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The Reporter

The Judge Advocate General's Corps

Foundational Leadership: Our JAG Corps DNA

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Message from

The Commandant

Our DNA is what makes each of us unique organisms. The genetic information contained in DNA is what our bodies utilize to build and maintain themselves and is hereditarily passed on to the next generation. TJAG's Foundational Leadership model has always been a blueprint for building JAG Corps leaders. The recent emphasis placed on building leaders gives us as a corps the impetus to study, discuss and develop the character traits current leaders need to internalize and pass along to the next generation of leaders. *The Reporter* provides a forum for leaders across the JAG Corps to share lessons learned and engage in a dialogue about the content of our leadership DNA.

In this edition, we are excited to lead off with articles by Capt Velma Gay and TSgt Jason Leighton who share very personal experiences and the leadership lessons they drew from those experiences. Capt Gay emphasizes the need to be an inclusive leader while TSgt Leighton explores the importance of knowing how to communicate in a manner to which your people will be receptive.

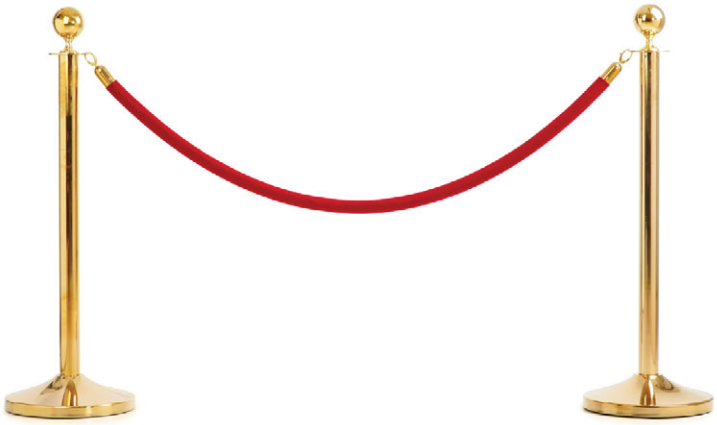
Building leaders is a theme that continues through the next two sections of this issue. The leadership team at the 27 Special Operations Wing, Col Heather LoBue, Maj Brad Morris and MSgt Lacelle Lawrence, provide an exceptional article on what JAG-Paralegal Teaming really means in a base legal office. In doing so, they highlight three leadership characteristics critical to building a cohesive team, which makes them necessary components of our leadership DNA.

In addition, filed under the Training section, Capt Clayton Fuller identifies a trend we should all find troubling with correspondence based Professional Military Education and proposes a unique solution that could provide us with a means of tracking how effective we are at building leaders. TSgt Michael Barker's article on Professional Responsibility for Paralegals rounds out this section with a discussion of the personal integrity that is required of Paralegals who inevitably have access to a plethora of sensitive information.

As always, we have a robust offering of Military Justice articles beginning with a practitioners guide to the Stored Communications Act by Maj Sam Kidd. Next, Capt Richard Hanrahan writes an insightful article sharing his top five lessons learned as a SVC, which is followed by Maj Christopher Goewert and Capt Seth Dilworth's explanation of CAAF's recent holding on the issue of victims being heard in court through a SVC.

The featured articles in this issue also happen to feature leadership and character as themes. Lt Col Thomas Murrey's article on the duty to report the misconduct of other attorneys reminds us of the integrity and accountability our profession expects of us. Four-Star Lawyer, by Mr. Thomas Becker, is a fascinating story about a great Air Force leader's time as a Judge Advocate and the challenges he faced as a JAG on Guam during World War II and his fight to maintain his dual status as a JAG and a rated officer.

We conclude this issue with two more thoughtful pieces, a review of the book *Monsoon: The Indian Ocean and the Future of American Power* by Lt Col Murrey; and Mr. Becker's review of James Salter's, *The Hunters*.



The Exclusive Club

BY CAPTAIN VELMA C. GAY

Three years ago, when my oldest daughter entered the sixth grade, she told me that her dream was to attend Stanford University for her undergraduate education. To foster her dream, I promised her that for our annual spring break trip during her eighth grade school year, we would travel to California and go on a college tour of three or four universities in the area, to include her dream school. I started planning our trip in July 2012, the same month I started working for my new boss. I discussed my plans with him and he immediately recommended a great place for us to stay during our time in San Francisco. He described how nice it was, the great location, the awesome rates, and most important, the free full breakfast they serve each morning.

All I could think was what a great tip from my new boss—it sounded perfect, I was sold! I immediately looked up the hotel and found out that you had to become a member of the Marines' Memorial Association to take advantage of the discounted room rates at the Marines' Memorial Club. I signed up, paid my thirty-five dollar membership fee and immediately booked my reservation for our spring break 2013 college tour.

What a great trip! We stayed in San Francisco and toured Stanford and UC Berkley. Then we flew to Los Angeles and toured UCLA. We enjoyed *almost* every aspect of our vacation…there was one exception…our stay at the Marines' Memorial Club. Surprisingly, by day two of our four-night stay, we realized we were the only blacks in the hotel for breakfast each morning. Now don't get me wrong, this revelation was not unusual for us, and it's not what caused us to feel uncomfortable. Besides, we've lived in Jacksonville, Florida, we've been stationed in Abilene, Texas and Montgomery, Alabama—so being the "only" amongst a group was more than normal for us. The feeling we felt at this particular place was a different feeling, it was a feeling that we didn't belong. We tried very hard to enjoy the free full breakfast each morning, but we were constantly subjected to uncomfortable stares and whispers as we ate. It was our vacation, so of course, I wore civilian clothes each day, so no one knew I was an actual active duty member of the military—but I didn't think I would need to let anyone know that to be treated with respect.

Despite our misery (anyone who knows me knows that I had no intention of paying for breakfast elsewhere, especially when it was included in our stay), and my daughters begging that we not eat breakfast in the hotel anymore, we went to breakfast for the fourth and final morning. Not only were we subjected to uncomfortable stares on this particular morning, but as I was sitting with my daughters during breakfast, I actually overheard the conversa-

(Image courtesy of iStock)

> [W]e must understand that diversity is not an "object" to be managed; it is a collection of people, living, breathing people....

tion of two elderly gentleman seated directly across from us. One gentleman looked at his friend with a disgusted look on his face, and he said, "Look, there are three black people sitting over there." His friend immediately turned and looked at us. His friend went on to say, "I wonder what they are doing here?" The words expressed by the elderly men that day reminded me that regardless of my service to my country, regardless of my right to be a member of "the club," there are still individuals who feel that I do not belong and I should not be included.

When I arrived back at the office after our vacation, my boss immediately inquired, "How was your stay at the Marines' Memorial Club? Was it awesome?" I looked at him and I politely said, "Thanks for the recommendation Sir, but I don't think we'll ever stay there again." I went on to describe our experience in detail. He was shocked, embarrassed and felt really bad for recommending the hotel. His exact words were, "What?!? You were in the heart of San Francisco… I would have never imagined you would experience that type of behavior." Then, he thought for a minute, he said it never occurred to him that every time he stayed at the "club," he rarely, if ever, saw any people of color. My boss realized he had never experienced this type of behavior. He also admitted that his thoughts, ideas and experiences about the club were all based on his own perspective.

As of 2013, the percentage of female Active Duty JAGs increased from 22% in 1994 to 29%, and the percentage of JAGs who are ethnic or racial minorities increased from 7% to 10%. Our current Paralegal force structure is even more diverse with 60% being female and 33% minorities. JAG Corps civilians are 43% female and 13% are minorities.[1] To understand the challenges we face as leaders, we must understand that we operate in a world in which both leaders and followers represent different ethnicities, races and genders. Diversity is a reality that is here to stay, and its impact is increasing as our demographics continue to change. We cannot avoid this conversation. The issues affect all of us. As a result, there should be an automatic interconnectedness between leadership and diversity. As the population within the Air Force becomes increasingly diverse, the way we teach leadership within our Corps should also become diverse. Attention to diversity is not solely about making sure there is representation from diverse groups in the ranks of our leadership. Attention to diversity means changing our theories of leadership so as to make them inclusive; it also means paying attention to the perceptions and expectations of diverse leaders by diverse followers and paying attention to how bias influences the exercise of leadership.

In order to truly become effective leaders in the JAG Corps, we must understand that diversity is not an "object" to be managed; it is a collection of people, living, breathing people; individuals with minds and emotions. People who come from different backgrounds, who grew up in different areas, who have different stories—people who do not just want to be represented, but people who want to also be included. President Lyndon B. Johnson gave a commencement address at Howard University in 1965 in which he stated, "Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates." Does it mean anything, that as an active duty military member, I am able to pay my membership fee to become a member of this "exclusive club," or is it important that I am actually included and feel accepted by the club once I show my brown face?

What is your current leadership style? Is it "exclusive" or is it "inclusive?" Do you focus on a list of cultural "do's and don'ts," or are you more concerned with establishing common ground with people from cultures other than your own? Are you aware of your own biases? Do you challenge false assumptions? Are you developing cultural dexterity? Are you embodying trust and fairness? Are you being consistent? These are just a few examples of introspective questions we can ask ourselves in order to help us develop some solid diversity leadership competencies. Diversity issues are relevant for every single one of us, regardless of our cultural backgrounds. You cannot be an effective leader in a diverse society without understanding diversity. Simply put, you cannot lead what you do not understand.

[1] Source data from AFPC, current as of August 2013.

The Value of a Hat

BY TECHNICAL SERGEANT JASON L. LEIGHTON

What is the value of a hat? This seems like an odd question, yet I'm curious as to how you might answer. To some, value may simply be found in the $25.00 price tag. To others, the value may be the joy of representing a favorite sports team or geographic location. To a college graduate, the cap is a visual representation of the culmination of years of hard work and dedication. To a retired vet, the value might be a reminder of a career filled with tragedy or joy. So you see, different people value hats differently.

Today I will share my Air Force story with you, and it is filled with both failures and successes. I am sharing my story in order to reflect on leadership, or at least give my opinions and observations on leadership. I should be honest from the start; I do not have all the answers. I wish I did, perhaps then this would be a more exciting story. It certainly would be filled with fewer examples of failure. The best I can do is tell you my story, offer my observations and share what I have learned. It is up to you to decide how it benefits you and those around you. I hope it does, but I'm realistic; after all it is really just a story about a hat.

How it All Began

From early on, I was a terrible student. There were a number of reasons for this—some of them were even my own fault. I never really applied myself to my studies. I acknowledge this freely now that I have had time to reflect. I was also a troublemaker in my own right, but those are stories for another day. Mostly, my undoing was a lack of math skills. I have had a fear of numbers for as long as I can remember. This caused a lot of strife for my parents and my educators. I took elementary algebra three times and never passed. Yet the school kept pushing me on. I should have been held back; I know that now. But I was able to continue on because each year presented a new "opportunity to succeed." Everyone promised that, "This year would be the year that everything clicked." And of course there was always summer school if things did not. I'll let you know right now—things never clicked. Eventually kicking the can down the road caught up with everyone, and it became a problem in my junior year of high school. I was taking an elective that required Chemistry and my school allowed me to take both the elective and prerequisite at the same time. The trouble was that

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> We need to have an understanding of our audience, our team. This is particularly true if we want to be effective leaders and to develop others into effective leaders.

I was failing Chemistry due to my problems with numbers, while acing the elective. The school would not budge when I asked to drop Chemistry. This caused frustration and anger, which eventually boiled over into a very public argument in the middle of a Chemistry experiment. Long story short, I found myself in the principal's office. During the meeting I was told, "Frankly Jay, you are really just taking up space here." That was my last full day of school; I dropped out the next afternoon. Now I know what the educator meant. He was trying to tell me that I needed to apply myself. He was trying to say that I needed to change my attitude in order to succeed. But instead, his message inspired anger and caused me to lash out in unexpected ways. Here is what I consider to be my first lesson in leadership:

The first lesson: Understand your audience

How often do we put ourselves in the shoes of others? How often do we try to speak to them on their level? We are very good at understanding our audience when communicating with commanders and senior leaders but how do we communicate with those below us? Our words have the ability to impact others in the most profound way. My principle never wanted me to drop out, but those words had an unintended consequence. We need to remember this in our day-to-day dealings with those both above and below us. This is an important concept when trying to develop those under us into effective leaders in their own right. I once worked an air show with an attorney who I greatly respected. We were reviewing the new military pay charts and he was complaining how he did not think he was getting enough of a raise. I pointed to his salary and then showed him mine. His response was, "Man! How can you live off that?" How would you have responded? We need to have an understanding of our audience, our team. This is particularly true if we want to be effective leaders and to develop others into effective leaders.

Hats Off

I joined the Air Force four months after my 17th birthday almost by accident. I never wanted to join the military, and I didn't put a lot of thought into it. After dropping out of school, I went to work for Walmart. One day, I was walking by the local recruiter's office. I remembered that when recruiters came to school, they would pass out free items. I walked into the office and asked for a hat. I was very honest with the recruiter—I told him the only reason I was there was because it was cold and I wanted a hat. I was told if I answered a few questions I would be given one. So I did. I said I had never done drugs, I wasn't in trouble with the law, and other things of that nature. I walked out with my hat! This started a six-month give and take relationship, at the end of which I found myself on a plane to San Antonio, Texas. I had passed the ASVAB, lost 20 pounds, and earned my GED all before shipping off to basic training. And of course I wore my hat! While I don't regret a single choice I have made, I wonder what life would have been like if I had stayed with Walmart. Here I found leadership lesson number two.

The second lesson: Understand and explain the "Big Picture"

I quit Walmart because I was working with people more than twice my age who were miserable with both their job and their life. At 16, I had no understanding of the corporate ladder. I never realized that over time I could improve and promote. No one took the time to explain to me where I fit in when it came to the corporate model. We in the Air Force have a tendency to do this with our own people. We don't often explain to them where they fit in. We provide tasks and marching orders and become frustrated with the mumbles, grumbles, and whys. We need to ensure that those around us understand their role in the legal office, the JAG Corps, and the Air Force. As paralegals, we have the Career Field Education and Training Plan. I'm

> If you have never marched a gravel track on your knees, low crawled through three feet of water and mud, or done flutter kicks until you can not count, you have never been properly motivated.

shocked at how often this document is neglected. As supervisors and managers, we should be relying on this document and using it to explain to those we work with how they fit into the big picture. Only then will our subordinates accept their roles. Further, it will allow them the opportunity to train those who come after them.

Nice View

It probably will not surprise you to learn that I carried my high school experiences and attitudes with me into the Air Force. I was a terrible student and a terrible military member. I did not understand why we did the things the way we did and I questioned everything. I failed to understand the significance of military education and it almost cost me my career. In my first technical training school, I found myself in all kinds of trouble. I failed tests, I failed room inspections, and I failed uniform inspections. Being disciplined for these failures caused me the same anger and frustration I had felt in high school. This resulted in greater trouble for me. Eventually, I found myself the guest of Keesler's correctional custody program. Now let me be crystal clear; this was not through an Article 15. I was honored to attend a 24-hour "re-motivational" experience in an attempt to salvage my failing career. If you have never marched a gravel track on your knees, low crawled through three feet of water and mud, or done flutter kicks until you can not count, you have never been properly motivated. But this single experience reshaped my view of the Air Force and of life. The head of the correctional custody program, a crotchety old Senior Master Sergeant, pulled me aside and told me that he felt I might make it. He told me that I was selfish, petty, and I didn't get it, but with a change of perspective he felt I could turn my life around. He then said something that both shocked me and stuck with me. "Airman Leighton, you look at things backwards. You aren't ***IN*** the Air Force. You ***ARE*** Air Force." This single statement changed things for me, and started my turn around. I started to see the "big picture" and began to understand leadership lesson number three.

The third lesson: People matter

I once worked with a Senior NCO who loved to yell, sometimes in rather derogatory ways. I was once told that I had a tendency to talk out of my "behind" and I didn't know much of anything. I certainly couldn't differentiate between that area of my body and a hole in the ground. Not surprisingly, I responded negatively to this. This leader didn't take the time to understand me. He didn't realize that his actions brought me back to a time when I was told that I was just taking up space, a reminder of all my previous failures. Something we

(photograph by Senior Airman Marleah Miller)

need to remember is that planes can't fly without pilots. Paychecks don't get paid without finance personnel to process them. The Air Force is more than our buildings, processes, and equipment. People really do matter. JAGs and paralegals matter. Constitutional rights aren't protected without the Area Defense Counsel and their paralegals. The Air Force can't effectively complete the mission without the hard work and dedication of legal offices around the globe. Without our people, we will never be able to get the job done.

Learning to Love Learning

Although changing my perspective helped, it wasn't smooth sailing from there. I still had a lot of lessons to learn. I had the drive, but I didn't have the tools needed to succeed. In a very numbers heavy career field (ironic I know), I did not perform well when it came to my career development course.[1] I actually failed my initial CDCs three times—something almost unheard of in the Air Force. An enlisted member is usually only given two chances before separation. But I had a supervisor who sat me down and forced me to study. He listened to my story, understood me, and had faith in me. I was able to pass on my fourth attempt. But it was more than just getting through the career development course. My supervisor was able to instill in me the value of education, the importance of studying, and the significance of educational achievement. Things finally clicked for me.

Enable Your People

One of the most important lessons I have learned is that in order to be an effective leader you have to know your people. Only then will you understand what will motivate the individuals you are responsible for leading and be able to appropriately tailor your leadership style. How often do we find ourselves guilty of failing to do this? How often do we simply provide tasks and checklists? We have this opinion that, "Because we had to figure it out on our own, they need to." But leadership isn't about trial and error tribulations. We have a responsibility to understand our people, and give them what they need to succeed. What happens when we don't? We set our people up for failure instead of enabling them to succeed.

