 2016); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (Supp. 2016); Kan. Stat. Ann. § 60-5320 (2016); La. Code Civ. Proc. Ann. art. 971 (Supp. 2016); Me. Rev. Stat. Ann. tit. 14, § 556 (West Supp. 2015); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2013); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Minn. Stat. Ann. §§ 554.01–554.05 (West 2010 & Supp. 2015); Mo. Ann. Stat. § 537.528 (West Supp. 2016); Neb. Rev. Stat. §§ 25-21, 241–25-21, 246 (2010); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (LexisNexis 2013); N.M. Stat. Ann. § 38-2-9.1 (2016); Okla Stat. tit. 12, §§ 1430–1440 (Supp. 2014); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8303 (West 2011); Tenn. Code Ann. §§ 4-21-1001–4-21-1004, 20-17-101–20-17-110 (2019); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011 (West 2015); Vt. Stat. Ann. tit. 12, § 1041 (Supp. 2015); Va. Code § 8.01-223.2; Wash. Rev. Code Ann. §§ 4.24.510–4.24.520 (West 2005 & Supp. 2016).

28. Del. Code Ann. tit. 10, §§ 8136-8138 (2013); Fla. Stat. Ann. § 720.304(4) (West 2015); *id.* § 768.295 (West 2011 & Supp. 2016); Haw. Rev. Stat. §§ 634F-1–634F-4 (LexisNexis 2012); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); Ind. Code Ann. §§ 34-7-7-1–34-7-7-10 (West 2011); Or. Rev. Stat. Ann. §§ 31.150–31.155 (2003); R.I. Gen. Laws §§ 9-33-1–9-33-4 (2012); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (LexisNexis 2012) follow existing civil procedure for a motion to dismiss or for summary judgment. However, New York is unique in that it treats the Anti-SLAPP right as a counterclaim and requires the defendant to follow the normal procedure and deadlines for counterclaims. *See* N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (McKinney 2016).

29. *See* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val. U. L. Rev. 1235, 1242 (2007).

30. Ark. Code Ann. §§ 16-63-501–508 (2005); Cal. Civ. Pro. Code § 425.16 (West Supp. 2016); Conn. Gen. Stat. § 52–196a (2019); H.B. 1324, 72nd Gen. Assem., 1st Sess. (Colo. 2019); D.C. Code Ann. §§ 16-5501–16-5505 (Supp. 2016); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (Supp. 2016); Haw. Rev. Stat. §§ 634F-1–634F-4 (LexisNexis 2012); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); Ind. Code Ann. §§ 34-7-7-1–34-7-7-10 (West 2011); Kan. Stat. Ann. § 60-5320 (2016); La. Code Civ. Proc. Ann. art. 971 (Supp. 2016); Me. Rev. Stat. Ann. tit. 14, § 556 (West Supp. 2015); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2013); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Minn. Stat. Ann. §§ 554.01–554.05 (West 2010 & Supp. 2015); Mo. Ann. Stat. § 537.528 (West Supp. 2016); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (LexisNexis 2013); Okla Stat. tit. 12, §§ 1430–1440 (Supp. 2014); Or. Rev. Stat. Ann. §§ 31.150–31.155 (2003); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8303 (West 2011); R.I. Gen. Laws §§ 9-33-1–9-33-4 (2012); Tenn. Code Ann. §§ 4-21-1001–4-21-1004, 20-17-101–20-17-110 (2019); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011 (West 2015); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (LexisNexis 2012); Vt. Stat. Ann. tit. 12, § 1041 (Supp. 2015).

31. *See* Hartzler, *supra* note 29, at 1242.

32. *See id.* at 1260–70.

33. *See id.* at 1253–60.

34. *See id.* at 1248–52.

35. Ariz. Rev. Stat. Ann. §§ 12-751–752 (2016); Ark. Code Ann. §§ 16-63-501–508 (2005); Cal. Civ. Pro. Code § 425.16 (West Supp. 2016); Conn. Gen. Stat. § 52–196a (2019); H.B. 1324, 72nd Gen. Assem., 1st Sess. (Colo. 2019); D.C. Code Ann. §§ 16-5501–16-5505 (Supp. 2016); Fla. Stat. Ann. § 720.304(4) (West 2015); *id.* § 768.295 (West 2011 & Supp. 2016); Ga. Code Ann. §§ 9-11-11.1, 51-5-7(4) (Supp. 2016); Haw. Rev. Stat. §§ 634F-1–634F-4 (LexisNexis 2012); 735 Ill. Comp. Stat. Ann. 110/15–110/25 (West 2011); Ind. Code Ann. §§ 34-7-7-1–34-7-7-10 (West 2011); Kan. Stat. Ann. § 60-5320 (2016); La. Code Civ. Proc. Ann. art. 971 (Supp. 2016); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Minn. Stat. Ann. §§ 554.01–554.05 (West 2010 & Supp. 2015); Mo. Ann. Stat. § 537.528 (West Supp. 2016); Nev. Rev. Stat. Ann. §§ 41.635–41.670 (LexisNexis 2013); N.M. Stat. Ann. § 38-2-9.1 (2016); Okla Stat. tit. 12, §§ 1430–1440 (Supp. 2014); Or. Rev. Stat. Ann. §§ 31.150–31.155 (2003); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301–8303 (West 2011); R.I. Gen. Laws §§ 9-33-1–9-33-4 (2012); Tenn. Code Ann. §§ 4-21-1001–4-21-1004, 20-17-101–20-17-110 (2019); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011 (West 2015); Vt. Stat. Ann. tit. 12, § 1041 (Supp. 2015); Va. Code § 8.01-223.2; Wash. Rev. Code Ann. §§ 4.24.510–4.24.520 (West 2005 & Supp. 2016); *see also* Hartzler, *supra* note 29, at 1242. Del. Code Ann. tit. 10, §§ 8136-8138 (2013); Me. Rev. Stat. Ann. tit. 14, § 556 (West Supp. 2015); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (LexisNexis 2013); Neb. Rev. Stat. §§ 25-21, 241–25-21, 246 (2010); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney 2009); N.Y. C.P.L.R. 3211(g) (McKinney 2016); Utah Code Ann. §§ 78B-6-1401–78B-6-1405 (LexisNexis 2012) merely permit the award of attorney fees rather than require such an award

36. Alabama, Alaska, Idaho, Iowa, Kentucky, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, West Virginia, Wisconsin, and Wyoming have no anti-SLAPP statute. *See also supra* note 23.

