



# THE ARMY LAWYER

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*Edward J. O'Brien*

**Not the Third Wheel: Intervenors in Government Accountability Office Protests**

*Daniel Chudd & Damien Specht*

**The Triple Threat Trial Counsel**

*Captain Ryan Howard*

**Copyright Issues at the Unit Level: Seeing Through the Fog of Law**

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## Lore of the Corps

### Military Legal Education in Virginia: The Early Years of The Judge Advocate General's School in Charlottesville

Fred L. Borch III  
Regimental Historian & Archivist

In August 2011, The Judge Advocate General's School, U.S. Army (TJAGSA), now a principal component of The Judge Advocate General's Legal Center and School (TJAGLCS), celebrated its Diamond Jubilee—sixtieth birthday—in Charlottesville, Virginia. How military legal education came to be in Virginia and what happened in the early years of TJAGSA on the grounds of the University of Virginia (UVA) is important and worth telling.

After the Japanese attack on Pearl Harbor, and the rapid expansion of the Army in the weeks and months that followed America's entry into World War II, the Judge Advocate General's Department (JAGD) recognized that the old way of preparing lawyers for service as judge advocates (JAs) would no longer work; "on the job training" took too long and the hundreds of new lawyers entering the Department had to be ready in the shortest possible time to serve in a variety of locations at home and overseas. These new JAs had to know something about international law, procurement law, the Articles of War, and the practice of courts-martial, as well as the law governing claims for and against the government. These new military lawyers also had to understand military organization and procedures, so that they would be efficient and effective staff officers. The result was the opening of TJAGSA at the University of Michigan in 1942. While the JAGD no doubt would have preferred to keep TJAGSA open at the end of World War II, the rapid de-mobilization of the Army—and the greatly reduced need for lawyers in uniform—led to the school closing in 1946. But not before the value of having a TJAGSA had been proven—since hundreds of lawyers had passed successfully through its classrooms and had been given the specialized education and training needed to serve commanders and soldiers both in garrison and in the field.

In June 1950, North Korean troops attacked U.S. and South Korean forces and the Judge Advocate General's Corps began recalling Reserve JAs to serve during the rapidly escalating Korean crisis. Since these officers needed a refresher course on military law, the Corps obtained a temporary building at Fort Myer, Virginia, and assigned Colonel (COL) Edward H. "Ham" Young (who had led the school in Michigan) and a handful of Active Duty JAs to serve as instructors. When TJAGSA reopened on 2 October 1950, the bulk of the teaching at Fort Myer focused on the new Uniform Code of Military Justice (UCMJ), which had been enacted by Congress in 1950 and was scheduled to take effect in 1951. Since the UCMJ was a revolutionary change from the Articles of War that had been in use during World War II—and with which Reserve JAs were familiar—this made sense.

At the same time, recognizing that a permanent TJAGSA was needed—a school that would continue after the crisis on the Korean peninsula ended—Major General (MG) Ernest M. "Mike" Brannon, who had only recently begun serving as The Judge Advocate General (TJAG), directed COL Charles E. "Ted" Decker "to plan for and locate a permanent Judge Advocate General's School."<sup>1</sup> This meant that COL Decker was to propose an organization for the new school as well as find a suitable location.

#### Organization of the New TJAGSA

Decker and the other members of the "Special Projects Division"<sup>2</sup> ultimately decided that the new TJAGSA should consist of three parts: "a resident school, non-resident school, and a research, planning and publications unit."<sup>3</sup> The concept for the resident school was that it would offer a "basic" or "regular" course of instruction, and an advanced course. All new JAs would attend the regular course and would be given basic instruction in military legal matters. Colonel Decker saw the advanced course lasting a full academic year, and believed that "officers with eight to twelve years of military law practice who had outstanding records" should be invited to attend. Significantly, the advanced course was not for every JA, but only for the best. The concept for the advanced course was that it would be a "thorough and comprehensive 'rounding out' in all military law subjects." Additionally, each student in the advanced course would be required to write a research thesis on some "facet or some phase of military law." The non-resident school would provide instruction to Army Reserve and National Guard JAs not on active duty in two ways: "group schooling for those officers in larger communities, extension courses for the officers in smaller communities." Finally, the research, planning and publication unit would research novel legal questions and disseminate its findings to JAs in

<sup>1</sup> Charles E. Decker, "A History of the Development of the Judge Advocate General's School," at 4 (June 15, 1955) (unpublished monograph) (on file in TJAGLCS Library).

<sup>2</sup> The Special Projects Division had been created in 1950 to draft the new *Manual for Courts-Martial* needed after the enactment of the Uniform Code of Military Justice. As Decker was the Chief of the Special Projects Division, it was logical for The Judge Advocate General (TJAG) to task him (and the other division members) with the special project of organizing and locating a permanent Judge Advocate General's School, U.S. Army (TJAGSA). See U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 217 (1975).

<sup>3</sup> Decker, *supra* note 1, at 5.

the field. It would also prepare all legal texts for Army-wide distribution and publish periodic updates to keep JAs abreast of recent developments in military law.<sup>4</sup>

### Location of the New TJAGSA

Finding the right location for the new school was not an easy task, but COL Decker had a number of requirements to guide him. First, it seemed desirable for the school to be located no more than two hundred miles from Washington, D.C. Consequently, while COL Decker and the Special Projects Branch considered locations as far away as Fort Rodman, Maine and Fort Crockett, Texas, and actually considered renovating an abandoned brewery at Fort Holabird, Maryland and a former ordnance shop at Fort Benjamin Harrison, Indiana, Decker and his team ultimately concluded that there was no “feasible site” on a military installation.<sup>5</sup>

A second factor—of great importance in the 1950s—was the recognition that the new TJAGSA must have a first-class law library. Colonel Decker in particular noted that if the permanent TJAGSA were located at an existing law school, such a location would provide a law library and “save an enormous sum of money.”<sup>6</sup>

By late spring in 1951, the Corps had decided that only two civilian law schools were suitable for a permanent TJAGSA: the University of Tennessee and UVA. It is probable that the latter got the nod for two reasons: first, UVA was less than 125 miles from the Pentagon, and this satisfied the Corps’ desire that the new school be geographically close to Washington, D.C. Second, UVA President Colgate W. Darden, Jr., offered the Army a new dormitory (identified as “Building No. 9” but later named “Hancock House”) that would be ready for occupancy in August 1951. Having been built as a dormitory for more than 100 students, this new structure was large enough to provide office space for TJAGSA faculty and staff as well as housing for Army students who did not desire to live in town.

Additionally, UVA’s law school was adding a new wing to its existing building, and UVA offered to lease the Corps classroom space in this new structure. As President Darden wrote to COL Decker on 19 June 1951:

This will confirm our [telephone] conversation of this morning. Should the Judge Advocate General’s Office decide to use the facilities of the University of Virginia in connection with the school

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

which they now have under consideration, I should be glad to recommend to the Board [of Visitors] that Building No. 9, and such space in the Law School as is required for the conduct of classes, be rented to the Army at the price paid by it for like space in other parts of Virginia. Arrangements can be made to have your students receive the medical service now offered students of the University. They will be free to use the restaurants and recreation facilities around the University on the same basis as to the students.

President Darden closed his letter with another incentive to choose UVA: “Maid and janitor service for the occupants of Building No. 9 can be furnished by the University at cost, plus 10% to cover overhead. We can arrange for such furnishings as are desired as soon as we know your needs.”<sup>7</sup>

The Army liked this last idea because it eliminated the use of enlisted personnel for maintenance and also reduced the need for a large administrative operation.<sup>8</sup> In any event, the Army accepted UVA’s offer, and signed a lease on 30 July 1951. It was a year-to-year tenancy for \$46,000 per year.<sup>9</sup> The Army signed its first multi-year lease—for five years—in the summer of 1954. The rent was \$53,354 per annum for 36,212 square feet of floor space, joint use of additional rooms and library facilities at UVA’s law school in Clark Hall, “and parking space for 30 automobiles.”<sup>10</sup>

On 2 August 1951, the Department of the Army announced in General Orders that TJAGSA had been established at UVA and that the school at Fort Myer would close on 25 August.<sup>11</sup> The move to Charlottesville was made by truck on 25 August. As COL Decker later wrote, the move “was completed and all offices were in operation on the afternoon of 27 August 1951. There was no founding ceremony; we just went to work—there was a lot to be done.”<sup>12</sup> There were twenty officers on the first day of TJAGSA’s operation; a month later, the school had hired fifteen civilian employees. By 1955, the staff and faculty

<sup>7</sup> Letter from Colgate W. Darden, Jr. to Colonel Charles L. Decker (June 19, 1951) (on file with Historian, TJAGLCS).

<sup>8</sup> The fact that the University of Virginia (UVA) had hosted the Army’s School of Military Government during World War II, and that some students attending the school were judge advocate (JAs) (who likely would have reported favorably to TJAG about their experiences in Charlottesville), apparently had no impact on the decision to move TJAGSA to UVA.

<sup>9</sup> THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, THE JUDGE ADVOCATE GENERAL’S SCHOOL, 1951–1961, at 3 (1961).

<sup>10</sup> Memorandum from Franklin G. Floete, Adm’r, Gen. Servs. Admin., to the Chief of Eng’rs, U.S. Army (June 4, 1954) (on file with Historian, TJAGLCS).

<sup>11</sup> Headquarters, U.S. Dep’t of Army, Gen. Order No. 71 (2 Aug. 1951).

<sup>12</sup> Decker, *supra* note 1, at 7.

consisted of over seventy officers and civilians. The commandant, faculty and staff offices were in Hancock House (known colloquially as “The JAG School”); classes were held in UVA’s law school in Clark Hall, which was located across a parking lot from Hancock House.<sup>13</sup>

In the early years of TJAGSA, the school consisted of an Executive Office (which handled all administration and supply issues and also served as the registrar’s office) and an Academic Department with four teaching divisions: Military Justice, Military Affairs, Civil Affairs and Military Training. Military Justice provided instruction in court-martial practice, while Military Affairs covered administrative and civil law (except for claims). The Civil Affairs Division taught contract law and claims. As for the Military Training Division, it was responsible for instructing JAs in military courtesy and discipline, staff functions, weapons, and map reading. The first change to this organization occurred in 1953, when the Procurement Law Division was formed from the personnel of the Civil Affairs Division.

### **Resident Regular and Advanced Courses**

When TJAGSA began operating in Charlottesville in 1951, the regular course for all new JAs (about 60 were in each class) was eight weeks long. In early 1952, the instruction was increased to twelve weeks. Then, in early 1954, the Army opened an eight-week special basic leadership course for newly commissioned officers at Fort Benning, Georgia, and JAs began reporting to Benning’s Infantry School for this instruction prior to starting the regular course in Charlottesville. But, as newly commissioned Army lawyers had already spent eight weeks at Fort Benning, the JA regular course was reduced to eleven weeks. Today, the Regular course—now called the Basic Course—consists of two weeks at Fort Lee, Virginia, and ten weeks in Charlottesville. After graduating, the new JAs attend the six-week Direct Commissioned Officer Course at Fort Benning before reporting to their first assignments.

As for the advanced course, the number of students attending in the early years of TJAGSA was quite small; a total of 64 JAs attended the first three advanced courses and TJAGSA planned on about 25 JAs per advanced class in the mid-1950s. The seven month long course (1360 hours in the early 1950s) covered international law, procurement law, military justice, military affairs (today’s administrative and civil law), claims, legal assistance, lands, and comparative law. Instruction was chiefly “through the use of seminar, panel, problem and other methods of group instruction.”<sup>14</sup> The first non-Army JAs to attend the Advanced Course were naval officers, who joined the 4th Advanced Course in 1955.

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<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 11.

A naval officer, Lieutenant Commander Owen Cedarburg, was also the first non-Army faculty member.<sup>15</sup> The advanced course, renamed the Career Course in 1960<sup>16</sup> and the Graduate Course in the 1970s, continues to be the jewel in the crown of military legal education, especially since its graduates now earn an LL.M.<sup>17</sup>

### **Non Resident Instruction**

The Non-Resident Schools Division had two branches: the Text Preparation Branch and the Extension and U.S. Army Reserve (USAR) School Operating Branch. Initially, it had five officers and six civilians; by 1955, the branch had grown to thirteen officers and twelve civilians.

In addition to preparing texts for “extension courses” for non-active-duty JAs, the division operated a USAR non-resident school basic course. Students enrolled in the program took extension courses created by the Text Preparation Branch and then completed the USAR basic course by attending a “USAR summer school encampment” run by each of the six continental armies.<sup>18</sup> Reserve JA instructors (trained at TJAGSA) presented legal instruction.<sup>19</sup>

### **Short Courses**

The first “short course” at TJAGSA was the contract termination law course, which was first conducted in August 1953. The impetus for this course came with the end of the Korean War, when the “tapering-off of certain procurement activities” meant that many contracts needed to be terminated for the convenience of the government. Judge advocates and lawyers at other federal agencies needed special instruction in this area—and TJAGSA rose to the occasion by creating a short course. A three-week procurement law course followed in 1954. Over the years, hundreds of different short courses have been offered in Charlottesville, and today the school provides some 6000 students a year with “continuing legal education.”

### **Research, Planning and Publications**

The intent of the Research, Planning and Publications Division was to provide adequate research tools for JAs. As

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<sup>15</sup> Darden, *supra* note 7, at 10.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> For the history of the LL.M. at TJAGSA, see Fred L. Borch, *Lore of the Corps: Master of Laws in Military Law, The Story Behind the LL.M. Awarded by The Judge Advocate General’s School*, ARMY LAW., Aug. 2010, at 2–3.

<sup>18</sup> At the time, I Army, V Army, etc. were known as “continental armies.”

<sup>19</sup> Decker, *supra* note 1, at 15.

the UCMJ had just gone into effect, Army lawyers in the field needed help in deciphering the more “foggy areas” of the new code. The creation of a new civilian appellate court—the Court of Military Appeals—meant that the division had to collect and analyze opinions being handed down by the court. The division also was busy producing 16-milimeter black-and-white training films, including “Uniform Code of Military Justice,” “Non-Judicial Punishment,” “The Investigating Officer,” “The General Court-Martial,” “The Special Court-Martial,” and “The Summary Court-Martial.”<sup>20</sup>

### Annual Conference

Starting in 1952, TJAGSA began hosting an annual conference for senior JAs, with attendance averaging between 100 and 120. Interestingly, the Research, Planning, and Publications Division (which ran the conference) solicited JAs in the field to advise it of legal topics that they wanted covered at the conference and, after getting input from the field, scheduled those subjects that were the most requested. Except for 2001, when the conference was cancelled in the aftermath of the 9/11 attacks,<sup>21</sup> the Corps has continued to hold an annual gathering of senior JA leaders in Charlottesville. Today, the conference is called the “World Wide Continuing Legal Education Conference” and is held the first week of October every year.

### Court-Reporter Training

The school also took the first step in enlisted education when it began training Corps enlisted personnel in modern electronic court reporting. The first class was held in January 1955 and “consisted of 18 enlisted men,

representing 16 general court-martial jurisdictions in the continental United States.” Those who completed the six week course could take down court-martial proceedings “at more than 200 words per minute” using the electronic recorder-producer device equipped with a steno mask. They also could “prepare and assemble records [of trial] in a minimum of time.”<sup>22</sup>

Court reporter training remained at TJAGSA until November 1959, when the course was transferred to the Naval Justice School in Newport, Rhode Island. It returned to Charlottesville in January 2000. Today, TJAGSA does initial court reporter training for court reporters in both the Army and Air Force.

When he completed his tour as TJAGSA’s first commandant on 15 June 1955, COL Decker noted that the American Bar Association (ABA) had been enthusiastic in supporting Army legal education in Charlottesville, and that an ABA inspection of the school revealed that new JAs “came, on average, from the upper fifteen percent of their classes in law school and that roughly six to ten percent had stood first [in their class] or had been law journal editors.”<sup>23</sup> Not surprisingly, the ABA’s House of Delegates approved accreditation for TJAGSA on 22 February 1955. In COL Decker’s opinion, this date was only fitting, as it was the anniversary of George Washington’s birthday—and it was Washington who had been on the first committee to draw up Articles of War for the Army and, as Continental Army commander, had petitioned Congress to appoint the first Army Judge Advocate in 1775.<sup>24</sup>

Today, TJAGSA remains in Charlottesville, albeit as part of a larger TJAGLCS. Additionally, military legal education at UVA now includes warrant officer legal administrators and noncommissioned officer paralegals. Despite the many changes, what COL Decker and the Special Projects Division started sixty years ago remains: the oldest and the only ABA-accredited military law school in the world.

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website

*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

<sup>20</sup> *Id.* at 18.

<sup>21</sup> Ultimately, the 2001 conference was held in Spring 2002.

<sup>22</sup> *First Enlisted Men Training as Court Martial Reporters*, ARMY TIMES, Jan. 29, 1955, at 8.

<sup>23</sup> Decker, *supra* note 1, at 20.

<sup>24</sup> After leaving TJAGSA in 1955, Colonel “Ted” Decker returned to Washington, D.C. From 1957 to 1961, then-Brigadier General Decker served as the Assistant Judge Advocate General for Military Justice. He was promoted to major general and assumed duties as TJAG on 1 January 1961. Decker retired on 31 December 1963.

# Rehabilitative Potential Evidence: Theory and Practice

Edward J. O'Brien\*

## Introduction

The sentencing rules in courts-martial dramatically favor the defense.<sup>1</sup> No rule better illustrates the advantages the defense has than Rule for Courts-Martial (RCM) 1001(b)(5).<sup>2</sup> This rule allows the trial counsel to offer opinions about the accused's duty performance and the accused's potential for rehabilitation.<sup>3</sup> However, the rule also lists requirements for, and limitations on, the foundation, basis, and scope of a rehabilitative potential opinion that make presentation of rehabilitative potential very tricky for the prosecution. Section 1 of this article discusses the case law that created these requirements and limitations. Defense counsel must read these cases, understand the military courts' concerns, and use the requirements and limitations to their advantage. Defense counsel should not fear the rehabilitative potential opinion offered by government witnesses. If the defense counsel insists on a proper foundation and a properly limited opinion, the witness's opinion will be largely meaningless. Section 2 bridges the gap between theory and practice by addressing tactics to limit and counter the government's presentation of rehabilitative potential testimony. These tactics are general rules to guide defense counsel, and, like all general rules, they have exceptions. Defense counsel must analyze each case individually and choose the tactics that accomplish the goals of the representation. Section 3 discusses the cases that allow defense counsel to offer opinions about the accused's potential for future military service during the case in extenuation and mitigation. This topic is related to, but distinct from, rehabilitative potential. Finally, in Section 4, this article discusses a recent opinion by the Court of Appeals for the Armed Forces that clarifies the foundation required when trial counsel rebut defense-offered opinions about future military service. Like RCM 1001 generally, RCM 1001(b)(5) and the cases that interpret it offer a very limited opportunity to the trial counsel and an expansive opportunity to the defense.

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<sup>1</sup> Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2008) [hereinafter MCM] (listing five restrictive categories of information the trial counsel can present during the pre-sentencing proceeding), with *id.* R.C.M. 1001(c) (listing two broad categories of information the defense can offer during the pre-sentencing proceeding). In particular, compare the restrictive nature of "aggravation" evidence, which must be "directly relating to or resulting from the offenses of which the accused has been found guilty," with the broad nature of "mitigation" evidence, "matter . . . introduced to lessen the sentence of the court-martial."

<sup>2</sup> *Id.* R.C.M. 1001(b)(5).

<sup>3</sup> *Id.* R.C.M. 1001(b)(5)(A).

## The Basics

When the 1984 *Manual for Courts-Martial (MCM)* was originally published, the rule addressing evidence of rehabilitative potential was very short and simple:

The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of an opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.<sup>4</sup>

This rule reflected the judgment that the sentencing authority needed a complete view of the accused, that knowledge of the accused's character was so important that its presentation should not be left up to the accused, and that in civilian criminal cases, the sentencing authority considered similar evidence.<sup>5</sup> The rule and its intent favored a very broad discussion of the accused's rehabilitative potential, at least initially. In 1994 the rule was amended to codify recent case law, yielding the rule we have today. The new RCM 1001(b)(5) includes a definition of rehabilitative potential,<sup>6</sup> requirements for the opinion's foundation,<sup>7</sup> a warning that the severity or nature of the accused's offenses is not a sufficient basis for the opinion,<sup>8</sup> and a warning that the

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<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1984).

<sup>5</sup> MCM, *supra* note 1, app. 21, at A21-71 to 72 (analysis of Rule for Court-Martial (RCM) 1001(b)(5)). Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1994) (identical to the 1984 rule), with MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (1995) (identical to the current rule).

<sup>6</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(A). Rule for Court-Martial 1001(b)(5)(A) provides: Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

<sup>7</sup> *Id.* R.C.M. 1001(b)(5)(B). Rule for Court-Martial 1001(b)(5)(B) provides: *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

<sup>8</sup> *Id.* R.C.M. 1001(b)(5)(C). Rule for Court-Martial 1001(b)(5)(C) provides: *Bases for opinion.* An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding

witness may not comment on the appropriateness of a punitive discharge.<sup>9</sup> These changes transformed a very broad rule into a very restrictive one. Understanding the evolution from the original rule to the current rule requires examination of three opinions from the Court of Military Appeals (CMA).