Conclusion

I have had a lot of ups and downs in my career; we all have. Our experiences shape us. As you read my story, I hope you found something that will help you develop yourself or someone around you into a more effective leader. Remember that in every aspect of leadership, communication is essential. You could have an excellent vision of what your office, or section, needs to do to be successful, but if you cannot effectively communicate that vision to your people you are as ineffective as the leader who doesn't have a vision. Remember that you need to understand your audience (look at things from your people's perspective), and you need to understand and be able to explain the big picture. Also, remember that without people, we can't get the job done, so value and enable your people. I find inspiration in a quote from the JAG Corps' *I LEAD!* where C. Michael Armstrong, a former Chairman and CEO of AT&T, recounts a Roman practice: "The ancient Romans had a tradition: whenever one of their engineers constructed an arch, as the capstone was hoisted into place, the engineer assumed accountability for his work in the most profound way: he stood under the arch." When it comes to the house we are building around us, our JAG Corps, ask yourself where you stand. Are you developing those around you into a firm and lasting foundation? Or is your capstone going to collapse down on you?

Epilogue

Everyone enjoys a happy ending. I am not sure if I can give you that, but I hope you see the value of a hat—really, the value of anything you hold dear. To me, a hat became a symbol of a hard fought career. I was almost kicked out of training due to discipline issues and almost failed out because of academics. But then, found my calling in the Paralegal Career field, and most recently graduated college with a perfect GPA. As an instructor at the JAG School, I've come full circle: dropout to educator. All of this is because of a hat. Well, a hat and strong leaders. People who took time to train me, educate me, and show me where I fit in. We have a responsibility to others to be the best we can, and to train those behind us. But this story is really just about a hat, which proved to be worth more than its weight in gold.

[1] My first career field was Ground Radio Communications and involved a lot of schematic work, electronic theory and various other overwhelmingly technical areas.

Creating an Office Team

BY COLONEL HEATHER E.K. LOBUE, MAJOR BRAD A. MORRIS, AND MASTER SERGEANT LASCELLE L. LAWRENCE

Everyone has heard about JAG-paralegal teaming. If you have been in the JAG Corps for over 10 years, you may have also heard of "paralegal utilization." However, there are some misconceptions about what JAG-paralegal teaming is. If you view teaming as something you need to do in order to answer a question on the CUI checklist, you are missing the point. There is a difference between "teaming" and being a team. As leaders, you want to motivate your subordinates in such a way as to maximize their skills and abilities to get the mission accomplished. You can only do this by building your office into a team.

Building a culture of teamwork takes work, as we have learned at Cannon. We are a relatively small office at one of only two active duty bases in Air Force Special Operations Command (AFSOC). Since we support special operators, we typically have at least one JAG and one paralegal deployed at any given time. Each person has a job title, but we are all on the same team with the singular goal of ensuring the mission of the office gets done. Shortly after the SJA arrived, we as a leadership team provided three guiding principles to the office, but we left the day-to-day management of the sections to the officers in charge (OICs) and noncommissioned officers in charge (NCOICs). Our three guiding principles are:

1. Always Do What's Right
2. Take the High Ground
3. Over-communicate

Everyone has heard about JAG-paralegal teaming.... However, there are some misconceptions about what JAG-paralegal teaming is.

We then tasked the OICs and NCOICs with ensuring the responsibilities of their section were met and we gave them the authority to enlist support from the other members of the office to accomplish this assignment. For example, when we are busy in military justice and a record of trial (ROT) needs to be completed, we have "ROT blocking" parties where everyone reviews copies of a ROT at the same time. In this way, we have all the copies completed in the time it takes to go through a single ROT.

Similarly, the office often pulls together to support the Operations Law section. The JAG and paralegal in this section are responsible for ensuring the legal readiness of over 4200 active duty Airmen at Cannon. The base averages 30% deployed at any one time, excluding those who are "deployed in place" supporting remotely piloted aircraft (RPA) missions. We have rotators coming in and departing out of the base once a month. This operations tempo has the potential to be a huge burden if the Operations Law JAG and paralegal attempted to cover it alone. Instead, they arrange a schedule that pulls from all office members to cover the mobility lines. When we are under-manned in paralegals, the JAGs step up to cover the front desk and provide notary services to clients. When we are under-manned in JAGs, paralegals draft initial legal reviews. In short, everyone pitches in to help wherever and whenever needed.

However, it is not just the JAGs and paralegals working together in our office. We also rely on and work closely with our civilian employees. Our front desk

> Teaming doesn't end at the front door to the legal office. You need to become part of the team on your base.

clerk manages the G-series orders for the entire base, which is a significant task at Cannon. The AFSOC commander requires units to have an officer on temporary G-series orders if the permanent commander will be away (TDY or leave) for 10 days or more. Keeping an updated list and copies of required forms can be challenging. Our front desk clerk reviews the packages as they come in and creates an electronic file for JAG review. She then runs the checklist she created and finds an available JAG to review the package. Finally, she created a tabbed binder which she keeps updated with the most current orders for each unit on base. As you see, leaders will grow if you let them lead.

Teaming doesn't end at the front door to the legal office. You need to become part of the team on your base. Everyone in the office should understand your wing's mission and your commander's priorities. At Cannon, even something as simple as having regular office PT has helped identify us as part of the base team. Physical fitness is important in Special Operations and all of our units have some sort of unit PT. Our office is no different. We exercise as a group three times a week and, not unexpectedly, we PT at the same time as some of the other units on base. Being seen running and working out has earned us credibility as Airmen. It's easy for non-JAGs to see us as outside the "real Air Force." We have separate promotion boards, a separate assignment system, and we don't need a master's degree to get promoted. By holding ourselves to the same standard others are held to, we demonstrate that we are part of the Air Force and that we want to be part of the base team.

A perfect example of how our office has been folded into the Cannon team is our support of a relatively new standing advanced echelon (ADVON) team. Last summer, the wing commander at Cannon stood up an Air Operations Squadron (AOS) and tasked that unit with developing a fully manned advanced echelon (ADVON) team ready to deploy to anywhere in the world at a moment's notice. He then tasked the Inspector General (IG) to exercise this team on a regular basis. There is a JAG assigned to that team. We have exercised the ADVON three times and have had two real world responses since it stood up last summer. The ADVON team JAG is a two-week duty which we rotate between all of our JAGs. Here at Cannon, we have found it is easier to tie ADVON duty to the on-call JAG. Meaning that the JAG on-call is the one who deploys. In order for us to do this, every JAG at Cannon is up-to-date on deployment training, immunizations, and personal readiness. They all have a personal bag and deployment gear packed and ready to go at all times. The Operations Law paralegal ensures the JAGs have the required training and gear they need.

When the base exercises, we are integrated at all levels of the base operations. In a recent exercise, the deputy staff judge advocate (DSJA) and SJA alternated time at the installation incident command center, guiding the wing response. There was also a JAG and a paralegal helping the planners with the execution of the operation. Finally, there was a JAG on ADVON who traveled with the team to the "deployed" location. The ADVON team set up bare base operations on Melrose Air Force Range, which is about 20 miles west of the base. The deployed JAG was with the ADVON team throughout the exercise.

We also shoulder our fair share of officer and enlisted extra duties and volunteer organization activities around the base. The Law Office Superintendent (LOS) serves as an additional duty first sergeant who occasionally stands in when the Comptroller Squadron first sergeant is out. All of the members of the leadership team have volunteered to score wing quarterly and annual award packages. One of our paralegals, who is married to a military member, is a key spouse for her husband's unit, and another of our paralegals is the vice president of the Airmen's Counsel.

Recently, we even offered up our building to be used during an exercise to train the Security Forces Squadron and local law enforcement. The IG held an exercise simulating a hostage scenario where a perpetrator had stormed our building and was hold-

> Once you develop a culture of team work, you need to continue to nurture it.

ing 12 people, including the vice wing commander, hostage in the court room. Everyone in the office responded properly and, after a few hours, the civilian hostage negotiator was able to talk the hostage taker into giving up without firing a single shot. Although this seems minor, we've reaped countless benefits from the connections our JA teammates have made by being involved across the base.

Being part of the base team doesn't end with our support to daytime operations. Special operation missions normally occur under cover of darkness. Therefore, our units train at night. It was difficult for members of our maintenance and operations groups to get take advantage of our normal legal assistance hours. In response to feedback we received on the AF legal assistance website, we instituted early morning and late night Legal Assistance hours each month. Once a month we come in early and once a month we stay late to help shift workers who can't come in during the normal duty day. The Comptroller, Force Support Squadron, and Medical Group have followed our lead , offering late night and weekend hours as needed. In addition, we schedule legal readiness days in units that have upcoming deployment rotations. We bring pre-deployment legal assistance, mainly wills and powers of attorney, to the units instead of waiting for them to come to us.

Once you develop a culture of team work, you need to continue to nurture it. Like any relationship, a team will fall apart if you don't make an affirmative effort to keep it alive. Continually re-examine your processes. Encourage open communication and make it clear that you value input, regardless of the source. Give the junior members in the office the opportunity to lead. Finally, take time for shared fun. In our office, we have a weekly award that we bestow on the person who made the funniest blunder during the past week. We take verbal nominations at the end of our staff meeting from anyone with a candidate. More often than not, members of the office end up nominating themselves. The nominations are a mix of reality with a large dose of exaggeration and never fail to leave us laughing. It's not labor intensive or time consuming, but it has brought our team closer.

Part of building a team is recognizing what each person's own set of strengths brings to the table and effectively utilizing this diversity makes a team stronger. Strive to develop your office into a team and to integrate your team into the base team. If you work together to achieve success, JAG-Paralegal teaming will come naturally—and the question on the CUI checklist—will take care of itself.

(Image courtesy of iStock)

Squadron Officer School and Professional Military Education

Checking Boxes or Building Leaders?

BY CAPTAIN CLAY M. FULLER

There is a troubling trend in professional military education (PME). This trend hung over the heads of several company grade officers (CGOs) like a specter as we listened to an O-6 wing commander pull back the curtain on officer promotion boards. The wing commander laid bare the surprising reality of how little time the board has to fully consider each officer for promotion to the next grade. With so little time for the board to consider each candidate, he explained how oftentimes they look for "self-identifiers" that reveal the promotable officers. One of these self-identifiers is the speed at which an officer finished the correspondence portion of Squadron Officer School (SOS).

Is this incentive to rush to the next SOS test or assignment to finish the training as fast as possible compatible with the SOS mission "to develop Company Grade Officers as leaders ready to fly, fight, and win?" For JAG CGOs, there is an even greater incentive to rush through the course work as quickly as possible, because we need to complete what is supposed to be professional *military* education to ensure favorable statistics for Article 6 visits.

This trend and attitude shows that we, as a service and as a Corps, have lost our way when it comes to an officer's first real experience with formal PME. The clear message is that officer PME, SOS by correspondence in particular, is a block to be checked as quickly as possible to ensure an officer's promotion prospects rather than an opportunity to develop him or her as a leader.

In contrast, is my experience in the Marine Expeditionary Warfare School (MEWS)[1]. In that

[1] The Expeditionary Warfare School (EWS) is the Marine Corps' Squadron Officer School equivalent. It provides career-level professional military education with emphasis on combined arms operations, warfighting skills, tactical decision-making, and Marine Air Ground Task Forces in amphibious operations. Air Force officers interested in the distance education version of EWS should contact the Regional Director for their area. A list of Regional Directors can be found at https://www.tecom.usmc.mil/cdet/SitePages/contacts.aspx#tab-contacts-RCs.

(Image courtesy of iStock)

> One way to fix the problem is to incentivize self-study in general, to include getting the most out of online formal PME.

PME, a seminar leader illustrated what we as a service and a JAG Corps can learn from our sister services. He summarized what MEWS means for CGOs in the Marine Corps: "MEWS is not about you…"; he snarled, "…it is about those Marines you lead." Now that training is one of the JAG Corps' Foundational Pillars, the JAG Corps should take the lead on correcting this troubling trend and ensure that our CGOs utilize opportunities like the SOS correspondence course to learn how to become better leaders of the Airmen we are called upon to lead.

One way to fix the problem is to incentivize self-study in general, to include getting the most out of online formal PME. As the JAG Corps is pressured to "do more with less," a campaign for increased self-study will certainly elicit complaints of being too busy to do additional reading. However, two Marine officers have interesting answers to this complaint. Gen James Mattis summed up the consequences of being too busy to read in a recent viral email, "the problem with being too busy to read is that you learn by experience (or by your men's experience), i.e., the hard way. By reading, you learn through others' experiences, generally a better way to do business, especially in our line of work where the consequences of incompetence are so final for young men."[2]

Col William F. Mullen, III identified a self-study problem in the Marine Corps. His solution could be a possible solution for us. The Marines have institutionalized self-study and actually make it a part of their rating system for enlisted personnel. Moreover, there is a permanent Commandant's reading list, which all officers are expected to participate in and discuss with their peers. Despite the Marine Corps' efforts, Col Mullen laments in his article "Ensuring that Continuous Officer Education Goes Beyond the Published Guidance," that the "pursuit of self-study seems to have faded significantly."[3] He argues that the onus for bringing back a focus on self-study is not with the subordinate but with the superior. The superior "who is guiding the officer" should "enter his certification and electronic signature" when subordinates have completed self-study tasks.[4] Requiring this certification provides an opportunity for leaders to discuss the subject matter with the subordinate and ensure that the development of future leaders in the profession of arms is a product of self-study and engaged mentorship.

Using Col Mullen's model, we could modify the CAPSIL training dashboard to function as a tool for SJAs, Deputy SJAs and Law Office Superintendents who would validate completion of self-study and facilitate discussion of self-study topics by attorneys and paralegals within a legal office. The leadership team in each individual office would be responsible for dictating the importance and value of real discussion and thought about the profession of arms. This model could be especially useful in the situation where a number of attorneys in an office are working on SOS. The SJA could encourage and track discussion of topics found in the PME course among the CGOs in the office.

The capability of tracking and validating self-study and the effectiveness of PME could be used in a number of different ways to incentivize leadership and professional knowledge development in the JAG Corps. Instead of tracking the SOS completion timeliness numbers, this new leadership development "metric" could provide a quantifiable picture of how a base legal office is building leaders. A briefing from a SJA during an Article 6 visit about how an office is making sure PME is effective and self-study is incentivized and tracked would seem to be of more interest to senior leadership than how fast the attorneys completed SOS. However, adding this as a required topic to brief during Article 6 visits may encourage a "just check the box" attitude and will further stultify PME and self-study. Therefore,

[2] Geoffrey Ingersoll, *General James 'Mad Dog' Mattis Email About Being 'Too Busy to Read' Is a Must-Read*, http://www.businessinsider.com/viral-james-mattis-email-reading-marines-2013-5, 9 May 2013.

[3] Col. William F. Mullen III, *The Officer PME Continuum: Ensuring that Continuous Officer Education Goes Beyond the Published Guidance*, The Marine Corps Gazette, http://www.mca-marines.org/gazette/article/officer-pme-continuum (last visited 22 August 2013).

[4] *Id*.

> General Martin E. Dempsey believes leadership development for CGOs should change because modern wars are pushing much of the responsibility for tough decisions to lower levels of leadership.

JAG Corps leaders should look to get creative on incentivizing self-study. For example, during formal feedback sessions supervisors can challenge subordinates to read books listed on the Chief of Staff of the Air Force's reading list, and then make a point to discuss with subordinates their thoughts on what they are reading. As TDY money continues to become even scarcer, the self-study metric could be used to help SJAs identify members of the office who the SJA can be confident will make the most of TDY education opportunities. Similarly, this metric could be used to determine which attorneys or paralegals are best prepared to fill deployment opportunities which will likely become scarcer as our presence in Afghanistan continues to decrease. A CGO who completes SOS and is involved in an office book club, or has shown more development through the self-study or leadership discussions the SJA has been tracking, should be on the radar of SJA and JAX as someone who is professionally prepared to take on the enormous responsibility of a deployment. Call them "meritocracy deployments."

Unfortunately, some of these efforts may only reinforce that SOS and self-study are about the officer's career and not the airmen we are being entrusted with leading. However, an even more radical approach would be for the JAG Corps to institutionalize a major change within the structure of the base legal office, by only placing officers in charge of sections and other airmen after they have demonstrated appropriate leadership development. The new leadership development metric could be the deciding factor for selecting CGOs to serve in supervisory positions. This would be in opposition to the every-CGO-needs-to-be-a-Chief-of-something duty title mentality. These officers in charge would not just be figure heads with hollow titles, but would be institutionally empowered to pick their own personnel, develop their subordinates, and, most importantly, to rate them. This would help ensure that only those officers who have demonstrated a certain level of training and study in leadership are put in charge of our airmen.

Self-study and PME go beyond formal courses like SOS. This is important because the current trend with the SOS correspondence course prompts busy base legal office captains to skim articles that are not always the most thought provoking. The leadership of the JAG Corps needs to make more of an institutionalized push for the study and discussion of real leadership issues in base legal offices and the development of a sense of air-mindedness in all JAG Corps personnel. The new leadership development metric should take informal leadership development, like book clubs and on-line doctrine courses, into account. The recent addition of TJAG's "Building Leaders" foundational pillar may be just the push the JAG Corps needs to begin developing methods of incentivizing real discussion and thought on officership, leadership, and air-mindedness. This idea of a leadership development metric or method of tracking self-study and effective PME metric is one way that SJAs can implement TJAG's vision for this new pillar.

The concern with how young leaders are being developed in the military today is not just an Air Force JAG Corps concern. It is also a problem that is clearly on the mind of the Chairman of the Joint Chief of Staff. General Martin E. Dempsey believes leadership development for CGOs should change because modern wars are pushing much of the responsibility for tough decisions to lower levels of leadership. When asked by the Senate Armed Services Committee what his major lessons learned from Iraq would be, Gen Dempsey stated:

> Another [lesson] is the degree to which military operations in particular, but probably all of them, have been decentralized. You know, you'll hear it called various things, decentralized, distributed operations, empowering the edge. Whatever we call it, we have pushed enormous capability, responsibility and authority to the edge, to captains and sergeants of all services. *And yet our leader develop-*

> *ment paradigms really haven't changed very much*. They are beginning to change, but I think the second lesson on the enormous responsibility that we put on our subordinates' shoulders *has to be followed with a change in the way we prepare them to accept that responsibility*.[5] (emphasis added)

With these types of statements coming from the highest levels of the military, an argument that we do not need to change anything because our leadership development programs worked in the past, rings hollow today.