37. *See* Hartzler, *supra* note 29, at 1248–60.

38. 28 U.S.C. § 2679(b)(1) (2018). The Westfall Act "preclude[s]" any suit brought against a federal employee acting within the scope of their office or employment other than those brought under the Federal Torts Claims Act against the United States. 28 U.S.C. § 1346(b) (2018); s*ee, e.g.,* Nietert v. Overby, 816 F.2d 1464 (10th Cir.1987) (holding that a federal employee had absolute immunity from suit as a whistleblower because she was acting within the scope of her official duties); West v. Rieth, No. 16-30919, 2017 U.S. App. LEXIS 12316 (5th Cir. July 10, 2017) (unpublished opinion) (holding that the district court did not err when it found that plaintiff, a Marine, failed to present sufficient evidence to rebut Westfall Act immunity with regards to his claim that fellow Marines falsely reported to command that he sexually assaulted them).

39. 28 U.S.C. § 2679(b)(1) (2018).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Restatement (Second) of Torts § 588 (1977) (privilege of absolute immunity to witnesses for communications preliminary to a proposed judicial proceeding). "Privilege permits conduct that would ordinarily be actionable to avoid liability because the defendant's act furthers an important public interest which deserves protection at the expense of harm to the plaintiff's reputation. There are two types of privilege: (1) absolute privilege and (2) qualified privilege." Tara Blake Garfinkel, *Jurisdiction Over Communication Torts: Can You be Pulled into Another Country's Court System for Making a Defamatory Statement Over the Internet? A Comparison of English and U.S. Law*, 9 Transnat'l Law 489, 513-514 (1996). "[S]tatements made by those participating in a judicial proceeding are absolutely privileged. . . . Absolute privilege has been significantly expanded and is no longer limited to formal pleadings and in-court communications, but includes any communication pertinent to pending litigation." John B. Lewis & Lois J. Cole, *Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures–Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should Be Expanded*, 45 DePaul L. Rev. 677, 687-688 (1996).

44. *See* Restatement (Second) of Torts §§ 588, 595, 598, 890 (1977 and 1979) (common law privileges of absolute or qualified immunity relevant to putative victims); Unif. R. Evid. 502-505 (evidentiary privileges under the common law relevant to putative victims). Fed. R. Evid. 501 provides that federal common law governs all rules of privilege unless there is overriding federal law, but that in civil cases, the controlling state law governs privilege regarding a claim or defense for which state law supplies the rule of decision, i.e. in the case of a state law claim brought under diversity jurisdiction.

45. *See supra* note 26.

46. *See* Kingkade, *supra* note 7.

47. A frequently heard complaint by civil litigants in federal court is the lack of active judicial management of the discovery process. The Honorable Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes can Make a Big Difference in Civil Discovery*, 64 S.C. L. Rev. 495, 505–06 (2013). The Federal Rules of Civil Procedure provide as follows:

"The scope of discovery is stated in Rule 26(b)(1) of the Federal Rules of Civil Procedure. Last amended substantively in December 2000, it creates a two-tiered approach to what can be discovered in a civil action. A party may discover as a matter of right 'any nonprivileged matter that is relevant to any party's claim or defense,' subject to certain additional limitations to be described below. Thereafter, it may discover information more broadly described as 'relevant to the subject matter involved in the action' only upon a showing of 'good cause.' Furthermore, information that falls within the scope of discovery, as provided by the rule, 'need not be admissible at trial if [it] appears reasonably calculated to lead to the discovery of admissible evidence.'"

Id. at 514. As of 2014, there are twenty-three so-called replica jurisdictions that have adopted the Federal Rules of Civil Procedure; another four jurisdictions with similar rules that are set out in statutory codes; three jurisdictions that "show strong affinity to the content and organization of the Federal Rules"; and three jurisdictions replicate many of the Federal Rules of Civil Procedure, except they utilize fact pleading rather than notice pleading. John P. Sullivan, *Do the New Pleading Standards Set Out in Twombly and Iqbal Meet the Needs of the Replica Jurisdictions?*, 47 Suffolk L. Rev. 53, 54 (2014).

48. *See* MCM, *supra* note 4, Mil. R. Evid. 613, 801(d)(1)(A).

49. *Compare supra* notes 3-4 (description of the discovery tools available to the defense in a courts-martial) *with supra* note 47 (discovery process in civil litigation).

50. *See* United States v. Sarras, 575 F.3d 1191, 1214–15 (11th Cir. 2009) (holding prosecution had no duty to obtain the computers and camera of the complainant and her mother and certain medical records of the complainant which were not in its possession, since "the government does not have a duty to disclose items it does not possess" and defense could have attempted to utilize the subpoena process). "It should be remembered that there is no constitutional right to discovery and that the rules or analyses applicable to the pretrial access of information may differ from those applicable to a defendant's trial right of information since a defendant at trial has certain constitutional rights, such as confrontation and compulsory process, which are absent during pretrial proceedings." 1 Paul DerOhannesian II, Sexual Assault Trials § 1.4 (Matthew Bender ed., 4th ed., 2019). With regards to procurement of evidence at trial, "Rule 703 necessarily presumes that the defense will be able to adequately

interview the witness in order to set forth an adequate synopsis, and the courts may be expected to be particularly hostile to a witness request made without any contact with the given witness." Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure § 20-22.20 (Matthew Bender ed., 4th ed., 2018). *See also* Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure §§ 20-22.40, 20-22.70, 20-22.71, 20-22.72 (Matthew Bender ed., 4th ed., 2018).

51. *See generally* Kimberly J. Winbush, Annotation, *Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action to Which Government Is Not Party Involving Facts or Transactions upon Which Prosecution Is Predicated—Federal Cases*, 34 A.L.R. Fed. 2d 85 (2018); Kimberly J. Winbush, Annotation, *Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action Involving Facts or Transactions upon which Prosecution Is Predicated—State Cases*, 37 A.L.R. Fed. 6th 511 (2018).

52. *See* MCM, *supra* note 4, Mil. R. Evid. 304, 613, 801(d)(1)(A), 801(d)(2).