*United States v. Horner*<sup>10</sup> was an uneventful, judge alone guilty plea to a single specification of wrongful distribution of hashish. The case seemed routine until the trial counsel called the accused's battery commander as an aggravation witness. The battery commander testified that that the accused was an average Soldier and that drug-related conduct was incompatible with the accused's military duties.<sup>11</sup> When the trial counsel asked whether the accused had rehabilitative potential, the battery commander responded, "I don't think he should be allowed to stay in the Army." The defense counsel objected, and, curiously, the trial judge overruled the objection while noting that the answer was non-responsive to the question. On cross-examination, the witness made clear that his concept of rehabilitative potential was whether the accused should be given another chance to be a Soldier and that his opinion was based only on the fact that drugs were distributed.<sup>12</sup> The court adjudged, and the convening authority approved, a sentence that included a bad conduct discharge, confinement for thirty days, and "accessory penalties."<sup>13</sup>

The CMA held that the military judge erred when he allowed the battery commander to give an opinion on the accused's rehabilitative potential where the opinion was based only on the severity of the offense involved. Before addressing the granted issue, the court clarified the scope of the phrase "potential for rehabilitation." The court observed that rehabilitation can denote a return to a particular status or a return to society generally and then rejected the concept that rehabilitative potential is the potential to be restored to a particular military status. The court clarified two points in this case. First, rehabilitative potential is the potential to return to society in general, not just a return to duty.<sup>14</sup> Second, a rehabilitative potential witness's opinion must be

based on the accused's character and potential, not just the severity of the offenses.<sup>15</sup>

In *United States v. Ohrt*,<sup>16</sup> the CMA addressed the same question in the context of a guilty plea where court members imposed the sentence. The accused, an Air Force staff sergeant (SSgt) with twelve years of service, pled guilty to a single specification of wrongful use of marijuana.<sup>17</sup> During the case in aggravation, the trial counsel called the accused's squadron commander and asked him, "Sir, based upon everything that you know, do you have an opinion as to Staff Sergeant Ohrt's potential for continued service in the United States Air Force?" The commander responded, "I believe he does not have potential."<sup>18</sup> Moreover, in response to a court member's question, the commander said that he had not offered SSgt Ohrt nonjudicial punishment because there is no room for drug use in the military and, when he took command, he warned his subordinates that if they were involved with drugs, he would "have no more use for [their] services in [his] command."<sup>19</sup> The accused was sentenced to a bad conduct discharge and reduction to E-2.<sup>20</sup>

The court reiterated the two points it made in *Horner*. The first point was that rehabilitative potential means the potential to be a useful member of society, not the potential for further military service. In *Ohrt*, the trial counsel's question explicitly asked about "continued service in the United States Air Force." The court did not address the form of this improper question directly, but the court said, "it is clear that some prosecutors view this rule as a license to bring a commanding officer before a court-martial preemptively to *influence* the court members into returning a particular sentence. It is most apparent that the trial counsel are urging adjudication of a punitive discharge. Such witnesses have no place in court-martial proceedings."<sup>21</sup> The court set aside the findings and sentence based on the second point clearly established in *Horner*: the witness's opinion was based only on the nature of the offense. "[The commander's opinion] lacked a proper foundation to demonstrate that the [commander's] opinion was personalized and based upon the accused's character and

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the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

<sup>9</sup> *Id.* R.C.M. 1001(b)(5)(D). Rule for Court-Martial 1001(b)(5)(D) provides: *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

<sup>10</sup> 22 M.J. 294 (C.M.A. 1986).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 295.

<sup>13</sup> *Id.* at 294.

<sup>14</sup> *Id.* at 296. *See infra* note 62.

<sup>15</sup> *Id.*

<sup>16</sup> 28 M.J. 301 (C.M.A. 1989).

<sup>17</sup> *Id.* at 302.

<sup>18</sup> *Id.* at 306-07.

<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Id.* at 302.

<sup>21</sup> *Id.* at 303. For another example of how a government witness can encourage or discourage a particular sentence, see *United States v. Davis*, 39 M.J. 281, 282-83 (C.M.A. 1994). In *Davis*, the trial judge allowed, over objection, the trial counsel to ask the victim how he would feel if the accused received no punishment. The court found the question improper but the victim's equivocal answer was harmless.

potential; rather, it was a view that the appropriate punishment for drug users included a punitive discharge.”<sup>22</sup> Directly or indirectly, the court reminded us of the definition of rehabilitative potential and the scope of the foundation that is required for an opinion about rehabilitative potential.

In *Ohrt*, the court also discussed the foundation required for a rehabilitative potential witness. Stressing the importance of the foundation for a lay opinion on rehabilitative potential, the court said, “[A] foundation must be laid to demonstrate that the witness does possess sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his determination to be rehabilitated[.] Thus, a witness whose opinion is based upon factors other than an assessment of the accused’s service performance, character, and potential does not possess a rational basis for expressing an opinion.”<sup>23</sup> An opinion based solely on the nature and severity of the offenses is impermissible.<sup>24</sup> The foundation for a rehabilitative potential opinion must be based on the accused’s individual circumstances.<sup>25</sup>

In *United States v. Aurich*,<sup>26</sup> the CMA faced the same issue with a slightly different question. The accused pled guilty to wrongful use and distribution of marijuana and was tried by military judge alone.<sup>27</sup> The government offered a record of prior nonjudicial punishment for wrongful use of marijuana and then called the accused’s company commander. The commander was asked, “Do you want Private Aurich back in your unit[?]” Naturally, he didn’t. The defense counsel objected, citing *Horner*.<sup>28</sup> The military judge overruled the objection, and the witness was allowed to answer the question.<sup>29</sup>

All three judges agreed there was no reversible error. Two judges found the question and answer irrelevant and inadmissible, but found that the error was harmless under the

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<sup>22</sup> *Ohrt*, 28 M.J. at 307.

<sup>23</sup> *Id.* at 304 (citing *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986)).

<sup>24</sup> *Ohrt*, 28 M.J. at 383; *Horner*, 22 M.J. at 296. *See also* *United States v. Kirk*, 31 M.J. 84, 86–89 (C.M.A. 1990). *Kirk* contains a farcical attempt to offer an opinion about the accused’s rehabilitative potential. After being unable to remember the accused’s name and being unable to identify the accused even after the trial counsel instructed the witness to look at her nametag, the accused’s squadron commander testified that he did not think the accused had potential for future service in the Air Force. The commander’s opinion was based solely on the nature of the offenses of which the accused was convicted. The court found plain error and set aside the sentence.

<sup>25</sup> *Horner*, 22 M.J. at 296.

<sup>26</sup> 31 M.J. 95 (C.M.A. 1990).

<sup>27</sup> *Id.* at 98.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 99.

circumstances in a judge alone case. The third judge found the question and answer permissible under the facts of the case.<sup>30</sup> The majority found the issue irrelevant because “absent a full, logical, and acceptable explanation establishing that the reason he does not want such an accused in the unit is his lack of rehabilitative potential[.]”<sup>31</sup> the commander’s desire not to have the accused back proves nothing. The court noted that RCM 1001(b)(5) limits the witness’s testimony to an opinion, and, therefore, the witness cannot give a full explanation about how he formed his opinion except on cross-examination.<sup>32</sup> This chicken-and-the-egg problem results in an opinion that is largely meaningless; the government witness can give an unfavorable opinion, but the witness cannot explain why he holds that opinion. The court noted two situations where the commander’s opinion on whether to return the accused to his unit may be relevant: first, when the command wants the Soldier back, and, second, in rebuttal when the defense offers evidence that the command wants the Soldier back. “[I]f the accused ‘opens the door’ by bringing witnesses before the court who testify that they want him or her back in the unit, the Government is permitted to prove that that is not a consensus view of the command.”<sup>33</sup>

In addition to prohibiting the commander’s view of whether the accused should be returned to the unit during the case in aggravation, *Aurich* is famous for two other points. First, the court gave us a structured format for admitting a proper rehabilitative potential opinion that will avoid specific instances from being discussed on direct examination and the return-to-the-unit issue. “RCM 1001(b)(5) contemplates one question: ‘What is the accused’s potential for rehabilitation?’—and one answer: ‘In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.’”<sup>34</sup> Second, the CMA injected concerns about unlawful command influence into the analysis. The court pointed out that having the “accused’s commander tell other officers that ‘I do not want this accused in my unit,’ . . . is fraught with danger of undue and unlawful influence.”<sup>35</sup> The court noted if the company commander can express his

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<sup>30</sup> Judge Sullivan, concurring in part and dissenting in part, reasoned that although the court in *Horner* recognized a broad definition of rehabilitative potential, the court did not intend to prohibit all testimony about military rehabilitative potential. He treated military rehabilitative potential as a subset of societal rehabilitative potential. Having found the topic of military rehabilitative potential relevant, Judge Sullivan found the form of the question proper. *Id.* at 100.

<sup>31</sup> *Id.* at 96.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 96–97. *United States v. Claxton*, makes clear, however, that the Government is not limited to offering rehabilitative potential evidence in rebuttal. “We are not aware of having made such an assertion; if we have, we hereby disown it.” 32 M.J. 159, 162 (C.M.A. 1991).

<sup>34</sup> *Aurich*, 31 M.J. at 96.

<sup>35</sup> *Id.* at 97.

view, there is no principled reason not to allow the battalion, brigade, division, or corps commanders to express their opinions.

The 1994 amendments to RCM 1105(b)(5) are based primarily on *Horner, Ohrt, and Aurich*.<sup>36</sup> These cases reflect four concerns of the CMA. First, the court wants to ensure our military justice system is free of unlawful command influence.<sup>37</sup> Second, the court wants to ensure that each convicted Soldier gets an individualized sentencing proceeding, and, if rehabilitative potential evidence will be offered, the witness's evaluation of the accused's rehabilitative potential is based on the accused's character, performance, and potential and not just the severity or nature of the offenses for which the accused is to be sentenced.<sup>38</sup> Third, the court wants to ensure that courts-martial are more than administrative discharge boards.<sup>39</sup> A punitive discharge is punishment; the issue of whether a given Soldier deserves a punitive discharge is distinct from the issue of whether the Soldier should remain in the military. Fourth, the court wants to ensure that sentencing witnesses do not invade the province of the court-martial panel by making suggestions, directly or indirectly, about whether a particular punishment is appropriate in a given case.<sup>40</sup> With these concerns in mind, we will now address the tactics available to defense counsel.

## Defense Tactics

### *Fight the Foundation*

Defense counsel should adopt the working hypothesis that the defense can prevent the government from presenting rehabilitative potential witnesses (or, at least, complicate their ability to do so) by denying members of the chain of command (or anyone, for that matter) the opportunity to develop an acceptable foundation.<sup>41</sup> A rehabilitative potential opinion must be based on knowledge of the

<sup>36</sup> See MCM, *supra* note 1, app. 21, at A21-72.

<sup>37</sup> *Aurich*, 31 M.J. at 96.

<sup>38</sup> *Horner*, 22 M.J. at 296.

<sup>39</sup> *Ohrt*, 28 M.J. at 306.

<sup>40</sup> *Id.* at 304-05.

<sup>41</sup> This is a working hypothesis that may or may not be correct. The hypothesis is a supposition assumed to be true to facilitate further discussion. Even if the hypothesis is untrue, the tactics discussed in this article are still valid. Even if the tactics do not prevent the government witness from offering an opinion, the tactics will provide the sentencing authority with information to determine how much weight to give the opinion. Some military trial judges may have a different view about the requirements of the foundation for a rehabilitative potential opinion. See, e.g., Lieutenant Colonel Roger E. Nell, *A View from the Bench: Rehabilitative Potential and Retention Evidence*, ARMY LAW., Apr. 2007, at 42, 43 (arguing that a sufficient foundation can be formed simply by observing the accused and talking to his immediate supervisors). The less rigorous a trial judge is about the foundation, the greater the risk of error.

accused's character and potential. Appellate cases repeatedly stress the importance of the foundation of character witnesses called by the trial counsel to offer an opinion about the accused's rehabilitative potential. "The witness . . . providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses."<sup>42</sup> By simply not talking to anyone about his case, the accused can deny potential government sentencing witnesses information about his character, moral fiber, and determination to be rehabilitated. A witness cannot fully understand the accused's character, plans for the future, degree of remorse, attempts to make restitution or apologize to the victim, and participation in counseling programs without talking to the accused. Defense counsel must instruct the accused not to talk to anyone about these topics (or anything related to the case) early in the representation.<sup>43</sup>

In cases where the accused has been instructed not to talk about his case to anyone but his defense counsel and the accused has complied, the defense counsel should plan to challenge government-called rehabilitative potential witnesses. The defense counsel can do this in advance of the witness's testimony during an Article 39(a) session or in front of the sentencing authority.<sup>44</sup> Regardless of when the witness's foundation is challenged, the questions remain the same.

Defense counsel should begin by ensuring the witness understands the definition of rehabilitative potential. Many rehabilitative potential witnesses are poorly prepared.<sup>45</sup> Even today, many do not understand the concept and mistakenly believe that their opinion is about whether the accused should be returned to duty. "Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in

<sup>42</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

<sup>43</sup> This is but one of the excellent reasons for defense counsel to give this advice. A client who follows it also protects himself from damaging admissions to be brought in under MRE 801(d)(2) when others twist or misremember his words (or remember them all too well).

<sup>44</sup> See *infra* notes 49 to 51 and accompanying text for a discussion of the tactical considerations bearing on the timing of the challenge.

<sup>45</sup> See generally Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24 (discussing the inexperience of Army prosecutors and suggesting improvements). See also Colonel Jeffery R. Nance, *A View from the Bench: So, You Want to Be a Litigator?*, ARMY LAW., Nov. 2009, at 48 (discussing the characteristics of successful litigators).

society.”<sup>46</sup> This, of course, is much more than a return to duty. Challenge the witness<sup>47</sup> by asking an open-ended question: “What do you believe rehabilitative potential means?” Odds are the witness has not been properly prepared, has not thought about the answer to this question, and will simply say something to the effect that rehabilitative potential is whether the accused deserves another chance as a Soldier. If you get this answer, you are done. Object to the witness, citing the concerns expressed in *Horner*, *Ohrt*, and *Aurich* and the cases that follow them: the inappropriateness of suggesting to the sentencing authority whether the accused deserves a punitive discharge, the failure to individualize the sentencing proceeding to the accused, and unlawful command influence if the witness is a member of the accused’s chain of command.

In the minority of cases where the witness has been prepared or somehow muddles through the first question, press the attack. Ask a second open-ended question: “How well do you know the accused?” Listen carefully to the answer and identify the weak spots you can exploit with leading questions. The common weak spots are the witness’s knowledge of the accused’s character, moral fiber, and determination to be rehabilitated. If the accused has not discussed these topics with the witness, the witness probably has an insufficient foundation. Develop questions to highlight the deficiencies: “Have you discussed the accused’s childhood with him?” If the accused has complied with your direction not to talk about his childhood, the answer will be “no.” The point being, the witness has no information about the accused during the years when his character was formed. Defense counsel should craft similar questions covering the accused’s high school years and years of military service. Also craft questions showing the witness has no knowledge of the accused’s moral fiber and determination to be rehabilitated. In the end, the witness will be left only with knowledge of the offenses and the accused’s duty performance. Remember, the witness’s opinion must be based on the witness’s knowledge of the accused’s character and potential.<sup>48</sup>

Defense counsel must decide when to challenge the witness.<sup>49</sup> One option is to challenge the witness in advance

<sup>46</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5).

<sup>47</sup> The suggested questions here in no way relieve the defense counsel of his duty to interview the witnesses before trial, or to use information gleaned in the interviews to craft good questions. The witness interview should not simply replicate the anticipated cross-examination or attempt to convince the witness that his opinion is unfounded, as these tactics will serve only to warn the witness of what is coming, but instead should encourage the witness to talk freely about what he knows and how he knows it. See Major Timothy MacDonnell, *It Is Not Just What You Ask but How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65 (providing some guidelines which apply equally well to opposing and friendly witnesses).

<sup>48</sup> *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986).

<sup>49</sup> Defense counsel should also consider whether to challenge the witness’s foundation. Defense counsel must identify those situations where the

when the members are not present.<sup>50</sup> This could be days before trial or minutes before the witness is to appear before the members. The other option is to challenge the witness with the members present. Defense counsel could mount the challenge in front of the members before the opinion is offered by requesting an opportunity to *voir dire* the witness or after the opinion is offered during cross-examination.<sup>51</sup> The factors defense counsel should consider are the likelihood the military judge will allow the testimony and the amount of good character evidence available to the defense. Generally speaking, if the judge is certain to allow the opinion testimony, wait and challenge the witness before the members. If there is a chance the judge will not allow the testimony, defense counsel should, generally speaking, challenge the witness in an Article 39(a) session. Of course, there are exceptions to these general rules.<sup>52</sup>

### *Limit the Opinion*

Even if the military judge allows a rehabilitative potential witness to offer his or her opinion, the defense counsel still has options. The first option is simple, but critical: limit the witness’s opinion. Remember the structured format for admitting a rehabilitative potential opinion from *Aurich*.<sup>53</sup> After the witness demonstrates an adequate foundation, “RCM 1001(b)(5) contemplates one question: ‘What is the accused’s potential for rehabilitation?’—and one answer: ‘In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.’”<sup>54</sup> If the trial counsel’s question varies from “What is the accused’s potential for rehabilitation?” in any meaningful way, object. Most experienced judges will not press you to explain your objection because they will recognize the issue and understand the objection. If the military judge does not

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witness has an adequate foundation but the trial counsel does a poor job presenting the witness’s basis of knowledge. Cross-examining such a witness likely will be counterproductive. Even if not counterproductive, attacking the foundation will give the trial counsel the opportunity to rehabilitate the witness during redirect examination. The better tactic in this situation may be not to challenge the foundation but urge the members not to give the opinion any weight during closing argument. Identification of these situations requires background knowledge that must be gained before trial through witness interviews.

<sup>50</sup> Article 39(a) authorizes the military judge to conduct court-martial proceedings without the members being present to rule upon various issues including whether witness testimony is admissible. This situation may fall under either Article 39(a)(1) or Article 39(a)(2). UCMJ art. 39 (2008).

<sup>51</sup> If the military judge is the sentencing authority, he or she will probably deal with this issue during the case in aggravation for efficiency purposes.

<sup>52</sup> One exception is when the defense has a great case in extenuation and mitigation and the defense counsel wants to present good character evidence during the case in aggravation. See *infra* note 59 and accompanying text. See also *supra* note 49.

<sup>53</sup> See *supra* note 34 and accompanying text.

<sup>54</sup> *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990).

recognize the issue, explain that the trial counsel is eliciting an improper opinion and cite *Aurich*. In addition to the improper questions in the cases discussed, improper questions that are commonly heard in courts-martial include: “What is your opinion of the accused?”, “What is your opinion of the accused’s potential?”, and “What is your opinion of the accused’s character?” Trial counsel who do not understand the requirements of RCM 1001(b)(5) often ask improper questions that invite the witness to stray into inappropriate areas.<sup>55</sup>

The second way to limit the witness’s opinion is to limit the answer. Listen carefully to the first sentence of the witness’s response. If it deviates meaningfully from, “In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation,” object quickly. If the judge asks for an explanation, cite *Aurich* and explain the witness is giving an improper opinion. Often, government rehabilitative potential witnesses are not properly prepared and do not understand the limits on what they can say; they innocently give what they believe to be a responsive answer to the question. Common inappropriate answers include: “In my opinion the accused has no potential for further service,” “The accused has no integrity,” and “The accused has no character.” Military officers and noncommissioned officers are naturally inclined to explain how they arrived at an opinion when asked to give one. Even if the witness gives the properly limited answer, “In my opinion, the accused has \_\_\_\_\_ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation,” the witness will be tempted to continue and explain his opinion. If the witness starts to explain his or her opinion, object. Remember, the witness

cannot give a full explanation or discuss specific instances of conduct until cross-examination.<sup>56</sup> Whether the problem is the content of the witness’s answer or what comes after, you must object quickly to stop the witness from discussing forbidden topics.

### *Make the Government Sorry They Asked*

Before deciding to call a witness, all counsel should conduct a cost-benefit analysis to see if their cause is, on balance, helped or harmed by the witness.<sup>57</sup> Defense counsel can limit the benefit to the government’s case by challenging the foundation, insisting the trial counsel’s question is properly framed, and limiting the answer to the question. Even if you run across a trial counsel who can properly present rehabilitative potential evidence, you can increase the cost of deciding to call a rehabilitative potential witness. This can be done during cross-examination and must only be attempted after careful consideration of the trial counsel’s response to this tactic. Put another way, the defense counsel must anticipate the trial counsel’s reaction and conduct his or her own cost-benefit analysis.

In an appropriate case, the defense counsel can inflict a lot of damage to the government’s case when cross-examining the government’s rehabilitative potential witness. Of course, the cross-examination can begin with the same questions asked to challenge the witness’s foundation, if those questions have not already been asked in front of the sentencing authority. The more you can highlight the fact that the witness does not really know the accused, the less weight the sentencing authority will give the opinion.

Occasionally rehabilitative potential witnesses go too far. Often, a witness will testify, “In my opinion, the accused has no rehabilitative potential.” Very, very rarely does an accused have no rehabilitative potential. This is usually a sign that the witness believes he is being asked to give an opinion about whether the accused should be returned to duty. An effective way to deal with this is to ask

<sup>55</sup> See *United States v. Warner*, 59 M.J. 590, 594–95 (C.G. Ct. Crim. App. 2003) (providing for an example of how this can happen during cross-examination). In *Warner*, the accused’s supervisor testified “that Appellant was an excellent worker who sought advice on achieving a ‘healthy lifestyle’ through exercise, improved nutrition, and stress management.” When asked, without objection from the trial counsel, if he had an opinion as to Appellant’s rehabilitative potential, he said that Appellant had “taken the right steps . . . to better his future after the Coast Guard.” On cross-examination, trial counsel asked the witness if he was familiar with the “Coast Guard’s drug policy” and whether appellant had “rehabilitative potential *in the Coast Guard*, given his drug abuse?” (emphasis added). When the witness reiterated his opinion that appellant had rehabilitative potential, trial counsel asked if he understood that illicit drug use was “contrary to the [Coast Guard’s] core mission” and drug use “can create problems in efficiency and otherwise for the chain of command?” The court held these questions to be improper but found their admission to be harmless error, in part because the defense counsel did not object. Cf. *United States v. Armon*, 51 M.J. 83, 84–87 (1999). In *Armon*, the accused was convicted of making false official statements and wearing unauthorized military accoutrements, including a combat infantryman’s badge, a Special Forces tab, a Special Forces combat patch, and a parachute badge with bronze star. The Government called several sentencing witnesses who had actually earned some of these accoutrements, and who gave very emotional accounts of what the ribbons and badges meant to them, their low opinions of anyone who would wear them falsely, and their unwillingness to serve with such a Soldier. This case shows how quickly leadership testimony can become impermissible commentary on the offenses. The court affirmed the sentence, partly because the defense counsel did not object. See also *United States v. Randolph*, 20 M.J. 850, 851 (A.C.M.R. 1985).

<sup>56</sup> See *supra* notes 32 to 33 and accompanying text.

<sup>57</sup> An example illustrates the danger:

A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination, she was asked if she had heard that the defendant had shot anybody, and, if so, how many. She answered, “Three or four,” and gave the names of two, but could not recall the names of the others. She still insisted, however, that he was of “good character.” The jury seems to have valued her information more highly than her judgment, and, on appeal from conviction, the cross-examination was held proper.

*Michelson v. United States*, 335 U.S. 469, 479 n.16 (1948) (citing *People v. Laudiero*, 192 N.Y. 304, 309 (1908)).

the witness, “So, in your opinion, the accused has no potential to \_\_\_\_\_?” Fill in the blank with any civilian, entry-level job you can think of. “So, in your opinion, the accused has no potential to be a laborer at a construction site?” “So, in your opinion, the accused has no potential to flip burgers at a fast-food restaurant?” “So, in your opinion, the accused has no potential to pump gas?” The witness, sensing a trap, will usually respond that he did not mean that, what he meant was the accused has no potential to be a Soldier. Thinking he has avoided the trap, he walked right into it. If the witness answers these questions affirmatively, the witness usually looks ridiculous. As the cases discussed in this article illustrate, the government typically offers opinions about rehabilitative potential evidence only in low-level cases with no true victim—drug use, for example—because there is nothing else to offer.<sup>58</sup> A witness will look ridiculous trying to convince others that the accused has no potential to be a useful member of society when the accused has only been convicted of smoking marijuana.