Many in the JAG Corps may want to punt this issue for the big Air Force to deal with, but we do not have the luxury to do that. For JAG CGOs that go through Commissioned Officer Training (COT), many of us may have a knowledge deficit when it comes to officership and air-mindedness. SOS by correspondence should be the first opportunity to formally develop our officership, and the SOS online curriculum was recently overhauled in an attempt to build in more collaboration with fellow students and interaction with instructors. However, just like any learning opportunity, a student only gets out of it as much as they are willing and able to put into it. Mailing in the SOS by correspondence does not help bridge that knowledge gap. SJAs need to engage those attorneys working on SOS in their offices with questions about the material and help them understand how the lessons being taught apply to their future leadership roles in the JAG Corps. We cannot wait for an *in residence* SOS slot to give JAG CGOs the first formal opportunity to "reflect on their personal leadership styles as they are exposed to education and experiential opportunities that challenge them to become more effective leaders for our Air Force."[6]

[5] Tom Ricks, *Dempsey on Two Big Lessons of Iraq: Think More and Train Leaders Better*, http://foreignpolicy.com (Jul 27, 2011).

[6] Squadron Officer School Website, (2011), http://www.au.af.mil/au/soc/sos.asp (last visited August 2011).

Currently, our PME system does not incentivize any reflection on officership, air-mindedness, or personal leadership styles. Instead, the pressure is to get the correspondence training out of the way as quickly as possible for promotion purposes and also to report in an Article 6 visit that all of the captains have completed SOS. Instead of waiting for the Air Force to fix the problem, we should lead the way. Just like the JAG Corps did with the representation of sexual assault victims, we should take a proactive approach on fixing a pressing issue.

PME is not about you; it's about the Airmen you lead.

It will take courage to admit that there is a troubling trend looming like a specter over us. Institutional inertia is difficult to overcome. Yet, the JAG Corps must find a way to institutionalize the idea of SOS by correspondence as an educational opportunity, not a box to be checked as quickly and painlessly as possible, and develop a means of fostering real discussions between senior officers and subordinates to develop leadership and air-mindedness in our future leaders. Whether it may hurt an officer's chances at promotion, we owe it to those we lead to take PME seriously and use self-study and formal PME to become better leaders and better Airmen. We must have the courage to remember our core values as a service, and to always remember that PME is not about you; it's about the Airmen you lead.

PR for Paralegals

BY TECHNICAL SERGEANT MICHAEL N. BARKER JR.

Have you heard about the case where AMJAMS reports and 1168s were found during a search of an accused's residence? How did they get there you may ask? It turns out they were given to the accused by his friend—a Staff Sergeant paralegal from the legal office! Due to issues like this, it seems to be a good time to discuss some of the key professional responsibility rules paralegals must follow.

As paralegals, we are valuable members of the legal office team. We do amazing things to contribute to a smooth running legal office or court-martial. But we need to be careful. The longer we are in our offices, the greater the temptation becomes to tell a client what they should do because you have seen it a hundred times,—or give advice because you already know what your attorney would say, and it will just save time,—or, as in the case mentioned earlier, to give your buddies a heads up because you have access to information no one else does. Knowing and following the rules for professional responsibility will keep you and your attorney out of trouble.

Professional Responsibility

Our rules for professional responsibility come from TJAG Standards 2 (TJS-2) which contains the *AF Rules of Professional Conduct* and the *AF Standards of Civility in Professional Conduct* (AFRPC or the *Rules*). This is what the JAG Corps is required to read and certify review of every year. Who do they apply to? *The* AFRPC "apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in the Air Force Judge Advocate General's Corps."[1] Notice it says "paralegals." We have to play by the rules too.

TJAG's memorandum established that when the AFRPC say "a lawyer," it also applies to paralegals.

Confidentiality

In what ways could paralegals find themselves in a situation where these rules come into play? Of course the situation with the paralegal mentioned above would definitely be one, but there are many more. For instance, Rule 1.6 deals with confidentiality. Rule 1.6(a) states that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation...." TJAG's memorandum established that when the AFRPC say "a lawyer," it also applies to paralegals. So paralegals also have a duty to protect client information. In the case of the paralegal SSgt, did he protect the client, in this case the Air Force, by giving documents to the accused?—no! This was a violation of the rules we are bound to follow. Rule 1.13(a) states that "…an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force...." Unless you are a defense paralegal, a Special Victim's Counsel paralegal, or working a legal assistance issue, your client is almost always the Air Force. In each instance, you have a duty to protect your client's information the same way.

Let's look at how this rule applies with a legal assistance client. Would it be a good idea to text

[1] TJAG Policy Memorandum: TJAGC Standards – 2, *Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct*, paragraph 3, 17 Aug 05.

> [R]emember these rules. Respect the attorney-client privilege. Safeguard client information. Do not give legal advice.

your friend to give him a heads up when his wife comes in asking about a divorce?—no. That is not safeguarding your client's information and is a breach of confidentiality. It all comes down to the attorney-client privilege. How effective would attorneys be if the client had no faith in their confidentiality? Would the client disclose much knowing what he or she says is going to be broadcast to the world?—of course not. Therefore, we need to protect that relationship. But it bears mentioning that this relationship does not extend to communications between an attorney and a client concerning certain crimes. For instance, if an accused tells the attorney he or she is leaving the office to commit murder, the communication may not be protected under the Rules.

Unauthorized Practice of Law

Another issue to be aware of is the unauthorized practice of law, which is covered in AFRPC Rule 5.5 and AFI 51-504, paragraph 1.6.1. Only attorneys can give legal advice. We all know that phrase like we know our own names. It is seared into our brains beginning with the Paralegal Apprentice Course. It sounds so easy! But unfortunately we need to be on guard when it comes to legal advice. If not, we could be guilty of the unauthorized practice of law, the implications of which could have repercussions on you and your attorney. As we see more and more clients, we gain more and more knowledge as to their needs. As a result, we can be tempted to tell them, or "advise" them, about what they need or should do. Here is an example that seems innocuous, but could be serious, and could happen on any given day. Let's say a client walks in asking for a power of attorney (POA) but has no idea which one. They ask you which POAs you have. You proceed to give them the rundown of what is available. The client says, "I don't know what to do. What do you think I need?" Based on the phrase "only attorneys can give legal advice," you would have to say something along the lines of "I am a paralegal and can't advise you on what you need. Let me get an attorney." This seems so easy, yet I would be willing to bet that some of us would be tempted to just tell them what they need for their situation because you know the information. And chances are, you would be right, and the client would be taken care of and happy. But hold on, you just gave legal advice. This is a scenario that happens every day and you need to beware of it.

Another area to be cautious of is military justice, specifically when dealing with commanders and first sergeants regarding nonjudicial punishment. If a first sergeant asks you what they should do and you say "give them a 15," you just gave legal advice. It can sometimes be a fine line, but you need to know which side of the line to be on. You can provide general information. You can provide UCMJ or AFI references. You can outline available options. But if your answer contains "I would," "you should," etc., you could be giving legal advice and committing the unauthorized practice of law.

Consequences

So what can happen if you violate these rules? The introduction to the AFRPC states that those rules are not punitive in nature, but violations may be addressed administratively, or through actions to withdraw certification or designation. Thus, not following the rules can cost you the AFSC you worked so hard to get, which could also be your ticket out of the Air Force. What about attorneys? Your supervising attorney could also be liable for your conduct under AFRPC 5.3, and could be disciplined or possibly lose his or her license to practice because of your violation. Take these rules seriously.

Conclusion

So what happened to the SSgt paralegal? He was punished at a general court-martial with the following sentence: reduction to E-4, three months of hard labor without confinement, and 30 days of confinement. No punitive discharge was adjudicated, but he is being administratively separated. Be careful and remember these rules. Respect the attorney-client privilege. Safeguard client information. Do not give legal advice.

Military Courts Declared Incompetent:

What Practitioners (Including Defense Counsel) Need to Know about the Stored Communications Act

BY MAJOR SAM C. KIDD

What I expect to be my last case ever as a trial counsel, turned out to be a bizarre, borderline overwhelming but uniquely educational experience.[1] The charge sheet, a twelve page document, contained five charges, four additional charges and a total of twenty-seven specifications. The allegations included everything from false official statements to conduct unbecoming an officer and gentleman to federal wire tapping and unauthorized computer access charges incorporated under general Article 134, UCMJ. The accused was a First Lieutenant, who was intent on finding a way to get the charges against him dismissed. He filed multiple Congressional, Inspector General (IG) and Article 138 complaints, alleging that he was being victimized by the prosecution and the victims of his alleged crimes. The accused's defense counsel were also hard at work defending their client and had filed nine motions, seven of which needed to be argued before the trial could begin. Ultimately, he pled guilty to fifteen of the twenty seven specifications. As a condition of the pretrial agreement, the government agreed to withdraw and dismiss the remaining charges. What would have likely been an eight or nine day trial turned into a one day sentencing hearing.

> One of the greatest challenges all the parties faced was trying to determine the veracity and origination of multiple email messages relevant to the case.

[1] The entire McConnell AFB Legal Office gets the credit for getting this case to trial and for the outcome. Especially Capt Sean Hudson who reluctantly accepted, if not embraced, his role as the most junior trial counsel on the team.

(Image courtesy of iStock)

> I had seen financial institutions, medical treatment facilities and educational institutions produce personal financial, medical and educational records pursuant to trial counsel subpoenas or military judges' orders. Therefore, I did not anticipate the significantly stricter statutory protections under the SCA.

Everything leading up to this relatively uneventful and straightforward judge-alone guilty plea, had been complex and litigious, to include the Article 32 investigation and the second Article 32 investigation.[2] One of the greatest challenges all the parties faced was trying to determine the veracity and origination of multiple email messages relevant to the case. The prosecution and the defense both requested the military judge order public service providers Yahoo! Inc. and Google Inc. to produce email records the parties felt were relevant to the charges or relevant to the credibility of certain witnesses. Thus began an education on the Stored Communications Act[3] (SCA), specifically Section 2703, as Yahoo! and Google each relied on the statute, but different rationale, to refuse production of most of the records the military judge ordered them to produce.

I probably should have been more familiar with the SCA and realized the limitations of a military judge's order to produce records of electronic communications. Based on my experience, I fully expected a military judge's order would be sufficient legal process to compel production of the records. I had seen financial institutions, medical treatment facilities and educational institutions produce personal financial, medical and educational records pursuant to trial counsel subpoenas or military judges' orders. Therefore, I did not anticipate the significantly stricter statutory protections under the SCA. It is critical that judge advocates serving as trial counsel or those advising military criminal investigators be familiar with the SCA because of the growing prevalence of digital evidence.

A thorough analysis of the SCA, the challenges it poses to military investigators and litigators and some potential long term solutions can be found in an Air Force Law Review article authored by Lt Col Thomas Dukes and Lt Col Albert C. Rees, Jr.[4] The purpose of this article is to briefly discuss the sections of the SCA relevant to compelling email providers to disclose records of electronic communications. The article then explains why a probable cause search authorization issued by a Federal Magistrate or State court authorized to issue warrants is likely the only means by which military investigators or prosecutors will be able to compel disclosure of records of electronic communication relevant to a criminal investigation or prosecution. In order to meet this objective, I will share my recent experience working with Yahoo! and Google legal compliance teams and the different positions they took on the issue.

The SCA and Required Disclosure of Stored Electronic Communication

The SCA protects the privacy of stored electronic communications by prohibiting unauthorized access to such records as well as prohibiting voluntary disclosure of the records to government agencies.[5] However, the SCA also provides specific procedures by which law enforcement officials may compel disclosure of records of stored electronic communications from public service providers such as Yahoo! and Google. 18 U.S.C. § 2703 distinguishes between three different categories of records: 1) contents of electronic communication stored by an electronic communication service provider, that is in electronic storage in an electronic communications system for 180 days or less, 2) electronic communication that has been in electronic storage in an electronic communications system for more than 180 days or maintained in a remote computing service and

[2] The Defense filed multiple written objections to the choice of Investigating Officer and the General Court-Martial Convening Authority determined he would not take action on the case until a new Article 32 investigation was conducted. The second round of investigation utilized a sitting SJA as the Investigating Officer and concluded, after two longs days, at 2100 on a Friday.

[3] 18 U.S.C. §§ 2701-2712 (1986). The Stored Communications Act is the commonly used name for United States Code Title 18, Chapter 121, Stored Wire and Electronic Communications and Transactional Records Access. The SCA was enacted as part of the Electronic Communications Privacy Act of 1986.

[4] 64 A.F. L. Rev. 103 (2009). This article was actually cited by Google to explain why Google is precluded by law from disclosing the records the military judge ordered produced.

[5] See 18 U.S.C. §§ 2701 and 2702.

3) information generally referred to as subscriber information.[6] Military prosecutors and those advising military investigative agencies do not necessarily need to understand the difference between records maintained in an electronic communications service provider versus records maintained in a remote computing service. Recent case law, which is discussed below, makes the distinction merely academic.

According to the statute, the process government agencies must follow in order to compel disclosure of records varies depending on which of the three categories the records fall under. Subscriber information is the most readily available to military investigators and prosecutors. A public service provider is required to disclose subscriber information if presented with an administrative subpoena, such as a Department of Defense IG subpoena, or a trial counsel subpoena.[7] Subscriber information includes the name, address, length of and types of service utilized and the means and source of payment for such service.[8] However, the accuracy of the name and address of the subscriber is at the discretion of the subscriber. Yahoo! and Google do not verify this information.

A public service provider is required to disclose subscriber information if presented with an administrative subpoena, such as a Department of Defense IG subpoena, or a trial counsel subpoena.

Compelling production of the content of electronic communications is much more problematic for military investigators and prosecutors, whether stored for more or less than 180 days. Public service providers are only required to disclose the content of electronic communications stored for less than 180 days to a government agency pursuant to a warrant issued "using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction."[9]

The SCA provides alternative methods, in addition to a search warrant, for government agencies to demand production of records of electronic communication stored for more than 180 days. Subsection 2703(b) allows a government entity to compel disclosure of these records with an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena if the government entity provides prior notice to the subscriber.[10] A government entity may also utilize what is called a 2703(d) order and delayed notice may be given to the subscriber consistent with section 2705 of the statute.[11] Pursuant to 2703(d), a court of competent jurisdiction may issue a court order "only if the government entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a[n]…electronic communication…are relevant and material to an ongoing criminal investigation."

Under section 2705 of the SCA, a 2703(d) order may also order the service provider to delay discloser to the subscriber of the existence of the court order when there is reason to believe an "adverse result" may occur if the subscriber were aware of the court order.[12] The statute defines "adverse results" for the purpose of delaying notification as when disclosure may 1) endanger the life or physical safety of an individual, 2) lead to flight from prosecution, 3) destruction of or tampering with evidence, 4) intimidation of potential witnesses, or 5) otherwise serious jeopardize an investigation or unduly delay a trial a court.[13] The notification may be delayed for a period not to exceed 90 days. [14]

[6] Classifying emails stored in electronic storage versus emails stored by remote computing service is a complicated analysis that appellate courts have struggled with. An in-depth discussion of this distinction and the courts' application of it can be found in Orin S. Kerr's A User's Guide to the Stored Communications Act – and a Legislator's Guide to Amending it, 72 Geo. Wash. L. Rev. 1208, 2004. Military prosecutors and those advising military investigative agencies do not necessarily need this level of understanding, because recent case law public service providers cite to makes the distinction academic.

[7] 18 U.S.C. § 2703(c)(2).

[8] *Id.*

[9] *Id*. at § 2703(a).

[10] *Id*. at § 2703(b)(1)(B)(i).

[11] *Id.* at § 2703(b)(1)(B)(ii).

[12] 18 U.S.C. § 2705(a)(1)(A).

[13] *Id.* at § 2705(a)(2).

[14] *Id*. at § 2705(a)(1)(A).

> Yahoo! and Google both cited to the opinion of the Sixth Circuit in *United States v. Warshak* in denying the release of the contents of electronic communications regardless of whether they had been stored for 180 days or more.

The last subsection of section 2703 that is relevant to military investigators and prosecutors is subsection (f). Subsection 2703(f) provides government agencies the means to request preservation of records of electronic communication, whether stored as electronic communication service records or remote computing service records. This can be a valuable tool for investigators and prosecutors. The statute requires service providers to take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.[15] The service provider is required to maintain the records and evidence for 90 days and another 90 day extension may be requested by the government agency.[16] If a government agency makes a preservation request, usually in writing pursuant to the service provider's policies and procedures, the service provider is required to take action to preserve the records. Yahoo! provides a sample preservation request letter in its law enforcement guide.[17] Public service providers will only maintain records of stored communications deleted by a user or associated with closed accounts for a finite amount of time. A timely preservation request will prevent the records you are seeking from being permanently deleted in accordance with the public service provider's records management program.

Courts of Competent Jurisdiction

Assuming a military judge could issue a search warrant consistent with the procedures described in the Federal Rules of Criminal Procedure, or is willing to issue a 2703(d) order, public service providers are not required to comply. A military court, according to the Act, is not a "court of competent jurisdiction. " The SCA excludes military courts from its definition of courts of competent jurisdiction. [18] According to the SCA definition section, a court of competent jurisdiction is "a district court of the United States (including a magistrate judge of such a court)" with either jurisdiction over the offense being investigated or the district in which the public service provider is located or where the electronic communications or records are stored.[19] The only other category of courts listed in the statute's definition section is courts of "general criminal jurisdiction of a State authorized by the law of the state to issue warrants."[20]

Military courts are conspicuously not included in the definition of courts of competent jurisdiction. Furthermore, it would be difficult to argue that Congress intended to include military courts under the statute's definition, because the statute is so specific in naming which federal courts are competent to issue search warrants and 2703(d) orders. It is possible that the exclusion of military courts from the list of courts of competent jurisdiction was an oversight, but the statute has been in existence for almost two decades and the "oversight" has yet to be corrected. Understanding which options are and are not available to military investigators and prosecutors based on this definition is important, but so is understanding how case law has affected the application of the SCA and the options available to military investigators and prosecutors.