53. "Silence may constitute an admission when it does not involve a reliance on the privilege against self-incrimination or related rights. Rule 301(f)(3). For example, if an imputation against a person comes to his or her attention under circumstances that would reasonably call for a denial of its accuracy if the imputation were not true, a failure to utter such a denial could possibly constitute an admission by silence. Note, however, in this regard, Rule 304(h)(3), and Rule 801(a)(2)." Manual for Courts-Martial, United States, App. 22-11 – 22-12 (2016). *Compare* Doyle v. Ohio, 426 U.S. 610 (1976) *and* United States v. Hale, 422 U.S. 171 (1975) *with* Jenkins v. Anderson, 447 U.S. 231 (1980) *and* Anderson v. Charles, 447 U.S. 404 (1980). *See also* United States v. Noel, 3 M.J. 328, 330-331 (C.M.A. 1977) (dicta). In essence, silence may be introduced as evidence from which a negative inference can be drawn when the alleged perpetrator is not in custody or in court during a preliminary hearing or trial and it would be reasonable for him or her to deny the accuracy of evidence presented against him or her. A civil defamation lawsuit against the putative victim meets this criteria if the alleged perpetrator does not offer into evidence any specific facts showing actual dishonesty in opposition to an anti-SLAPP motion to dismiss (or strike) or motion for summary judgment. The alleged perpetrator has initiated the lawsuit and bears the burden of proving any claims and/or overcoming any affirmative defenses; therefore, he or she cannot rely on the Fifth Amendment to shield his or her silence. Military Rule of Evidence 301(f)(2) is no bar to the admission of pretrial silence by the alleged perpetrator while not in custody or a preliminary hearing. MCM, *supra* note 4, Mil. R. Evid. 301(f)(2). Mil. R. Evid. 304 also permits such evidence to be used for impeachment purposes if the alleged perpetrator takes the stand in the court-martial and asserts facts in their defense not raised in the defamation litigation. MCM, *supra* note 4, Mil. R. Evid. 304.

54. *See, e.g.,* United States v. Rylander, 460 U.S. 752, 758 (1983).

55. *See supra* note 51; s*ee, e.g.,* Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (10th Cir. 1979).

56. *See* Hiroshi Motomura, *Using Judgments as Evidence*, 70 Minn. L. Rev. 979 (1986). A general officer letter of reprimand or non-judicial punishment will not provide either collateral estoppel or issue preclusion under state law and is also inadmissible as hearsay. *See id.*; Fed. R. Evid. 801(c).

57. *See id.*; U.S. Dep't of Army, Reg. 135-178, Enlisted Administrative Separations para. 3-18 (7 Nov. 17); U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 2-12 (19 Dec. 16).

58. *See* Motomura, *supra* note 56; U.S. Dep't of Army, Reg. 135-175, Separation of Officers, para. 2-26, 6-12 (29 Nov. 17); U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges, para. 4-15, 4-20 (12 Apr. 06).

59. Federal Rule of Evidence 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the current trial or the hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

60. *See* David A. Anderson, *Rethinking Defamation*, 48 Ariz. L. Rev. 1047 (2006).

61. *See* Restatement (Second) of Torts § 581A (1977); Meiring de Villiers, *Substantial Truth in Defamation Law*, 32 Am. J. Trial Advoc. 91 (2008).

62. For a discussion of the professional and ethical challenges facing defense attorneys when representing clients who unreasonably insists they are innocent, *see* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 Hofstra L. Rev. 925–61 (2000).

63. George M. Cohen refers to a "blind spot in the ethics rule architecture" with regards to multiple lawyers representing a client. *See* George M. Cohen, *The Multilawyered Problems of Professional Responsibility*, 2003 U. Ill. L. Rev. 1409, 1411 (2003).

64. *See* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346 (2007) (describing cases where attorneys were named as parties in abuse of process counterclaims and attorney-client privilege did not necessarily bar discovery even while the underlying litigation was ongoing).

65. "First, unlike civilian trials, military trials and their outcomes are minimally visible to the public. Civilian courts are presumptively open: absent special circumstances, trials and court filings are open to the public and anyone can walk into a federal or state courthouse and ask to read a case file for any reason. The military justice system, on the other hand, makes it hard for the public to learn about trials. Military trials may be technically open to the public, but these trials are held on military bases—bases that are rarely, if ever, open to the general public. Further, the military only makes brief trial results available to the public; court records and documents related to them will only be released after repeated Freedom of Information Act requests, appeals, fees, and often months of waiting. This would be less problematic if military trial court decisions were available on major legal databases like Westlaw and LexisNexis. Unfortunately, only military appellate decisions are included in reporters. This opacity is far from ideal because openness in a justice system 'is designed to provide accountability.'" Brady, *supra* note 4, at 214–15.

66. "[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule." Model Rules of Prof'l Conduct r. 3.8(f) (2002).

67. SVC Handbook, *supra* note 14, at 21.

68. *See* Model Rules of Prof'l Conduct r. 3.6(a)-(b) (2002) ("(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. (b) Notwithstanding paragraph (a), a lawyer may state . . . information contained in a public record . . . ."). *See also* Michael Downey, *Ethical Rules for Litigating in the Court of Public Opinion*, A.B.A. Litig. 2012, https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2012/summer2012-0712-ethical-rules-litigating-court-public-opinion/.

69. *See* Model Rules of Prof'l Conduct r. 3.6(c) (2002) ("[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."); *see also* Downey, *supra* note 68.

70. *See* DerOhannesian II, *supra* note 50, §§ 2.35, 2.36.

71. *See* John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. Sch. L. Rev. 981 (2010/11).

72. Based on strategic leaks of information orchestrated by the defense team, the media skewered the alleged victim in the Kobe Bryant case, portraying her as promiscuous and out to collect a large civil judgment from a wealthy celebrity, until she decided that she was no longer interested in cooperating with the prosecution. In this case, the defense successfully aired a competing narrative, and Kobe Bryant walked free. *See* T.R. Reid, *Rape Case Against Bryant Is Dropped, Accuser Decided Against Testifying*, Wash. Post (Sept. 2, 2004).

73. *See* MCM, *supra* note 4; Mil. R. Evid. 304, 613, 801(d)(1)(A), 801(d)(2).

74. *See supra* note 53.

75. *See* Gilligan & Lederer, *supra* note 50, § 23-44.51.