In addition to minimizing the witness’s foundation and challenging absurd opinions, defense counsel can inject the entire defense case in extenuation and mitigation<sup>59</sup> into the government’s case in aggravation. This is as simple as repeatedly asking questions in the form, “Did you know \_\_\_\_\_?”<sup>60</sup> The defense counsel simply fills in the blank with each piece of favorable information. Some questions might be: “Did you know the accused won the National Geography Bee in 4th grade? Did you know the accused has two varsity letters in football? Did you know the accused is an Eagle Scout? Did you know the accused was president of

<sup>58</sup> This pattern calls into question whether RCM 1101(b)(5) evidence *ever* has value for the prosecution. As a practical matter, the accused in a low-level case will be returned to society (military or civilian) after a brief period of punishment no matter what the witnesses say about him, so that his potential to function there is not really at issue. The accused in a high-level case, who might actually be kept out of society for life, does not face this kind of evidence because better, stronger aggravation is available to the prosecution. There is no benefit in offering rehabilitative potential evidence in a low-level case, but there is the possibility of creating an appellate issue. See *United States v. Bish*, 54 M.J. 860, 861–62 (A.F. Ct. Crim. App. 2001) (excoriating trial counsel for “interjecting an appellate issue into a case for no good reason,” by introducing rehab potential evidence from a commander when much better aggravation was in evidence).

<sup>59</sup> “Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.” MCM, *supra* note 1, R.C.M. 1001(c)(1)(A). “Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation for clemency.” *Id.* R.C.M. 1001(c)(1)(B). Matter in mitigation includes specific acts of good conduct, bravery, good duty performance, or any evidence of a trait that is desirable in a Soldier. *Id.*

<sup>60</sup> Counsel should be aware that the military judge will be likely to give Instruction 7-18, “Have you Heard” Questions to Impeach Opinion. This instruction tells members that they can only consider “have-you-heard” or “did-you-know”-type questions to determine how much weight to give to a character witness’s testimony. The members will also be told that the question cannot be considered for any other purpose. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHMARK para. 7-18 (1 Jan. 2010).

his high school class? Did you know the accused was active in his church’s youth group? Did you know the accused was the runner-up at the Brigade Soldier of the Month board?” The defense counsel can methodically and patiently cover every achievement of the accused during his entire life. Cover every segment of the accused’s life: early childhood, high school, and military service. The point is to illustrate that the accused is an achiever with a special emphasis on those things that show the accused was raised to have good character. In addition to demonstrating that the witness does not know the accused, this tactic sets up the argument that the current misconduct is out of character, and the accused deserves another chance. Many of these questions will foreshadow what the defense will present later, but the cross-examination of a rehabilitative potential witness is not limited to what the defense will present later. That means the defense counsel can ask “did-you-know”-type questions to challenge the foundation of the witness even if the defense counsel cannot prove the favorable information for whatever reason, as long as the defense counsel has a good-faith basis for asking the question.<sup>61</sup> The more times the witness answers “no” to these questions, the less weight the sentencing authority will give to the opinion.<sup>62</sup> Another benefit is that the defense counsel gets to foreshadow the favorable information sooner—during the government’s case in aggravation. In a particular case, it may be important to

<sup>61</sup> The defense counsel is required to have a good faith basis in order to ask the question. See *United States v. Pruitt*, 46 M.J. 148, 151 (1997).

<sup>62</sup> The defense counsel might even renew his objection if the witness answers negatively to all of the “did-you-know”-type questions. The less the witness knows about the accused’s background before his military service, the more the opinion seems to be an inappropriate comment on the accused’s lack of potential for further military service. Defense counsel should be aware of an odd and incorrect opinion by the Army Court of Military Review (ACMR), *United States v. Sylvester*, 38 M.J. 720, 722–24 (A.C.M.R. 1994). In that case, a government sentencing witness testified that the accused had “low” rehabilitative potential. On cross, he admitted that this was based solely on the accused’s potential for military service. The defense moved to strike his testimony and the trial court overruled. Contrary to substantial authority, the ACMR affirmed, and held “that R.C.M. 1001(b)(5) opinion evidence is not per se inadmissible merely because it is shown to be based solely on the witness’s view of the appellant’s potential for military service,” *Id.* at 723 (The court also held that the testimony was not an improper euphemism because the defense had raised it on cross.). *Id.* at 724. The flaw in the court’s holding is caused by a fundamental misreading of *Horner*. In *Sylvester*, the court states, “[T]he Court of Military Appeals, interpreting the term ‘rehabilitative potential’ from R.C.M. 1001(b)(5), adopted an expansive definition consistent with a return to a particular status *and* a return in society in general.” *Id.* (citing *Horner*) (emphasis in original). The CMA did no such thing. After reviewing the definitions of rehabilitation and rehabilitate from *Webster’s* dictionary, the court stated, “[I]n other words, ‘rehabilitation’ can denote both a return to a particular status and a return to society. Our view of ‘potential for rehabilitation’ is consistent with Webster’s more expansive definition.” *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986). In *Horner*, the CMA selected the expansive definition (return to society) and rejected the narrow definition (return to a particular status). The correct interpretation of *Horner* is reflected in the 1994 amendment to the rule, so *Sylvester’s* impact has been minimal. See MCM, *supra* note 1, R.C.M. 1001(b)(5); see also Major Charles E. Wiedie, Jr., *Rehab Potential 101: A Primer on the Use of Rehabilitative Potential Evidence in Sentencing*, 62 A.F. L. REV. 43, 60 (2008).

present the favorable information contemporaneously with aggravation evidence to prevent the sentencing authority from concluding the accused is a bad person.

Defense counsel must carefully select when he or she cross-examines a government rehabilitative potential witness (or any character witness) with specific instances of conduct. If the defense cross-examines with specific instances, the government can discuss specific instances of conduct on redirect examination.<sup>63</sup> The defense counsel must know what unfavorable information is available to the trial counsel, anticipate the trial counsel's likely response, and decide whether the benefit to the defense case is sufficient given the cost imposed by giving the trial counsel the opportunity to discuss specific instances of bad conduct the members would not otherwise hear.

### What's Good for the Goose Doesn't Apply to the Gander

In *United States v. Griggs*,<sup>64</sup> the accused was convicted of wrongfully using marijuana and ecstasy, and wrongfully distributing ecstasy. He was sentenced to a bad conduct discharge, confinement for 150 days, total forfeiture of pay and allowances, and reduction to E-1.<sup>65</sup> Senior Airman Griggs (SrA) pled guilty to the marijuana offense but contested the other charges. During the sentencing portion of the trial, the defense counsel offered six letters. The trial counsel objected to specific language in the letters that amounted to a recommendation that SrA Griggs be retained in the Air Force.<sup>66</sup> The military judge sustained the

objection and the passages of the letters were redacted. Although his reasons were unclear, it appears that the trial judge based his ruling limiting the evidence the defense could present on RCM 1001(b)(5)(D), a rule normally used to limit the evidence the government can present. The Court of Appeals for the Armed Forces (CAAF) considered whether the trial judge based his decision on an erroneous view of the law.<sup>67</sup>

The court noted that its analysis should be as simple as looking at the structure of RCM 1001. Rule for Court-Martial 1001(b) is titled, "Matters to be presented by the prosecution." Rule for Court-Martial 1001(c) is titled, "Matters to be presented by the defense." So, a restriction in RCM 1001(b)(5)(D) that limits the evidence the trial counsel can present during the case in aggravation would not apply to the defense case in extenuation and mitigation.<sup>68</sup> The court recognized that the analysis was not that simple and the complicating factor was the court's decision in *United States v. Ramos*.<sup>69</sup>

Specialist Ramos was convicted of larceny, forgery and larceny of mail matter and sentenced to a bad conduct discharge, confinement for six months, and a \$2,000 fine.<sup>70</sup> During the sentencing case, the defense called three noncommissioned officers who testified that SPC Ramos was still a good Soldier and that they would take him back in their unit, even knowing about the convictions.<sup>71</sup> The trial judge, *sua sponte*, gave the members a limiting instruction to

<sup>63</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5)(F) discussion:

For example, on redirect a witness or deponent may testify regarding specific instances of conduct when the cross-examination of the witness or deponent concerned specific instances of misconduct. Similarly, for example, on redirect a witness or deponent may offer an opinion on matters beyond the scope of the accused's rehabilitative potential if an opinion about such matters was elicited during cross-examination of the witness or deponent and is otherwise admissible.

See also *United States v. Eslinger*, 69 M.J. 522, 534 (A. Ct. Crim. App. 2010).

<sup>64</sup> 61 M.J. 402 (C.A.A.F. 2005). See Major John Rothwell, "I Made A Wrong Mistake": Sentencing and Post-Trial in 2005, *ARMY LAW.*, June 2006, at 41, 41-44.

<sup>65</sup> *Griggs*, 61 M.J. at 403.

<sup>66</sup> The specific passages were:

*I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I can honestly say his future is not in my hands, but I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force. I would still like to be able to work with SrA Griggs.*

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*In fact I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him. Even with the stress of a pending court martial he has remained dedicated, motivated, and faithful till [sic] the end.*

*I would not hesitate to have SrA Griggs working for me or with me. I continue to hear, "This is not a one mistake Air Force" so I feel SrA Griggs can learn a valuable lesson from this experience.*

*I believe strongly that everyone deserves a second chance to prove him or herself. I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.*

*I am convinced that he has learned from this experience and can still be of great potential to the United States Air Force ... We seem to "eat our young" sometimes and see the only course of action is to toss them out after investing so much time, effort, and money.*

*Id.* at 406 (emphasis in original).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 406-07.

<sup>69</sup> *Id.* at 408 (citing *United States v. Ramos*, 42 M.J. 392, 396 (1995)).

<sup>70</sup> *Ramos*, 42 M.J. at 393.

<sup>71</sup> *Id.* at 393-94.

disregard the portion of the witness testimony where they said the accused could still be a Soldier in the Army. On appeal, the accused complained that the trial judge abandoned his impartial role. In affirming the judge's decision to give the limiting instruction, the court said,

In *United States v. Ohrt* [citation omitted] this Court recognized that "use of euphemisms, such as 'No potential for continued service'; 'he should be separated'; or the like are just other ways of saying, 'Give the accused a punitive discharge.'" The mirror image might reasonably be that an opinion that an accused could "continue to serve and contribute to the United States Army" simply is a euphemism for, "I do not believe you should give him a punitive discharge." If so, then such testimony would seem to be what the *Ohrt* Court had in mind when it explicitly stated that "a witness—*be he for the prosecution or the defense*—should not be allowed to express an opinion whether an accused should be punitively discharged."<sup>72</sup>

This language caused the trial judge in *Ramos* to give the limiting instruction, and the language can be reasonably interpreted to mean that *Ohrt* prohibits both sides from using euphemisms to influence the members' decision about adjudging a punitive discharge. Whether a defense witness can give testimony that could be interpreted as a euphemism for "do not discharge the accused" is the matter the court resolved in *Griggs*.

In *Griggs*, the court reviewed two lines of cases that seemed to be at odds: the *Ohrt-Ramos* line of cases, and an older line of cases recognizing evidence that the accused should be returned to duty as "classic mitigation evidence," and admissible as such.<sup>73</sup> In resolving this tension, the court concluded "the better view is that RCM 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again."<sup>74</sup> The court warned, however, that "there can be a thin line between an opinion that an accused should be returned to duty and the expressions of an opinion regarding the appropriateness of a punitive discharge. . . . [A]n explicit declaration that an accused should not receive a punitive discharge or that any such discharge should be of a certain severity is disallowed for the defense not because of R.C.M. 1001(b)(5)(D), but

because such evidence invades the province of the members to decide alone on punishment."<sup>75</sup> Thus, both lines of cases were upheld, and the left and right limits of this kind of evidence were established.

The bottom line is clear, correct, and easy to implement: no witness, regardless of which side calls him or her, can express an opinion on whether the accused deserves a punitive discharge. The trial counsel cannot call a rehabilitative potential witness and elicit a euphemism for "the accused deserves a discharge."<sup>76</sup> The defense can present testimony that a witness would be willing to serve with the accused again, even though this resembles a euphemism for "the accused does not deserve a discharge."

Of course, before offering testimony of a witness's willingness to serve with the accused again, the defense counsel must carefully analyze the costs and benefits of doing so. The defense counsel must know what unfavorable information is available to the trial counsel, because the trial counsel will be able to test the witness's foundation with specific instances of bad conduct during cross-examination. Defense counsel do not want to give the trial counsel an opportunity to ask "did-you-know"-type questions and present information to the sentencing authority that the sentencing authority would not otherwise hear.

In addition, defense counsel must frame the questions carefully. A defense witness cannot testify that the accused does not deserve a punitive discharge and should not say anything close to that. If the defense properly limits the opinion of its witness, the defense is also limiting the opinion of any government-called rebuttal witness.<sup>77</sup> If the defense witness mistakenly says, "In my opinion, the accused should remain in the Army," the trial counsel may be allowed to rebut this testimony with witness testimony that shows this opinion is not the consensus of the command. An appropriate question would elicit an answer, the theme of which is, "I would serve with the accused again." An appropriate question and answer will limit the scope of the government's cross-examination of the defense sentencing witness.<sup>78</sup> An appropriate answer by the defense witness

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<sup>75</sup> *Id.*

<sup>76</sup> In fact, the Government rehabilitative potential witness is very limited in the opinion he or she can give. See *supra* note 34 and accompanying text.

<sup>77</sup> The testimony of a defense witness may allow the prosecution to present rebuttal evidence that would be inadmissible without the defense witness's testimony. *United States v. Tipton*, 23 M.J. 338, 344 (C.M.A. 1987).

<sup>78</sup> See *United States v. Hill*, 62 M.J. 271, 275 (C.A.A.F. 2006):

Once the defense opened the door to the issue of whether the battalion commander would want Appellant back in the unit, the prosecution appropriately sought to explore the witness's response on cross-examination by addressing the desirability of retaining in the unit a person who had

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<sup>72</sup> *Id.* at 396 (emphasis added).

<sup>73</sup> *Id.* at 407. See, e.g., *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990); *United States v. Vogel*, 37 C.M.R. 462, 463 (1967).

<sup>74</sup> *Griggs*, 61 M.J. 409.

will also limit the government rebuttal witness to an opinion, the theme of which is, “I would not be willing to serve with the accused again.”<sup>79</sup> *United States v. Eslinger*<sup>80</sup> is a good illustration of what can go wrong if these clear and easy-to-implement rules are not followed.

### Watch Out for Rebuttal Witnesses

In *Eslinger*, the accused was convicted of wrongful possession of child pornography.<sup>81</sup> The accused was a sergeant first class (SFC) with eighteen years of service; he was a Special Forces medic, high-altitude, low-opening (HALO) qualified, and a veteran of four deployments. He had been awarded the Bronze Star Medal for Valor. On the other hand, the accused also had two general officer memoranda of reprimand for driving under the influence of alcohol and a civilian conviction for criminal trespass, which were offered by the prosecution during the case in aggravation.<sup>82</sup> The accused was sentenced to a bad conduct discharge, confinement for three years, reduction to E1, and forfeiture of all pay and allowances.<sup>83</sup>

As mitigation evidence, the defense offered a stipulation of expected testimony that included:

I definitely think there is a place for [the accused] in the Army and within the 10th Special Forces Group. I truly believe that Special Forces is the only place for SFC Eslinger. I would be proud to serve with him in the future despite this conviction. . . . [I] would welcome him to my team any day.<sup>84</sup>

The defense also called several witnesses who testified in response to various questions, “I would take him on my team

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committed the offenses of which Appellant had been convicted.

The battalion commander, called by the defense, went on to clarify that he was willing to take the accused back if the judge decided not to discharge him, but if he was a panel member, he would discharge the accused. *Id.* at 273. Defense counsel must be very careful in selecting witnesses and limiting the scope of the witness’s opinion on direct examination.

<sup>79</sup> The Government may call rebuttal witnesses to prove the defense-called witnesses’ opinions that they would serve with the accused again are not the consensus of the command. *See supra* note 33 and accompanying text. *See also* Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing and the “Good Soldier,”* ARMY LAW., Mar. 2010, at 91, 93.

<sup>80</sup> 70 M.J. 193 (C.A.A.F. 2011).

<sup>81</sup> *Id.* at 195.

<sup>82</sup> *Id.* at 201.

<sup>83</sup> *Id.* at 195.

<sup>84</sup> *Id.* at 196.

in a minute[.]” “I would say, yes, we need to keep this soldier . . . I think, you know, something needs to be done, you know. Past that, I think he needs to stay in the service[.]” and “he ‘would like to have Sergeant First Class Eslinger on the plane’ with him when he deployed.”<sup>85</sup> The government called five rebuttal witnesses, three of whom barely knew the accused. However, they were unanimous in their opinion that the accused should not remain in the 10th Special Forces Group or the Army.<sup>86</sup>

The Army Court of Criminal Appeals found plain error, but found the error harmless and affirmed the findings and sentence.<sup>87</sup> The court held that the trial judge “committed error by permitting the government rebuttal testimony essentially calling for the panel to discharge [the accused] without imposing a meaningful foundation requirement or providing a necessary limiting instruction.”<sup>88</sup> In its opinion, the court extensively discussed the cases and principles discussed in Sections 1 and 3 of this article.<sup>89</sup> The Army Court held, “[T]he foundation and scope of testimony by government witnesses rebutting so-called defense retention evidence must generally conform with the principles of R.C.M. 1001(b)(5)(B)-(D).”<sup>90</sup>

The court repeatedly emphasized the importance of the witnesses’ foundations. Three of the trial counsel’s rebuttal witnesses would have had a hard time picking the accused out of a one-man line-up. These witnesses simply did not know SFC Eslinger, his background, or his character. The complete lack of personal knowledge of the accused made the court acutely concerned about the related issue of unlawful command influence. The accused’s acting battalion commander was “wholly devoid of foundation,”<sup>91</sup> and the acting commander “repeatedly invoked the name—and sought to quote the opinion of—the battalion commander regarding whether [the accused] should deploy and remain in the SF Group and the Army. In addition to improperly reciting specific facts of [the accused’s] prior disciplinary actions on direct examination, [the acting

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<sup>85</sup> *United States v. Eslinger*, 69 M.J. 522, 527 (A. Ct. Crim. App. 2010); *see also Eslinger*, 70 M.J. at 196 (C.A.A.F. 2011).

<sup>86</sup> *Eslinger*, 69 M.J. at 527–29 (A Ct. Crim. App. 2010). The first rebuttal witness, the accused’s acting battalion commander, admitted on cross-examination that he had no prior contacts or knowledge of the accused and had only learned of his disciplinary problems during the trial. The second witness, the accused’s acting battalion command sergeant major, admitted on cross-examination that he had no prior knowledge of the accused and his opinion was based on the nature of the child pornography offenses. The fourth witness, the accused’s group commander, only knew the accused was in his unit and his disciplinary history.

<sup>87</sup> *Id.* at 535.

<sup>88</sup> *Id.* at 530.

<sup>89</sup> *Id.* at 529–35.

<sup>90</sup> *Id.* at 536.

<sup>91</sup> *Id.* at 534.

commander] noted those actions (reprimands) reflected the judgments of a flag officer regarding [the accused's] character."<sup>92</sup> Similarly, the foundation for the group commander's and the battalion command sergeant major's testimony was no broader than their knowledge of any Soldier under their command. Referring to superiors and calling commanders with no knowledge of the accused, his background, and his character hints at unlawful command influence because the probative value of the witnesses' opinions is no greater than that of a commander expressing the hope that the accused is discharged.

The court warned counsel about the impermissible practice of having government witnesses explain the basis of their opinion on direct examination. The court noted that the specific instances of conduct that challenge or support the witnesses' opinions are properly covered only during cross-examination and redirect examination.<sup>93</sup> The government rebuttal witnesses extensively discussed, on direct examination and without objection, why they held the opinions they offered the court.<sup>94</sup> Finally, the court was concerned that the opinions of the government rebuttal witnesses went beyond what is allowed by *Griggs*. Instead of merely demonstrating that the defense witnesses' opinions that they would be willing to serve with the accused in the future were not the consensus of the command, the government rebuttal witnesses, with varying degrees of directness, recommended that the members discharge the accused.<sup>95</sup> The court found clear and obvious errors, but held the errors were harmless.<sup>96</sup>

The CAAF reviewed the case and affirmed the result,<sup>97</sup> but changed the legal analysis. "[A]lthough rebuttal testimony of the type in this case may raise some of the same concerns addressed by RCM 1001(b)(5), that is different than concluding that this rule specifically applies to rebuttal evidence. Rebuttal evidence is governed by RCM 1001(d), which does not contain the same restrictions as RCM 1001(b)(5)."<sup>98</sup> While recognizing the concerns that

arise when members of the chain of command testify that they do not want the accused returned to their unit, CAAF warned defense counsel that if the defense opens the door by presenting *Griggs* evidence, "[P]rinciples of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation."<sup>99</sup> Noting that the Military Rules of Evidence (MRE) apply to presentencing proceedings, the CAAF analyzed the testimony of the government rebuttal witnesses as lay opinions. "M.R.E. 701(a) requires that lay opinions or inferences be limited to those that are 'rationally based on the perception of the witness.' In similar fashion, MRE 602 provides that '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.'"<sup>100</sup> Evaluating the witnesses' testimony according to this standard, the CAAF concluded that the trial judge did not commit plain error.<sup>101</sup>

The lessons for defense counsel are many. First, do not call a "*Griggs* witness" if the government can effectively negate the benefit of the *Griggs* witness by calling a series of rebuttal witnesses. Carefully conduct a cost-benefit analysis before calling a character witness. Second, understand that the foundational requirements of RCM 1001(b)(5) do not apply to government rebuttal witnesses. Military Rule of Evidence 701(a) provides the correct standard. Under either standard, the defense may have prevented at least three of the government rebuttal witnesses in *Eslinger* from testifying based on their razor-thin foundations by simply objecting. Challenge the government's character witness's foundation the same as you would if the witness were called in the government case in aggravation because, in the end, it all comes down to the witness's personal knowledge.

Third, defense counsel should carefully limit the opinions offered by *Griggs* witnesses. The government may call witnesses in rebuttal to defense retention evidence to show that the defense witness's opinion is not the consensus of the command. The scope of the rebuttal witness's opinion will be determined by how far the defense has opened the door. If a defense witness testifies, "I definitely think there is a place for [the accused] in the Army and within the 10th Special Forces Group," the defense counsel should expect the government to rebut this opinion with a witness whose opinion is that there is no place in the Army or 10th Special Forces Group for the accused. If the defense surgically limits the defense witness's opinion to, "I would gladly serve with the accused again," the government's rebuttal witness would be limited to, "I am not willing to serve with

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See also *United States v. Powell*, 49 M.J. 460, 461–62 (C.A.A.F. 1998); *United States v. Rhoads*, 32 M.J. 114, 115–16 (C.M.A. 1991); *United States v. Gregory*, 31 M.J. 236, 238 (C.M.A. 1990).