United States v. Warshak

Yahoo! and Google both cited to the opinion of the Sixth Circuit in *United States v. Warshak* in denying the release of the contents of electronic communications regardless of whether they had been stored for 180 days or more. In *Warshak*, federal agents obtained over 27,000 emails from Warshak via a subpoena and a 2703(d) order pursuant to the SCA provisions.[21] The court held that a subscriber to a public service provider has a reasonable expectation of privacy in the content of email messages that are

[15] 18 U.S.C. § 2703(f)(1).

[16] *Id.* at § 2703(f)(2).

[17] For example see https://www.eff.org/ru/document/yahoo-law-enforcement-guide.

[18] 18 U.S.C. § 2711(3).

[19] *Id.*

[20] *Id.*

[21] 631 F.3d 266 (6th Cir. 2010).

“The combination of the SCA definition of a court of competent jurisdiction and the Sixth Circuit holding in *Warshak* severely limits the means by which military investigators and prosecutors may compel disclosure of records of private electronic communication from providers such as Yahoo!, Google or Facebook.

stored with, sent or received through the provider.[22] Therefore, the government may not compel a public service provider to turn over the contents of subscriber electronic communication without a search warrant based on probable cause.[23] The court found the provisions of the SCA, which granted government agencies the authority to compel disclosure of the content of electronic communications without a warrant, violated the Fourth Amendment.[24]

Options for Military Investigators and Prosecutors

The combination of the SCA definition of a court of competent jurisdiction and the Sixth Circuit holding in *Warshak* severely limits the means by which military investigators and prosecutors may compel disclosure of records of private electronic communication from providers such as Yahoo!, Google or Facebook. The only reliable method is a probable cause based search warrant issued by a court of competent jurisdiction, as defined by the Act. What this means to judge advocates advising military criminal investigative agencies is that if electronic communications may contain evidence relevant to the investigation, the first step is to immediately send a preservation request to the appropriate service provider. Then, as long as the crimes being investigated are not military specific offenses, which the local Federal District Court would not have jurisdiction over, judge advocates should advise investigators to work with the local United States Attorney's office in order to obtain a search warrant from the Federal Magistrate. Investigators could also attempt to obtain a search warrant from the Federal District Court with jurisdiction over the provider when investigating military specific offenses, however getting buy-in from the appropriate United States Attorney's office would surely be difficult. The probable cause based search warrant is the only legal process which is fully compliant with the SCA and the Sixth Circuit opinion in *Warshak*. Whether or not the Sixth Circuit opinion provides binding precedent, service providers will most likely cite to it when they refuse to produce the content of electronic communication compelled by any other means.

Trial counsel and DoD IG subpoenas should be more than adequate to compel production of subscriber information, and Yahoo!, Google and Craigslist all complied with subpoenas demanding production of subscriber information. Unfortunately, the subscriber information is often incomplete or false and the service providers do not verify the accuracy of any of the information. When Yahoo! responded to a subpoena with subscriber information for multiple accounts, which where anonymously harassing multiple individuals, Yahoo! pointed out that subscriber information is often false.

My recent experience with the SCA was limited to Yahoo! and Google, but my interactions with these two providers was remarkably different and so was their interpretation of the statute. Google was extremely difficult to work with. Google has an email address to which you may email subpoenas or court orders. However, when someone from Google Legal Investigation Support responds, they only provide a reference number for your request and all communication continues through the same email address where you initially submitted the subpoena or court order.[25]

I had submitted a court order to Google and after about two weeks I received a response stating to compliant with section 2703(d) of the SCA the court

[22] *Id*. at 288.

[23] *Id.*

[24] *Id*.

[25] The email address for Google Legal Investigation Support is legal-support@google.com. There is also a phone number (650-253-3425), but an automated answering service directs you to use the email address unless the caller is a law enforcement agent and the request is an emergency.

> The SCA can be confusing and frustrating for trial and defense counsel who are certain that email or social media messages contain relevant information.

order needed to state whether notification should be delayed or not. The implication was that once the court order was corrected and resubmitted, Google would produce the records.[26] I drafted a new order, which the military judge signed, and submitted it to Google. As our trial date was quickly approaching, I requested status updates from Google weekly until the week before the trial when I resorted to calling Google headquarters. After waiting on hold for an hour I finally spoke to an operator who would only tell me her operator number. She could not give me a direct phone number for their legal department, but shortly after speaking to her I received an email from Google Legal Investigation Support stating that no records would be produced pursuant to the 2703(d) compliant court order because military courts are not courts of competent jurisdiction under the SCA. Google's refusal to comply with the court order cited the SCA, *Warshak* and the Air Force Law Review article by Lt Col Dukes and Lt Col Rees.

My experience with Yahoo! was much different. Shortly after submitting the court order to Yahoo! I received an email from the representative who was processing the court order and compiling the responsive records. She even provided her individual email address, office phone number and cell phone number. She explained that Yahoo! has taken the position that the disclosure of the content of subscriber communications without a probable cause based search warrant is unconstitutional. However, after she consulted with the attorney she worked for she provided some language for us to insert into the military judge's order. Yahoo! would comply and produce the responsive records if the court order contained the additional language. The inserted language stated that the military judge found there was probable cause to believe the records contained evidence of a crime.

The prosecution could only articulate probable cause in order to demand production of some of the email records and the defense could not establish probable cause for any of the records they had requested under the relevancy standard. Ultimately, the Military Judge issued an order with the probable cause determination for a narrower list of email addresses and Yahoo! produced the responsive records. This option may be available to trial counsel or defense counsel demanding production of evidence under R.C.M. 703, when dealing with Yahoo! or other service providers, but only if a military judge is willing to determine the probable cause standard has been met. Trial counsel need to be able to explain this limitation to defense counsel who demand production of stored electronic communication from public service providers that may be relevant and necessary under R.C.M. 703, but there is no probable cause to believe the records contain evidence of a crime.

Conclusion

The SCA can be confusing and frustrating for trial and defense counsel who are certain that email or social media messages contain relevant information. However, contents of those stored communications are protected by the Fourth Amendment and will not be disclosed without a probable cause determination. The limited means by which military investigators and prosecutors may procure probable cause based warrants is problematic and likely impossible in the case of military specific crimes. In order to ensure the records are not deleted, preservation requests should be submitted early, and then investigators should be advised to seek a search warrant from the local Federal Magistrate or state court judge if those courts meet the jurisdictional requirements in the statute. Prosecutors will be much less successful if they think they can wait until charges are referred and utilize subpoenas and military court orders to compel disclosure.

[26] This all took place shortly after the Edward Snowden story broke and we were in the midst of the public outcry over internet and cellular phone providers giving government agencies access to subscriber records without a warrant.

Through Her Eyes

The Lessons Learned as a Special Victim's Counsel

BY CAPTAIN RICHARD A. HANRAHAN

My client is a naturalized United States citizen. She came to this country alone, taught herself English, and joined the United States military to honor her new country. She proudly graduated from basic training and technical training school and reached out to her former military training instructor to thank him. A friendship bloomed and she decided to fly back to Lackland Air Force Base to visit him. He picked her up at the airport, drove her to his apartment, and raped her. From that day on, her life and her view of the Air Force has never been the same.

In her culture, she had "lost face." She was raped. The rape would bring shame on her and her family. She told no one and suffered in silence. Two years later, when the Air Force Office of Special Investigations began investigating the conduct of military training instructors, she had a choice: tell the truth and risk shame in her culture or stay silent. She spoke up, told the truth, but decided not to tell her husband and family. She decided to face this process alone.

I was detailed as her Special Victim's Counsel (SVC) and met her for the first time in January of 2013—the

(Image courtesy of iStock)

> My client exhibited...belief in our legal system...she carried on through endless hours of interviews and testimony because it was "the right thing to do." However, without a SVC, my client indicated she couldn't have imagined going forward with the case.

day before the official start of the SVC program. Her allegations resulted in charges against the accused. The case started the next day with a MRE 412 hearing, interviews, and then trial itself. Hearing her speak about being raped in multiple interviews and hearings gave me a new appreciation for what it means to be "re-victimized." Because the client had no family support system, I was her only confidant. I ran interference for her with other witnesses, connected her with culturally-based support groups and even protected her interests by attempting to prevent her family from finding out about the rape.

I also served as her defender. When she inadvertently began to testify about MRE 412 information, I re-advised her about her rights and helped her assert them. When a friend of the accused threatened to contact my client's family and tell them about the case, we were able to shut down this witness intimidation plot with a reprimand and a no contact order from his commander. Finally, when the case ended in a conviction with confinement, I listed myself as her agent on the DD 2704 so she could receive information while protecting her privacy.

My client exhibited courage, perseverance, and belief in our legal system that puts me at awe. And above it all, my client was not vindictive towards her perpetrator. Rather, she carried on through endless hours of interviews and testimony because "it was the right thing to do." However, without a SVC, my client indicated she couldn't have imagined going forward with the case. In all likelihood, she would have become another statistic in the pool of victims who give up on the legal system before trial even begins. The SVC Program made a difference.

TOP 5 TAKEAWAYS AS A SPECIAL VICTIMS' COUNSEL

1 It takes time to develop a relationship.

Human relationships are not built in a day or even a week. Rather, they take time to develop and are built on trust. Without trust between you and your client, you will not be able to truly understand, counsel, and advocate for the details of your client's goals. As such, if you are detailed as a SVC well in advance of a court hearing, it is imperative to make every effort to reach out to your client early and to develop a meaningful attorney-client relationship. The better you understand the finer details of your client's situation, attitude, beliefs, and goals, the more likely you will find success in representing your client—regardless of whether the accused is found guilty or not.

In other situations, you may be detailed as a SVC only a week or days before the first court hearing. You will have to balance the immediate need of acquiring information with the sensitivity of your client. Every client is different and this balancing act will be dependent on the facts of the case and the client. Your attitude, approach, and the consideration and/or application of some of the following techniques listed below will help to guide you to a more successful representation.

2 Consider using video teleconferencing and/or Skype for more intimate face-to-face meetings when you cannot see your client in-person.

As an SVC, you may not be in the same location as your client. A telephone conversation is usually

> When feasible, try to coordinate one substantive interview with all main participants for the defense and then for the government rather than multiple separate interviews.

fine to introduce yourself. However, if you need to discuss substantive details of the case and you cannot meet your client in-person, VTC, "FaceTime", or "Skype" is often the next best option. In a video call, you and your client can see each other, view body language, and pick up on other physical cues that cannot be communicated through a phone call. As such, a video call will likely help you to develop a better understanding of each other at the onset of your relationship. After you meet face-to-face or by video call, your subsequent telephone conversations will likely be more meaningful.

NOTE: Take care not to conduct a video call in an uncomfortable setting for your client. For example, a courtroom or other large room where most VTCs are located may leave your client feeling uncomfortable and/or exposed. If this is the case, consider using Skype as an alternative so you and your client can choose a more relaxed setting to talk. If you use Skype, consider setting up a professional SVC Skype profile rather than using your personal Skype profile.

3 Guard against the number of interviews where your client is required to talk about substantive details unless necessary for the case.

You are not only an advocate but also a protector of your client's best interests. This usually means you should work to ensure your client is not inadvertently forced to re-live the trauma of the sexual assault by re-telling the story unless necessary for the case. There are obviously times where your client must tell the story such as in an initial interview, hearings, and at trial. However, it is usually in your client's best interest to limit unnecessary or duplicative interviews.

You can work to limit duplicative interviews by proactively asking the defense and government when they plan to interview your client and who the participants will be. When feasible, try to coordinate one substantive interview with all main participants for the defense and then for the government rather than multiple separate interviews. For example, sexual assault cases generally have multiple trial counsels for both the defense and government and expert witnesses for both sides. In these situations, ask to have all the attorneys, expert witnesses, and paralegals present for one substantive interview for each party. This can help to avoid duplicative interviews.

Even in the majority of cases where your client's interests align with the government, it is best to limit the number of substantive discussions about the sexual assault. Many of my clients have told me that they view these substantive interviews as a "hurdle" they have to overcome to make it through the case. Every time a new interview is added, you are just moving the finish line farther and farther away. So, as SVC, try to ensure quality over quantity in relation to the hurdles your client has to jump. Your client will likely recognize you for your efforts and his/her trust in you will grow.

NOTE: Always ensure a paralegal, or other witness besides an attorney, is present in an interview in case the interviewing attorney would ever want to impeach your client. If so, you could ask the court to call the paralegal and/or other witness instead of you, if a party tries to impeach your client.

4 Avoid rushing into discussing the substantive details of the case with your client unless absolutely necessary.

On the surface, it may appear that you need to talk to your client about the nitty-gritty substantive details of the case from the outset. However, this approach is often not necessary and can even be detrimental. How you handle this with each client should be a case-by-case determination.

Some clients will naturally discuss substantive details with you early on and others may not. Your main focus in the beginning of your relationship should be to ensure that your client's safety and security needs are met. Then, you can begin to distill information about the legal process in manageable doses.

You will have to learn about the substantive details of the case at some point in your relationship to best advocate for your client, but your goal should be for those discoveries to naturally occur when your client is ready and comfortable to discuss them with you. In other words, don't force the issue. Give your client the space and time needed to open up to you.

NOTE: Consider not taking notes of attorney-client relationship discussions to avoid your notes potentially being subject to a discovery request.

5 Above all—*actively* listen so that you can effectively manage expectations of your client.

Nothing is more important than to be (i) an *active* listener and (ii) to manage expectations of your client. First, active listening means truly listening and observing your client's goals, wishes, intents, attitude, demeanor, body language, and ultimate state of mind on the case. Active listening is not a passive exercise. Rather, you can apply the 80/20 principle to active listening where you spend 80% of the time listening and 20% of the time with your client providing effective and meaningful feedback. Every client deals with sexual assault in his or her own way so there is no set formula in how to approach active listening.

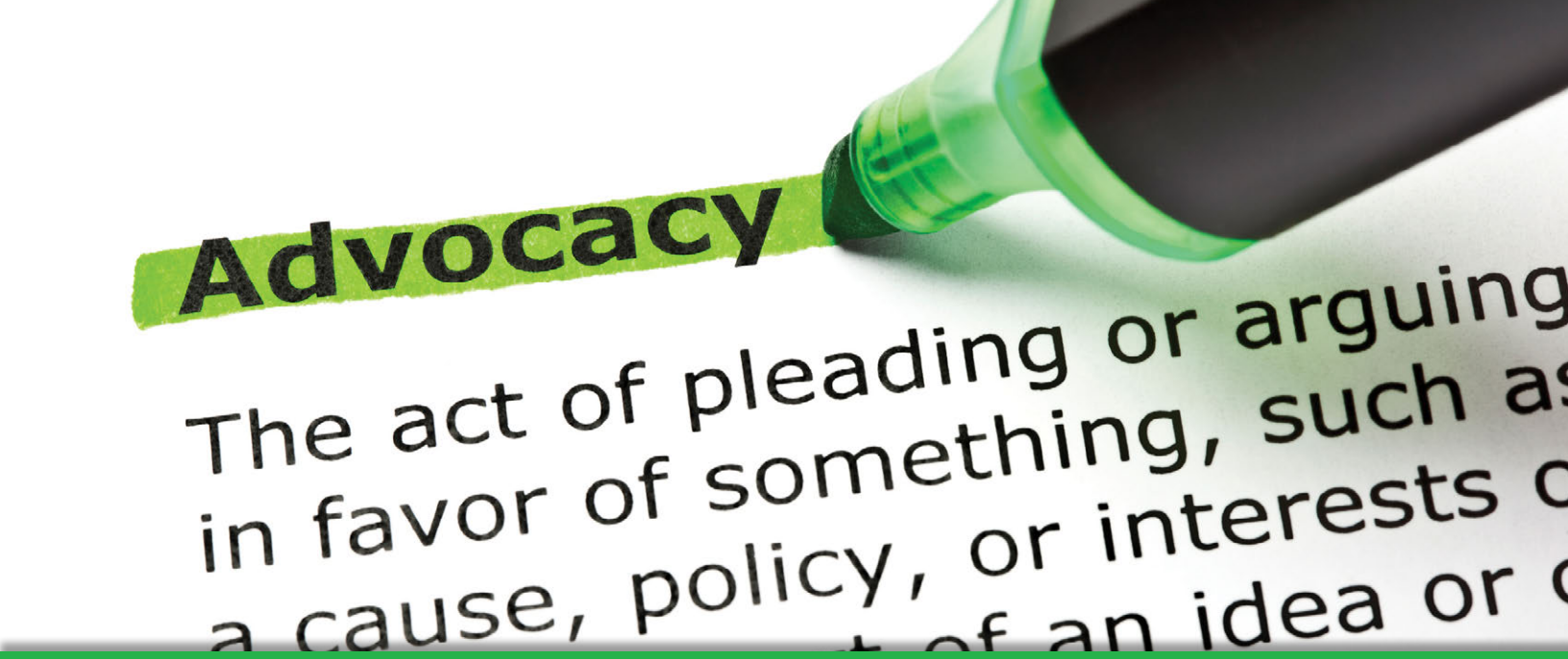
Active listening begins by just getting to know your clients. Simply ask, "How are you doing?" Ask it often, if necessary. Ask open-ended basic background questions. Find out where they are from, what are their hobbies, what are their career goals, and ask about their friends and family. You should ask them to tell you why they joined the Air Force. Let your client do the talking. As a SVC, you are not there to pry into all the affairs of your client. Rather, you are there to learn, understand, and capture your client's interests and ultimate state of mind on the case to best advocate for your client. Active listening will nurture and help to develop a relationship built on trust.