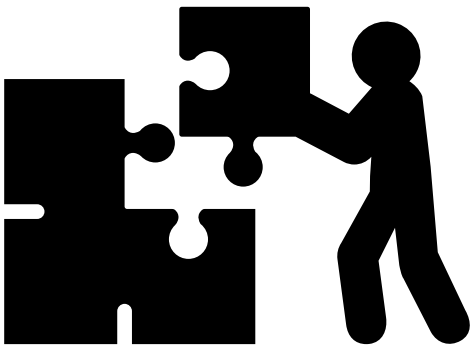
76. *See id.* § 23-53.70.

77. *See id.* § 12-25.10, 12-25.19(d); *cf. id.* § 23-12.00.

78. *See, e.g.,* Roxanne Jones, *Should False Rape Accusers Be Sued?*, CNN (Dec. 17, 2013, 7:52 ET), https://www.cnn.com/2013/12/17/opinion/jones-rape-claim-lawsuits/index.html.

No. 4

The Art of #BJAlife



Part I: How to Become a Hit with Your Brigade Command and Staff

By Major Cesar B. Casal

Ask any former or current brigade judge advocate (BJA) what the most important task is upon arrival at the brigade, and they will likely respond with a variation of "becoming a member of the team." This should be intuitive, as it won't matter much if you are the second coming of Lieber or "Clausewitz with a JD"; if you are not a member of the team, you are not invited to meetings and your advice is not heeded or sought. Your insights may as well be "a tale told by an idiot, full of sound and fury, signifying nothing."[1]

Ask any former or current BJA how exactly to accomplish the above, and you will get the opposite of unison: you'll suffer through musings about how to fit in, ranging from their innate brilliance, to "smoking the rest of the staff in PT," all the way to "not a clue as to how it happened, it just did." What is a new BJA to do?

Fear not! This trick will jump-start your integration into the brigade by identifying sources of deeper-level knowledge that will turn a legal section from one that does "legal-related stuff" to one that proactively solves the brigade's problems. We won't cover the obvious: you must have relationships with the commanders, the Brigade Executive Officer, and the brigade primary staff officers. You will spend most of your time and effort cultivating those relationships. This article focuses on the lesser-known individuals with whom a minimal investment of time will yield disproportionately high and near-immediate returns when it comes to solving problems as a new arrival to the brigade.[2] This trick is laid out in three steps: the people, the lunch, and the questions.

Step One: The People[3]

Identify the following in your brigade:

1. Assistant S3
2. Brigade Safety Officer (BSO)
3. Fires Section Warrant Officer (FWO)
4. Brigade HHC Commander
5. Battalion XOs
6. "Old Reliable"

1. Assistant S3: Just as busy as the S3 (and possibly busier) is the "3's XO." The Assistant S3 knows the goings-on in the plans shop and controls access to and runs the planning meetings. Most importantly, as the executive arm of the plans section, the Assistant S3 is responsible for the first draft of plans. Get to them early and you can affect the planning process at the very beginning—where you can shape the effort by opening potential avenues or foreclosing investment in ones that may yield unacceptable legal risks. This will prevent problems before they make it onto the slide deck.

(Credit: istockphoto.com/XtockImages)

2. Brigade Safety Officer[4]: The BSO is likely a veteran or retired Soldier with an in-depth familiarity of the Army, the installation, your unit, and all its equipment. This familiarity provides them with a unique vantage into aspects of the brigade that transcend PCS cycles, namely the unit's safety culture and best installation practices. Brigade safety officers are not only well-versed in accident investigations, but they are likely to have a deeper understanding as to the systemic, recurring problems that give rise to those accidents. While they may not be able to share everything about their investigations, they remain a critical contact in understanding how accidents unfold, how they affect the brigade's mission, and how they can be mitigated.[5] This input bears directly on your advice to your commanders regarding their preventative policies and directives. Brigade safety officers are also constantly on the move, whether in garrison or deployed. They are a primary source of direct information about the brigade's activities in distributed operations.

3. Fires Section Warrant Officer: The FWO is the heart, brain, eyes, and ears of the fires cell; they have a hand in nearly every, if not every, function.[6] The FWO is the technical guru, and has forgotten more about targeting than you and the Fires Support Officer combined. The FWO is one of the entities on the TOC floor who directly controls the tenor of engagements—if they know you (and your operational law captain), that relationship will instantly make you relevant and credible in the tactical operations center. Know this officer, know the battlefield. Plus, they are almost always willing to give you an impromptu collateral damage estimate tutorial as needed, and you'll never miss a targeting meeting.

4. Brigade Headquarters and Headquarters Company (HHC) Commander: The Brigade HHC commander is typically a second command officer from within the brigade. This is for a reason—this officer knows how the brigade runs and the personalities that drive it. This officer has developed the contacts within the brigade and on the installation and knows how to get things done. They will have a close relationship with the Brigade Family Readiness Group and up-to-the-minute knowledge of fundraising efforts, events, and associated support organizations. Moreover, as a commander, they have a voice at the table when it comes to personnel movements and resourcing at your brigade that will help you take care of your own section (e.g., leave, passes, and TDY).[7]

5. The Battalion Executive Officer (BN XO): True relationships with the often overlooked BN XOs will yield eyes and ears at the BN level, where a BJA rarely has complete visibility. Battalion commanders may be reticent at first to bring problems to "brigade" (i.e., you), but the BN XOs offer that all-important peer-level candor.[8] Battalion commanders are also still in the initial stages of learning how to interact with attorneys; being close to the BN XOs will ease you into that relationship without seeming like an outsider from higher seeking to point fingers.

The BN XOs can offer a quick snapshot of the morale and effectiveness of their battalions. They are adept at identifying challenges at their level, which often end up rising to the brigade commander's attention if not otherwise addressed; as the battalions go, so goes the brigade. Battalion executive officers can also quickly provide names of investigating officers (IOs), line of duty investigators, and any other names you may need for a legal duty.

6. Old Reliable: Old Reliable will take some time to identify, but every brigade has one. This is the officer at the table who is the consummate friendly, approachable, highly-competent staff officer. This is the officer you know will do a thorough job as an IO on a high-visibility investigation and will not blink when appointed to do it. This is the officer you can pass a note to in the middle of a staff meeting to tell you what an acronym means and will, with only the hint of a smile, explain the difference between TACON (tactical control) and OPCON (operational control) during a bathroom break.[9]

Step 2: The Lunch

Invite the individuals above to lunch, on you. Depending on the operational tempo of your unit, bringing lunch by their office may be better. During an exercise, a candy bar or energy drink dropped off in their chair goes a long way.[10]

Step 3: The Questions

Ask these questions:

1. I'd like to hear more about your job and what you do.
2. What are you most concerned about?
3. What can my section and I do for you?