<sup>94</sup> *Eslinger*, 69 M.J. at 527–29 (A. Ct. Crim. App. 2010).

<sup>95</sup> *Id.* at 534–35. Without a doubt, the defense may have invited the improper opinions from the government witnesses by eliciting opinions from the defense witnesses that went beyond expressing a willingness to serve with the accused again. For example, one defense witness testified, "I think [the accused] needs to stay in the Army." *Id.* at 527. The court noted that even if the defense provoked the improper rebuttal evidence, the trial judge should have limited the improper testimony and put it in context with an appropriate instruction. *Id.* at 530.

<sup>96</sup> *Id.* at 536.

<sup>97</sup> *United States v. Eslinger*, 70 M.J. 193, 201 (C.A.A.F. 2011).

<sup>98</sup> *Id.* at 199.

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<sup>99</sup> *Id.* at 198.

<sup>100</sup> *Id.* at 199.

<sup>101</sup> *Id.* at 200. Even though the court did not find plain error, the court tested for prejudice, the last step in the plain error analysis. The CAAF concluded that even if the military judge committed plain errors, the errors were harmless. *Id.*

the accused again.” Defense counsel should object to any testimony offered by the government rebuttal witness that goes beyond, “I am not willing to serve with him again.” In this situation, testimony to the effect, “I don’t want him back in my unit,” “there’s no place in the 10<sup>th</sup> Special Forces Group for him,” “I don’t think he can remain in the Army,” or “there’s no place in our ranks for the accused” goes too far, does not rebut the defense witness’s opinion, and implicates the concerns the courts have expressed since *Horner*.

Finally, do not allow the government’s witness to explain his or her basis for the opinion on direct examination with specific instances of conduct. The witness will be allowed generally to describe how well and how long the witness knows the accused, but the witness should not be allowed to go into specific instances of conduct. Craft your cross-examination carefully, keeping in mind if you cross-examine with specific instances of conduct, the witness will likely be allowed to explain the basis of his opinion on redirect examination, including specific instances of bad conduct.

### **Conclusion**

Defense counsel can set the agenda for the discussion about the accused’s potential for rehabilitation and future service. If the accused’s potential is low or there are many specific instances of bad conduct that the trial counsel can exploit, prevent all discussion of the accused’s low potential and bad behavior by denying the government witnesses the information necessary to form a legally acceptable foundation. This means the accused must follow the standard advice given to all clients: do not discuss your case with anyone. If the trial counsel calls a rehabilitative potential witness, defense counsel must know how to attack the witness’s foundation and prevent the testimony. If the accused’s potential is low or there are many specific

instances of bad conduct that the trial counsel can exploit, do not give the trial counsel a second opportunity to bring unfavorable information to the attention of the sentencing authority by calling defense witnesses willing to serve with the accused again.

If the misconduct reflected in the specifications for which the accused is to be sentenced is truly a one-time mistake, the accused’s potential for rehabilitation and further military service are probably high. If the accused’s misconduct is a one-time mistake, there should be no other specific acts of bad behavior available to the trial counsel. In this situation, the defense counsel should not hesitate to call a *Griggs* witness and start a discussion of the accused’s potential for further service.

For the cases that fall in between the easy situations, defense counsel must exercise judgment; knowledge of the law and tactics, though important, are not enough. Before starting or expanding a discussion of the accused’s potential, defense counsel must become thoroughly acquainted with the client’s background, in both its favorable and unfavorable aspects, anticipate the trial counsel’s response, and decide whether the favorable information warrants risk of more unfavorable information being presented to the sentencing authority. Many times, the issue is close, but these are among the hard decisions that defense counsel make every day.

## Not the Third Wheel: Intervenor in Government Accountability Office Protests

*Daniel Chudd & Damien Specht<sup>†</sup>*

### Introduction

In protests at the Government Accountability Office (GAO), the protester and agency have easily defined roles. Intervenor, however, may seem about as useful as a third wheel on a bicycle. Protesters' counsel properly see the intervenor as an obstacle to a successful protest, while agency attorneys are often hesitant to work too closely with intervenor counsel either out of concerns related to information sharing or that the interests of the government and the intervenor may diverge, or both. Our goal in this article is to dispel these agency concerns. We will, accordingly, explain why the intervenor should not be perceived as a third wheel, but rather as an integral and valuable part of the agency's defense. We explain why intervenors intervene, discuss the government's perspective, and describe a roadmap of how intervenors can help agency counsel defend an award. We offer these views to illuminate a clearer role for intervenors in a bid protest as a key part of the agency defense.

### Why Intervenor Intervene

When we discuss the role of intervenors with friends and colleagues who are agency protest counsel, they are sometimes skeptical that intervenors can be a useful part of the process. Many claim, only half in jest, that the most substantive document filed by the intervenor is usually its Notice of Intervention. But we suggest that their views may have been colored by intervenor counsel who did not do all they should to assist the agency as a team player. And the reality is that both active and passive intervenors exist; knowing which one you are dealing with, and their motivations, can go a long way in determining how helpful they can be.

According to the GAO's regulations, an intervenor is "an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied."<sup>1</sup> This is about as dry a definition as there is, and offers no insight into the real world of intervenors. So, to clarify things, we will divide intervenors into three categories: Risk Assessors, Trackers, and Litigators.

The Risk Assessor is the most conservative intervenor. Full scale litigation, even a short term bid protest, can cost hundreds of thousands—if not millions—of dollars. With a sustain rate of less than 20%,<sup>2</sup> many contract awardees see no reason to expend resources defending against ill-founded protests. However, to make an assessment of whether a particular protest poses significant risk, the awardee needs to understand the protester's claims. This is not easy without intervening. Awardees are entitled only to a redacted copy of the initial protest, and often the redactions are so extensive that it is impossible to discern the quality of the protest.<sup>3</sup> As a result, the Risk Assessor asks counsel to intervene to obtain a copy of the unredacted protest, and then asks counsel for an appraisal of the merits. But, after this initial flurry, a Risk Assessor may disappear, confident that the agency has the case well in hand. This intervenor typically will not file any further documents, and there is no requirement that it do so. If, however, the intervenor's counsel thinks that there is exposure and the intervenor's perspective can add value, a Risk Assessor may transform into a Litigator, discussed below. Whatever approach this intervenor takes, agency counsel should appreciate that even the most passive Risk Assessor will be willing to answer agency questions or provide information at any point during the protest process. This information may take the form of declarations from key company employees or assistance finding particular references in the awardee's proposal. There is no reason not to take advantage of this resource.

A close cousin to the Risk Assessor is the Tracker. The Tracker follows the same pattern as a Risk Assessor, but may be more active after the filing of the Agency Report and any supplemental protests. These intervenors are most common in protests that raise substantive challenges to the protester's proposal, but non-existent or general challenges to the awardee. Trackers are known for silently participating in conference calls with GAO attorneys and filing one- or two page Comments on the Agency Report which add little more than a "me too" to the agency's filing. If, however, a direct challenge is levied against the Tracker's proposal, a Tracker may become active to address that issue.

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<sup>1</sup> 4 C.F.R. § 21.(b)(1).

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<sup>2</sup> See GAO BID PROTEST ANN. REP. TO THE CONGRESS FOR FISCAL YEAR 2010, at 2 (2010), available at <http://www.gao.gov/legal/bids/bidproan.htm>.

<sup>3</sup> See 4 C.F.R. § 21.3(a) (2011) ("The agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall furnish copies of protest submissions to those parties, except where disclosure of the information is prohibited by law . . ."). As disclosure of protected information outside of the protective order would be prohibited, intervenors are, initially, only entitled to redacted filings.

As a result, one way to engage this type of intervenor is for the agency to ask for assistance on a specific issue on which the intervenor could add value. This is a sensible proposition in all events.

Finally, there are Litigators. From the beginning of the protest to its conclusion, and no matter whether the protest is focused on the protester's proposal or the awardee's, these intervenors file substantive briefs and actively engage the protester's arguments. They can add significant value by bringing important legal resources to bear and often provide new arguments or perspectives to support the agency's position. It is easy to identify this type of intervenor, because they not only will ask the agency for its assessment of the merits of a given protest, but will also ask how they can help, often offering to perform legal research or sending cases or draft arguments to agency counsel before the filing of the Agency Report. These intervenors would prefer to be full partners in the defense of the award, but, as discussed below, that is not always the agency's preference. The disconnect between the agency and a Litigator is not beneficial to either party, as a well informed intervenor is a more effective advocate for dismissal of the protest.

### Concerns About Intervenors

When it comes to Litigators, we hear two primary concerns from agency attorneys. First, they are concerned that sharing government information with the intervenor without sharing it with the protester is inequitable or contrary to the GAO's regulations. Second, agency attorneys worry that working too closely with an intervenor will be counterproductive if the parties' interests diverge. Although we appreciate these perceptions, neither of them should stand in the way of close coordination between agency and intervenor.

### Once a Protective Order Is Entered, Information Can Be Shared with the Intervenor

We have heard concerns from agency counsel that working too closely with intervenor counsel is unfair to the protester or a prohibited ex parte communication. Protests are an adversarial process with the intervenor and agency on one side and the protester on the other. Many agency attorneys, however, mistakenly believe that information must be shared evenly with the intervenor and protester because of GAO rules or because information shared could be used against the agency in future litigation. As a result, agency counsel are often disinclined to preview the contents of the agency record or the Government's proposed arguments for intervenor counsel before the record is filed. These concerns are simply misplaced. To the contrary, good communication between parties that find themselves on the same side of litigation is essential to presenting the best case possible.

There are two GAO rules that address information sharing. First, 4 C.F.R. § 21.3(e) requires that "the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors."<sup>4</sup> This rule does *not* prohibit an agency from sharing documents with the intervenors *before* the agency Report is filed.<sup>5</sup> This type of preview, or at minimum a summary of key documents, can often help the intervenor understand why the agency came to the conclusion it did, focus the intervenor's arguments in its support of the agency's position, and advance the parties' joint goal of defending the award decision. Moreover, no privilege or other joint defense issue is compromised by merely sharing because the documents will eventually be released to all parties as part of the agency record. Second, the GAO discourages *ex parte* communication with GAO attorneys: "Parties should not engage in ex parte communications with the GAO attorney assigned to the protest or with any other GAO employee."<sup>6</sup> But by its terms, this language applies only to communications with GAO attorneys, not between counsel for the parties. Thus, this does not limit communications between agency and intervenor counsel.

Aside from GAO rules, there is also the issue of the standard protective order that is issued for protests. In the early stages of a protest that involves protected information, counsel for the intervenor will seek access to that information through the GAO's standard protective order. The protective order "limits disclosure of certain material and information submitted in the above captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure."<sup>7</sup> Of course, once intervenors are admitted, the protective order does not preclude free information sharing between the agency and intervenor counsel. To the contrary, the protective order prohibits intervenor counsel from sharing with its client competitively sensitive information that might yield an unfair advantage in any future competition.<sup>8</sup> Thus, the protective order should encourage, rather than discourage, open lines of communication between attorneys.

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<sup>4</sup> *Id.* § 21.3(e).

<sup>5</sup> In fact, "GAO encourages agencies to voluntarily release to the parties documents that are relevant to the protest prior to the filing of the agency report." U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 22 (9th ed. 2009) [hereinafter GAO DESCRIPTIVE GUIDE], available at <http://www.gao.gov/http://www.gao.gov/special.pubs/og96024.htm> (citing 4 C.F.R. § 21.3(c)).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, GUIDE TO GAO PROTECTIVE ORDERS 17 (2006), available at <http://www.gao.gov/special.pubs/d06716sp.pdf> (showing complete text of the standard order)

<sup>8</sup> *Id.* at 18 (order allows sharing of the information only with individuals "admitted under the order," to include paralegals and support staff, "*who are not involved in competitive decisionmaking for a party* or for any firm that might gain a competitive advantage from access to the protected material. . ."). "[O]nly attorneys and consultants they retain may be admitted under a protective order." *Id.* at 4.

In addition, we occasionally hear agency counsel question whether information sharing may allow the intervenor to bring related challenges to the agency. For example, could information provided to an intervenor in one successful protest be used to later challenge a re-evaluation of that same award? Almost never! As a practical matter, it is unlikely that information from one protest would be of any use in another as each procurement is evaluated on its own merits.<sup>9</sup>

In addition, using information in this manner is not permitted by the GAO's standard protective order without the GAO's permission. "All material that is identified as protected" is covered by the protective order,<sup>10</sup> whether it was released before or after the agency report. As a result, these materials cannot be used in a subsequent protest without permission: "Material to which parties gain access under this protective order is to be used *only for the subject protest* proceedings, absent express prior authorization from the GAO."<sup>11</sup> This text is found in the GAO's standard protective order that is issued to all parties. Thus, there is little risk that a policy of transparency between the agency and the intervenor will result in future protests.

### The Interests of the Parties Are Unlikely to Diverge

It seems obvious, on the surface, that the agency and the intervenor have the same goal: defending the award and proceeding with performance as quickly as possible. Nevertheless, although it is rare, the parties' interests and arguments may diverge over the course of the protest. This should not inhibit full cooperation for very practical reasons, which become clear if one examines the circumstances when divergence actually occurs.

One area where the intervenor and agency may diverge is in the substance of arguments. For example, when faced with an unexplained downward shift in technical ratings between an initial and final evaluation, the intervenor may review the record and assume that the change is the result of additional weaknesses that were assigned. The agency, however, may know that the shift was a scrivener's error and that the Source Selection Official actually considered the previous, higher rating in the award decision. While it is true that these arguments diverge, there is no harm in the

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<sup>9</sup> See *Renic Corp.*, Gov't Sys. Div., B-248100, 92-2 CPD ¶ 60, at \*3 (July 29, 1992) ("[E]ach procurement stands alone, and a selection decision made under another procurement does not govern the selection under a different procurement."); *Leader Commc's, Inc.*, B- 298734, B- 298734.2, 2006 CPD ¶ 192, at \*7 (Dec. 7, 2006) ("[W]ith regard to [Protester's] apparent complaint that certain alleged aspects of its proposal were more favorably evaluated in procurements with other agencies, we note that each federal procurement stands on its own, so that evaluation ratings under another solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the present [request for proposals].").

<sup>10</sup> GAO DESCRIPTIVE GUIDE, *supra* note 5, at 58.

<sup>11</sup> *Id.* at 62 (emphasis added).

alternative explanations and, in the end, the agency's superior knowledge will carry significantly more weight than the intervenor's educated guess. Of course, as discussed below, good communication between intervenor and Government counsel can avoid this divergence in the first place.

Similarly, the parties may diverge on whether errors were made in the procurement decision. When faced with potentially meritorious protest grounds, the intervenor may choose to focus its argument on prejudice, rather than the merits. That is, the intervenor may take the position that even if the protester was correct it would not affect the outcome because the error would have made no difference in the award decision. The agency, on the other hand, has every incentive to defend the substance of its award decision before falling back to an argument of prejudice. Thus, although these arguments are different, they are complementary. The divergence is not harmful to the collective position supporting the award.

The other instance in which intervenor and agency interests may diverge is when the agency concludes that a protester's claims are valid, and corrective action is required. In this circumstance, there is no doubt that the parties' interests—with the intervenor seeking to maintain its award and the agency wanting to get the procurement right—are very different. As a practical matter, however, corrective action will often occur *before* the Agency Report is filed,<sup>12</sup> so any divergence in this area is unlikely to affect parties in substantive filings. Even if corrective action occurs after substantive filings have begun and significant information has been shared between the agency and intervenor, the decision to undertake corrective action, and its scope, are within the discretion of the agency. As a result, while the intervenor could protest the corrective action, such protests very rarely succeed and the likelihood of their doing so is not affected by the level of cooperation between the agency and intervenor during the protest process.

Thus, although there are instances where the interests of the agency and the intervenor diverge, none of these should block close coordination between the parties. In the end, it is the agency whose arguments will carry more weight, and the agency that will make—and defend—any decision to take corrective action. While the intervenor may not agree with the agency's decisions, it is in no position to determine the Government's course.

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<sup>12</sup> After all, if the agency delays corrective action until after the filing of the Agency Report, it risks being required to pay the protester's legal fees. *Id.* at 29 ("Where the agency takes corrective action in the face of a clearly meritorious protest, but fails to do so promptly, GAO may recommend that the agency pay the protester its reasonable protest costs. In general, if an agency advises GAO of its intent to take corrective action by the due date of its protest report, GAO will consider that action to be prompt and will not recommend reimbursement of protest costs.").

## How an Intervenor Can Assist Government Counsel (the Right Questions to Ask)

Once agency counsel establish open lines of communication with intervenors, the next question is what they can ask an intervenor to do. The answer is almost anything. Although intervenors cannot assist in preparing the agency record, they can be helpful in a myriad of other areas while the agency focuses on the record.

For example, the intervenor can help to shorten the protest process. As agency counsel are well aware, one of the largest burdens for the agency often is compiling the agency record within thirty days from receipt of the protest. This task can be especially burdensome these days, as documents and evaluators may be found as often in Afghanistan as in Aberdeen, depending on the procurement. During that same period, the intervenor can work with the agency to prepare a motion to dismiss some or all of the protest grounds.

Intervenor, of course, have as strong a motivation as the agency (if not more so) to dismiss protest grounds early. This not only reduces the risk of a successful protest, but also limits the number of documents the agency needs to include in the record and the awardee's potential exposure. Although it has been our recent experience that the GAO tends to look favorably on motions to dismiss all or part of a protest, the GAO often favors motions to dismiss filed by the agency rather than the awardee alone. Intervenor, therefore, are often keenly interested in assisting the agency by preparing initial drafts of motions to dismiss for agency counsel to consider. Agency counsel can adopt or disregard these drafts as they please, but there is nothing lost and much to be gained by being receptive to the intervenor's input. In addition, we have seen agency counsel move to dismiss only certain grounds while the intervenor successfully moved to dismiss the entire protest. This obviously is a significant benefit to both parties.

Likewise, intervenors often have the capacity and incentive during the initial thirty days to assist the agency in researching case law to be used in the Agency Report. Intervenor counsel, like agency counsel, are often repeat players in protests. Indeed, the fact that intervening counsel often have experience as both protester and intervenor may provide them with a useful perspective on the legal arguments that have and have not worked in the past. In addition, intervenor counsel have far fewer obligations than agency counsel during the first thirty days after a protest is filed. As a result, agency counsel can turn to intervenors to assist in researching case law, whether for an issue that comes up consistently in protests or a unique argument that may require more extensive research. Intervenor counsel may have a lot to offer in this regard given their experience in prior protests. It is often said that the GAO has a case for every proposition, and intervenor counsel may be aware of a key case to support the agency's argument. Where the issue is more unusual, intervenor counsel often have a deep bench

of attorneys to perform the necessary research. Moreover, counsel for "active" intervenors have a double incentive to assist the agency with research. Not only will the assistance be beneficial to the agency's defense of the award, but intervenors often want to see their counsel involved as early in the process as possible.

Intervenor also can be helpful to the agency in brainstorming potential responses to the protest. This is especially the case when the protest includes specific allegations concerning the intervenor's business or proposal. Nobody has a better understanding of what is contained in the intervenor's proposal than the intervenor's proposal team. When the agency is looking to identify specific references in the most efficient manner possible, the insights of these team members, provided through counsel in ways consistent with the protective order, may be invaluable. In addition, intervenors may have access to a host of technical and cost experts, and, if necessary, consultants that can supplement the agency's resources. Although these experts cannot explain why the agency did what it did, they may be able to improve on the statements of the Government's technical evaluators or demonstrate the flaws in the protest. Again, because the GAO tends to give greater weight to papers written by the Government, the intervenor is often happy to assist in preparation of the arguments to be included in the agency report, as opposed to waiting to make its own arguments in the comments.

While protest review at the GAO and Court of Federal Claims is focused mainly on what the agency did, certain allegations tend to require input or a response from the intervenor. For example, when the protester has been given access to the awardee's proposal, allegations about specific aspects of that proposal may become central. Likewise, allegations concerning the intervenor's accounting system status and audits, interpretation of an Organizational Conflict of Interest plan, or allegations concerning personnel issues may benefit from a direct response from the awardee. Intervenor counsel, of course, have access to the awardee's proposal team and others in the company, and therefore may have a better overall knowledge of the contents of the offeror's proposal, corporate structure, and business systems. Using redacted filings to keep within the bounds of the protective order, intervenor counsel can often go back to the awardee for support of a specific argument in response to the protester's allegations. Indeed, there are many cases in which the GAO has relied on declarations from intervenors to support decisions denying a protest.<sup>13</sup>

<sup>13</sup> See *Freedom Scientific, Inc.*, B-401173.3, 2010 CPD ¶ 111, at \*4 (Comp. Gen. May 4, 2010) (citing to declaration of intervenor's President regarding marketing of intervenor's existing models); *Servizi Aeroportuali, Srl.*, B-290863, 2002 CPD ¶ 208, at \*4 n.3 (Comp. Gen. Oct. 15, 2002) (citing to declaration of intervenor's Vice President concerning lack of reliance on tax credit in formulating its proposed price); *Draeger Safety, Inc.*, B-285366, B-285366.2, 2000 CPD ¶ 139, at \*7 (Comp. Gen. Aug. 23, 2000) (relying on declarations of intervenor's Government Sales/Technical Representative and intervenor's National Service Manager); *Constr. Tech. Grp., Inc.*, B-283857, 2000 CPD ¶ 15, at \*1, \*4 (Comp. Gen. Jan. 18, 2000) (relying on

Finally, intervenors can be instrumental in preparation for a GAO hearing, both from a substantive and practical standpoint. Substantively, intervenors can assist in strategizing the priorities for the hearing and identifying potential witnesses. Intervenor counsel, who have often also been protesters themselves, can assist in mock cross-examination of the agency witnesses and overall testimony preparation. From a practical standpoint, intervenors many times can offer office space in which witnesses can be prepared without any concerns about requiring access to Government facilities. This will allow agency counsel to put the majority of its time and effort into preparing for the hearing.

### **What Can Agency Counsel Do to Help Facilitate a Productive Relationship?**

As discussed above, intervenor counsel can provide significant benefits to agencies during the stressful and time compressed bid protest process. To facilitate this relationship, we have prepared a top six list of ways agency counsel can get the most out of intervenors and make them more than a third wheel in the protest process:

- (1) Communicate early and often. Once the intervenor is admitted under the protective order, do not be afraid to make the first call. The sooner the lines of communication are opened between the intervenor and the agency, the sooner they can work together on motions to dismiss and the agency's legal memorandum.
- (2) Discuss at an early stage what level of participation the intervenor and the agency anticipate. This will allow both agency and intervenor to coordinate and allocate resources without duplication of efforts.
- (3) Identify the type of intervenor you are dealing with and let that determination guide your future requests. If the intervenor is a Risk Assessor or a Tracker, do not expect significant engagement in

the early stages of a protest. However, raising issues of concern to these types of intervenors may quickly change them into Litigators. If you are working with a Litigator, make full use of the resources that they have at their disposal, including a small army of researchers, writers, and individuals with access to the offeror.