Active listening will enable you to understand what your client's expectations are regarding the case and legal process and how you can best manage those expectations. Use your legal skill set, but don't inundate your client with legalese. Provide your client with doses of the legal process in manageable sound bites. Be open and genuine in how you present the information. Don't give false impressions, and balance your client's sensitivity to the case.

Finally, there are very few absolutes in the law. This is especially true about predictions for a criminal trial. Here is one example you can offer to a client when working to manage expectations: "There are no guarantees in trial. That's why it's a trial. What a court of law decides is based on the law and certain legal burdens the government must prove. I don't know which way the case will go. There may be a conviction or an acquittal. Either way, what happened to you is real and no court of law in the world can alter that." An honest and genuine statement like this will help to show your client you can be trusted as his/her SVC.

Click link to view video

VIDEO: The new Air Force special victims council will provide representation for victims of sexual assault.



THE SCOPE OF A VICTIM'S RIGHT TO BE HEARD THROUGH COUNSEL

BY MAJOR CHRISTOPHER J. GOEWERT AND CAPTAIN SETH W. DILWORTH

Background

In January 2013, the Special Victims' Counsel Program was activated, providing victims of sexual assault detailed counsel to represent their individual interests. The program envisioned representation of victims both before actors in the administrative realms of the military justice system and, to the extent allowable, in courts-martial. The concept that a victim might be individually represented before a tribunal seemed novel to many, and was perceived by some as an effrontery to a time tested, unitary system of justice. These critics were concerned that this additional voice would be that of an interloper, dictating the course of a prosecution and infringing on the rights of an accused.

The first case to test the right of a victim to be heard through counsel was LRM v. Kastenberg.[1] LRM, the alleged victim of sexual assault, served notice on the court that she wanted to be heard through her Special Victims' Counsel (SVC), to represent her interests in hearings pursuant to Military Rule of Evidence (MRE) 412, 513, and 514. The accused in the case opposed her request, concerned that a third attorney in any of these hearings would violate his right to due process. The Military Judge concluded that LRM did not have standing to be heard by the court and that the participation of the SVC created an appearance of unfairness. He ruled that while a victim could present facts for the court's consideration, it would be inappropriate for such a person to make legal arguments through an SVC except under very limited circumstances.

LRM filed a petition for an extraordinary writ, called a writ of mandamus, with the Air Force Court of Criminal Appeals (AFCCA).[2] A writ of mandamus is simply an order by a superior court telling a lower court to bring its actions in conformity with the law. Such a writ is issued only rarely, to correct oft repeated errors or usurpations of judicial authority. LRM argued to the court that by denying her right to be heard through the SVC, the military judge had violated her procedural rights under MREs 412 and 513, the Crime Victims' Rights Act (CVRA),[3] and

[1] 72 M.J. 364 (C.A.A.F. 2013).

[2] *LRM v. Kastenberg,* Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. Apr. 2, 2013).

[3] 18 U.S.C. § 3771.

(Image courtesy of iStock)

those privacy interests protected by the Fourteenth Amendment of the United States Constitution. A lengthy and interesting argument was held, but ultimately AFCCA never reached any of these issues as it concluded that LRM was a "stranger to the court," the case not falling within the ambit of its jurisdiction under Articles 62 and 66 of the UCMJ.

The Judge Advocate General of the Air Force certified the issues in the case under Article 67 of the UCMJ to the Court of Appeals of the Armed Forces (CAAF), asking it to decide the questions of jurisdiction, the rights of a victim to be heard through counsel,[4] and whether or not to issue a writ. CAAF heard arguments from four appellate counsel and received seven Amicus Curiae briefs, encompassing a diversity of views. CAAF ruled that, as the named victim, LRM was not a stranger to the case and MRE 412 and 513 rulings are sufficiently important that an appellate court would have jurisdiction to hear an interlocutory complaint if it chose to do so. The court declined to issue a writ but instructed the trial judge to take action in conformity with its ruling.

While it concluded that a victim had a right to be heard through counsel under MRE 412 and 513, the court was careful to note that a military judge may exercise traditional discretion when hearing from a victim's counsel, e.g., hearing from counsel only via written submission. The ruling highlights the existence of a right, but leaves the fine-tuning of its implementation to trial courts.

Why a Victim Might Want to be Heard through Counsel

MREs 412 and 513 allow a victim to be present and heard in closed hearings held under these rules. A victim listening to these hearings without counsel can become lost in legal jargon and wonder what the parties and military judge are discussing. References to case precedents and statutory authorities can be confusing to any layperson, especially those who have experienced recent trauma. While traditionally victims may have discussed these issues with trial counsel, that counsel was ultimately limited by ethical obligations from providing victims legal advice about what was in their individual interest. Our system now affords a victim who is inundated with arguments and case law citations the opportunity to consult with counsel to aid him or her in making important decisions and understand the issues on which he or she may be heard.

In addition to feeling lost, victims often feel the focus of the trial should be on the act in question, and they are confused and insulted when their sexual history or mental health records become the focus. Frustration with this aspect of trial leads to negative emotions about the process. They feel they have become the subject of investigation. Victims think if they say anything, it will be used against them in cross examination. Some victims will choose to be heard through counsel to have their desires known and avoid an emotional moment in court.

Research shows that some military victims experience secondary victimization in the criminal justice system.[5] Choosing to be heard through counsel for any reason may minimize these effects.

Having a lawyer argue on behalf of a victim provides the victim the advantage of making a legal argument while removing from that argument both the personal exposure that comes with making a public statement and the victim's emotional interest in the issue. Where a victim acting alone would surely struggle to articulate his or her desires in the context of legal arguments already framed by written motions, the SVC is the victim's legal advocate who overcomes these limitations and solely pursues the victim's wishes with objectivity while guarding against the victim's perceived objectification. The victim's desire hasn't changed, but having counsel enhances the victim's ability to communicate those wishes.

A skeptic might ask why it is insufficient to have the trial counsel represent the victim's interests. An inherent problem of agency may arise when his or her interests do not align neatly with the Government's interests in the case. Victims' interests vary, but most simply want to get through the trial as quickly as possible with minimal invasion of their personal

[4] The court was asked to decide rights arising from MRE 412, 513, the Crime Victim's Rights Act and the U.S Constitution. The court only discussed MRE 412 and MRE 513 and therefore we conclude that the resolution of rights arising from other sources remains an open issue.

[5] Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCHOL. OF WOMEN Q. 97 (2005).

> Where a victim acting alone would surely struggle to articulate his or her desires in the context of legal arguments...the SVC is the victim's legal advocate who overcomes these limitations...

lives. Conversely, the Government is charged with seeking justice writ large. That greater obligation may grate against or clash with a victim's own personal and intimate interest. A trial counsel might take a position on a particular matter to avoid a possible appellate issue if they calculate that the introduction of the evidence is insufficiently harmful to their own case; they ultimately do not bear the cost of the public disclosure. As any given piece of evidence may have multiple uses, a trial counsel may not object to the defense introduction of some materials under MRE 412 or 513 because the evidence might conceivably support the prosecution's theory at trial – despite the interest of the victim in limiting disclosure. A victim may have minimal interest in participating and might be doing so only out of a sense of obligation, with little commitment to the outcome while the Government may be strongly pursuing the prosecution of a serious offense. As the Government is not actually representing a victim, they are not ethically charged with zealously representing the victim's individual interests.

For example, in a common case where a male accused faces substantial incapacitation sexual assault charges, the female victim might seek assistance from a mental health provider. The provider wants to help the victim resolve any residual conflicts or psychological damage in her life. The victim is grateful for the counseling and openly shares information regarding her strained family relationships and her depression after the assault. The mental health provider obtains informed consent and documents the conversations in accordance with the provider's regulations. Although the victim signed an informed consent form at the beginning of counseling, she thought her communications were confidential and did not realize any communications had legal implications. She requests an SVC after visiting mental health and is frustrated that all these communications may not be completely confidential and that others, including the military judge, will learn of her family problems.

In this example, the trial counsel may desire that the court review and release the records because of military law's broad discovery requirements, whether or not the defense has made a threshold showing that discoverable material exists in the records.[6] The trial counsel may also want to look at the records to determine if they have value in any sentencing hearing.

The SVC will spend the time talking the victim through the process and explain the available options. The victim better understands the process and can make an informed decision as to whether or not to release or challenge the release of those records. She is advised about the process and her options from someone whose sole obligation is to safeguard her legal interests.

If she wishes the military judge review her records in camera, her counsel can make that known to the parties prior to the start of trial. If she wishes to contest the request for an in camera review, her counsel can do so. If the government takes a position that is not correct in law or does not adequately reflect her interests, her counsel may file a motion with the court. In all of these scenarios, the victim will likely prefer to be heard through counsel. The court, after hearing her perspective from duly appointed counsel, can fulfill its duty to balance all interests and make the appropriate decision in each case.

SVC Appearance at Trial

The appearance of an attorney other than trial or defense counsel before a Court-Martial is not terra incognita. Courts-Martial have historically heard from a variety of limited participants, those persons that have a legal interest in the proceeding, such as news reporters, businesses contesting subpoenas, mental health providers, etc.[7] There is even precedent

[6] *See United States v. Klemick*, 65 M.J. 576 (N.M.C.C.A. 2006).

[7] *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F.1997); United States v. Wuterich, 67 M.J. 63, 69 (C.A.A.F. 2008) (assuming standing for CBS in part under RCM 703); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

for allowing a victim to be heard through his or her own counsel.[8]

In 1995, CAAF granted relief to two victims seeking to prevent "unwarranted invasions of privacy." In that case, CAAF ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents."[9]

LRM v. Kastenberg simply reaffirms the right of a represented participant to make an argument on a personal issue. A participant in a federal court whose personal financial records are subject to subpoena could challenge the subpoena through a lawyer.[10] While the success of that challenge will depend on the facts and law, that participant will be heard through his lawyer. Though neither the person seeking to quash a subpoena nor a victim is a party, they both have legally cognizable interests.

In contemplating victims' rights, researchers discuss victims not as parties or mere witnesses in a case, but as participants.[11] As a participant, the victim has limited standing and often serves as the primary witness in a sexual assault case. Thinking of the victim as a participant places a more appropriate label on the role of a victim, which is different than the role of other fact witnesses. The primary difference is that the victim has privacy rights that often become an issue at trial.

While restrictions may be placed on the manner in which a victim may be heard, CAAF upheld the victim's right to be heard through counsel. CAAF stated that the military judge may apply reasonable limitations on the right to be heard under authority of R.C.M. 801. In United States v. Brown, CAAF recognized the broad discretion of a trial judge to allow a victim advocate to sit next to the victim during the victim's testimony after she exhibited a great deal of emotion and appeared unable to testify without the accommodation of the court.[12] The same latitude given to military judges would also apply to restrictions in the manner in which a victim may be heard. CAAF's emphasis that limitations must be reasonable suggests that normally the SVC can file written responses to motions and give oral arguments in court. Substantial curtailment of this right does a disservice to the court by limiting the information it receives, preventing the court from fully balancing all interests involved in the case.

Practically speaking, a victim's counsel is not asking for a third table at the hearing. An SVC must be present in closed sessions in order to make an argument in the context of the subject matter of the motion. The victim has an explicit right to be present at the hearing, although some may choose not to do so because the SVC will be attendance. The SVC can observe the hearing from the gallery and stand when addressed by the court. In order to appropriately record the SVC's statements for the record, the SVC will need to speak near a microphone in the courtroom. To accommodate this, the SVC may need to speak from a podium in the well of the courtroom with the military judge's permission.

What Information Should be Provided to an SVC

While it is settled that a victim has a right to be represented by counsel, there is reasonable debate about the degree of information with which they should be provided. There are four possible levels of disclosure: (1) no disclosure; (2) disclosure of that information which is provided to the court; (3) provision of all evidence that directly relates to the victim; and (4) access to all information that is discoverable to the parties.

It is patently unreasonable for the government to provide a victim's attorney with no evidence, as the victim would then be represented by counsel that has been rendered ineffective. It is equally unnecessary for victims' counsel to receive all the evidence in a given case as they are not a party entitled to discovery.

In order for counsel to intelligently represent the victim's position, at a minimum, victims' counsel should receive those filings and accompanying evi-

[8] *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401 (C.A.A.F. 1995).

[9] *Id.*

[10] See Fed. R. Crim. P. 17(c)(2); *Khouj v. Darui*, 248 F.R.D. 729 (D.D.C. 2008) (assumes standing for a criminal witness in federal district court to quash a subpoena for personal financial records).

[11] Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, BYU L. Rev. 255, 269-70 (2005).

[12] United States v. Brown, 72 M.J. 359 (C.A.A.F. 2013).

> Providing information to the victim at an early stage will help the victim and allow counsel to intelligently advise the client without unduly compromising the validity of the case.

dence that are likely to be presented to the court.[13] Because a victim or patient has a right to present argument to the court under MRE 412 and 513, they need to understand what information the court has before it in order to intelligently and helpfully address the court.

In providing only that information that will be provided to the court, the government may inadvertently hamper SVCs in their role. The better practice would be to provide the victims' counsel with a copy of the Article 32 report. Such a document normally contains information that will be provided to a court in hearings under MRE 412 and 513 and will allow the SVC to fully understand the case, competently brief the issues and bring matters to the court's attention that might have been overlooked by the parties. There may be a natural hesitancy to disclose an Article 32 report to a victim for fear that it might taint the testimony of a victim. To that end, it should be scrubbed of Privacy Act information and provided with the understanding that certain testimony or other evidence should not be disclosed, as the victim may then appear to not be testifying from independent information. This cure would allow trusted counsel to properly advise the victim and the court without contaminating the victim as a witness.

Through the crucible of cross-examination, the trial process itself offers a mechanism to correct any tainting of the victim's testimony if the contents of the report have altered their account. By the time the case goes to trial, a victim will have made multiple reports to law enforcement, have been interviewed by trial and defense counsel, and testified at the Article 32 hearing. In this context, there is little danger from the victim learning about the nature of her case through discussions with a SVC about the content of an Article 32 report. The information he or she may learn from these discussion is information he or she would most likely glean from later interviews with trial and defense counsel.

Providing the Article 32 report will also aid the prosecution in its duty to consult with the victim about her views at the various stages of trial.[14] A victim who has access to the Article 32 report or has been advised by her counsel who has read it can make intelligent decisions about whether to support the dismissal of charges, a pretrial agreement or plea negotiations, etc. The underlying information contained in an Article 32 report had already been disclosed publically or in the victim's presence so it is not in any way privileged. The Article 32 report itself should be releasable under the Freedom of Information Act, as by the time of trial it is no longer a deliberative document and it would not contain sensitive information that could compromise an ongoing investigation. It will eventually be made part of the record of trial which must be provided to the victim and it is sensible to release it when it is of use to a victims' counsel.[15] Providing the information to the victim at an early stage will help the victim and allow counsel to intelligently advise the client without unduly compromising the validity of the case.

Conclusion

After LRM v. Kastenberg, it is indisputable that a victim has a right to be heard through counsel, though the exact contours of that right are as yet undefined. As with all courts-martial it is the behavior and motives of the parties, participants and lawyers that will determine how this right is ultimately viewed. Rather than approaching the right with antagonism and skepticism, it behooves military justice actors to view the judicial recognition of this right as an opportunity to protect the dignity of victims and their individual interests and to consider this as a positive addition to a justice system founded on the principle of the protection of individual rights.

[13] MRE 412, 513 and 514 all require that notice of the hearing be filed with the victim, which has in practice typically been satisfied by providing the victim a copy of the proponent's motion.

[14] AFI 51-201, Administration of Military Justice, Chapter 7.12.12.

[15] 10 USC § 854.

Air Force Rule of Professional Responsibility 8.3:

The Duty to Report the Misconduct of Others and the Consequences of Failing to Do So

BY LIEUTENANT COLONEL THOMAS W. MURREY JR.

Many attorneys find the idea of reporting a fellow attorney's misconduct a distasteful proposition. Although such reluctance is natural, attorneys actually have little leeway when they have knowledge of substantial misconduct by another attorney. The Air Force Rules of Professional Conduct (AFRPC) address this issue, although few written legal opinions address this rule and what little guidance is provided elsewhere seems vague. Despite these problems, Rule 8.3 packs a potent punch. Not only does Rule 8.3 require attorneys to report the ethical violations of others, but those who fail to make the report can face severe disciplinary consequences themselves.

Not only does Rule 8.3 require attorneys to report the ethical violations of others, but those who fail to make the report can face severe disciplinary consequences themselves.

The American Bar Association's Model Rules of Professional Conduct serve as the basis for the Air Force Professional Responsibility (PR) rules as well as the PR rules for most states. Air Force Rule of Professional Conduct 8.3 is titled "Reporting Professional Misconduct," and reads:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the AFRPC that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(Image courtesy of iStock)

> Put simply, if lawyers do not police their profession and instead turn a blind eye to serious misconduct by their fellow attorneys, the public will lose faith in the legal profession as well as the legal system.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.[1]

Most states adopt the first half of Rule 8.3(a) verbatim and then modify the last clause that instructs the lawyer where to report a violation.

At first glance, Rule 8.3 appears fairly straightforward. In practice, the Rule is full of nuance and ambiguities. Little published guidance on the subject exists, complicating an attorney's attempt to understand his duties under the Rule. However, one aspect of Rule 8.3 that is clear: the mandatory nature of the reporting requirement. The Rule mandates reporting with the unequivocal command "**shall** inform the appropriate professional authority." The explanation for mandatory reporting is simple: the legal profession regulates itself. The Rule goes beyond a mere suggestion or invitation to report misconduct. Rule 8.3 places an absolute requirement on attorneys to report certain types of misconduct to the appropriate bar authority. The arguments for this requirement maintain that such duties enhance the prestige of the legal profession in the eyes of the public while at the same time promoting professionalism. The standard and its purpose may have been best explained by the Colorado Supreme Court in the attorney disciplinary hearing *In The Matter of James DeRose:*

> Attorneys must adhere to high moral and ethical standards. Truthfulness, honesty, and candor are core values of the legal profession. Lawyers serve our system of justice as officers of the court, and if lawyers are dishonest, then there is a perception that the system must also be dishonest. Attorney misconduct perpetuates the public's misperception of the legal profession and breaches the public and professional trust.[2]

Put simply, if lawyers do not police their profession and instead turn a blind eye to serious misconduct by their fellow attorneys, the public will lose faith in the legal profession as well as the legal system.