Listen, learn, and understand. Help if you can,[11] point them in the right direction if you can't. Become the person *they* seek out when a problem arises.

Conclusion

The difference between a mediocre BJA and a great one is that the former identifies problems while the latter identifies solutions. A BJA who understands the inner workings of the brigade is more apt to find those solutions. A singular focus on the commanders and the brigade staff will yield only a tip-of-the-iceberg view of the brigade's risk profile—the individuals listed above will show you what's under that murky water. **TAL**

(Credit: istockphoto.com/MD Badsha Meah)

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Notes

* This is a reference to the ubiquitous internet "click-bait" ads, e.g., "Lose 20 pounds in three days with this one weird trick!"

1. William Shakespeare, Macbeth (1606).

2. The advice applies to anyone in the legal section whom the Brigade Judge Advocate wants to empower to solve problems at a particular level. At brigade, that includes the noncommissioned officer in-charge and captains. Battalion paralegals should develop similar relationships with their battalion staff.

3. This assertion is based on the author's recent professional experiences as the Brigade Judge Advocate for 1st Brigade Combat Team, 10th Mountain Division from 2015-2017. This was a maneuver BCT, but most every brigade will have equivalent functional areas. Every brigade is different, and this certainly won't apply universally as to specific personnel. In some cases, the enlisted or officer counterpart may be the better contact or the true "heart" of the section. The functional areas, however, are of such importance that truly low performers won't remain in the positions for very long.

4. Thanks to Major Michael (JR) Townsend for this suggestion.

5. U.S. Dep't of Army, Field Manual 6-0, Commander and Staff Organization and Operations para. 2-112 (5 May 2014) (C2, 22 Apr. 2016).

6. U.S. Dep't of Army, Field Manual 3-09, Field Artillery Operations and Fire Support para. 2-29 (4 Apr. 2014).

7. This applies especially to your paralegals, who are constantly under pressure for office space, details, and other duties.

8. This is especially critical when the degree of difficulty between company command and battalion command is arguably much higher than any other subsequent command, given the seismic shift from task-oriented to organizational leadership.

9. This is purely a hypothetical. But, if it weren't, the author would owe his thanks to a guy named "Ronnie," a School of Advanced Military Studies alumnus.

10. Make sure to follow the Joint Ethics Regulation.

11. Be conscious of the professional economies that come with being a lawyer: an Army Regulation 25-50 format memo that takes another staff member two hours to complete may take you only twenty minutes. That particular action may not necessarily be in your "lane," but capitalizing on these opportunities will build connections.

Part II: How to Remain a Hit with Your Brigade Command and Staff

By Major Michael (JR) Townsend and Major Tricia L. Birdsell

As a brigade judge advocate (BJA), you are operating in a dynamic environment at a break-neck pace. Your team is working hard to close out a never-ending list of administrative and military justice actions while participating in operational and training requirements for the brigade. As you operate in this frenetic environment, what do you need to do to remain fully integrated with staff to sustain mission success for the remainder of your tour? The answers are in three easy steps:

Step 1: Leverage Command and Staff Slides to Enable Command Teams to See Themselves

Your command and staff slides are one of the primary tools to communicate your section's efforts to the brigade staff. You must tailor specific information to meet your brigade commander's requirements in a standard format usually established by the brigade S1 or executive officer (XO). Adjust your slides to provide a detailed account of actions' processing times to increase productivity and force closer coordination with battalion command teams.

From article 15s and administrative separations to financial liability investigations of property loss (FLIPLs) and administrative investigations, document how many days these actions remain in-progress for completion. Use color schemes to track actions that are on time, close to overdue, or long overdue. The brigade commander is like an aggressive chief executive officer (CEO) and battalions are project teams competing for the CEO's favor at the next product pitch. Documenting processing timelines allows the battalions to see themselves alongside their peers in closing out legal actions. Command teams will want to post good numbers, and you will become more involved in getting them to improve processing times as needed.[1] This tweak also aims to limit the dreaded "it's with legal" excuse the battalions will note in their S1 slides or shout out with confidence during the brief. Fair warning: this requires your legal team to be on top of its game. You are committing battalions to firm processing times, and your team must be equally timely in its own processing of actions that are exposed for all to see. By tweaking your slides with processing timelines, your brigade commander, your XO, and your hard-charging brigade command sergeant major will appreciate your attention to detail and effort in keeping actions moving along. Note: never surprise a section by briefing they're tardy on an investigation without warning them first. They'll hate you for life.

Step 2: The Buck Does Not Stop with Your Command and Staff Slides—Build These Additional Products to Stay Connected to Decision-Makers

Command and staff slides are not the only products you need in your kit bag for long-term success in the brigade. The following three products promote keeping you seen and heard, enhancing your value as an advisor:

(Credit: istockphoto.com/puruan)

Build a Working Continuity/Legacy Book for You and Your Brigade Commander: The continuity book seems to have lost its luster in recent years thanks to shared drives and DVD storage devices. However, there is nothing more effective than a bona fide continuity book for the brigade legal section and the brigade commander. The continuity book will be a great introductory tool for when you and the brigade commander arriving on station at the same time. The typical incoming commander, new to brigade command, wants to know the limits of their command authority on a variety of legal and operational issues, and you will have laid the ground work for getting them comfortable with how to operate under various constraints with a continuity book.[2]

Your continuity book should, at a minimum, consist of tabbed sections covering: division and brigade policy letters, specifically highlighting areas of misconduct withheld to certain command levels and what can or cannot be delegated down; samples of brigade commander action requests and transmittal memoranda; the local installation military justice regulation highlighting key areas for the brigade commander to know, including any prohibited-conduct regulations or policies issued by higher headquarters; Army Regulation 15-6 investigation/FLIPL/line of duty investigation fact sheets; law enforcement/Criminal Investigation Command (CID) investigation criteria that require either military police or CID involvement; gift policies and fact sheets, especially policies that impact gifts for change of commands and hails and farewells; fundraising and military ball planning information, while also covering information related to informal fund set-up and a vetted standard operating procedure (SOP); include a vetted cup and flower fund SOP.