(4) Do not be afraid to make specific requests. If the agency would benefit from legal research on specific topics including discussions, deference to technical evaluations, or case law addressing any of the variety of issues that come up at the GAO, make a specific request to intervenor counsel. They will be happy to help, and the agency may use or disregard this input as it pleases. If you ask, intervenors are also often willing to review and provide editorial comments to drafts of the agency report.

(5) If at all possible, promptly approve redactions. While agency counsel often leave redactions to the parties, for the intervenor to provide the best possible support, particularly concerning allegations about the awardee's proposal, intervenor counsel need the ability to discuss the non-protected information with their clients.

(6) You'll never get what you don't ask for. Whether the request involves drafting a motion to dismiss, a factual declaration on an issue concerning the intervenor, or brainstorming legal responses, even the most reluctant of risk-assessing intervenors will likely be happy to assist the agency in any way it can if it would improve its chances of keeping the award.

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intervenor's affidavit explaining how mistake had been made in a bid); Premier Eng'g & Mfg., Inc., B-283028, B-283028.2, 99-2 CPD ¶ 65, at \*4, \*5 (Comp. Gen. Sept. 27, 1999) (relying on affidavit of awardee's President); *see also* Idea Int'l, Inc. v. United States, 74 Fed. Cl. 129, 141-42 (2006) (citing intervenor's declarations concerning balance of harms).

## The Triple Threat Trial Counsel

Captain Ryan Howard\*

While many new trial counsel invest exclusively in developing as a litigator, the successful trial counsel manages a diverse three-asset portfolio, acting as a sound staff officer, adept diplomat, *and* skilled lawyer.

### The Staff Officer

Staff officership is the corner-stone to a successful tour as a trial counsel. Great staff officers “C-A-V”—they communicate, anticipate, and validate. Mission success depends largely on the trial counsel’s ability to communicate effectively with their brigade and with the office of the staff judge advocate (OSJA). As a member of the brigade staff, trial counsel should brief the status of *relevant* legal actions vertically up and down the chain of command and laterally across the brigade staff. There are a number of techniques to facilitate effective communication throughout the brigade: standing office calls,<sup>1</sup> command and staff,<sup>2</sup> legal briefings

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<sup>1</sup> The successful trial counsel leaves his office and physically goes to see his company commanders and their first sergeants on a regular basis. At a minimum, trial counsel should do this on a monthly basis. At the initial meeting with the command team, the trial counsel should provide a business card with all relevant contact information, a once over on the military justice system, and close the meeting with a forceful recommendation for the command team to call if they believe there is a potential legal issue. Subsequent meetings should include a report on current military justice actions, and, if time permits, a two-minute educational brief on a relevant military justice issue (e.g., pretrial confinement). Commanders who experience this level of communication from their trial counsel are more likely to appreciate the trial counsel’s role in supporting them, to call the trial counsel with legal issues *before* they get out of hand, and to understand nonconcurring legal reviews (e.g., legally insufficient Article 15). On the other hand, commanders who first meet their trial counsel when the trial counsel recommends against an Article 15, or shows up demanding resources for a court-martial, are likely to have a different opinion and may want to work around their lawyer instead of with him.

<sup>2</sup> Briefing at command and staff is a tremendous opportunity for a trial counsel—it provides a venue for the trial counsel to highlight their mission to commanders, a forum for networking with the staff, and an opportunity for the trial counsel to grow as a staff officer. If unprepared, however, command and staff meetings present a considerable risk. Consequently, successful trial counsel master the status of their actions, anticipate questions from commanders and staff officers, ensure their material is relevant to their audience and appropriate for the group forum, and avoid ancillary issues with other staff sections. When a trial counsel finds that a particular staff section routinely briefs their actions are held up at “legal,” the trial counsel should talk to the staff primary after the meeting, work to resolve the instant matter, and then ask if, in the future, he can receive notice prior to command and staff. The value-added trial counsel will go one step further and resolve these issues *prior* to command and staff.

for leadership,<sup>3</sup> legal situation reports and newsletters, and SharePoint webpages. Communicating clearly within the legal community is equally important. While there are countless methods for effective communication, the value-added trial counsel will ask two questions: (1) Does the chief of justice know the precise status of all my actions? and (2) Do the paralegals know exactly what I need next?

Second, excellent staff officers anticipate. Trial counsel who can identify “what is next” for their command are extremely valuable. While many lawyers are able to prosecute misconduct, great judge advocates enable commanders to *prevent* misconduct by analyzing metrics, identifying patterns, and making specific recommendations. High performing trial counsel will first analyze their current blotters and identify high risk formations and populations. Then the trial counsel will analyze the previous year’s blotters for the following month (i.e., eleven months prior) and identify any seasonal trends.<sup>4</sup> Having analyzed the data, the trial counsel will then brief “what is coming next” at their weekly command and staff meetings *and* provide recommendations.<sup>5</sup> In addition to trends within the brigade, trial counsel should also examine patterns of misconduct occurring in similar sister formations<sup>6</sup> and more generally

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<sup>3</sup> In addition to monthly desk side briefs, successful trial counsel provide annual military justice training to all command teams within the brigade. This “military justice leader’s brief” should address each of the commander’s military justice tools, walking the leaders across the spectrum of military justice actions: administrative (e.g., letters of reprimand), non-judicial (e.g., Article 15s), and judicial (e.g., court-martial). Moreover, the briefing should include frequent reminders to “call your trial counsel.” Additionally, trial counsel should brief common legal issues, misconduct trends, and relevant recommendations. When scheduling the training, time the briefing following an influx of new commanders (e.g., August following change of command season). If properly executed, unit leadership will realize: (1) the trial counsel cares; (2) the trial counsel can and will help; and (3) they should call the trial counsel if they believe they have a legal issue.

<sup>4</sup> For example, in August 2011, trial counsel should pull the August, September, and October 2010 blotters, and look for any increases in misconduct.

<sup>5</sup> For example, trial counsel should brief, “Based on my review of misconduct from this quarter last year, I anticipate an increase in junior enlisted alcohol-related misconduct in the coming month. I recommend first-line supervisors meet individually with Soldiers E-4 and below under the age of twenty four every Friday during the weeks of Oktoberfest.” While such a recommendation may seem obvious to judge advocates, it will be well received by commanders because it is specific, relevant, and supported by facts.

<sup>6</sup> As the BJA for an aviation brigade, I was fortunate that Fort Campbell supported a second aviation brigade with whom I could compare and contrast metrics. While comparing like brigades may be difficult, comparing companies is very feasible. During the weekly military justice huddle, ask other trial counsel if there are trends in formations similar to yours.

across their divisions.<sup>7</sup>

Third, great staff officers validate, they do not “fire and forget.” Within the legal office, the successful trial counsel tasks paralegals with clear expectations and specific deadlines. The trial counsel will then follow through on the suspense, asking the paralegal for the status of the action on the deadline.<sup>8</sup> Over time, paralegals should learn to back-brief the trial counsel immediately prior to the suspense. Outside the legal office, the value-added trial counsel will routinely present status reports to both her commanders and members of the OSJA. Keeping commanders and judge advocates properly informed is not simply a standing trial counsel duty, it is smart business. There are great efficiencies in taking the initiative to brief the status of actions rather than responding to requests for information (RFI). As the trial counsel accurately tracks and briefs the status of legal actions, the RFIs from commanders and judge advocates will slow. As a result, the trial counsel will have more time to advance actions, reducing the processing times for legal actions. As actions are completed faster, the trial counsel will receive fewer RFIs, and the process will grow more efficient.<sup>9</sup> Additionally, there is an air of professionalism that attaches to the trial counsel who takes the initiative—an increased credibility that creates trust and even greater efficiency.

Fourth, staff officers are professional. In addition to C-A-V, trial counsel should digest and live Lieutenant Colonel Mike Ryan’s “10 Basics for Every Officer”<sup>10</sup>: (1) Be in the right place, at the right time, with a professional military appearance; (2) Be patient, have perspective, and maintain a positive attitude; (3) Stay calm—anger never wins; (4) Learn

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<sup>7</sup> Consider enlisting the support of long-serving civilians who enjoy more experience with the trends in your location. While it may take a trial counsel a year to identify seasonal changes in misconduct, the civilians will know, for example, that misconduct in Kaiserslautern increases during the Bad Dürkheim wine festival.

<sup>8</sup> As staff officers, trial counsel are also leaders (and sometimes raters) of their paralegals. Thus, while giving clear instructions on specific assignments, the successful trial counsel avoids usurping the functions or undermining the authority of his noncommissioned-officer-in-charge. Moreover, trial counsel must immediately identify any noncommissioned officers they will rate, track accomplishments as they happen, and recommend awards or letters of commendation when warranted. Thus, the enlisted Soldiers know their responsibilities and know they will be held accountable for their actions, but they also know they will be recognized for their hard fought achievements.

<sup>9</sup> This also works in the reverse. Inefficient trial counsel who fail to respond to RFIs accurately or in a timely manner inject uncertainty into the process and lose credibility. Having “chummed the waters,” the inefficient trial counsel will receive more RFIs. As a result, the trial counsel will then have less time to move actions as they spend more time answering RFIs. Successful trial counsel reverse this cycle by briefing accurate information before superiors ask, building trust and ultimately closing actions faster.

<sup>10</sup> Lieutenant Colonel Mike Ryan, *Azimuth, Distance, and Checkpoints—Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates*, ARMY LAW., Aug. 2005, at 40.

the craft—ask questions, admit mistakes, and share credit; (5) Never question motives; (6) Offer solutions, not just problems—after spotting an issue, what are *you* going to do to help; (7) Be a problem solver—start at the beginning of a problem, think through a solution, and work hard; (8) Rise to the occasion—never shy away from difficult missions, jobs, or schools; (9) Know that your efforts ultimately contribute to mission success—you are relevant; and (10) Be bigger than yourself—being an officer means putting the needs of your Soldiers, unit, and country ahead of yourself. The successful trial counsel is a constant professional who initiates Communication, Anticipates misconduct, and Validates progress.

## The Diplomat

The second asset in the triple threat trial counsel portfolio is that of diplomacy. Value-added trial counsel tactfully manage relationships as they navigate actions through their command and the OSJA. Within the brigade, trial counsel are conduits between each echelon of command and members of the brigade staff. Within the OSJA, trial counsel are intermediaries between their brigades and the OSJA, especially members of the military justice team. Successful trial counsel develop courses of action (COAs), *in coordination with* the OSJA, that provide the best opportunity to secure the command’s desired end-state. By coordinating with the OSJA, the trial counsel keeps the legal community apprised of her actions while simultaneously securing the technical support necessary to achieve the commander’s legal goals. Given the potential for distinct perspectives, the successful trial counsel is diplomatic.

While there are countless ways to be diplomatic, a few are worth emphasizing. First, the successful trial counsel is a key member of both the brigade and OSJA teams. She will appear indigenous to both the brigade she supports and the OSJA that supports her. When the trial counsel is at command and staff, she is a Task Force Thunder staff officer.<sup>11</sup> When she is attending a military justice meeting, she is one of the chief of justice’s prosecutors and a member of the OSJA.<sup>12</sup> Once the trial counsel is recognized as a loyal member of both the OSJA and brigade, the two teams synergize, creating efficiencies and catalyzing positive change for good order and discipline.<sup>13</sup>

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<sup>11</sup> Trial counsel should attend all brigade functions: go to the dining in and the dining out; play on intramural sports teams; participate in the golf outing; attend family readiness group meetings, etc.

<sup>12</sup> Trial counsel physically working at brigades must be deliberate to maintain contact with the office of the staff judge advocate (OSJA). Trial counsel should physically attend the chief of justice meetings, interact with fellow trial counsel, and preserve close working relationships with other sections of the OSJA.

<sup>13</sup> In addition to fostering these business efficiencies, trial counsel should *want* to be active in both the legal and brigade communities for the sake of it. The *esprit de corps* and genuine fellowship enjoyed in both circles will

Second, trial counsel must understand their roles as staff officers. Regarding military justice actions, trial counsel lack the authority to issue orders or make substantive decisions—trial counsel merely recommend. Consequently, while a contemplated COA may have negative legal repercussions, trial counsel rarely, if ever, tell commanders “no.” Instead, diplomatic trial counsel couch their legal analysis in terms of recommendations, risk, and COAs.<sup>14</sup> Moreover, the valued trial counsel will develop legal alternative COAs in support of the command’s desired end-state when they confront legal impediments.<sup>15</sup> The triple threat trial counsel will leverage his creativity to legally and ethically negotiate obstacles on behalf of his command.

Finally, trial counsel must acknowledge and reward the efforts of their strategic enablers—but for the efforts of paralegals, translators, court reporters, law enforcement, and other logistics support, the trial counsel would fail. No court-martial is possible without hundreds of seemingly minor events transpiring. Win or lose, trial counsel should take time to acknowledge the outstanding efforts of these key contributors.

### The Lawyer

Finally, successful trial counsel are skilled lawyers who serve as the protagonists of military justice by mastering their craft, swiftly advancing legal actions, and maintain focus on promoting good order and discipline.

Successful trial counsel labor to master their craft. There is no substitute for a trial counsel sitting alone in his office late at night simply mastering the facts of their cases,<sup>16</sup> reading the relevant authority,<sup>17</sup> and applying the

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yield great memories and friendships that will last throughout one’s career in the Judge Advocate General’s Corps and the Army.

<sup>14</sup> When trial counsel phrase their recommendations in ways that sound like orders, they appear to have outstripped their role as a staff officer and will be quickly corrected. The trial counsel’s recommendations are more likely to be properly considered if her thoughts are framed in a manner familiar to the commander. While attending command and staff, trial counsel should listen to, learn from, and brief like the S-3. For example, “Sir, I strongly recommend against this course of action because you are accepting considerable risk of. . . .” is much better than, “You can’t.” In those rare cases where the trial counsel believes the answer is “no,” he should consider leveraging the support of the OSJA to craft the best possible legal advice.

<sup>15</sup> The trial counsel may still be able to achieve *what* the commander desires, though not in the *way* the commander suggests. Without accepting legal or ethical risk, trial counsel should assist their command in navigating legal obstacles. However, trial counsel must never accept legal risk to satisfy their commander and not fully inform the commander of the risks he or she is accepting. While there are times the commander may *knowingly* disregard the trial counsel’s recommendation, trial counsel must ensure such a decision is never made *unknowingly*.

<sup>16</sup> Successful trial counsel master the facts as early as possible—long before charges are preferred. There is no substitute for a trial counsel getting out of the office to meet with law enforcement, read police reports, talk to witnesses, and go to the scene of the crime. Successful trial counsel do not

facts to the law. While trial counsel should always know reach-back support from the senior trial counsel and chief of justice is available, real growth occurs when the trial counsel takes ownership of their actions. In support of professional growth, chiefs of justice should ask trial counsel prior to assisting them, “Have you researched this?” and “What do you think?” Additionally, committed trial counsel understand the focus required to become skilled at military justice and they set the conditions for success. While conducting serious legal thought, the prudent trial counsel blocks research and study time in order to allow for genuine legal analysis<sup>18</sup>—they close the door, give the phone to a paralegal,<sup>19</sup> minimize the email, and read, analyze, and read some more. *Then* they call a fellow trial counsel, the senior trial counsel, or the chief of justice.

Second, the value-added trial counsel advances each action daily with a genuine sense of urgency. By moving actions swiftly, the trial counsel promotes deterrence by demonstrating the nexus between crime and punishment. Moreover, timely resolution of misconduct advances the interests of due process for all parties. Trial counsel can improve the timeliness of their actions by improving their brigade legal systems and by prioritizing their own work. Opportunities for systemic improvements abound. Trial counsel should leverage paralegal support to identify the systems that need the most improvement, conduct analysis

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wait for a final report of incident (ROI) before getting to work. Outstanding trial counsel develop a close working relationship with law enforcement so that they receive a phone call when the crime is first discovered. With such a relationship, the trial counsel can shape the investigation with a view toward court-martial rather than reacting to the investigation.

<sup>17</sup> As the facts are solidifying, the successful trial counsel analyzes the elements of potential offenses, as well as evidentiary foundations, and leverages paralegal and law enforcement support to secure the witnesses required to prove the elements. The successful trial counsel also reevaluates the case as the investigation proceeds, and if it is too weak to try, is not afraid to say so. His prosecution memos are balanced and realistic, not advocacy, so that the OSJA understands what supporting this prosecution really means, and referral decisions are *informed* decisions.

<sup>18</sup> Given the countless demands competing for trial counsel attention, many trial counsel fall prey to multi-tasking. In the alternative, successful trial counsel prioritize and give their very best effort to the task at hand. Recent studies suggest that multi-tasking undermines serious thought. In 2007, a group of Microsoft workers took, on average, fifteen minutes to return to serious mental tasks, such as writing reports or computer code, after addressing an incoming email. Steve Lohr, *Slow Down, Brave Multitasker, and Don’t Read this in Traffic*, N. Y. TIMES (Mar. 25, 2007), <http://www.nytimes.com/2007/03/25/business/25multi.html?pagewanted=1>. In 2009, Clifford Nass found that people who routinely manage numerous information streams, have less cognitive control than those who focus on one task at a time. Eyal Ophir, Clifford Nass, & Anthony D. Wagner, *Cognitive Control in Media Multitaskers*, 106 PROC. NAT’L ACAD. SCI. 15583 (2009), available at <http://www.pnas.org/content/106/37/15583.full?sid=798ac0d7-c493-46b6-8582-4d8cb88ecb6e>.

<sup>19</sup> However, trial counsel must remain accessible—especially to commanders. Consequently, successful trial counsel block research and study time during slow timeframes and provide specific criteria to their paralegals to forward phone calls based on the rank or position of the caller or the subject matter of the phone call.

supported by metrics to develop solutions, and implement improvements.<sup>20</sup> In a duty position with numerous competing requirements, successful trial counsel prioritize their work based on an action's importance (i.e., the significance of the task or the source of the tasking) and urgency (i.e., deadline).<sup>21</sup> The successful trial counsel finds a way to satisfy the requirements of the OSJA and the brigade through proper prioritization.

Third, successful trial counsel are able to focus in the midst of chaos. New trial counsel are frequently overwhelmed by the voluminous number of complex and serious military justice actions pending in their jurisdiction.

Successful trial counsel block out distractions and focus on the task at hand in two ways. First, they identify the next step for each action, and give their very best to *that*

particular step.<sup>22</sup> Second, trial counsel should form a military justice mission statement nested with the SJA's vision and the Commander's philosophy. When actions mount and pressure builds, the successful trial counsel steps back, turns to her mission statement, attains perspective, and gets back to the task at hand. Successful trial counsel are poised professionals who complete a complex process consisting of hundreds of steps and numerous stakeholders by addressing one step at a time.

The successful trial counsel is a sound staff officer, an adept diplomat, and a skilled lawyer—three distinct skill sets that stretch all judge advocates in unique ways as we navigate careers in the one of the most interesting and challenging professions in the world.

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<sup>20</sup> Trial counsel should consider the Lean Six Sigma "DMAIC" model of problem solving: Define the problem; Measure each step of the current state timeline; Analyze the steps that deviate the most from the desired processing time; Improve those steps; and Control the process by sustaining the improvements. *Lean Six Sigma*, U.S. ARMY OFFICE OF BUS. TRANSFORMATION, <http://www.armyobt.army.mil/cpi-kc-tools-lss.html> (outlining the DMAIC model of problem solving).

<sup>21</sup> Each week, trial counsel should prioritize their pending actions based on two criteria: importance (i.e., significance) and urgency (i.e., deadline). Then the trial counsel should categorize their actions as (1) *High Importance/High Urgency*—address these actions first; (2) *High Importance/Low Urgency*—set a deadline; (3) *Low Importance/High Urgency*—find efficient ways to complete the task, or if possible, delegate it; and (4) *Low Importance/Low Urgency*—batch these tasks together and knock them out all at once, delegate it, postpone it, or determine if the task is actually necessary. JOHN C. MAXWELL, *DEVELOPING THE LEADER WITHIN YOU* 23 (1993).

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<sup>22</sup> How do you eat an elephant? One bite at a time. Rather than being paralyzed by vague concerns about twelve massive courts-martial, the successful trial counsel knows the next step for each of her twelve courts-martial and works to address that particular step. Upon completion, she moves to the next step.

## Copyright Issues at the Unit Level: Seeing Through the Fog of Law

Major John Tutterow\*

*The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .*<sup>1</sup>

### Introduction

Copyright law is as old as the Constitution. Often viewed as a specialized area of the law addressed only at the highest levels of military command and technical authority, in reality copyright concerns arise in many common situations. For example, copyright issues exist when planning a training session or briefing, while planning command events or ceremonies, when using software, or even when designing and selling unit t-shirts and similar items. Despite the frequency of copyright concerns, to many judge advocates it remains an unfamiliar area of law, where solutions often seem elusive. This article proposes that with the appropriate tactics, techniques, and procedures, copyright law questions can be resolved using a clear, step-by-step approach. Armed with the essential principles of copyright law, judge advocates have the means to directly apply these principles to the most common copyright issues arising at the unit level.

First, this article gives an overview of copyright law, to include the definition of key terms, an explanation of how copyright is created, the effect of a copyright interest, and what exclusive rights vest in copyright holders. Next, using current Army policy, the analysis shifts to a detailed discussion of the fair use doctrine and the exceptions to copyright holders' exclusive rights. Finally, this article discusses hypothetical scenarios of copyrighted materials in military briefings, training sessions, official ceremonies, and unit operations as a means to identify and resolve the most common copyright issues judge advocates face in practice.

### Copyright Law: The Constitution, the Code, the Cases, and the Exceptions

#### Copyright Basics

Copyright is grounded in the enumerated powers of Congress under Article I, Sec. 8, of the Constitution, and governed by the statutory provisions of the Copyright Act of 1976, 17 U.S.C. sections 101 through 1332.<sup>2</sup> Copyright law

governs the ownership and use of original works of authorship, such as writings, works of literature, and even computer software, as well as music and works of art.<sup>3</sup> Copyright protects only a creator's particular *expression* of ideas; it does not apply to the ideas themselves.<sup>4</sup> Many creators can copyright their own original works based on the same idea or subject, provided their work is independent of other works.<sup>5</sup> Copyright protection arises immediately upon creation of the work, i.e., fixation in a tangible medium, and exists whether or not the work is marked with a copyright notice ("©") or registered with the Copyright Office.<sup>6</sup> Copyright infringement can result in criminal prosecution as well as civil penalties (damages); however, registration with the Copyright Office is required prior to filing any lawsuit for infringement.<sup>7</sup>

Protection under the Copyright Act applies to all sufficiently original works of authorship except those in the "public domain." In terms of copyright law, the public domain is the body of works that are not protected by copyright and are freely available for use without restriction.<sup>8</sup> Works whose copyright has expired, works placed in the public domain by creators who otherwise could assert copyright protection, and works that under the law do not qualify for copyright (including most U.S. Government

<sup>2</sup> See *id.*; see also Copyright Act, 17 U.S.C. §§ 101–1332 (2006).