The Air Force and RPC 8.3

"TJAG Policy Memorandum: TJAGC Standards-5" provides guidance for Air Force lawyers contemplating a Rule 8.3 issue. Paragraph 7 states that "attorneys will report suspected or alleged violations of the Rules and Standards by another attorney subject to this policy to:"

1. The subject's supervisory MAJCOM SJA;
2. The Commander, Air Force Legal Services Agency (AFLSA/CC), in the case of personnel assigned to AFLSA;
3. To TJAG, in the case of attorneys not assigned to a MAJCOM or AFLSA.[3]

TJAGC Standards-5 applies to a much broader practice group than in the civilian sector, covering uniformed lawyers, civilian lawyers employed by the Air Force, Air Force paralegals, non-lawyer assistants, e.g., volunteers, host-nation lawyers and paralegals, and "outside" or civilian lawyers, paralegals, and their assistants who practice in AF courts.[4]

Once an allegation is made that an Air Force attorney violated a Rule of Professional Conduct, an Inquiry Officer (IO) may be appointed to the case.[5] If appointed, the IO conducts an investiga-

[1] AFRPC is almost identical to the ABA Model Rule 8.3.

[2] *In re DeRose*, 55 P.3d 126 (Colo. 2002).

[3] Air National Guard Judge Advocates make their reports to the ANG Advisor to TJAG.

[4] See AFRPC 8.5.

[5] See TJS-5, para. 8(c). An IO not appointed in every case. Sometimes only an initial

tion that includes gathering all relevant information, obtaining sworn statements from witnesses, as well as interviewing the subject of the alleged violation. If the allegations also involve criminal misconduct, TJAG can defer the investigation until the criminal charges are handled.[6] The IO then prepares a report using a "preponderance of the evidence" standard for the conclusions reached, leaving out any recommendations as to case disposition. The report is then submitted to either the MAJCOM SJA or TJAG. At this point, the MAJCOM SJA can return the report to the IO for more inquiry, forward it with recommendations to TJAGs Professional Responsibility Administrator (TPRA), or it can be closed by TJAG.[7] If the TPRA does not close the case, the TPRA can refer the report to the Advisory Committee. This committee has no investigatory powers and does not talk to witnesses or the subject, but "discusses" the case before preparing a report with recommendations.[8] Ultimately, based on the investigation and the recommendations provided, TJAG makes the final decision on how to dispose of the allegations.

Analyzing The Problems Of Rule 8.3

By placing an affirmative duty on attorneys to report the misconduct of other attorneys, Rule 8.3 creates a situation for attorneys that the Rule does not specifically address. Failure by an attorney to report substantial misconduct of another attorney can lead to the non-reporting attorney being disciplined. With so much at stake, you would expect the rule to be thoroughly explained in the commentary or by caselaw. Instead, attorneys face a Rule that creates subjective standards with little guidance to aid in the decision-making process. The major ambiguities of Rule 8.3 involve the definitions of "knowledge" and "substantial," the friction with Rule 1.6 (Confidentiality), as well as the timeframe for reporting violations. Published guidance for the military rule is almost non-existent. State and federal court opinions provide military attorneys the best answers to their Rule 8.3 dilemmas.

What Constitutes Knowledge, and How Much Is Enough?

Before an attorney can be disciplined for failing to report misconduct, the disciplinary authority must have evidence that the attorney had "knowledge" that another attorney committed a violation of the Rules. The case of *Attorney U v. The Mississippi Bar*, 678 So. 2d 963 (Miss. 1996), contains one of the best reported analyses of what constitutes knowledge under Rule 8.3. In *Attorney U*, the Mississippi Supreme Court confronted the familiar problem of defining the "knowledge" requirement of the Rule, and quickly came to the conclusion that the Mississippi Rules of Professional Conduct failed to provide a satisfactory definition. The Court then began to search for help in opinions issued by other states, looking at Maine's "substantial degree of certainty" standard, Nebraska's "more than a suspicion" standard, New Mexico's standard of "a substantial basis for believing a serious ethical violation has occurred," New York City's requirement that a lawyer be in "possession of facts that clearly establish a violation of the disciplinary rules," and the District of Columbia's rule that an attorney must have "a clear belief that misconduct has occurred." The respondent in the case asked the court to impose a standard of "personal knowledge," meaning knowledge that would allow a person to testify as a witness in court. The Court declined and opted for a higher standard:

> The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects.

The Court also explained that to really understand what knowledge an attorney might have of another's misconduct, the disciplinary board must look at circumstantial evidence. Otherwise, the board would be limited to accepting whatever the responding attorney told the board he knew. The Mississippi Supreme Court used a "clear and convincing" standard to make their determination, a standard that most states have followed. Each state may have its own understanding of the definition of "knowledge",

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review is done on available evidence and case is recommended for closure.

[6] See TJS-5, para. 7(f).

[7] See TJS-5, para. 8€. Review TJS-5 for a different process for senior attorneys, details not included here.

[8] See TJS-5, para. 9.

> If an attorney only suspects that another attorney has committed a reportable offense, there is no duty to conduct a private investigation to confirm those suspicions.

but no other court has analyzed and wrestled with what constitutes knowledge like the Mississippi Supreme Court.

Despite the statements that attorneys must "police their own," there is one non-requirement that all jurisdictions agree upon. If an attorney only suspects that another attorney has committed a reportable offense, there is no duty to conduct a private investigation to confirm those suspicions. Policing one's profession does not mean that an attorney must turn into a private detective and sleuth for evidence of attorney misconduct. The "knowledge" needed to report another attorney would appear to be the type of knowledge an attorney would obtain from his or her normal every day duties. Although extraordinary circumstances could lead to an attorney learning of another attorney's misconduct, most reported cases involve "knowledge" being obtained in the ordinary course of practicing law.

The knowledge requirement of Rule 8.3 sometimes serves unexpected purposes. Courts occasionally use Rule 8.3 to maintain order and decorum in their courtroom when opposing attorneys begin casting allegations of misconduct at each other during trial. In *Balerna v. Gilberti, et al.*,[9] in federal district court in Massachusetts, attorney Coppola called attorney Gilberti to the stand, and during examination accused Gilberti of two crimes. The court took a recess to allow the parties to calm down, then came back with its own shot across the bow of attorney Coppola. The court told Coppola of its concern over his accusing another attorney of criminal offences, but there was another concern, explaining:

> This is not only defamatory, [b]ut for the litigation privilege, but it's also a violation of your responsibility under Rule 8.3 of the Rules of the Board of Bar Overseers. Rule 8.3 states: If a lawyer is aware that another lawyer had committed an unprofessional act that questions their fitness to serve as counsel, you have an obligation to report that to the Board of Bar Overseers.
>
> I doubt you've done that in this case. So I suggest as we go forward you be very careful how you frame these questions.

The message was clear—be very careful with your accusations of misconduct, because if you have not reported the alleged misconduct through the appropriate channels, you might be in line for discipline yourself. Post-trial, the court ordered Coppola to respond to a show cause order as to why he should not face sanctions for making baseless accusations against Gilberti, all the while holding Coppola's failure to report under Rule 8.3 over his head.

The Fifth Circuit Court of Appeals used a similar ploy in *Buford and Buford v. Rowan Companies and Vidrine*, 994 F.2d 155 (5th Cir. 1993). Responding to a defense counsel suggestion that the plaintiff's attorneys were filing fraudulent lawsuits, the court used a footnote to point out that "if an attorney has unprivileged factual knowledge that another attorney has engaged in unethical conduct, he is *obliged* to report the violation to the proper authorities."

How Much Substance is in "Substantial"?

When confronted with a potential reportable incident, an attorney must first ask, exactly what acts are reportable? Rule 8.3(a) defines a reportable incident as "a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects". The key word in this clause is "substantial." The word "substantial" suggests that only actions considered serious in nature should be reported. Run of the mill disputes over late discovery likely do not fall into the "substantial" category, nor do an attorney's repeated bad habits. The one thing everyone agrees upon is that attorneys are not required to report minor infractions.

[9] 2010 U.S. Dist. LEXIS 124639.

The Terminology section of the ABA Model Rules defines "substantial" as "a material matter of clear and weighty importance."[10] This definition provides little help and ambiguity still exists. The Comments section to ABA Model Rule 8.3 provides attorneys with more help defining "substantial":

> This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Most states use the same definition. For example, the Comments to the Colorado Rules of Professional Conduct for Rule 8.3 also explains that "the term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

The problem with trying to define "substantial" is that the word is so subject to interpretation that there is no universal understanding of the term. The reporting lawyer is placed in a position of making a subjective judgment as to whether the violation raised a "substantial" question to the violator's honesty, trustworthiness and fitness. If the reporting attorney guesses wrong, he can then become the subject of bar discipline himself.

The Friction With Rule 1.6

Rule 8.3(c) allows an attorney to not report an offense if the obtained information is otherwise protected by Rule 1.6. AFRPC 1.6 deals with client confidences and states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

Paragraph (b) includes a sub-list of circumstances in which a lawyer may reveal confidential information, such as to prevent a death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft or weapons system. Once again, this is a murky area that has been the subject of more reported civilian cases on Rule 8.3 than any other issue.

The most well-known civilian case involving Rule 8.3 and its relationship with Rule 1.6 is the Illinois case of *In re James H. Himmel*.[11] *Himmel's* notoriety comes from the fact that it was one of the first reported disciplinary cases involving Rule 8.3 and that it resulted in a severe punishment. The roots of the case begin at a time before Himmel was even a participant in the underlying case. A woman named Tammy Forsberg was involved in a motorcycle accident. She hired an attorney named Casey to represent her, agreeing to pay Casey one-third of any monies he recovered. Casey recovered $35,000.00, but never gave Forsberg her two-thirds share of the recovery. At that point, Forsberg hired Himmel to sue Casey and recover her share of the proceeds. Like Casey, Himmel was to receive one-third of any recovery. Casey agreed to settle for $75,000.00, but only if Forsberg agreed to not initiate any criminal, civil, or attorney disciplinary proceedings against Casey. Naturally, Casey breached the agreement and a suit was initiated against Casey, eventually ending in a $100,000.00 judgment against him. From an ethics standpoint, Casey's problems aside, Himmel failed to inform the state disciplinary commission of Casey's actions under Rule 8.3. Himmel next entered the attorney disciplinary world in Illinois.

Himmel's first defense was that his client filed a complaint with the disciplinary Review Board, and that action relieved him of his duty to file a complaint. The Court concluded that the client's actions did not relieve Himmel of his duty to report. Regardless of what his client did, Himmel had a duty to report as well. Himmel then argued that his client directed him not to file a complaint against Casey. The Illinois Supreme Court noted that Himmel had no legal authority to support his position, and that an attorney could not choose to ignore his duties because his client asked him to do so. Key to the

[10] See ABA Model Rule 1.0(l)

[11] See 125 Ill. 2d 531; 533 N.E. 2d 790 (Ill. 1988).

decision was the Court's finding that the information obtained by Himmel was unprivileged, because the information related to Himmel by Forsberg was not done so in confidence. Forsberg's communications lacked confidentiality because they were spoken to Himmel in the presence of Forsberg's mother and fiancé, who were not parties to the case, thus destroying any claim of confidentiality by Himmel. After dis-assembling all of his defenses, the Illinois Supreme Court suspended Himmel from the practice of law for one year.

The Arizona Supreme Court dealt with a similar issue in the case styled *In The Matter of a Member of the State Bar of Arizona, Lawrence Edwin Condit*[12] and basically came to the same conclusion as Illinois in *Himmell*. However, not all states have lined up with Illinois and Arizona on this issue. The Rhode Island Supreme Court dealt with issues almost identical to the ones in *Himmel* and *Condit* in a matter referred to as *In re Ethics Advisory Panel Opinion No. 92-1*.[13] The attorney in question (Attorney #2) was hired to represent a client against another attorney (Attorney #1) who had stolen money from the client during his earlier representation. During his investigation into the alleged embezzlement, the Attorney #1 admitted to Attorney #2 that he did in fact embezzle the funds in question. Attorney #1 then repaid the client the entire amount he had stolen, at which point the client instructed Attorney #2 not to report the Attorney #1 to the state bar. Rhode Island took a very broad view of Rule 1.6, finding that Attorney #1's admission did not have to be reported because Attorney #2 obtained the confession during his representation of his client, and was thus prohibited by Rule 1.6 from reporting Attorney #1. The Court did note their concern with the outcome and suggested that amendments to the Rhode Island Rules of Professional Conduct be considered.

Another issue with Rule 8.3 is that it does not specify a length of time in which a report of misconduct must be made to the appropriate authorities

How Late is Too Late To Report: Best Friends and Death-Bed Confessions

Another issue with Rule 8.3 is that it does not specify a length of time in which a report of misconduct must be made to the appropriate authorities. The state of Louisiana took up such an issue in the *In Re: Michael G. Riehlmann Attorney Disciplinary Proceedings*, 891 So 2d 1239 (La. 2005). Michael Riehlmann was a New Orleans attorney who had gone to law school and was close friends with an attorney named Gerry Deegan. Both men had worked together in the Orleans Parrish District Attorney's Office as prosecutors in the 1980s before leaving for private practice. In April of 1994, Deegan asked Riehlmann if he would meet him for a drink. During the course of the evening, Deegan informed Riehlmann that he was dying of colon cancer and had very little time left to live. Deegan got one last thing off his chest that night: he confessed to Riehlmann that in a murder case he prosecuted, he had not provided the defense with an exculpatory blood test that would have exonerated the accused. Riehlmann later described his reaction as "surprised" and "shocked". He claimed he told Deegan he needed to "remedy" the situation. Riehlmann did not act on the information Deegan provided him, and Deegan died three months later without taking corrective action.

Five years later, counsel for the defendant in the death penalty case that Deegan had prosecuted discovered the exculpatory blood test, just one month before the defendant was scheduled to die by lethal injection. When Riehlmann read in the local newspaper of the defense team's discovery, he realized that this was the case Deegan told him about. Riehlmann contacted the defense team and provided an affidavit about Deegan's confession, then reported the incident to the Louisiana Office of Disciplinary Counsel. When asked by the ODC why he had not reported Deegan's confession earlier, Riehlmann explained that when he received Deegan's confession he was

[12] See 1995 Ariz. LEXIS 122.

[13] See 627 A. 2d 317 (R.I. 1993).

under stress because he had just learned his best friend was dying, he had just left his wife and three children, he was under the care of a psychiatrist and was taking anti-depressants, and his two year-old son had just undergone open-heart surgery. Unmoved, the ODC filed formal charges against Riehlmann alleging that he violated Rule 8.3 by failing to report professional misconduct and that he also violated Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.

As a second line of defense, Riehlmann argued that he did, in fact, report Deegan's confession, when he reported it to the District Attorney and the Criminal District Court. The Court had two problems with Riehlmann's defense. First, the reporting requirement was that an attorney must report to a tribunal which had the power to act on attorney misconduct. Reporting to the death row inmate's attorneys, the district attorney and the criminal court did not discharge Riehlmann's duties under Rule 8.3. Second, and most obviously, Riehlmann waited five years to tell anyone. The court said that even though a time requirement for reporting is not mentioned in the Rule, five years was clearly too long. The Louisiana Supreme Court found that Riehlmann's failure to report Deegan's confession constituted a "serious offense", and ordered that Riehlmann be publicly reprimanded.

There are two lessons attorneys can take away from *Riehlmann*. First, even though Rule 8.3 lacks a defined time period to report an offense, it does not mean that the reporting attorney can report at his leisure. Reports should be made as soon as practicable. Second, when an attorney friend asks you to have drinks and tells you he needs to get something off of his chest, beware.

Judges Too: Rule 8.3 and the Hard to Believe.

The requirement of Rule 8.3 is not limited to attorneys reporting other attorneys. Rule 8.3(b) requires attorneys to also report judges who engage in misconduct. The Model Rules version of Rule 8.3(b) reads:

> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

Although most attorneys would be reluctant to report a judge for misconduct, attorneys have been disciplined for their failure to do so.

From the category of "this must be made up" comes the case of "In Re: Arnold", involving an Illinois judge and an attorney who regularly practiced in the judge's courtroom.[14] The judge in question had an interesting side business: growing marijuana in his basement then selling the product. Ultimately, federal drug agents arrested the judge for his extra-judicial gardening. As the investigation progressed, law enforcement learned that Attorney Arnold was not only a practitioner before the judge, he was also one of the best customers for the judge's side business of selling cannabis. For possessing a controlled substance and not reporting a judge who was selling illegal drugs, the disciplinary board suspended Arnold from the practice of law for a year followed by a two-year probationary period. In his defense, Arnold explained that he failed to report the judge because he did not want to lose his source for marijuana.

Conclusion

RPC 8.3 can be a difficult tightrope for attorneys to walk. When considering whether or not to report a fellow attorney for misconduct, an attorney must ask himself if he possesses information that constitutes "knowledge" under the Rule and if that knowledge raises a "substantial" question as "to that lawyer's honesty, trustworthiness or fitness as a lawyer." Then the attorney must analyze the source of his knowledge in relation to Rule 1.6 to make certain he is not violating client confidences if he does file a report. Lastly, the Air Force attorney must file the report with the appropriate authority and do so in a timely manner. Although Rule 8.3 can be troublesome to navigate, attorneys should understand that a false step can lead to their own disciplinary hearing.

[14] 93 SH 436, M.R. 10452 (1994).