The continuity book also comes in handy if, in the course of your tour, you undergo a change of brigade commanders. Going over a well-organized binder addressing administrative processes or policy areas that your commander should know when engaging with higher headquarters makes a good first impression. From day one, you are laying the foundation for a trusted relationship with the incoming commander. Remember, your continuity book also becomes a great resource that can be revised into a battle book for deployed operations or field training exercises.

Monthly Email and/or In-Person Updates to Command Teams: Your command teams from brigade to company levels operate under a wide range of legal and regulatory frameworks. Lean forward with updates to policies, new guidance, or any type of change that will impact them, communicating the "so-what" aspects of the changes. Establish a rhythm by sending email updates on a monthly basis.[3] You are uniquely situated to stay abreast of updates on a variety of legal matters. You have a legal technical chain pushing information to you from your higher echelon, Army Judge Advocate General publications, and other established sources. Also, consider weekly in-person updates at least to brigade and battalion commands. Battalion commanders can invite their company command teams as they see fit. You may be the only brigade staff officer to visit with battalion command teams, setting you apart from your brigade staff counterparts and forming strong connections with subordinate command teams and staff. These bonds will prove useful when battalion and company command teams must opine on difficult cases or initiate legal actions at their levels.

Publish a Weekly or Bi-Weekly Military Justice/Adverse Action Roll-Up: It is strongly recommended to include an attachment to your email updates entitled "[Insert Your Unit Here] Justice." This separate attachment is a one-page "snapshot" of military justice and administrative actions across the brigade. Consider a section reflecting article 15s (no personally identifiable information, just statistics and results), the number of administrative separations, general officer memoranda of reprimand, and other military justice and administrative actions. Identify any trends, like prevalence of alcohol in the commission of certain offenses or an uptick in adverse actions coming from one unit or barracks. The command team can use this roll-up as another tool to distribute to their company/troop/battery levels to show that Soldiers are held accountable for their actions, dispel the infamous "barracks lawyer" from spreading false or misunderstood information on punitive actions, and allow subordinate commanders to practice preventive law related to the identified trends.

Done right, monthly updates and adverse action publications accomplish a few long-term goals. Battalion command teams will remain engaged with you on reacting to published changes or updates, further integrating you into their decision-making processes. You are also leaning forward with helpful information, enhancing your value to the brigade staff.

Step 3: Seize Teaching Opportunities for Long-Term Gain

Personnel turnover in a brigade is a fact of life. A dependable command team or seasoned investigating officer (IO) who is in your brigade today will move for a permanent change of station or be reassigned to division staff by tomorrow. Develop a training plan to decrease the learning curve of incoming commanders, resulting in swifter and more accurate processing of administrative investigations and command teams that anticipate problems and respond more effectively to them.

Conduct In-Depth IO Training: You and your command teams are going to go back, time and again, to a select handful of talented officers in the brigade to serve as IOs. This select group will inevitably suffer "IO fatigue," as constant receipt of IO appointment orders diminishes their motivation and quality of work. As you battle IO fatigue, you will also find yourself becoming a broken record, spinning up new junior officers on how to conduct administrative investigations. Avoid this predicament by contacting the brigade and battalion XOs to organize training opportunities for new lieutenants, even company grade staff officers, on conducting administrative investigations on a wide range of topics ranging from misconduct, loss of sensitive items, and line of duty determinations to FLIPLs. Your in-depth training aims at engaging future IOs in critical thinking and understanding the nuances of investigation procedures. Provide them with digital packets containing templates and fact sheets for future reference. Your training outreach program will grow a stable crop of junior officers to serve as competent IOs in the brigade. Training early will result in better quality investigation packets later, smoothing processing for your legal team and for your commanders to take action on in the future.

Provide Enhanced New Company Commander/First Sergeant Course for Brigade: Get on the S3 training calendar or reach out directly to battalion staff to offer an in-depth new commander and first sergeant course that delves into the nuances of military justice and administrative actions specific to their footprint. You will still cover the typical investigations process, unit fundraising/Soldier and Family Readiness Group issues, but you will also provide tips on using and interacting with the local CID command as well as how to engage with local off-post law enforcement. Focus on particular law enforcement agencies, particular officers or investigations with the agencies, and occasions on which the company commanders and first sergeants may or must call these individuals. At the end of the training, company commanders and first sergeants should be comfortable with search and seizure requirements and know what is available to them via local law enforcement, such as using drug suppression teams and gaining access to privatized military quarters. A more in-depth course will cause you and the new command teams to think together regarding who should be the first to know and what initial steps to take when things go wrong both on- and off-post. Your training arms new command teams with better information and problem-solving skills to avoid potential pitfalls that can keep you and your senior commanders up at night.

Do not forget, creating products for any of the training initiatives discussed above will be easy because, as you guessed it, you have a continuity book already produced that will cover a lot of the groundwork for you.

Conclusion

The BJA life runs on a hard road with constant churn and never-ending fires to extinguish. Despite the high operational tempo, it is imperative that you continue to work to extend your influence within your brigade and to improve your own foxhole. Using these tried and tested tips will endear you to your command teams and make you an indispensable asset to the brigade. Your job is hard enough as it is on this challenging road. Apply these tips now on your brigade journey as you navigate toward a successful and well-earned finish. **TAL**

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Notes

* This is a tongue in cheek reference to the ubiquitous internet "click-bait" ads that attempt to capitalize on an initial click bait ad, e.g. "Lose 20 pounds in three days with this one weird trick!" that has gone viral. Additional thanks to Major Hans Zeller for contributing a tip from his brigade experience for us to share.

1. Remember, you are not using processing times on slides to catch battalions off-guard at command and staff. Be sure you are informing battalion command teams in advance of the big show to address delinquencies as needed. You endear yourself to that particular battalion command team when you are seeking them out with the "bad news" before it is published to the brigade staff and being able to explain delinquencies as needed when briefing to the staff. Everyone becomes more invested in your product and you will maintain communication, especially with the occasional mysterious battalion commander that is located far from you or just does not like to share with you or the brigade commander.

2. The continuity book will be greatly appreciated by your brigade executive officer (XO) and adjutant, especially as you confront various issues in the realm of fundraising and military ball planning. You will be taken more seriously in times of stress or command transition as you advise and leave them with a product to consult for reference.