<sup>3</sup> See 17 U.S.C. §§ 101–1332. Complete or absolute originality is not required to have protection under the Copyright Act; a work can have non-original elements, but must be sufficiently original to constitute a unique expression of an author.

<sup>4</sup> See, e.g., *id.* § 102(b); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); ROBERT A. GORMAN, FED. JUDICIAL CTR., COPYRIGHT LAW 6 (2d ed. 2006).

<sup>5</sup> See, e.g., 17 U.S.C. § 102(b); see also *Eldred*, 537 U.S. at 219; GORMAN, *supra* note 4, at 6.

<sup>6</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. at 539, 546–47 (1985); see also 17 U.S.C. §§ 401, 408. Accordingly, one should always assume a work has copyright protection whether or not marked, and should always seek permission from the copyright holder or identify an exception under the law that would allow the use intended. See U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY para. 4-1 (1 July 1993) [hereinafter AR 27-60]; see also U.S. DEP'T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 2-5(d) (27 Mar 2006) [hereinafter AR 25-30].

<sup>7</sup> See 17 U.S.C. §§ 411–412, 501–513 (2006); see also 18 U.S.C. § 2319 (2006) (criminal infringement of copyright).

<sup>8</sup> 17 U.S.C.A. 101 note (2006) (citing Pub. L. No. 100-568 § 12, 102 Stat. 2853 (1988)).

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8 (Copyrights and Patents Clause).

works) make up the public domain.<sup>9</sup> A “U.S. Government work” is a work created by an officer or employee of the United States Government as part of that person’s official duties, and is not itself entitled to copyright protection.<sup>10</sup>

Another key principle of copyright is that mere ownership of a work or lawful copy of a work does not give that owner the copyright to that work. The copyright is separate from the physical item, and unless specifically transferred, remains with the creator of the work or any lawful copyright holder to whom the creator transferred the copyright. The purchase of a book, software disc, or other copyrighted work does not, in and of itself, give the purchaser the right to reproduce, distribute, or exercise any other exclusive right reserved to the copyright holder.<sup>11</sup>

### *Copyright vis-à-vis Other Intellectual Property*

Copyright is one of the four primary areas of intellectual property law, along with trademark, trade secret, and patent law.<sup>12</sup> While collectively referred to as intellectual property (as opposed to personal or real property), these areas are very different, and a different body of law governs each.<sup>13</sup> However, the distinction of copyright from other intellectual property is not always clear.<sup>14</sup>

As copyright can apply to visual images as well as the written word, it is often confused with trademark. Trademark is the law that governs images, visual designs, and particular words associated with particular products, services, or entities, usually in the context of a company or brand name, logo, slogan, or catch phrase.<sup>15</sup> Trademark is

fundamentally different from copyright law.<sup>16</sup> The crux of trademark protection is to avoid consumer confusion in the marketplace, i.e., buyers mistaking one vendor’s goods for that of another.<sup>17</sup>

Copyright can also be confused with trade secret. Certain expressions of business information can have a copyright if sufficiently original, and could also meet the requirements for trade secret.<sup>18</sup> However, copyright remains distinct in that it does not protect facts, only expressions.<sup>19</sup> Trade secret protection focuses on the information itself, not any particular expression of that information.

In addition to trade secret, copyright could exist in situations involving patent. In contrast to copyright, patent addresses the protection of inventions, both tangible goods and less tangible processes.<sup>20</sup> Copyright will protect a book about a new invention, and the language in it, from being copied without permission (or under one of the statutory exceptions discussed *infra*), but it will not protect the information about the invention itself.<sup>21</sup> In fact, anyone reading the book could take the information and build the invention without violating copyright.<sup>22</sup> Patent is the law that would protect the invention itself.<sup>23</sup>

### **Exclusive Rights of Copyright Holders**

For protection of copyright, the Copyright Act provides the holder of a copyright with certain exclusive rights, including, *inter alia*, the right to reproduce the work, to distribute the work, and to publicly display or perform the work.<sup>24</sup> As with other property, a copyright holder may

<sup>9</sup> 17 U.S.C. §§ 101, 105–06. Determining the expiration date for a specific copyright can be complex; however, most works created prior to 1923 are considered to be in the public domain. *See id.* § 301–305; *see also* U.S. COPYRIGHT OFFICE, CIR. 15A, DURATION OF COPYRIGHT (2004) [hereinafter COPYRIGHT CIR. 15A], available at <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>10</sup> 17 U.S.C. §§ 101, 105 (2006); *see also* AR 27-60, *supra* note 6, para. 4-3. Note, however, that the U.S. Government can hold copyrights that it acquires by several means, primarily transfer, purchase, or contract, and those copyrights (including licenses), should be addressed along the lines of the discussion *infra*. *See* 17 U.S.C. § 105 (2006).

<sup>11</sup> 17 U.S.C. § 202. Section 109 of the Copyright Act contains what is known as the “first sale doctrine,” by which ownership of a physical copy of a copyright-protected work permits lending, reselling, disposing, etc., of that particular copy. *Id.* § 109. The first sale doctrine does not, however, allow reproducing the work or material, publicly displaying or performing it, or otherwise engaging in any of the exclusive rights reserved to the copyright holder under Section 106, and even the allowed activities may, in a given case, be limited by a license term. *Id.* §§ 106, 109, 202.

<sup>12</sup> *See, e.g.*, GORMAN, *supra* note 4, at 5.

<sup>13</sup> *See* 17 U.S.C. §§ 101–1332 (2006) (copyright); 15 U.S.C. §§ 1051–1141 (2006) (trademark); 35 U.S.C. §§ 1–376 (2006) (patent).

<sup>14</sup> *See, e.g.*, GORMAN, *supra* note 4, at 186–92.

<sup>15</sup> *See* 15 U.S.C. § 1125(a) (2006).

<sup>16</sup> *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 439 n.19 (1984).

<sup>17</sup> *See* 15 U.S.C. § 1125(a) (2006).

<sup>18</sup> *See* GORMAN, *supra* note 4, at 186, 192. To be a trade secret, information must not be generally known or readily ascertainable by the public, the trade secret holder must reasonably protect the information, and the information must have independent economic value from not being generally known to or readily ascertainable by the public. 18 U.S.C. § 1839 (2006).

<sup>19</sup> *See* GORMAN, *supra* note 4, at 186, 192.

<sup>20</sup> 35 U.S.C. § 101 (2006).

<sup>21</sup> 17 U.S.C. § 102(b) (2006)

<sup>22</sup> *See id.*; *see also* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); GORMAN, *supra* note 4, at 6; *see also* Copyright Basics, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/dcom/olia/copyright/basics.htm>.

<sup>23</sup> 35 U.S.C. § 101 (2006); *see also* GORMAN, *supra* note 3, at 6.

<sup>24</sup> 17 U.S.C. § 106 (2006). The duration of these exclusive rights varies under U.S. law, and determining the exact expiration of a given work’s copyright can be complex. *See id.* §§ 301–305; *see also* COPYRIGHT CIR. 15A, *supra* note 9, at 2.

transfer all of these rights or any particular right or rights.<sup>25</sup> The entire copyright may be transferred, by sale, by operation of law, or by bequest.<sup>26</sup> In the same manner, a copyright holder may retain ownership of the copyright itself, but convey a full license that grants rights equivalent to a full copyright, or a limited license granting lesser rights, usually tailored to a specific requirement of the copyright holder or the end user.<sup>27</sup> Absent any transfer or grant of license, in light of the exclusive nature of these rights, any use of a work that conflicts with those exclusive rights (i.e., reproduction, distribution, display, etc.), not authorized by the copyright holder, or not falling within an exception to the exclusive rights of a copyright holder, is illegal and constitutes copyright infringement.<sup>28</sup>

### Exclusions and Exceptions to the Exclusive Rights of Copyright

Several statutory exceptions to (or limitations on, as phrased in the statute) the exclusive rights of the copyright holder provide a legal means to use copyrighted materials without the copyright holder's consent. "[T]he definition of exclusive rights in § 106 of the Act is prefaced by the words 'subject to sections 107 through 122.' Those sections describe a variety of uses of copyrighted material that 'are not infringements of copyright notwithstanding the provisions of § 106.'<sup>29</sup> The statute contains several exceptions, including academic classroom use under the Technology, Education, and Copyright Harmonization (TEACH) Act.<sup>30</sup> Note that the TEACH Act has strict requirements, namely that the use be in a face-to-face setting during classroom instruction at an accredited educational institution.<sup>31</sup> Also included in the limitations on a copyright holder's exclusive rights is the doctrine of "Fair Use."<sup>32</sup>

<sup>25</sup> See 17 U.S.C. §§ 201–205 (2006).

<sup>26</sup> *Id.* § 201(d).

<sup>27</sup> See *id.* §§ 201–205.

<sup>28</sup> See *id.* §§ 501, held invalid as applied to states, Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents, 633 F.3d 1297, 1315 (11th Cir. 2011); see also *Harper & Row Publishers v. Nations Enters.*, 471 U.S. 539, 546–47 (1985). "An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute." *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 447 (1984) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154–55 (1975)).

<sup>29</sup> *Sony*, 464 U.S. at 447.

<sup>30</sup> See 17 U.S.C. § 110.

<sup>31</sup> *Id.* Accordingly, the standard Army training environment will not be covered under the Act, and any use of copyrighted materials must be either with permission of the copyright holder or under an exception for use without permission. AR 27-60, *supra* note 6, para. 4-1.

<sup>32</sup> 17 U.S.C. § 107 (2006); see also *Harper & Row*, 471 U.S. at 549.

### The Doctrine of Fair Use

Fair use is one of the primary exceptions for use of copyrighted materials without permission. Section 107 of the Copyright Act codified the common-law fair use doctrine "traditionally defined as 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'"<sup>33</sup> Although found in the statute as a limitation on the exclusive rights under copyright, fair use in practice is an affirmative defense, to be proven by one accused of copyright infringement.<sup>34</sup> In short, when the copyright holder and the one who uses the copyrighted materials disagree, fair use is a matter for the courts to decide.<sup>35</sup>

In deciding whether a given use is fair use under the law, the distinction between fair use and infringement is often unclear.<sup>36</sup> Neither the statute nor the relevant case law give a specific number of words, lines, or notes that can safely be taken without permission.<sup>37</sup> With no specific guidelines, determining fair use is a mixed question of law and fact, and requires a case-by-case analysis with consideration of the four nonexclusive statutory factors.<sup>38</sup> These four factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>39</sup> "These factors are not necessarily the

<sup>33</sup> *Harper & Row*, 471 U.S. at 549 (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

<sup>34</sup> *Id.* at 561; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>35</sup> Note that in light of the often unclear distinction between fair use and infringement, per AR 27-60, all use of copyrighted materials without the permission of the copyright holder within the Army must be approved by OTJAG IP. See AR 27-60, *supra* note 6, para. 4-1.

<sup>36</sup> See, e.g., *Harper & Row*, 471 U.S. at 569 (Supreme Court disagreed with Second Circuit, which disagreed with trial court, as to whether a given use was "fair use"); *Campbell*, 510 U.S. at 572 (Supreme Court disagreed with Sixth Circuit, which disagreed with trial court, about limits of "fair use"); *Salinger v. Random House*, 811 F.2d 90, 99-100 (2d Cir. 1987) (Second Circuit disagreed with trial court on limits of fair use).

<sup>37</sup> See 17 U.S.C. § 107 (2006) (listing "amount . . . of the portion used" as a factor to be considered without more specific guidelines); *Harper & Row*, 471 U.S. at 560 ("[S]ince the doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." House Report, at 65, U.S. Code Cong. & Admin. News 1976, p. 5678.").

<sup>38</sup> *Harper & Row*, 471 U.S. at 549 (In drafting the exception under Section 107 of the Copyright Act, "Congress 'eschewed a rigid, bright-line approach to fair use . . . A court is to apply an 'equitable rule of reason' analysis, guided by [the] four statutorily prescribed factors[.]'" (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984)).

<sup>39</sup> 17 U.S.C. § 107 (2006).

exclusive determinants of the fair use inquiry and do not mechanistically resolve fair use issues; ‘no generally applicable definition is possible, and each case raising the question must be decided on its own facts.’<sup>40</sup> Notably, even if a work is unpublished, copyright still exists.<sup>41</sup> However, fair use may still prove viable for unpublished works, if a determination is made considering all the above factors.<sup>42</sup>

Discussing the four factors, the Supreme Court noted that as to the purpose of the use, the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>43</sup> In other words, non-profit use is not automatically allowed.<sup>44</sup> As to the second factor, the nature of the copyrighted work, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”<sup>45</sup> With respect to the third factor, the Court examined “the amount and substantiality [i.e., the quantity and quality] of the portion used in relation to the copyrighted work as a whole.”<sup>46</sup> Quoting Judge Learned Hand, the Court noted that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>47</sup> “Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”<sup>48</sup> The final factor, effect on the market, focuses on “the effect of the use upon the potential market for or value of the

copyrighted work.”<sup>49</sup> Per the Court, this factor “is undoubtedly the single most important element of fair use.”<sup>50</sup> “Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”<sup>51</sup> In other words, the law does not forbid all impairment, only material impairment. However, impairment does not have to be actual; potential impairment can suffice.<sup>52</sup> While each case must be judged on its own facts, the courts have used these four factors to find fair use in a number of circumstances.

Circumstances where fair use excused infringement vary widely. In *Wright v. Warner Books*, a biographer quoted from unpublished letters and journal entries of the subject of the book.<sup>53</sup> The case hinged on the third factor, amount and substantiality, or quantitative and qualitative nature of the portion used. The court noted that overall, less than one percent of the subject’s unpublished materials were quoted, and for informational purposes only.<sup>54</sup> In *Bill Graham Archives v. Dorling Kindersley, Ltd.*, reprinting music concert posters in a book for sale commercially was fair use.<sup>55</sup> The court noted the posters were in a much smaller format, and were only used to illustrate a timeline of an artist’s career history.<sup>56</sup> Another instance of fair use, and a rare example that allowed copying of an entire work, was the home videotaping case of *Sony v. Universal Studios*. In the *Sony* case, the Court found that home taping of entire television shows was fair use, in that most viewers were only taping in order to watch the shows later (“time-shifting” in the words of the Court), and not collecting for permanent use.<sup>57</sup> Significantly, the Court found that taping to view later did not deprive the copyright holders of any revenue.<sup>58</sup> The Court has also found other commercial uses to be fair use, notably parody.<sup>59</sup>

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<sup>40</sup> *Harper & Row*, 471 U.S. at 560 (1985) (citing H.R. REP. NO. 94-1476, at 65 (1976)).

<sup>41</sup> *Id.* at 549; *Salinger*, 811 F.2d at 94.

<sup>42</sup> 17 U.S.C. § 107 (2006); see also *Bond v. Blum*, 317 F.3d 385, 394–97 (4th Cir. 2003); *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1525–26 (D. Colo. 1995). While fair use applies to unpublished works, one should note that “the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work . . . the author’s right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.” *Harper & Row*, 471 U.S. at 564.

<sup>43</sup> *Harper & Row*, 471 U.S. at 561.

<sup>44</sup> Further, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

<sup>45</sup> *Harper & Row*, 471 U.S. at 563.

<sup>46</sup> *Id.* at 564.

<sup>47</sup> *Id.* at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)).

<sup>48</sup> *Id.* at 566.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 566–67.

<sup>52</sup> *Id.* at 568. “[O]ne need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” *Id.* (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984) (emphasis in original)).

<sup>53</sup> See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 734–35 (2d Cir. 1991).

<sup>54</sup> *Id.* at 738–39.

<sup>55</sup> 448 F.3d 605, 606-07 (2d Cir. 2006).

<sup>56</sup> *Id.* at 611.

<sup>57</sup> *Sony Corp. of Am.*, 464 U.S. at 421.

<sup>58</sup> *Id.* at 446 n.28, 456.

<sup>59</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

Parody of an original work (using the author's work to make fun of the author's work, at least in part), may qualify as fair use regardless of whether it is published or performed for profit.<sup>60</sup> Parody is evaluated under the four-factor analysis, with emphasis on the first factor (purpose and character of use). Using portions of a classic rock and roll song for humorous effect in a rap song, mocking the original, can be acceptable parody and allowable under fair use.<sup>61</sup> Taking familiar or famous photographs or works of art that are protected by copyright and superimposing different heads or other features for humorous effect can also be acceptable parody under the fair use doctrine.<sup>62</sup> In *Leibovitz v. Paramount Pictures*, a movie company used a photograph of a naked pregnant woman with the head of actor Leslie Nielsen superimposed on the image, in a spoof of a popular *Vanity Fair* magazine cover that had featured actress Demi Moore, pregnant, nude, and in the same pose.<sup>63</sup> The court held that the use was in fact parody under the fair use doctrine, as it targeted the original Moore photograph for humorous effect.<sup>64</sup> However, in *Steinberg v. Columbia Pictures*, the court ruled that a promotional poster for the movie *Moscow on the Hudson* that used the same visual imagery as a famous *New Yorker* magazine cover did not qualify as a parody under fair use. In that case, the magazine cover humorously purported to show the world from the perspective of an average New York resident, i.e., where New York was the center of the known world, and the movie poster did essentially the same.<sup>65</sup> The court pointed out that the movie poster did not parody the magazine cover itself, not even in part. Per the court, the poster only used a slightly modified version of the magazine cover's own parody of New York residents' world view for its own purposes, i.e., promotion of the movie.<sup>66</sup> In short, just copying a parody is not a parody.

While the above demonstrates that findings of fair use are varied, findings of "not fair use" (infringement) are equally diverse. Courts have used the four factor analysis to find a given use as not fair use (i.e., "unfair") in many circumstances. A significant case finding not fair use is the software copying case of *Wall Data v. Los Angeles County Sheriff's Department*. In that case, the Los Angeles County Sheriff's Department installed a certain software program on approximately 6000 computers, but had purchased only 3600 licenses. The Department had configured the network

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<sup>60</sup> *Id.* at 584.

<sup>61</sup> *Id.* at 592–94.

<sup>62</sup> See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114–17 (2d Cir. 1998).

<sup>63</sup> *Id.* at 111–12.

<sup>64</sup> *Id.* at 114–17.

<sup>65</sup> *Id.* at 709–10.

<sup>66</sup> *Id.* at 714–15.

so that only the licensed number of computers could access the software at any one time.<sup>67</sup> However, the court found that the verbatim copying of the entire software program was essentially commercial in nature, could have seriously impacted the market for the software, and thus was not fair use.<sup>68</sup> Another not-fair-use case involved downloaded music. In *BMG Music v. Gonzalez*, the copyright holder to 30 songs sued an individual who claimed the downloading was fair use for sampling, to help her decide if she wanted to purchase those songs. The court found that numerous sites allow a "try before you buy" listen, so the sampling defense was without merit and the downloading was not fair use.<sup>69</sup> *Ringgold v. Black Entertainment Television* involved infringement of a work of art entitled "Church Picnic Story Quilt" that appeared in the background of a television broadcast for approximately twenty-seven seconds.<sup>70</sup> The court found the use was not *de minimis* as claimed by the defendant,<sup>71</sup> and overturned a grant of summary judgment by the trial court, sending the case back for trial.<sup>72</sup>

In sum, copyright law is an area of subtle distinctions and careful factual analysis, requiring educated judgment. As the above discussion shows, the exclusive rights under the Copyright Act are substantial and often vigorously enforced. However, in practice, gaining permission from a copyright holder for an Army unit's use of copyrighted materials may not be as daunting as it appears. Further, for those circumstances where permission is not available, the doctrine of fair use may provide a useful tool in resolving common situations a unit Judge Advocate (JA) encounters.

### **Use of Copyrighted Materials: Army Policy and Regulation**

With the above legal landscape surrounding the use of copyrighted materials, a JA must also follow Army policy when addressing situations regarding copyrighted materials. Current Army policy, as expressed in AR 27-60 and related publications, states:

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<sup>67</sup> *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 774–75 (9th Cir. 2006).

<sup>68</sup> *Id.* at 779–82.

<sup>69</sup> *BMG Music v. Gonzalez*, 430 F.3d 888, 890–91 (7th Cir. 2005). The Supreme Court addressed downloading copyrighted music without permission as unfair use in *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>70</sup> See *Ringgold v. Black Entm't Television*, 126 F.3d 70, 72 (2d Cir. 1997).

<sup>71</sup> The doctrine of *de minimis* use is separate from fair use analysis, as the court recognized. *De minimis* use is a use that is trivial, and as such does not trigger relief—for example, private display of a photocopied *New Yorker* cartoon taped to a refrigerator. *Ringgold*, 126 F.3d at 74–75.

<sup>72</sup> *Id.* at 77–81.

It is DA policy to recognize the rights of copyright holders consistent with the Army's unique mission and worldwide commitments. As a general rule, copyrighted works will not be reproduced, distributed, or performed without the permission of the copyright holder unless such use is within an exception under United States Copyright Law, 17 USC, or such use is required to meet an immediate, mission-essential need for which noninfringing alternatives are either unavailable or unsatisfactory. Use of a copyrighted work by the Army without permission of the owner must be approved by the [Intellectual Property Counsel of the Army, Office of Regulatory Law and Intellectual Property, U.S. Army Legal Services Agency, Office of The Judge Advocate General].<sup>73</sup>

Army policy thus gives the highest priority to obtaining permission from all copyright holders, and the only allowable alternative is to request a determination from the Office of Regulatory Law and Intellectual Property as to any non-permissive use. The above policy applies equally to any foreign works protected by copyright.<sup>74</sup> The following discussion will focus on when that permission or determination is needed, using several situations common to unit JA practice. The discussion will also highlight practical guidance on getting that permission or determination.

### **Permission: When Needed, From Whom, and How to Find Them**

At the outset, practice proves that getting permission, at no cost, to use copyrighted materials for many U.S. Army purposes can be surprisingly easy.<sup>75</sup> However, that permission must be granted by the proper copyright holder (i.e., a copyright owner with authority), as discussed in detail below. Critical to getting permission is determining when it is needed, whom it must be obtained from, and how to find the proper copyright holder.

Prior to beginning work on obtaining permissions, licenses, or identifying exceptions to the requirements for such, a breakdown of all materials to be used and a list or table of all the potential copyright interests of each should be

made. This document should be updated regularly, ideally with each copyright interest noted when permission or license is obtained, or justification under an exception is made. The legal authority for any identified exception should be given, as well as any internal approvals and concurrences needed. Depending on the circumstances, one or more legal memoranda may be needed for the file or for any required approval process.