FOUR-STAR LAWYER:
THE JOURNEY OF GENERAL RUSSELL E. DOUGHERTY

BY MR. THOMAS G. BECKER

Here's a trivia question for you the next time you're at a JAG Corps conference:[1] Who is the only judge advocate to attain the grade of four-star general? It's a trick question, of course—no one can attain four-star rank *while serving* as a JAG. But it can happen to a *former* JAG, and the only one to have achieved that distinction was General Russell E. Dougherty. And in his journey lies a fascinating tale of the development of the Air Force, military law, and The Judge Advocate General's Corps.

> Who is the only judge advocate to attain the grade of four-star general?

Charter Airman and Combat JAG

A native Kentuckian, General Dougherty graduated from Western Kentucky University and the University of Louisville School of Law. He began his service to the United States as an FBI agent, but soon found his services needed elsewhere when America entered World War II. He became an Army Air Force officer and pilot through the Aviation Cadet Training Program, a sort of Officer Training School

[1] I know, we don't have conferences any more. But if we ever do, you'll be ready!

(Image courtesy of Wikipedia)

“While performing legal duties involving courts-martial, legal assistance, and contracts, he maintained his flying hours, served as an instructor pilot and intelligence officer, and even flew combat missions during the Korean War.

just for aviators, through which the cadet was both commissioned and awarded wings.[2]

After serving in combat aboard B-29s and as an instructor pilot, then–Captain Dougherty remained in the service and became a charter member of the brand-new U.S. Air Force on 1 July 1948. General Dougherty's newly-issued Air Force serial number (9985) reflected his relative rank on Air Force Day One—he was the 9985th most senior member of the Air Force![3] And here, from the JAG Corps' perspective, is where General Dougherty's career becomes interesting.

From 1948 (when he served at North Field, Guam) through 1952, (including assignments with Far East Air Force in U.S.-occupied Japan and HQ Air Logistics Command at Wright-Patterson AFB, Ohio), then–Captain and Major Dougherty served as both an assistant staff judge advocate **and** Air Force pilot. While performing legal duties involving courts-martial, legal assistance, and contracts, he maintained his flying hours, served as an instructor pilot and intelligence officer, and even flew combat missions during the Korean War.[4]

"Jungle Law"

General Dougherty's descriptions of his JAG practice are in marked contrast to that of today's military lawyer. Admitting that he didn't know much about military justice in 1948 Guam, General Dougherty and his JAG colleagues relied on the "straight forward rules of evidence" and the 1928 Manual for Courts-Martial, which he described as "easy to read—and small!"[5] In General Dougherty's words, Guam in the late 1940s was at a "societal low point" with the armed forces posted there in a "post-war period of let-down and lethargy," resulting in "rampant" crime, all of which produced a "magnificent training ground for young trial lawyers."[6] Guam was also a possession of the U.S. (not a territory as it is today), under martial law, and a virtual "Naval fiefdom" governed at the whim of the admiral in command—"we called it 'jungle law' and we weren't far off."[7]

The practice of military law on Guam in the post-war 1940s featured practices that would be alien to today's judge advocates, as well as some practices that are now standard. General Dougherty recruited two second lieutenants (non-lawyer pilots who had lost their cockpits in the post-war drawdown), trained them as "paralegals," and "trade[d] them off [in] trial counsel and defense duties."[8] Today, fully-qualified lawyers representing both sides in courts-martial are the norm,[9] and the practice of trading off trial and defense duties in the Air Force JAG Corps

[2] The Aviation Cadet Training Program (ACTP) began in 1907 and was the principal method for training Army Air Force aviators and, after 1947, Air Force pilots, bombardiers, and navigators, through the Korean War. The program for pilots continued until 1961, although a navigator version continued to 1965. *See, generally*, Bruce Ashcroft, We Wanted Wings: A History of the Aviation Cadet Program (AETC Office of History & Research, 2005).

[3] Memorandum from R. E. Dougherty to E. F. Rodriquez, Jr., 2 Oct 1992, ("Dougherty Memo") at 1.

[4] General Dougherty's Korean War combat missions included airlift evacuations from Kimpo Air Base in Seoul and K-3 at Taegu as North Korean soldiers were overrunning the base. *Id* at 7.

[5] *Id* at 2. Compare today's Manual for Courts-Martial, United States (2012), which weighs in at about four pounds.

[6] Dougherty Memo at 2. Those of us who entered the JAG Corps in the late 1970s, as the U.S. military was winding down from the Vietnam War, may recognize this state of affairs in the Air Force of that era.

[7] *Id* at 2-3. General Dougherty tells one anecdote where the admiral in command was hosting a Congressional delegation and ordered up a round of cocktails from a bar across the street. The admiral's aide reminded the admiral that the Guam Code prohibited alcohol in government buildings, to which the admiral responded with an order to his secretary to take his dictation for a new law. *Id* at 3.

[8] *Id* at 4.

[9] *See* Art 27(b), (c), UCMJ, 10 U.S.C. § 827(b), (c) (qualifications of trial and defense counsel at general and special courts-martial). *See also* Art 19, UCMJ, 10 U.S.C. § 819 (for jurisdiction to adjudge a Bad Conduct Discharge, an accused before special court-martial must be defended by counsel with qualifications under Art 27(b)). Many in today's society might express shock at anyone facing a criminal conviction without representation by a lawyer. But recall that General Dougherty's Guam experience was 15 years before **any** American defendant facing prison had the right to appointed counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). The Articles of War of 1920 (under which General Dougherty and his colleagues practiced) provided "defense counsel" for the accused at general and special courts-martial, although it didn't specify their qualifications.

ended with the advent of the Area Defense Counsel program in 1974. In 1949, military personnel on Guam filed federal income tax returns for the first time. As General Dougherty put it, "I can't describe the legal assistance problem associated with helping 14,000 uninitiated people file their first income tax returns!"[10] Income tax assistance programs run by Air Force legal offices, including those at large bases with surrounding retiree communities, are now standard legal assistance activities.

The rights of military members who may be suspects in an investigation were also limited, if non-existent, during General Dougherty's time as a judge advocate. The requirement of Article 31[11] rights advice was only a gleam in someone's eye in 1948-1949,[12] and notions about expectations of privacy for service-members were unheard of. General Dougherty recounted one notorious Guam case where a base librarian was kidnapped, raped, mutilated, and left staked out in the jungle to die. Illustrating the state of military law at the time, and the power of the local military commander over everyone on the island, "[a]ll males on the island were inspected (naked) for cuts and scratches," apparently without consent or authorization based on probable cause.[13]

The "Bomb Shell" Falls

We now fast-forward to 1952. Then–Major Dougherty is at HQ Air Logistics Command (ALC)[14] working every lawyer's dream job—reviewing Air Force contracts. Strangely, General Dougherty found it "pretty dull pickings" and looked forward to his weekend Instructor Pilot duties on the so-called "Wright Flyer," the daily courier back and forth to Bolling Air Force Base in Washington, D.C.[15]

In the meantime, the UCMJ had become law in 1951, and the services' Judge Advocates General now had unprecedented authority over judge advocate assignments.[16] The Air Force's first TJAG, Major General Reginald Harmon, decided to exercise this power to specialize his JAGs as full-time legal officers. As General Dougherty describes, the "bomb shell fell—The Judge Advocate General revoked the rated status of those pilots and navigators who were designated as Judge Advocates."[17] Despite advocacy through Pentagon surrogates, and even personally at a dinner party at the Dougherty home, General Harmon did not change his mind—he wanted his designated JAGs to be full-time lawyers, not part-timers "with an eye on pilot and navigator duty."[18] Sweetening the pot, General Harmon offered to fund then-Major Dougherty and another rated JAG, also at HQ ALC, to attend graduate study in International Law at McGill University in Montreal.[19]

Then–Major Dougherty did not accept General Harmon's offer and continued his efforts to reverse General Harmon's decision. Receiving permission to do so, he pleaded his case personally to the Air Force Deputy Chief of Staff for Personnel, Lieutenant General Laurence Kuter.[20] It was a bad Pentagon day for General Kuter, who had only a minute to speak to the young major. In a scene familiar to anyone with staff judge advocate experience General Kuter could only offer then–Major Dougherty the opportunity for a"walk-and-talk,"[21] General Kuter invited him to make his arguments while walking to the general's next meeting. Then–Major Dougherty did so and convinced General Kuter that General Harmon had exceeded his authority—TJAG may determine the duties of judge advocates, he may remove officers from the judge advocate rolls, but he

[10] *Id.*

[11] *See* Art 31(b), UCMJ, 10 U.S.C. § 831(b).

[12] *Compare* Articles of War, 1920, art 24 (compulsory self-incrimination prohibited during investigation or other proceedings, but no requirement to advise military member of that right prior to questioning).

[13] Dougherty Memo at 5. Compare Mil.R.Evid. 312(b).

[14] ALC was one of the predecessors to today's Air Force Material Command at Wright-Patterson AFB.

[15] *Id* at 9. This is not a mistake–there used to be runways and flight operations on Bolling AFB. Fixed wing flight operations were ended in 1962 and the runways gave way to housing in the 1970s, no doubt to the relief of air traffic controllers at Washington National (now Reagan National) Airport directly across the Potomac.

[16] *See* Art 6(a), UCMJ, 10 U.S.C. § 806(a) ("…assignment for duty of judge advocates… shall be made upon the recommendation of the Judge Advocate General…"). Congress solidified TJAG's authority to direct JAG duties in 2008, as well as clarifying that TJAG is the principal legal advisor to the Secretary of the Air Force and other officials in the Department of the Air Force. 10 U.S.C. § 8037(c)(1), (2); Pub. L. 110-181, Div. A, Title V, §543(c), 122 Stat. 115 (28 Jan 2008).

[17] Dougherty Memo at 10.

[18] *Id*.

[19] In the words of the other concerned JAG officer attending the dinner, "I think the damn TJAG is trying to bribe us!" *Id*.

[20] General Kuter was later named Commander of Air University at Maxwell Air Force Base and, in 1957, appointed the first commander of Pacific Air Forces. Veterans of assignments to Okinawa will remember Kuter Boulevard as one of the main drags on Kadena Air Base.

[21] Graduates of GATEWAY will remember the "walk-and-talk," "elevator speech," and other exercises in effective 30-second communication between JAGs and senior officers, which are featured in Mr. John Martinez's "Communicating with the Stars" lesson.

may not revoke aeronautical orders. General Kuter promised "we will get this thing straightened out."[22]

"I married an Air Force pilot"

General Kuter did get it straightened out—sort of. General Harmon's decision to require designated JAGs to be full-time lawyers was confirmed, but his purported revocation of the rated status of General Dougherty and others similarly situated was rescinded. So, the JAG/pilots/navigators now had a choice—keep flying as full-time operators, or give up the flight deck and be judge advocates all day, every day. According to General Dougherty, of the approximately 250 who were given this choice, about half stayed as JAGs and half, including the general, stayed with their airplanes.[23]

Although General Dougherty would have rather avoided this choice, he said "in many respects, it was no choice at all. I had joined the Air Force because I wanted to be a pilot, and I wanted to stay that way."[24] The general's wife, Gerry, echoed this sentiment: "I married an Air Force pilot, and I've been happy with my life—no need to change it for me."[25] And that was that.

"Another story"

As General Dougherty wrote, his decision to leave JAG duties behind ended one chapter of his Air Force life, but "the next 25 years is another story."[26] The general's flying duties took him to General Curtis LeMay's Strategic Air Command, arguably the heart of the Cold War Air Force and the principal force deterring Soviet attack against the United States and its allies.[27] General Dougherty piloted tankers for SAC and, in later assignments, planned SAC, Air Force, and joint operations, ranging from SAC's nonstop around-the-world B-52 flight in 1957 to the joint U.S.-United Nations rescue mission to Stanleyville (now Kisangani), Congo, in 1964. In 1972, he was promoted to four-star general and assigned as Chief of Staff for Supreme Allied Command Europe. On 1 August 1974, he became the SAC's eighth commander-in-chief,[28] where he served until his Air Force retirement on 1 October 1977.

Upon retirement from active duty, General Dougherty returned to the practice of law as a partner at the Washington DC law firm of McGuire, Woods, Battle and Booth. He remained an active lawyer and air power advocate until his death in 2007 at age 86. We remember him as the second recipient of The Judge Advocate General's Special Service Award in 1989, the namesake of Dougherty Hall on Maxwell Air Force Base (the building that began life as the "JAG Dorm" and, among us old-timers, sometimes is still referred to as such[29]), and a special friend to the JAG Corps. A plaque commemorating General Dougherty has an honored place in the lobby of Dougherty Hall to this day.

General Russell E. Dougherty was unique in Air Force history. It's not unusual for a rated officer to become a JAG. And, in General Dougherty's time, many JAGs remained pilots and navigators when forced to make that choice. But of those officers who shared JAG and aviator status, only General Dougherty holds the distinction of attaining the highest grade in the Armed Forces of the United States, as well as command of freedom's most powerful arsenal.[30]

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[22] *Id* at 10-11.

[23] *Id* at 11. General Dougherty's 2007 obituary states he was one of 98 rated JAGs that chose flying over law. The Reporter, vol. 34 no. 3 at 39 (Fall 2007). One of the rated officers that decided to stay as a JAG was Harold R. Vague, later Major General Vague and the Air Force's fifth Judge Advocate General. The author has a letter signed in September 1977 by General Vague designating the author as a judge advocate. General Vague apparently considered this his crowning achievement, as he retired on 1 October 1977.

[24] Dougherty Memo at 11. General Dougherty's obituary quotes the general as saying flight pay was also an important factor in his decision, as he had three small children at the time including recent additions of twin boys. The Reporter at 39.

[25] Dougherty Memo at 11.

[26] *Id*.

[27] *See, generally*, L. Douglas Keeney, 15 Minutes: General Curtis LeMay and the Countdown to Nuclear Annihilation (2011).

[28] During General Dougherty's time and until it's standdown in 1992, the Strategic Air Command had been designated a "Specified Command," that is, a single-service command dedicated to supporting a broad continuing mission as specified by and under the direction of the Joint Chiefs of Staff. FM 110-5, Joint Action Armed Forces at 34 (19 Sep 1951). SAC's specified missions were strategic deterrence and global strike. Like the Unified Commands of the era, the commanders of Specified Commands carried the title "Commander-in-Chief" and that was General Dougherty's title. This practice was discontinued in 2002 by order of then-Secretary of Defense Donald H. Rumsfeld, thereby reserving the title "Commander-in-Chief" for the President.

[29] The original plan for the Dickinson Law Center construction included a dormitory near the School that would be under JAG School administration and dedicated for JAG School students. In the intra-Air Force negotiations for control of the buildings associated with this project, the so-called "JAG Dorm" was absorbed into the 42nd Air Base Wing billeting operations and its only surviving association with the JAG Corps is its being named for General Dougherty. One other building on Maxwell Air Force Base is also named for a judge advocate—Morehouse Hall, an Officer Training School dormitory, is named for Major General David C. Morehouse, the tenth Judge Advocate General of the Air Force.

[30] General Dougherty was not the only lawyer to attain four-star grade. General Dougherty's successor as CINC SAC, General Richard H. Ellis, was a lawyer in private practice when recalled for duty in the Korean War and then decided to make a career in the Air Force. General Ellis, however, was never a judge advocate.

MONSOON
THE INDIAN OCEAN AND THE FUTURE OF AMERICAN POWER

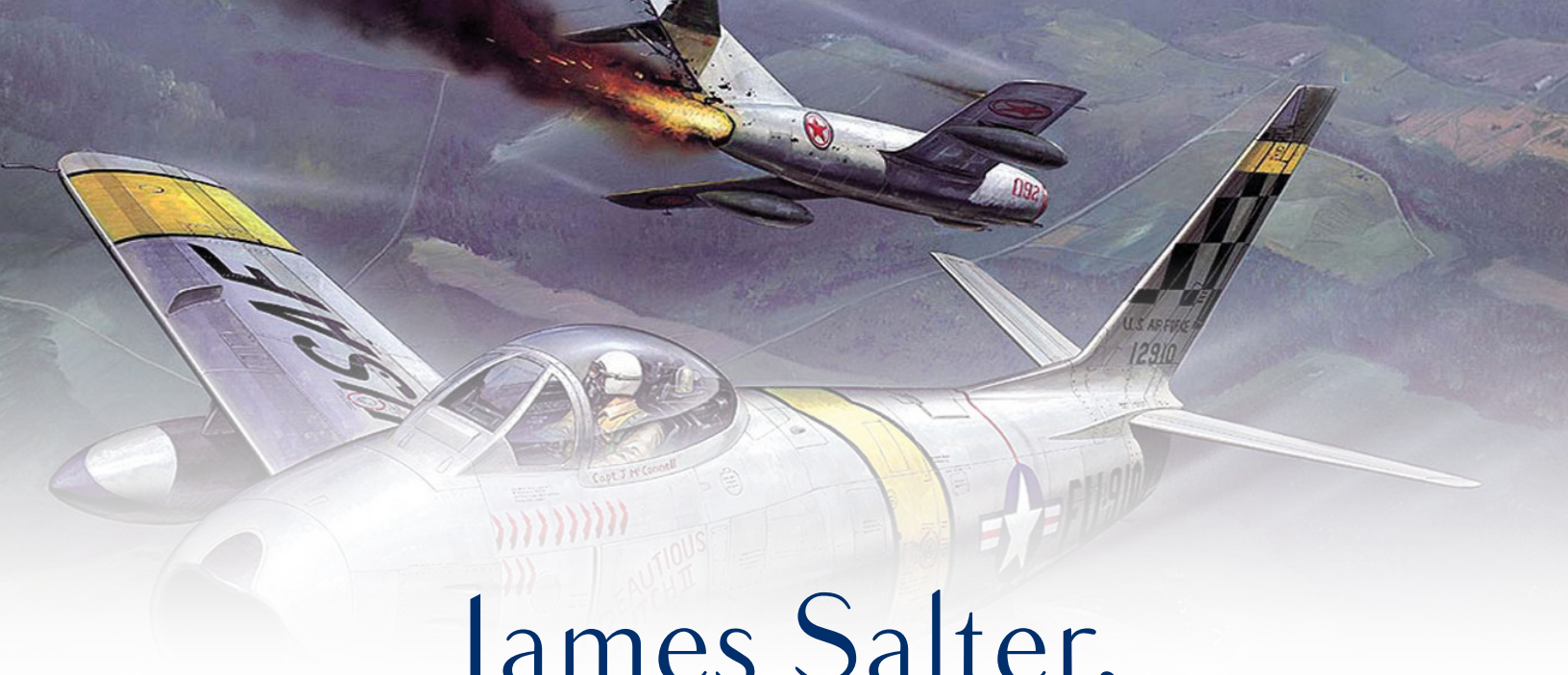
BY ROBERT D. KAPLAN, REVIEWED BY LIEUTENANT COLONEL THOMAS W. MURREY JR.