3. The update consists of a brief email with attachments and simple summaries of respective changes or updates that will impact the command teams. Your emails are sent to battalion command teams (battalion commander, command sergeant major, and XO), cc'ing brigade commander, command sergeant major, and XO. Targeting battalion command teams allows you to engage with battalion commands, especially the XOs, who will be updating company command teams on a constant basis. It also gives your battalion commanders the ability to get first crack at questions concerning the update, so they have flexibility to decide on communicating important changes to their companies/batteries/troops themselves or have you do it for them (which you should offer to do).

AROUND THE CORPS

Fort Bragg SJA office members participate in a trial run of the new Army Combat Fitness Test. (Credit: Justin Kase Conder/AP)

(Credit: istockphoto.com/rudall30)

Closing Argument

The Loneliest Jobs in the JAG Corps

SVPs, SVCs, and DCs—Don't Go It Alone

By LTC Rebecca L. Farrell, MAJ Joshua S. Mikkelsen, and LTC Keirsten H. Kennedy

The Judge Advocate General's Corps (JAG Corps) places company-grade judge advocates (JAs) in many different roles, but some are necessarily more independent than others; meaning, in those roles, JAs have just a technical supervisor and must make many decisions on their own, without a team to truly consult with to make the decision together. Whereas in a traditional Office of the Staff Judge Advocate (OSJA), many captains have a division chief, deputy, and staff judge advocate they can run their work products by before those legal products go to the client, usually the commanding general. Three such roles can become particularly isolating for attorneys: special victims prosecutors (SVPs), special victims' counsel (SVCs), and defense counsel (DCs).

Not only can the work they do be particularly lonely, but the topics and issues these attorneys deal with are serious and emotionally draining. This article talks about the challenges of serving as an SVP, SVC, or DC—connecting the subject matter they deal with every day and the isolation they may be feeling in those positions to possible negative effects on these JAs. Unique to SVCs and DCs is the fact that they represent a client, which—in light of attorney-client privilege—can make those jobs even lonelier. The purpose of the article is to shed light on and acknowledge these challenges, mainly so JAs enter these positions knowing of the difficulties isolation and client representation can present. Lastly, this article closes with tips for both attorneys assigned to these jobs as well as for JAG Corps leaders, including those who supervise SVPs, SVCs, and DCs and those who mentor them.

"One Is the Loneliest Number"[1]

When JAs first enter the Army, they are, of course, organized into teams, who are placed in squads, who are in platoons, etc.—they're on teams of teams. At the Judge Advocate Officer Basic Course, they work out in teams, they go through exercises together as teams, and they're taught by teams in departments at the Legal Center and School. Being a JA is, quite literally, a team sport. At a typical first assignment, a new JA will join an OSJA: another team. Many of the first duties of a new JA will be on teams: administrative law, national security law, and even general crimes prosecution teams. Following this usual introduction to the JAG Corps, and once adequately experienced in military justice, JAs might become SVPs, SVCs, and DCs. This is where one can be truly the loneliest number.

SVPs

With their direct supervisors located in the National Capitol Region at the Trial Counsel Assistance Program, SVPs are organized regionally and cover other installations in a regional alignment.[2] They are commonly situated at larger installations, traveling to smaller posts to try special victim cases in their jurisdictions. Day in and day out, SVPs deal exclusively with murder and sex crimes.[3] This can take its toll, especially when an SVP has no similarly situated peers within hundreds of miles. Reviewing the facts of their assigned cases almost always entails exposure to graphic details, whether it is statements of victims or pictures of injuries, among other traumatizing evidence.

SVCs

Like SVPs, SVCs are regionally aligned and almost always work out of a legal assistance office on their assigned installation.[4] Their mission is "to strengthen our support of victims of sexual assault and enhance their rights within our military justice system"[5] and their clients[6] are all victims of sex-related offenses and, also like SVPs, there are no other cases they deal with during their stints as SVCs.[7]

Many SVC clients are not located at the same installation as their SVC, and if they are when they report, they may not remain there throughout the long investigation and court-martial process. With delayed reports, expedited transfers, and the normal course of a military career, it is likely that an SVC will become geographically separated from their client during the course of their representation. Due to this separation, SVCs are constantly traveling.[8] There is a preference, both from Congress and the SVC Program Office, that client meetings are conducted in-person when possible.[9] While traveling may sound fun at first, it quickly becomes a strain on the SVC's time and energy. While away from the office, SVCs are likely alone, which means they have limited ability to interact with other members of the OSJA.

On the other hand, when SVCs are not traveling, they are often dealing with issues that put them in direct conflict with their peers or leadership at their home installation as they represent their clients. Whenever there is a victim who is being ostracized, retaliated against, or their case is not going forward, there is a JA on the other side who is likely a peer of the SVC, or perhaps even their SJA. While the vast majority of these interactions are handled professionally, this is still a difficult situation for any JA to navigate as they zealously represent a client who doesn't have these same concerns.

An additional area that creates a feeling of isolation is professional ethics. The practice of an SVC is just over five years old,[10] which creates the challenge of an absence of legacy of case law and experience to guide an SVC's actions. Couple this with the fact that many SVCs are not co-located with their technical chain for advice and non-SVC Chiefs of Legal Assistance rate them. While an SVC can interact daily with counterparts in their OSJA, professionally, there is not the same camaraderie as those serving in other long-standing positions.

DCs

In Trial Defense Service (TDS), you're off on your own—sometimes truly on your own if you're in a one-person TDS branch or field office—with a senior defense counsel (SDC) and a regional defense counsel (RDC), oftentimes not co-located with the DC. There are usually other DCs and a few paralegals in your TDS office, though; however, in your client representation, it's you and the client, and you're embarking on this journey together. What is particularly difficult at times about serving in TDS is the feeling that you're fighting an uphill battle every day, where the deck is stacked against you, credible evidence against your client, a client who is usually not a model Soldier/officer, and sometimes fewer resources than the government has to deal with a case.

In addition to that feeling of being outnumbered, a DC is not "on the team" or "one of the good guys." The installation OSJA is the team, and TDS just isn't an integral part of that. Defense counsel can attend the professional development sessions with their peers, they can be friends with the prosecutors, they can even be part of all the OSJA social events; yet, the fact remains that DCs' mission is to represent their client—or, as some view it, essentially to undermine the government and what it's trying to do in the pursuit of justice. Those feelings of exclusion can wear on a JA; it's probably why DC assignments are usually no more than two years. Every story clients come to TDS with is sad; every story is fraught with negativity and terrible situations, all leading to their presence in your office. This can be a lot for DCs to deal with and manage on their own.