With the copyright interests identified, the very first inquiry when seeking to use copyrighted materials is to determine whether the Government, the Army, or the command already has the permission or a license to use the material sought in the manner it will be used in. This inquiry may be easier said than done, as there may be scant or no records of any permission, and determining where to find those records may be challenging. The technical legal chain, up to and including, if necessary, the Office of Regulatory Law and Intellectual Property, as well as the command Public Affairs Office (PAO), are likely sources to begin the search. If records are found, the critical determination is to identify if the Government holds a full copyright interest, a full license, some form of limited license, or simple written permission which, depending on the terms, may equate to a full or limited license.<sup>76</sup> Once that determination is made, the limits of what is permitted use for the specific work should be noted. Lastly, per Army regulation, leaders should ensure that all use of the work complies with the terms of any license or permission, and does not exceed them.<sup>77</sup> For instance, permission to use parts of a published work in written instructional materials does not necessarily mean permission to distribute electronically or post on an intranet or internet website.<sup>78</sup>

All JAs should make it a personal habit to ask if any information is available about the permitted uses of a given material, and to ensure the proposed use complies with the those terms. Further, JAs should ensure that the requirement to learn the limits on use is included in any unit policies or standard operating procedures that implicate the use of copyrighted materials, such as training, contact with media, and related subjects. The nature and specifics of this search will of course vary depending on the exact materials being used, whether pulled from the internet, taken from an audio recording, excerpted from a video, quoted from a publication, or otherwise used.

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<sup>73</sup> AR 27-60, *supra* note 6, para. 4-1; *see also* AR 25-30, *supra* note 6, para. 2-5(d).

<sup>74</sup> *See* U.S. DEP'T OF ARMY, PAM. 25-40, ARMY PUBLISHING: ACTION OFFICERS GUIDE para. 2-37(g) (7 Nov. 2006) [hereinafter DA PAM. 25-40].

<sup>75</sup> *See* AR 27-60, *supra* note 6, para. 4-2(a); *see also* DA PAM. 25-40, *supra* note 74, para. 2-40.

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<sup>76</sup> *See* AR 27-60, *supra* note 6, para. 4-2(a); *see also* DA PAM. 25-40, *supra* note 74, paras. 2-37, 2-40.

<sup>77</sup> AR 27-60, *supra* note 6, para. 4-2(a).

<sup>78</sup> *See* DA PAM. 25-40, *supra* note 74, para. 2-37a ("Copyright releases received for a printed book do not necessarily translate to an electronic dissemination authorization.").

## General Research and Seeking Permission

Often, there will not be existing permission or license to use the specific material in the way desired, and the copyright holder(s) will have to be contacted for permission or license.<sup>79</sup> There are various ways of searching for licenses and permissions. Usually the first place to search is the copyright registry of the U.S. Copyright Office.<sup>80</sup> The Copyright Office maintains the only legally binding copyright registry, and offers a thorough website with numerous copyright resources, including a copyright records search engine. However, for many works registered prior to 1978, only an in-person search of the registry will be productive.<sup>81</sup> Also note that under the law, registration is not required for copyright to be effective, so many copyright interests may not be recorded within the registry. Thus, one cannot conduct one simple search of that database and be assured that the materials desired can be freely used. If the material sought does not appear in the Copyright Office database, or the copyright holder or other important information is unclear from the record, other available resources should be examined.

While the Copyright Office registry may provide information about the copyright holder, possibly even a point of contact for a given work, there are other services, often referred to as clearinghouses, that offer not only that information, but also direct permission and licensing of specific materials. With the advent of the internet, the practice of complying with permitted uses, and obtaining permissions and licenses, has dramatically simplified and different practices yield good results for different types of work. Some best practices for internet materials, music, printed materials, and movie and video clips follow.

### Internet Materials

When using materials from the internet, it must become habit to click on the “terms of use” or similar link, usually found in a very small font at the bottom of a web page, or in some other obscure location. Exploring the terms of use pages from various sites will yield a quick education in how materials that are “free to use” are anything but free when the issue is copying to distribute to others, to present in public, or often to use for anything but personal viewing on the website. In other words, “free” is not necessarily free. Many common sites such as MapQuest® and Google maps®, allow copying or printing out results for personal

<sup>79</sup> See *id.* para. 4-1.

<sup>80</sup> Search Copyright Information, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/records>.

<sup>81</sup> U.S. COPYRIGHT OFFICE, CIR. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 2, available at <http://www.copyright.gov/circs/circ22.pdf> (last visited Oct. 5, 2011).

use, but place strict limits on any other use.<sup>82</sup> Terms and conditions vary from site to site and may change over time; thus, each site from which materials are used must be checked each time to guard against improper use and possible infringement. One must also use caution because material found on a website may not be lawfully present there; i.e., the website itself could be infringing on the copyright holder’s rights, and any use stemming from that use could also be infringing.<sup>83</sup>

### Music and Recorded Audio

When using music or recorded audio, one must note that there are often two copyright interests at stake: that of the creator, who holds the publishing rights (e.g., sheet music) and that of the company that released the recording, who holds the recording rights (i.e., the rights in the actual recording made by the artist).<sup>84</sup> Permission should be obtained from each if possible, or some other exception to the copyright holders’ exclusive rights must apply. One must also note that the original artist or composer will, in many cases, not be the copyright holder. Noted examples include the late Michael Jackson’s ownership of many of the publishing rights in the Beatles song catalog.<sup>85</sup> For compact

<sup>82</sup> See, e.g., *Terms of Use*, MAPQUEST.COM, <http://www.mapquest.com/http://www.mapquest.com/terms-of-use> (last visited Sept. 28, 2011); *Google Maps/Earth Terms of Service*, MAPS.GOOGLE.COM, [http://maps.google.com/help/terms\\_maps.html](http://maps.google.com/help/terms_maps.html) (last visited Sept. 28, 2011); *Google Permissions*, GOOGLE.COM, <http://www.google.com/permissions.geoguidelines.html> (last visited Sept. 28, 2011).

<sup>83</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, v. Grokster, Ltd.*, 545 U.S. 913, 931-37 (2005) (discussing “derivative infringement,” i.e., activity that equates to infringement that stems from or is facilitated by the infringing activities of others). See also *Viacom Int’l v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010). In this case, Viacom sued Youtube and Google over the posting of “tens of thousands of videos” from works for which Viacom held enforceable copyrights. *Id.* at 518. The trial court awarded summary judgment in favor of defendants Youtube and Google under the “safe harbor” provisions of the Digital Millennium Copyright Act (DCMA), 17 U.S.C. § 512(c)(2010). *Id.* at 527–29. When the statutory requirements are met, the DCMA safe harbor essentially allows an otherwise-innocent or unknowing website operator to escape liability for contributory copyright infringement resulting from third parties posting copyrighted works or portions thereof on their website. To merit this protection, the statute requires, *inter alia*, that the operator “upon obtaining . . . knowledge or awareness [of an infringing post], acts expeditiously to remove, or disable access to, the material . . . [and] does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” *Id.* at 516–18. As of this writing, the Second Circuit has not acted on this case.

<sup>84</sup> See *Freeplay Music, Inc. v. Cox Radio, Inc.*, 404 F. Supp. 2d 548, 551–52 (S.D.N.Y. 2005) (recognizing separate rights in public performance and particular sound recordings) (citing 17 U.S.C. § 102, 106 (2006)). 17 U.S.C. § 106(6) recognizes a separate right in public performance of sound recordings, which is why separate copyright holders must sometimes be consulted when a recording is to be “performed” in public.

<sup>85</sup> Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 239–40 (2010). Interestingly, Paul McCartney, the former Beatle who had to purchase licenses from Michael Jackson to perform songs he himself had

disc or other tangible media releases (as opposed to internet downloads), information contained on the recording sleeve, CD container, etc., may yield a contact for permissions, usually at least for the recording company.

For use of the written, i.e., published music, and public performance licenses of it, perhaps the easiest way to obtain information about copyright holders and points of contact for permissions and licenses is via artists' association websites. Three artist associations cover many past and present music artists. These associations are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors & Composers (SESAC).<sup>86</sup> A license or permission is needed for use of the written music, but if the music is to be performed in public, either by live performers or by playing a recording, then often a separate license or permission is required for the public performance.

### Books, Magazines, and Other Publications

While any search should begin with a check of the Copyright Registry of the U.S. Copyright Office, other organizations can provide valuable assistance in seeking permission for use of copyrighted printed materials such as books and magazines. For contact information for either no-cost or purchased permissions or licenses, one of the readiest sources is the Copyright Clearance Center (CCC).<sup>87</sup> The CCC serves as a permission facilitating service providing a single point of entry for users seeking permissions or licenses to use copyrighted works.<sup>88</sup> The CCC focuses on providing licenses for a fee and "supporting the principles of copyright," for both domestic and foreign works. The database lists various uses and a set price for each use, including whether a given use is free of charge.<sup>89</sup> If the unit's intended use is not listed as free, the copyright holder may be contacted directly for no-cost permission.<sup>90</sup> Other entities like the CCC exist that will work to obtain copyright

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written, owns the copyrights to Buddy Holly's catalog of songs, and collects licensing fees accordingly. *Id.*

<sup>86</sup> See BROADCAST MUSIC, INC., [www.bmi.com](http://www.bmi.com) (last visited Sept. 28, 2011); AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, [www.ascap.com](http://www.ascap.com) (last visited Sept. 28, 2011); SESAC, [www.sesac.com](http://www.sesac.com) (last visited Sept. 28, 2011).

<sup>87</sup> See COPYRIGHT CLEARANCE CTR., <http://www.copyright.com> (last visited Sept. 28, 2011).

<sup>88</sup> See *About Us*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html> (last visited Sept. 28, 2011).

<sup>89</sup> *Products and Solutions*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions.html> (last visited Sept. 28, 2011).

<sup>90</sup> See DA PAM. 25-40, *supra* note 74, para. 2-40.

permissions for a fee.<sup>91</sup> The above guidance can also apply to a third type of materials often sought out: movie and video clips.

### Movie Excerpts and Video Clips

Movie and video clips are generally more complex than either audio or printed materials, in that movies and video usually contain several elements, all with potentially independent copyrights for which permission, license, or an exception to copyright must be found. Movies and videos can have copyright in the movie or video itself, as a visual work, as well as in the soundtrack, within which several songs may have different copyright holders, as might the images of the actors.

This kind of confusion can arise in most any work that contains multiple copyright interests. Fortunately, identifying those different copyright interests in advance makes free permission, license, or justification under an exception such as fair use easier to accomplish. A breakdown of all materials to be used, and a list or table of all the potential copyright interests of each, should be made. This document should be updated regularly, with each copyright interest noted when permission or license is obtained, or justification under an exception is made. In many instances, a vendor offers a clip (or a limited license for it); several networks and movie production companies do so directly.<sup>92</sup> The websites of these entities can be good sources for contact information for seeking free permission or no-cost limited licenses.<sup>93</sup> Many famous actors, or their estates if they are deceased, have websites that offer permissions and licenses as well.<sup>94</sup>

### Non-Permissive and Fair Use Determinations

Sometimes obtaining permission is not practicable at the unit level. In such situations, a statutory exception such as fair use may still allow use of the materials desired. Per Army policy, reliance on fair use is only appropriate if permission cannot be obtained, and any use of copyrighted materials without permission must be approved by Office of

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<sup>91</sup> See, e.g., THE PERMISSIONS GROUP, <http://www.permissionsgroup.com> (last visited Sept. 28, 2011), and ICOPYRIGHT, <http://info.icopyright.com/> (last visited Sept. 28, 2011), both for-profit entities.

<sup>92</sup> See, e.g., SONY PICTURES STOCK FOOTAGE, <https://sonypicturesstockfootage.com> (last visited Sept. 28, 2011); THOUGHTÉQUITY, <http://www.thoughtequity.com> (last visited Sept. 28, 2011).

<sup>93</sup> See *Classic Movie Merchandise*, REELCLASSICS.COM, <http://www.reelclassicsl.com/Buy/licensing.htm> (last visited Sept. 28, 2011) (listing various websites for movie studios, independent licensors, and images of stars).

<sup>94</sup> See, e.g., WAYNE ENTERS., <http://www.johnwayne.com> (last visited Sept. 28, 2011); *Licensing*, ELVIS PRESLEY ENTERS., <http://www.elvis.com/licensing> (last visited Sept. 28, 2011).

Regulatory Law and Intellectual Property, U.S. Army Legal Services Agency, Office of The Judge Advocate General.<sup>95</sup> When seeking such approval, all the relevant facts should be recorded in a memorandum, and accompanied by a memorandum of law assessing use of the material and any applicability of fair use or other exceptions, and staffed through the technical chain.<sup>96</sup>

### **Common Scenarios Regarding Copyrights: Putting It All Together**

With all the above rules and authorities, even simple projects may appear daunting. But with careful parsing of the various copyright issues, i.e., eating the elephant one bite at a time, most common situations in Army practice can meet with success. The following discussion will examine several typical scenarios, the copyright issues that may arise, and potential resolutions.

#### **Unit Briefings: Clips, Quotes, and Soundtracks**

In the first scenario, a JA is preparing a briefing as part of the unit's pre-deployment training for an upcoming rotation to Afghanistan. In the presentation, the JA wants to open with the famous "Patton speech" film clip, featuring actor George C. Scott giving his stern monologue in front of a massive American flag. Later in the presentation, to highlight a teaching point, he plans to use a pithy quote from Benjamin Franklin: "Never leave that 'til tomorrow which you can do today," from *Poor Richard's Almanack*.<sup>97</sup> Lastly, he plans to close with a video clip from the movie *The Green Berets* starring John Wayne. This clip will be only a few minutes of the film, and will feature The Duke growling out the most famous line of the movie: "Out here, due process is a bullet."<sup>98</sup> As the film fades into a red Viet Nam sunset and the helicopters take flight, the song "The Ballad of the Green Berets" begins to play.<sup>99</sup> All in all, not an uncommon collection of add-ins to a presentation, and in a training environment, it should be simple enough. However, as each work is analyzed, even simple, brief uses can raise several copyright issues at once.

### *The Patton Speech Clip*

In unpacking these copyright issues, each work and its respective use must be examined independently. Start with the film clip of the Patton speech. If there is no record of any existing permission to use the clip, the first step in using the clip without infringing any copyright interests is to correctly identify the respective interests and interest owners.

Here, from a copyright perspective, the Patton clip is very straightforward; it consists of just one scene, no music, and just one actor. Thus, there is a copyright in the film clip itself, but likely no other interests that would preclude use of the clip. To identify the owner of the film copyright, an easy check of the U.S. Copyright Office registry at [www.copyright.gov](http://www.copyright.gov) shows that 20th Century Fox is the owner of the copyright.<sup>100</sup> A quick internet search obtains the contact information for licensing of 20th Century Fox film clips, including a telephone number to call for permission or license.<sup>101</sup> With the contact information in hand, seeking written permission by means of a properly tailored request per the example in DA PAM 25-40 is the next step.<sup>102</sup> Note that all permissions for an intended use should be in writing.<sup>103</sup>

In light of the intended use of the clip—Army training for an upcoming deployment—the copyright holder may well grant a limited permission or license at no cost, but likely with strict requirements to use the clip only for the briefing and to not distribute or otherwise provide copies to anyone. Not distributing includes not posting the briefing, with the clip included, on the internet or in a location where others could download copies, or e-mailing the briefing to others with the clip included. Further, under a no-distribution requirement, any handouts should not include the copyrighted material in any form (such as a film still photo, etc.). Consider next the second item, the quote from Benjamin Franklin.

### *The Franklin Quote*

This particular Franklin quote is from his work *Poor Richard's Almanack*. Franklin first published the work in book form in 1732, and reissued it each year through 1758;

<sup>95</sup> See AR 27-60, *supra* note 6, para. 4-1.

<sup>96</sup> *Id.* para. 4-1 through 4-2; AR 25-30, *supra* note 6, para. 2-5; DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

<sup>97</sup> See BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1733).

<sup>98</sup> THE GREEN BERETS (Batjac Prods., Inc., & Warner Bros. 1968).

<sup>99</sup> For purposes of this hypothetical, certain elements of the movie are compressed into one scene that are not present in the same manner in the original.

<sup>100</sup> *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011).

<sup>101</sup> See *Latest News*, FOX SEARCHLIGHT PRESS SITE, <http://press.foxsearchlight.com/license> (last visited Sept. 28, 2011) (listing phone number for Fox Clip Licensing Department).

<sup>102</sup> DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

<sup>103</sup> See, AR 27-60, *supra* note 6, paras. 4-1 through 4-2; AR 25-30, *supra* note 6, para. 2-5; DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

it was published by others up through 1796.<sup>104</sup> While several reprints are available today that may have a copyright in any new introduction or annotations, the original work by Franklin now has no copyright and may be copied and used freely.<sup>105</sup> Franklin published his *Almanack* before 1 January 1923, and under the Copyright Act, any copyright in the work has expired and the work has passed into the public domain.<sup>106</sup> Accordingly, Franklin's quote can be used in the briefing and can be included in any posted or e-mailed version of the briefing, as well as any handouts. Now consider the last item, another movie clip.

### *The John Wayne Movie Clip and Soundtrack Music*

As with the first movie clip, here the first step is to check if any permission or license exists for use of the clip. If no permission for the intended use exists, or if no record can be found, the inquiry should then correctly identify all the respective copyrights and copyright holders. Here, the film clip features the scene with John Wayne and the movie's signature song. As before, the movie company has the obvious copyright in the movie itself. Also, the song composer has a copyright interest in the music, and the recording company has an interest in the recording of the song.<sup>107</sup>

To identify the owners of these three interests, a check of the online Copyright Office registry<sup>108</sup> shows that "Batjac Productions, Inc., & Warner Brothers, a division of Time Warner Entertainment Company, LP (PWH)" are the owners of the movie copyright. A quick internet search obtains the contact information for licensing of Warner Brothers film clips, as well as contact information for Batjac Productions.<sup>109</sup> Apparently, both entities have ownership of the copyright, so unless further research indicates otherwise, both should be contacted for permission or license. As for

<sup>104</sup> See James D. Hart & Phillip W. Leininger, *Poor Richard's Almanack*, in THE OXFORD COMPANION TO AMERICAN LITERATURE (1995).

<sup>105</sup> 17 U.S.C.A. § 101 note (2006) (citing Pub. L. No. 100-568 § 12, 102 Stat. 2853 (1988)).

<sup>106</sup> See COPYRIGHT CIR. 15A, *supra* note 9, at 2.

<sup>107</sup> While not strictly copyright, celebrities often have a protected interest under state publicity laws or similar authorities against any use of their personal images without permission; even non-celebrities may have enforceable interests under state right-to-privacy laws. Here, permission or a release could be sought from the Estate of John Wayne through Wayne Enterprises. See WAYNE ENTERPRISES, <http://www.johnwayne.com> (last visited Sept. 28, 2011).

<sup>108</sup> *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011).

<sup>109</sup> Warner Bros. Licensing Dep't, 4000 Warner Blvd., Burbank, CA 91522, Batjac Prods., Inc., 9595 Wilshire Blvd., Beverly Hills, CA 90212; see also *Clip Licensing*, WARNER BROS. STUDIOS, [http://www2.warnerbros.com/main/company\\_info/med/wb\\_companyinfo.swf](http://www2.warnerbros.com/main/company_info/med/wb_companyinfo.swf) (last visited Sept. 28, 2011).

the music, unfortunately the Copyright Office database only contains records for various recordings of the song, not the actual song. Further, from the movie information on the DVD package, it is clear the movie was made in 1968, and all the recordings shown are newer than 1978.<sup>110</sup> Accordingly, a search of the major music artist association websites should be the next course of action.

Here, a search of the ASCAP database<sup>111</sup> yields results that while SSG Barry Sadler, U.S. Army, along with Robert Moore, composed "The Ballad of the Green Berets," the current publisher and administrator of the song is the Eastaboga Music Company, whose contact information is given. Some basic internet research reveals that the original recording, and the one used in the John Wayne movie, is from SSG Sadler's 1966 album, *Ballads of the Green Berets*, and that the current compact disc release of that recording is by the Collectors' Choice Music Company. Thus, Eastaboga and Collectors' Choice should be contacted for permission to use the clip.

### **Unit Ceremonies: Distribution of Printed Materials and Public Performance of Music**

Like briefings, unit ceremonies often bring copyright issues to the forefront when copyrighted materials are used. For a change of command, a memorial service, etc., participants and planners often want to use music and include quotes in the programs and printed materials. The use of copyrighted works in printed materials should be addressed as shown in the briefing scenario above. Copyrights should be identified, a quick check should be done to see if any existing permissions apply, and then the copyright holders and their contact information should be determined. The Copyright Office registry may prove helpful, as might the Copyright Clearance Center and similar websites.<sup>112</sup> If necessary, permission should then be obtained from the copyright holders to use the material.

For playing copyrighted music at an Army ceremony, i.e., a "public performance" under the law, the research for copyright holders and contact information is as described above.<sup>113</sup> However, in the public performance context, the

<sup>110</sup> The year 1978 is the cutoff date for the searchable database; all records older than that year must be searched in hard copy. U.S. COPYRIGHT OFFICE, CIR. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 2, available at <http://www.copyright.gov/circs/circ22.pdf>.

<sup>111</sup> AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, [www.ascap.com](http://www.ascap.com) (last visited Sept. 28, 2011).

<sup>112</sup> See *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011); COPYRIGHT CLEARANCE CTR., <http://www.copyright.com> (last visited Sept. 28, 2011). The U.S. Copyright Office's web address ends in ".gov" while ".com" is the commercial Copyright Clearance Center.

<sup>113</sup> Note that the number and status of persons in attendance can influence whether the performance is legally considered public or private; generally, a

permissions needed vary depending on circumstances. If an existing recording of the song or music will be played (the most common situation), then the two permissions described above, from both the composer and the recording company, should be obtained. But if the music will be played live by musicians, then permission from the recording company will generally not be needed, as the actual recording will not be used.<sup>114</sup> Note that if the ceremony will be recorded, such as a DVD for distribution to attendees, later broadcast, internet posting, or otherwise, permission should be requested that explicitly allows for this use. As with any use where permission cannot be obtained for some reason, a fair use determination may be sought; however, it may be more practicable to simply use non-copyrighted music, or music with existing permissions.

### **Unit Operations: Computer Software**

Copyright issues can also arise in a unit's use of computer software. A unit may have a limited number of copies or licenses for software legally owned, and the technicians or end users want to install the program on newly-installed workstations or laptops. The rules in this situation are clear: any use of the copyrighted software must comply with the terms of the license.<sup>115</sup> As with books and other copyrighted materials, ownership of the physical object, here a CD with the software encoded on it, does not mean ownership of the software itself, and does not grant permission to copy freely.<sup>116</sup> In fact, software is often much more restricted by limited license than other copyrighted media such as books and music recordings. The *Wall* case discussed *supra* is particularly instructive. Other situations may involve "shareware" or "freeware" downloaded from the internet or obtained on a promotional disc. As with any

other permissive use, any terms of the license must be strictly complied with; "free" in this context rarely means "free to distribute." The best practice is to always check the "terms and conditions" link on any website offering downloads or material for use.