For most Americans, the Indian Ocean is an afterthought. Located on the opposite side of the planet, the Indian Ocean region rarely receives attention in the western world. If Robert Kaplan is correct, that will change in the twenty-first century. The premise of Robert Kaplan's "*Monsoon*" is simple; the rise of China and India, combined with Middle Eastern oil, will make the region a very important place for the rest of the century. The Air Force Chief of Staff deemed Kaplan's premise important enough to put *Monsoon* on the 2011 Chief's reading list. This book can serve as a starting point for those who wish to familiarize themselves with this vast, diverse and complex region that is rarely studied and frequently misunderstood.

Thirty years ago, few Americans had heard of places like Mogadishu, Kuwait and Kabul. In the decades ahead, currently unfamiliar places such as Gwadar, Kyauk Phru and Banda Aceh have the potential to become household names. The author traveled the region from west to east, spending weeks in each country where he interviewed local figures and familiarized himself with political as well as cultural issues. Kaplan begins the book with an analysis of Oman, then in turn addresses the major regional powers of Pakistan, India, Myanmar and Indonesia. Throughout the analysis of each country, the reader will find the repetitive and pervasive influence of China. Therefore it seems only natural that Kaplan finalizes his assessment with a look at China's intentions in the region and explains possible future scenarios. The result provides the reader with a much better understanding of the challenges the United States may well face in the Indian Ocean in the decades ahead.

One of the strengths of Kaplan's work is that he understands the role of history in the region, and how events that occurred hundreds of years ago still influence and shape the Indian Ocean nations to this day. In particular, Kaplan explains the involvement of the colonial European powers and how one by one they struggled to dominate trade with countries such as India, Burma and Indonesia. The Portuguese, Dutch and English all left their mark, for better or worse.

This book is an important read for all military personnel, especially junior officers, as the Indian Ocean could very well become a flash point for future conflicts during their military careers. These could be major conflicts with China as the adversary, or they could be local, internal conflicts that require peace keeping operations similar to the 1990's missions to the former Yugoslavia. Kaplan clearly lays out not just China's intentions but their current activities as well. Looking to become the world's next superpower, China desperately needs natural resources to continue its climb up the economic ladder, and the relatively undeveloped lands that lie along the Indian Ocean could be the primary source for these materials. From Africa to Indonesia, the Chinese are investing, building ports and airfields, and looking to economically dominate the region. As the United States Navy gets smaller and smaller, Kaplan argues that it will be harder for the United States to remain the dominant naval force in the region. China and India are already looking to step into that role. To conclude, Kaplan presents a potential scenario where a peaceful, power-sharing arrangement in the region would be mutually beneficial to all parties. But if Kaplan's best-case scenario does not work out, it may serve American military personnel well to learn where Banda Aceh is located.



James Salter, The Hunters (1957)

In the course of his review of this novel about the U.S. Air Force during the Korean War, Mr. Becker makes comments comparing events in the book to later conflicts and today's Air Force. Mr. Becker emphasizes his opinions are his own and do not necessarily reflect those of the Commandant, the Commander, Air Force Legal Operations Agency, or The Judge Advocate General.

REVIEWED BY MR. THOMAS G. BECKER

Good books should be reread from time to time. So, when author James Salter—still active at age 88—published a new novel and a collection of short stories in 2013, I was inspired to revisit *The Hunters*, Salter's first novel published in 1957 while he was still on active duty as an Air Force fighter pilot. I'd read *The Hunters* about 40 years ago when I was an Air Force ROTC cadet. While I enjoyed it then, I enjoyed it more this time, as I now have the perspective of nearly a half-century of association, in one capacity or another, with the U.S. Air Force. While *The Hunters* is set in the Korean War, its characters and events are relevant to today's Air Force and the novel remains must reading for any airman. That's because, although Korea was our last pure fighter-to-fighter air war and plane-to-plane combat has all but disappeared from the airscape of 21st Century conflict,[1] many of the personality traits and values demonstrated by Salter's characters will strike a chord with today's Air Force reader.

Novels about war, authored by participants and based on their first-hand experiences, are great ways to study history. The use of fictional characters, who may or may not represent real people or may be composites of several persons, gives the author freedom to tell the full stories without complicating the lives of the living or memories of the dead. Salter takes full advantage of this with a colorful array of characters with diverse backgrounds and experiences, but all with a single-minded purpose: fly the newly operational F-86 Sabrejet and kill MiGs.[2]

[1] The surface-to-air missile (SAM) made its combat debut in 1960 with the shootdown of Captain Francis Gary Powers' U-2 reconnaissance jet over Soviet territory. Virtually overnight, the tactics of American strategic bombers changed from high-altitude flights to low-altitude under-the-radar penetration, as the primary threat was now SAMs and not air-breathing fighter aircraft with limited operational ceilings. (A friend of mine, a B-52 pilot, once observed how strange it was to be practicing flying "in the weeds" in an airplane nicknamed the "Stratofortress"). Although there was significant air-to-air combat over North Vietnam, and Coalition Forces achieved ship-to-ship kills during both our wars with Iraq, the main threat to U.S. aircraft from 1960 through the present has been SAMs.

[2] "MiG" is an acronym for airplanes designed by the Soviet team of Artem Mikoyan and Mikhail Gurevich (**Mi**koyan + **G**urevich = MiG). It was the MiG-15 that flew against the

(Image courtesy of James Vaughan/Flikr)

The novel's protagonist is Captain Cleve Connell, an experienced fighter pilot but with no combat experience. Obviously based on Salter's own background, Connell's character entered the Army Air Force at the end of World War II but did not get into combat before that conflict ended. He stayed in the service, becoming a charter member of the new Air Force in 1948 and continuing in fighters, but with no one to shoot at or shoot back at him. The Korean War and the Air Force's new jet dogfighter, the F-86, presents the perfect opportunity for Connell to prove his mettle. He arrives at Kimpo Air Base, near Seoul. Salter doesn't name the wing, but it must be the 4th Fighter-Interceptor Wing, which was stationed at Kimpo and to which Salter himself was assigned.[3]

Connell's wing commander, Colonel "Dutch" Imil, knows Connell and is happy to have an experienced pilot to serve as a flight leader for a bunch of lieutenants, some of whom are right out of flight and gunnery school. As Connell meets and gets to know his brood, self-described by one, DeLeo, as "an arithmetic teacher, a wop, and two eagle scouts," you just know that one or more of them isn't going to make it back home.

Connell settles in and sets about his task of mentoring his flight and, most importantly, shooting down enemy jets. For it is killing MiGs that Colonel Imil values most. The wing has a board with the name of every pilot—present, dead, or returned to the States—that has at least one confirmed air victory with the red stars under the name representing those kills. Honored above all others are those with five or more red stars—the aces.

It soon becomes clear to Connell that Colonel Imil is less interested in the actual truth about claimed victories than he is in adding as many "confirmed" kills to the board as possible. The rules of the game were, for a pilot to get credit, a kill must be confirmed by gun camera film or, in the event of a camera malfunction (a very common occurrence, it seems) by the visual confirmation of another U.S. pilot, usually the shooter's wingman. Colonel Imil is not above arm twisting a young wingman into changing his account from "I didn't see a thing," to "I do seem to recall that MiG smoking," to "That's right. It was on fire…He got it all right." Connell is shocked by this, and by the suspicion in the wing that some of the "confirmed" victories of the wing's leading ace, Captain Robey, are questionable. While reading this part, I couldn't help but think of Karl Marlantes' descriptions of the corrupt "body count" system in his 2010 Vietnam War novel *Matterhorn*, based on his experiences as a Marine platoon leader in Vietnam in 1969, where first-hand reports of enemy casualties were routinely inflated at each level of command before they were "officially" tallied.

Into this mix now arrives the Connell's antagonist, the swaggering Second Lieutenant Ed Pell. When assigned to Captain Connell's flight, Pell promptly makes it clear that, notwithstanding his junior rank and inexperience, he considers himself the best combat pilot in the flight, if not the wing. He even has the temerity to introduce himself by his nickname and call sign, "Doctor," which he apparently has given to himself.[4]

Much to Connell's frustration and the glee of MiG-hungry Colonel Imil, Pell goes about proving that he just might be the best pilot in the wing; he is certainly the luckiest. And we learn that MiG hunting is as much about luck as skill. With few exceptions, MiG pilots are timid and avoid fights. Connell flies on mission after mission without any enemy encounters. He finally scores one kill—a MiG-15 pilot ejects as soon as Connell's fire strikes him. According to Salter, this was a common occurrence and sometimes a MiG pilot would eject as soon as a Sabrejet was behind him, even without any fire.

Contrasting with Connell, Lieutenant Pell seems to have all the luck, running into MiGs and racking

F-86 over Korea. As is apparent from the illustration accompanying this book review, the two jets were similar in appearance, although the MiG-15 may be distinguished by its tail assembly featuring horizontal stabilizers mounted high on the vertical stabilizer, in comparison to the F-86's more conventional tail assembly. The capabilities of the aircraft were similar, although the MiG-15 had an edge at high altitude while the F-86 was superior at lower altitudes. The MiG-15's armament was a rapid-fire cannon firing explosive shells. The F-86 featured six .50 caliber machine guns with incendiary ammunition. For both aircraft, limited ammunition and fuel capacities were worrisome. As Salter notes in his forward to *The Hunters*, the F-86 carried enough ammunition for only 11 seconds of firing. There was no mid-air refueling capability, so actual combat time was limited to a matter of minutes. The F-86s' fuel capacity – or lack of it – plays a major role in the novel's climax.

[3] The 4th FIW is now the 4th Fighter Wing, flying the F-15E Strike Eagle out of Seymour Johnson AFB, NC.

[4] I am not a pilot but, as I understand the culture, Pell's presumption is a grave breach of etiquette. A new pilot is given a call sign by a committee of veteran pilots at his or her first squadron. I have known new pilots who, having claimed a call sign without authority, were promptly issued a new one with a meaning antithetical to the one claimed. E.g., a new F-16 pilot at Misawa who announced his call sign was "Killer" was promptly re-christened "Bambi." Applying this tradition to Pell, his "Doctor" call sign should have become "Bedpan" or something similar.

up kills. One time, Connell abandons a sure kill because Pell is in trouble—Pell has a fuel tank hung up on his wing[5] and can't outrun two MiGs on his tail. Connell goes back, chases one of the MiGs away, and then sees the other spin out of control into the ground through pilot error without taking any fire from Pell. But Pell gets credit for a kill. See what I mean about Pell being lucky?

In addition to having luck, Pell is also aggressive. During one dogfight in which he is wingman to an element leader, Pell leaves his leader to chase a MiG. The leader is shot down by another MiG, but Pell gets another kill to his credit. Upon his return to base, Connell confronts Pell and accuses him of killing the element leader. As the only surviving witness, Pell has his excuses and, much to Connell's dismay, is backed up by Colonel Imil who, as is now clear to Connell, cares only that another red star goes on the wing victory board.

This tension builds to a climax where Connell, nearing the end of his combat tour, finally gets into the fight he's been looking for – except this time, he and his wingman are short on fuel, and he's facing the distinctively marked MiG-15 of the legendary enemy fighter ace known to Americans as "Casey Jones." The ensuing fight and its aftermath force Connell to make impossible choices both in the air and on the ground.

The Hunters teaches the modern Airman that, while some things have changed in the Air Force, others have remained the same. I laughed out loud at Salter's description of the O'Club bar scene when Captain Connell first arrives at Kimpo: "It looked like a lumberjack camp. No two pilots were dressed alike." One senior officer "was wearing a fur hat with the ear flaps tied together on top of it. He carried a .38 snub-nose revolver in a shoulder holster, and a shining leather bandoleer studded with brass butts of cartridges." This, of course, would not pass in today's Air Force where we obsess on whether airmen have the correct color of backpack, position their tie bars correctly, and debate which color of combat boot goes best with ABUs. And wearing a hat in the bar? It's just not done, Old Boy.

Some things are the same as today. I enjoyed the pilots' collective response to the rejection by Headquarters, Fifth Air Force, of a third Distinguished Flying Cross for the ace, Captain Robey. Robey and his friends decide the recommendation needs more amplification, changing "outmaneuvered the enemy aircraft with great skill," to "although under fire…and in great danger…better make that jeopardy; in great jeopardy…Captain Robey nevertheless pressed…a brilliant…timed attack." Later, Salter describes another pilot's return home: "He had no victories, only a hundred missions and a few Air Medals that had been awarded to him with all the objective deliberation of birthday presents." Sound familiar?

On the more serious side, there's also a familiar ring to the wing leadership's intense focus on MiG kills as, not just an important thing, but the only thing. There was no question of air superiority over Korea. We had it and there was no way the enemy was going to get it. While our equipment was equal, American pilots were so superior that the "MiG trains" didn't come up very often and only the occasional "Casey Jones" worried us. So knocking down the MiGs became the only goal without regard to how it may or may not help achieve the war's overall objectives. Something is wrong when a Colonel Imil brushes aside the loss of an American pilot due to the negligence of a Lieutenant Pell, but heaps praise on Pell because he managed to add to the wing's victory board by shooting down an enemy far less capable than the U.S. pilot we lost. Sadly, such values continued in Vietnam, where high enemy body counts were the standard of success notwithstanding every other measure showing the war was going south. For the present and future airman, the lesson from *The Hunters* is to scrutinize what we're counting, and ask if it really is a valid measurement of our product and not just our process.

My editorial comments aside, James Salter's *The Hunters* should be on every Airman's reading list. In 1957 when it was published, in 1997 when it was republished on the 50th Anniversary of the legislation creating the Air Force, and today, *The Hunters* remains the best treatment of the U.S. Air Force's first fight in the jet age.

[5] F-86s were equipped with detachable wing tanks for extra fuel that were jettisoned when the enemy was in sight, as their drag undermined the jet's performance.

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TJAG Remarks on the Occasion of
A Memorial Service
for Mr. James W. Russell (Col, USAF, Ret.)

CHAPEL 1, ANDREWS AFB, MARYLAND, MARCH 8, 2013

I, like you, cannot believe I'm here today. I, like you, did not see this coming. I, like you, miss my friend, my mentor, my wingman.

For me, Jim always represented endless possibilities. I have been privileged to work with Jim and the teams that always seemed to surround, and follow him. We worked on difficult challenges together, and somehow always found ourselves out in front of change—a wonderful place to be. But sometimes it's difficult to explain to others in your service, in other services or in the public, what it is that you plan to do or have done. At those times, I would always ask, "Jim, what do you think I ought to say?" And with a gleam in his eye, Jim would always reply, "Golly sir, you'll think of something." That was followed by a pause, and then Jim would list an endless series of ways we could explain our actions or answer the problem.

What a difference a week can make. A week ago, Jim was working on improvements to the Air Force's victim care program, a passion for him—his special mission. On Saturday, he sent some great ideas to me and others. I thanked him. Then on Sunday, I got a call and was told Jim had unexpectedly passed away.

For me and for you, the news rocked our world. Everything has changed. There's a hole in our universe.

On Monday morning, as I left my quarters on Bolling Air Force Base, I decided to drive to the Jones Building here at Andrews and spend some time with Jim's office—the Military Justice Division of the Air Force Legal Operations Agency. I didn't know what to say to them, but I knew I needed to be with them—with Jim's working family, his colleagues, his JAG Family.

As I was driving in, I began to think, "What should I say?" What can I say? What can you say to comfort people in that kind of pain?

In a moment of quiet reflection, I said silently—to myself really, "Jim, what do you think I ought to say?"

And then something very special happened. I heard Jim, as clear as bell, in my inner ear, as if he were seated next to me, "Golly, sir. You'll think of something." And I waited for the rest of the answer, because there was always more. And then it came. Here is what I learned.

All of us here today, share something in common with Jim Russell. We all volunteered to serve others. We all raised our hand and said, "Send me."

We all believe that there is something noble in that calling. And we all believe in making a difference for others.

Jim's passion was justice—military justice to be sure—and caring for victims of crime. And in that, he made a difference for others.

But we share something else. Look around this room, into the faces of each other, and you'll find it. It's this. We were touched by Jim's presence in our lives. He coached us, mentored us, laughed with us, mourned with us, lived with us, and enriched us.

We all carry…a little piece of Jim's special spirit with and in us.

So Jim's legacy is a living legacy. It's you and me—all of us. His legacy also lives on in the people he never met—the victim community whose lives he has enriched and will enrich into the future. He lives on in every Special Victims' Counsel, a program he not only believed in but worked tirelessly to make a reality.

Vicki, there no words that adequately express Jim's impact on all of us. But it's important you know that Jim made a positive and profound difference in the lives of so many. And we all know that he could not have accomplished what he did, without you. Please accept my condolences on behalf of not just the JAG Corps, but all who served with Jim. We all join in thanking you for sharing Jim with us.

So, I'll end with this. For someone who wanted to make a difference, he hit the ball out of the park. So, I'm happy for me friend's accomplishment, a life well lived!

But I still miss my friend.

I want all of you to know that I believe in many things—many wonderful things. One of the wonderful things I believe in is that I will see my friend again. And what a happy day that will be!

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Basic Military Training—Where it all begins (U.S. Air Force photo/Staff Sergeant Vernon Young Jr.)