Tips for JAs Fulfilling SVP, SVC, and DC Roles

As honorable as it is to assist a victim of an assault to obtain justice or to represent a Soldier accused of such a crime, these are admittedly difficult jobs. They're taxing on a JA's mental health with the repeated exposure to trauma, as they take up much of an attorney's emotional energy in dealing with such a case. Here are a few things to keep in mind as you serve in these positions:

- Set up and enforce healthy boundaries. You want to be emotionally available to a victim or client, but you do not want to take on that person's emotional load. Their problems, though concerning to you as a caring, thoughtful person, are truly theirs—not yours. It is so important to actively keep that boundary engaged (professional standards help).
- Rely on your squad. It's a trendy term right now, but you need a squad in your life to turn to when you want to unburden yourself, let off some steam, or just sit with at the end of the day. Your squad can be your family, your friends, your colleagues, your boss, or all of these. Identify people in your life you can rely on to help yourself disengage from a victim's or client's tumultuous situation.
- Exercise. Though you may believe you cannot squeeze in a workout due to your workload, that is almost never true. Make time to get a sure-fire dopamine hit from the high of sweating it out, even if just for short period of time. Exercise can be a wonderful release for any frustration you may be feeling about a case; exercising with a buddy is even better.
- Do work-unrelated things. Like exercising, embarking on activities that have nothing to do with work is important to keep that healthy distance from work and to hold on to yourself through intense work periods (like in the middle of a case). Once again, you may not think

you have time to take your dog on a long walk or to sit down to read a book. Make the time; it reinforces to your mind that you are separate from the case and what is going on there.

- Consult your supervisors and/or mentors. More experienced JAs have been through what you are going through; that's a fact. Make use of their experience by asking their advice, asking them to simply sit and listen, asking them for help. The most important thing to remember is that you are not alone.
- Be honest with yourself about yourself. How are you really feeling? Have you noticed that you are no longer participating in hobbies or social events? Take time to do an honest self-inventory to ensure you are practicing self-care.

Tips for Supervisors and Mentors of SVPs, SVCs, and DCs

- Regularly check in on your SVP, SVC, or DC subordinates/mentees. Connect with them through email, a text, social media, or by stopping by their office. They may be buried so deep and carrying such a load that they either don't realize they need your guidance or they believe it's pointless to ask you for it. Simply being present or available to them in some way can open up a JA who is feeling isolated or even hopeless. And, when you check in, don't only speak about work, because it will be harder to see the drain. Ask about their weekend—if they are not doing anything outside the office that could be a flag.
- Keep tabs on your subordinates/mentees through their peers. Asking friends and colleagues of an SVP, SVC, or DC how things are going can let you know when you need to reach out for support.
- Make them take leave. Real leave. Not the kind of leave where you come to work in your civvies. And, have a coverage plan so someone else covers the work that they can give up. Use or lose leave is a significant problem in the trial world and should be unacceptable for leaders.

That's it. Only those three things are what you need to do to keep this vulnerable population of JAs from suffering vicarious trauma or too burdensome an emotional load to carry on their own. Do not hesitate to connect your subordinate/mentee with professional assistance; knowing the rules on what has to be reported on security background checks will ensure you advise well on where to seek help beyond just yourself.

Conclusion

Dealing with the types of cases that SVPs, SVCs, and DCs litigate is intense. Some JAs have excellent coping mechanisms, and some must work on these to perform their jobs well, without a lasting effect on them. The takeaway for practitioners is that you might *feel* alone, but you never are. The JAG Corps has set up three excellent organizations: TDS in 1980, the SVP Program in 2008, and the SVC Program in 2013. All of these have an internal support system for you to rely on, but you may feel at some points in interacting with victims and clients that your organization's support system is failing you. Or, you may feel too disillusioned to reach out. These may feel like the loneliest jobs in the JAG Corps, but "one" doesn't have to be the loneliest number when you use the tips in this article, know that your leaders and mentors care tremendously for you and your well-being, and, yes, remember the takeaway: you are not alone in this. **TAL**

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Notes

1. Three Dog Night, One (Dunhill Records, 1968), https://www.songfacts.com/lyrics/three-dog-night/one. The full lyrics go on to explain that "[t]wo can be as bad as one. It's the loneliest number since the number one." *Id.*

2. *Information Paper, SUBJECT: Army Special Victim Prosecutor (SVP) Program*, LTC G. Bret Batdorff (24 Feb. 2016), https://jpp.whs.mil/Public/docs/07-RFI/Set_6/Responses/RFI_Attachment_Q119_USA.pdf ("To ensure the Army adopted the best practices in the field of sexual assault prosecution, the Secretary of the Army, in December 2008, authorized the creation of 15 Special Victim Prosecutor (SVP) positions within the Judge Advocate General's Corps (JAGC). In 2011, The Judge Advocate General increased the number of SVPs to 23. Presently, there are 24 SVPs dispersed across the Army's 21 largest installations.").

3. Memorandum from Lieutenant General Charles N. Pede, The Judge Advocate General to Judge Advocate Legal Services Personnel, subject: Special Victim Prosecution Program-Policy Memorandum 17-05 (1 Dec. 2017).

4. U.S. Army Special Victims' Counsel Program, Special Victims' Counsel Handbook Fourth Edition (9 June 2017) [hereinafter SVC Handbook].

5. *Id.*

6. Special victims' counsel clients are "adult and child victims of sexual assault and abuse." *About the SVC Program*, Special Victim Counsel, https://tjaglcspublic.army.mil/svc (last visited Nov. 14, 2019). This informational website also includes an interactive game for child clients to learn more about the SVC Program and "to guide children through the military justice (MJ) process—orienting them to persons, places, and processes involved in their journey." *Id.*

7. Army Special Victims' Counsel, https://www.jagcnet.army.mil/SVCounsel (last visited Nov. 14, 2019).

8. *See* Captains Nicholas K. Leslie & Aaron R. Matthes, *A Roadmap for Leaders of SVCs*, Army Law., Issue 4, at 41 (2019), https://tjaglcspublic.army.mil/a-roadmap-for-leaders-of-svcs.

9. 10 U.S.C. 1044e(e)(3)(A) (2018).

10. Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, Army Law., Issue 1, at 65 (2019), https://tjaglcspublic.army.mil/the-special-victim-counsel-program-at-five-years?inheritRedirect=true.

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