### **Conclusion**

Infringement remains the primary concern when using copyrighted materials at the unit level. With knowledge of the legal landscape of copyright law outlined in Section II, Army policy and regulation as discussed in Section III, and the practical tactics, techniques, and procedures given in Section IV, almost any situation involving copyrights at the unit level should be resolvable. The above is not an exhaustive discussion of all the potential copyright concerns that could arise at the unit level. But most situations will involve markedly similar issues, and practical resolutions will follow closely along the lines of those discussed here. A conscientious JA should remain vigilant and serve the Army and the unit by guarding against any infringement, intentional or otherwise. Effective employment of the methods discussed here will ensure that the unit, its personnel, and the Army remain within the law of copyright, yet still attain the mission objective.

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performance is "public" when the work is "perform[ed] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" or when a work is transmitted to such a place or places. 17 U.S.C. § 101 (2006) (definition of "To perform or display a work 'publicly'").

<sup>114</sup> Note, however, that the best practice remains to contact all potential copyright holders to ensure that no permission that may be needed is overlooked, as well as to provide flexibility to address unforeseen circumstances. In the context discussed here, such circumstances could arise when, say, the band cannot make it to the venue, and a recording must be used instead. With the permission from the recording company already in hand, last-minute changes would not be at risk of violating copyright.

<sup>115</sup> See *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 781–82 (9th Cir. 2006).

<sup>116</sup> See 17 U.S.C. § 109 (2006).

**Claims Report**  
*U.S. Army Claims Service*

*Claims Award Note*

**Career Claims Award**  
*Colonel R. Peter Masterton\**

The Career Claims Award is bestowed each year to the top claims professional in the U.S. Army.<sup>1</sup> Established by The Judge Advocate General in 2009, the award recognizes claims personnel who have made significant and lasting contributions to the field of Army claims over the course of a federal career.<sup>2</sup>

The criteria for the award are demanding. Recipients must be current or former Army military or civilian claim professionals with at least twenty years of federal service. They must have at least five years of federal service working in the field of claims and be eligible for retirement or have already retired from or left the federal service. Finally, recipients must have contributed significantly to the field of claims through substantial accomplishments of lasting import.<sup>3</sup>

Nominations for the award are solicited at the beginning of each calendar year.<sup>4</sup> The Judge Advocate General selects a single award winner each year, based on a recommendation from the Commander of the U.S. Army Claims Service.<sup>5</sup> A plaque is maintained at the U.S. Army Claims Service to record the names of past Career Claims Award recipients.<sup>6</sup> To date, three claims professionals have received the award: Mr. Joseph Rouse, Ms. Heidrun Gruetzmacher, and Ms. Mary Manderscheid.<sup>7</sup>

**Winner of 2009 Award: Joseph Rouse**

The first winner of the Career Claims Award was Mr. Joseph Rouse, the Deputy Chief of the Tort Claims Division at the U.S. Army Claims Service, Fort Meade, Maryland.

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\* Judge Advocate, U.S. Army. Until recently, assigned as Commander, U.S. Army Claims Service, Fort Meade, Maryland.

<sup>1</sup> Memorandum, U.S. Army Claims Serv. Commander to The Judge Advocate Gen., U.S. Army (1 May 2009) [hereinafter Career Claims Award Memo] (on file with U.S. Army Claims Service, Fort Meade, Md.).

<sup>2</sup> *Id.* ¶ 1.

<sup>3</sup> *Id.* ¶ 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 3.

<sup>6</sup> *Id.*

<sup>7</sup> Memorandum, U.S. Army Claims Serv. Commander, to The Judge Advocate Gen., U.S. Army, subject: United States Army Claims Service Career Claims Award (17 Mar. 2011) (on file with U.S. Army Claims Service, Fort Meade, Md.).

Mr. Rouse has been serving in the federal government for over seventy years. He started his career as a Reserve Officer Training Corps (ROTC) cadet and led troops in combat during World War II. He later joined the Judge Advocate General's Corps and served as a judge advocate in the United States, France, and Taiwan. In 1972, he retired from the Army and joined the Army Claims Service, where he still works, as a civilian attorney.

Joe Rouse was born on 28 June 1919 in Baltimore, Maryland. He graduated from Western Maryland College in June 1941 as an ROTC cadet and entered the U.S. Army at Fort Meade in June 1941 as a second lieutenant. He served as an infantry company commander during World War II in the United States, North Africa, and Italy. In 1947 Mr. Rouse attended the University of Louisville Law School (now Brandeis School of Law) and graduated in June 1950 with a Juris Doctor.

Mr. Rouse rejoined the active Army after law school and served in France from 1951 to 1955. While in France Mr. Rouse helped establish processes to cover French claims against the U.S. Forces incurred during and after World War II. After serving in Europe, he attended the Judge Advocate Graduate Course at The Judge Advocate General's School. He also served in Taiwan and as Legal Advisor to the Army Surgeon General.

Mr. Rouse began his career at the U.S. Army Claims Service in 1965. At the request of the Department of Justice, Mr. Rouse drafted the initial Federal Tort Claims Act regulations. He also led a restructuring effort within the Army to centralize many claims processes at the Army Claims Service. Mr. Rouse retired from active duty in July 1971 as a colonel. He entered civil service in February 1972 and served as Chief, General Claims Division of the U.S. Army Claims Service, until 1987. Since then he has been the Deputy Chief of the Army Claims Service Tort Claims Division.

In the late 1970s, Mr. Rouse single-handedly changed the way the military services pay medical malpractice claims to military dependents. Keeping the Government on the cutting edge of claims settlement practice, Mr. Rouse ended the practice of paying claims by means of lump sum payments and set up structured settlements using Government-funded trusts. The trusts allowed the Government to meet the special needs of claimants and guaranteed that funds would directly benefit claimants.

### **Winner of 2010 Award: Heidrun Gruetzmacher**

The winner of the Career Claims Award in 2010 was Heidrun (Heidi) Gruetzmacher, who served as a Supervisory Claims Examiner in Germany from 1988 until her retirement in 2008. During her thirty-five year federal career, she earned a reputation as one of the best supervisory claims professionals in the Army.

Ms. Gruetzmacher was born on 30 December 1947 in Guben, Germany (formerly East Germany). She escaped East Germany with her parents in 1957 and moved to Kassel, Germany. Ms. Gruetzmacher began her career with the U.S. Government as a clerk in the Transportation Office for the Army and later the Air Force from 1971 to 1974 in Kassel.

Ms. Gruetzmacher moved to Bad Kreuznach, Germany, in 1974. She began her career with the Office of the Staff Judge Advocate, 8th Infantry Division (Mechanized) in Bad Kreuznach in November 1976. She started as a legal clerk for the International Law Division. She was promoted to interpreter in 1978, to legal technician in 1981, and to legal assistant in 1984. While working in the International Law Office, she was selected as Bad Kreuznach's outstanding local national female employee.

In August 1988, Ms. Gruetzmacher was selected as the Supervisory Claims Examiner for the 8th Infantry Division (Mechanized). In 1991, her office was transferred to the 1st Armored Division. In 2001, her office moved from Bad Kreuznach to Wiesbaden, Germany, and merged with the V Corps Office of the Staff Judge Advocate. As a result, her office and responsibilities became much larger. She supervised claims operations in her own office and at the Baumholder Branch Office. Under Ms. Gruetzmacher's leadership, her office won The Judge Advocate General's Award for Excellence in Claims seven times. She repeatedly served as an instructor at the annual European Claims Conference and claims conferences in the United States. She also assisted the U.S. Army Claims Service with the fielding of several new computer claims programs, including the Personnel Claims Management System. Her awards include the Meritorious Civilian Service Award. Ms. Gruetzmacher retired in March 2008 with over thirty-five years of dedicated service.

### **Winner of 2011 Award: Mary Manderscheid**

The winner of the 2011 Career Claims Award is Ms. Mary Manderscheid, the Paralegal Claims Specialist at Fort Leavenworth. In her thirty-five year federal career, Ms. Manderscheid has been recognized as one of the preeminent claims professionals in the world.

Ms. Manderscheid began working for the United States in 1976. She worked for the Fort Leavenworth Transportation Office for six years before being assigned to the claims office in 1982. She initially served as a claims

examiner at Fort Leavenworth from 1982 until 1993, processing tort claims, personnel claims, and carrier recoveries. She was promoted to lead claims examiner in 1993. In that position she was responsible for oversight of personnel claims and carrier recovery actions processed at Fort Leavenworth and the claims office at Fort McCoy, Wisconsin. In 2006, Ms. Manderscheid was again promoted to become the Paralegal Claims Specialist at Fort Leavenworth. Between 1982 and 2006, she adjudicated or supervised the processing of over 18,000 personnel claims. Her diligence and tenacity resulted in the recovery of a remarkable \$7,925,000 from commercial carriers.

Under Ms. Manderscheid's leadership, the Fort Leavenworth Claims Office won the Judge Advocate General's Award for Excellence in Claims nearly every year it has been offered. She was recognized as employee of the year at Fort Leavenworth in 1993. In 1997 she received the Commander's Award for Civilian Service from the U.S. Army Claims Service for her assistance in designing a new personnel claims computer program. Because of her superb mastery of personnel claims, she was repeatedly selected as a facilitator at claims training conferences. She was also selected by the U.S. Army Claims Service to conduct claims assistance visits to other installations. In 2010, she was recognized again by the U.S. Army Claims Service for her service on a "tiger team" to assist another field office with affirmative claims. Throughout her twenty-nine years of service in the field of claims, Ms. Manderscheid devoted her talents to Soldiers, their Families, and the U.S. Army.

### **Conclusion**

The Career Claims Award encourages Army claims professionals to strive for excellence. It also honors those who have made lasting contributions in their field.<sup>8</sup> Staff judge advocates and chiefs of Army claims offices are encouraged to nominate outstanding claims professionals for this prestigious award.

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<sup>8</sup> Career Claims Award Memo, *supra* note 1, ¶ 1.

**The Uniformed Services Employment and Reemployment Rights Act<sup>1</sup>**

Reviewed by *Lieutenant (Retired) Gary R. Brown\**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal law governing the relationship of civilian employers with those serving in the military. George R. Wood and Ossai Miazad as Editors-in-Chief have compiled a well written series of reviews by various authors in analysis of USERRA for the ABA Section of Labor and Employment Law. Each review covers a different section of the Act and together provide an excellent resource for practitioners in this area.

For this reviewer, an understanding of USERRA (pronounced “you sa’rah”) is not only important to employers and employees affected directly by its terms, but broadens all citizens’ understanding of how important a roll the reserve military forces currently play in the defense structure of the country. Protecting one’s right to a job when returning from service allows the military member to focus on his military mission.

Though not addressed in the book, it is important to understand how the history of the nation has made this Act and therefore this book of such great significance. Although USERRA in its various forms has provided protections for military members in various iterations since 1940, the change in the military component structure and strategy following the Viet Nam War has expanded its application by numbers and by amendment of the law. To understand how this has occurred, a basic understanding of the changed military structure and strategy is helpful. Following Viet Nam the military adopted an all-volunteer force still in place today. In addition to that change, the forces adopted a Total Force Policy which involves treating the three components of the Air Force and Army (the Active Duty, the Reserve, and the National Guard) as a single force. The Navy, Coast Guard, and Marines have a similar reliance on their reserve forces. Much of the military capability was placed in the Reserves and National Guard by the Army and Air Force, thus requiring them in any major operation.

The Reserve forces (now an operational reserve rather than a strategic reserve) have participated in the Gulf War, peacekeeping in Kosovo, and the 2003 invasion of Iraq. These members continue as key participants in the ongoing War on Terrorism. Since 9/11 through April 2010 the Department of Defense reported 762,806 reserve activations. Citizen soldiers are frequently being called upon to leave their homes and jobs for deployments and training. Employers now see more than just weekend and annual two week tour orders, but multiple and longer deployments by their employees. Thus the understanding of both the employer’s and employee’s rights as defined by USERRA are important.

USERRA is the key federal legislation addressing the employer relation to its employee who is also in the military. The Wood and Miazad book begins with a short history of the Act and its predecessors showing how the provisions developed and continue to develop. Support for the military in our ongoing effort has resulted in ongoing supportive legislation. The section also includes legislative history speaking to key provisions of USERRA.

Chapters 2 through 11 discuss USERRA provisions and implications by subject matter, a useful format for employers, employees, and legal counsel. This results in some duplication of information throughout the book when read in its entirety, but for the person looking up information on a specific topic, having the information repeated under each topic is helpful. For example, the escalator principle is discussed several places within the book, but applied to the subject under discussion. Although not mentioned in the book, in the employers handbook or employment manual, the labor contract (if any), and the employer’s past customary practice can be used to evidence employer practice. When looking at an individual case, these additional sources can give leverage to either side when reviewed along with the Act itself.

The importance of the five year rule, and particularly its exceptions, is a very frequent concern, especially considering the number and duration of current operations utilizing the Reservist. The rule provides that an employee may not use cumulative military leave longer than 5 years

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\* Mr. Brown is a municipal judge in Estes Park. He previously served as Judge Advocate for the Colorado Army and Air National Guard, as the sole civilian attorney at the Air Reserve Personnel Center, and as a federal magistrate judge.

<sup>1</sup> GEORGE R. WOOD & OSSAI MIAZAD, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (George R. Wood & Ossai Miazad eds., 2009) (Reproduced by permission, © 2011 Colorado Bar Association, 40 The Colorado Lawyer 116). All rights reserved.

with any one employer and maintain their reemployment and related rights under the Act. The exceptions (those periods not counting towards the five years) are important to understand. Chapter 3 at page 3-3 lists those exceptions set forth in the statute. The important exception under 4 is military service under a national emergency. Since 9/11, most orders are a result of the declared national emergency. Therefore, they cannot be counted against this five year maximum period. In this reviewer's experience it was found that in general only orders placing an individual on Active Guard and Reserve (AGR) tours did not possibly fall into one of the exceptions. Although the orders themselves indicate the authority for the order, members and employers concerned about the particular service as it counts towards the five years can get confirmation from the member's servicing personnel office or command.

Chapter 4 discusses very well the notice provisions of the Act and exceptions. Because military service may trigger obligations of the employer, it is not unreasonable for the employer to seek authoritative verification of the service. If the member does not provide the orders (or in cases where the orders don't look official) the employer should check with the member's command to validate the service.

Chapters 5 and 8 briefly mention the Servicemembers Civil Relief Act (SCRA) (50 U.S.C. App. 521 et seq). To understand the entire picture of federal rights afforded mobilized reserve members, one must be aware of SCRA. As pointed out in the book, there is some overlap in the area of health care with USERRA. However SCRA's focus is much broader and multifaceted than the employer/employee relationship of USERRA.

In summary, this text provides a valuable tool for human relations offices, Judge Advocates, employers, employees and their attorneys. USERRA is but a recognition of the importance of military service to the nation, and provides a balance of employer and employee interests when that service comes into play. This book provides an excellent succinct guide to this important legislation.

## CLE News

### 1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGLCS CLE Course Schedule (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C20	186th JAOBC/BOLC III (Ph 2)	4 Nov 11 – 1 Feb 12
5-27-C20	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 12
5-27-C20	188th JAOBC/BOLC III (Ph 2)	20 Jul – 3 Oct 12
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	220th Senior Officer Legal Orientation Course	23 – 27 Jan 12
5F-F1	221st Senior Officer Legal Orientation Course	19 – 23 Mar 12
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F3	18th RC General Officer Legal Orientation Course	30 May – 1 Jun 12
5F-F5	2012 Congressional Staff Legal Orientation (COLO)	23 – 24Feb 12
5F-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12

5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12
5F-F55	2012 JAOAC	9 – 20 Jan 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12

<b>NCO ACADEMY COURSES</b>		
512-27D30	1st Advanced Leaders Course (Ph 2)	17 Oct – 22 Nov 11
512-27D30	2d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	3d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	4th Advanced Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D30	5th Advanced Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	1st Senior Leaders Course (Ph 2)	17 Oct – 22 Nov 11
512-27D40	2d Senior Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D40	3d Senior Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12

<b>WARRANT OFFICER COURSES</b>		
7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12
7A-270A2	13th JA Warrant Officer Advanced Course	26 Mar – 20 Apr 12
7A-270A3	2012 Senior Legal Administrator Symposium	31 Oct – 4 Nov 11

<b>ENLISTED COURSES</b>		
512-27D/20/30	23d Law for Paralegal NCO Course	19 – 23 Mar 12
512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27D-BCT	BCT NCOIC Course	7 – 11 May 12
512-27DC5	37th Court Reporter Course	23 Jan – 23 Mar 12
512-27DC5	38th Court Reporter Course	16 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	23 Jul – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12
512-27DC7	16th Redictation Course	9 – 13 Jan 12
512-27DC7	17th Redictation Course	26 – 30 Mar 12
5F-F58	2012 27D Command Paralegal Course	31 Oct – 4 Nov 11

<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F23	67th Legal Assistance Course	24 – 28 Oct 11
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 12
5F-F26E	2011 USAREUR Claims CLE	14 – 18 Nov 11
5F-F28	2011 Income Tax Law Course	5 – 9 Dec 11
5F-F28E	2011 USAREUR Tax CLE Course	28 Nov – 2 Dec 11
5F-F28H	2012 Hawaii Income Tax CLE Course	19 – 13 Jan 12
5F-F28P	2012 PACOM Income Tax CLE Course	2 – 6 Jan 12
5F-F202	10th Ethics Counselors Course	9 – 13 Apr 12

<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F11	2011 Contract & Fiscal Law Symposium	15 – 18 Nov 11
5F-F12	83d Fiscal Law Course	12 – 16 Mar 12
5F-F14	30th Comptrollers Accreditation Fiscal Law Course	5 – 9 Mar 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12
5F-F103	2011 Advanced Contract Law Course	31 Aug – 2 Sep 11

<b>CRIMINAL LAW</b>		
5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	40th Criminal Law Advocacy Course	30 Jan – 3 Feb 12
5F-F34	41st Criminal Law Advocacy Course	6 – 10 Feb 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12
5F-F35	35th Criminal Law New Developments Course	1 – 4 Nov 11
5F-F35E	2012 USAREUR Criminal Law Advocacy Course	9 – 12 Jan 12

<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F47	57th Operational Law of War Course	27 Feb – 9 Mar 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F47E	2012 USAREUR Operational Law CLE	17 – 21 Sep 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

### 3. Naval Justice School and FY 2011–2012 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	11 Oct – 16 Dec 11 23 Jan – 30 Mar 12 30 Jul 12 – 5 Oct 12
900B	Reserve Legal Assistance (010) Reserve Legal Assistance (020)	18 – 22 Jun 12 24 – 28 Sep
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	23 Apr – 4 May 12 (Norfolk) 9 – 20 Jul 12 (San Diego)
786R	Advanced SJA/Ethics (010)	23 – 27 Jul 12
850V	Law of Military Operations (010)	4 – 15 Jun 12
NA	Litigating Complex Cases (010)	4 – 8 Jun 12
961J	Defending Sexual Assault Cases (010)	13 – 17 Aug 12
525N	Prosecuting Sexual Assault Cases (010)	13 – 17 Aug 12
4048	Legal Assistance Course (010)	2 – 6 Apr 12
03TP	Basic Trial Advocacy (010) Basic Trial Advocacy (020)	7 – 11 May 12 17 – 21 Sep 12
NA	Intermediate Trial Advocacy (010)	6 – 10 Feb 12
748A	Law of Naval Operations (010)	12 – 16 Mar 12 (San Diego)

	Law of Naval Operations (020)	17 – 21 Sep (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	23 Jul – 3 Aug 12
0258 (Newport)	Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	7 – 11 Nov 11 6 – 10 Feb 12 12 – 16 Mar 12 7 – 11 May 12 28 May – 1 Jun 12 13 – 17 Aug 12 24 – 28 Sep 12
2622 (Fleet)	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (100) Senior Officer (110)	24 – 27 Oct 11 (Pensacola) 17 – 19 Jan 12 (Pensacola) 27 Feb – 1 Mar 12 (Pensacola) 9 – 12 Apr 12 (Pensacola) 21 – 24 May 12 (Pensacola) 9 – 12 Jul 12 (Pensacola) 30 Jul – 2 Aug 12 (Pensacola) 30 Jul – 2 Aug 12 (Camp Lejeune) 6 – 10 Aug 12 (Quantico) 10 – 13 Sep 12 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	2 – 6 Apr 12
03RF	Legalman Accession Course (030)	11 Jun – 24 Aug 12
07HN	Legalman Paralegal Core (030) Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	31 Aug – 20 Dec 11 25 Jan – 16 May 12 22 May – 6 Aug 12 31 Aug – 20 Dec 12
932V	Coast Guard Legal Technician Course (010)	6 – 17 Aug 12
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 12
056L	Reserve Legalman Course (Phase II) (010)	17 – 28 Oct 11
846M	Reserve Legalman course (Phase III) (010)	31 Oct – 11 Nov 11
08XO	Paralegal Ethics Course (010) Paralegal Ethics Course (020) Paralegal Ethics Course (030)	24 – 28 Oct 11 5 – 9 Mar 12 11 – 15 Jun 12
08LM	Reserve Legalman Phases Combined (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	28 Nov – 9 Dec 11 9 – 20 Apr 12 23 Jul – 3 Aug 12
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070)	14 – 16 Nov 11 (Norfolk) 15 – 17 Nov 11 (San Diego) 15 – 17 Feb 12 (Norfolk) 28 Feb – 1 Mar 12 (San Diego) 27 – 29 Mar 12 (San Diego) 30 May – 1 Jun 12 (Norfolk)

	Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100)	30 May – 1 Jun 12 (San Diego) 17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020)	10 – 12 Jan 12 26 – 28 Jun 12
	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030)	3 Oct – 16 Dec 11 25 Jan – 5 Apr 12 3 May – 20 Jul 12
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	9 Jan – 6 Apr 12 10 Jul – 5 Oct 12
NA	Leadership Training Symposium (010)	14 – 18 Nov 11 (Washington, DC)
NA	Information Operations Law Training (010)	19 – 23 Mar 12 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	19 – 23 Mar 12
NA	TC/DC Orientation (010) TC/DC Orientation (020)	30 Apr – 4 May 12 10 – 14 Sep 12

<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	17 Oct – 4 Nov 11 28 Nov – 16 Dec 11 23 Jan – 10 Feb 12 27 Feb – 16 Mar 12 2 – 20 Apr 12 7 – 25 May 12 11 – 29 Jun 12 9 – 27 Jul 12 12 – 31 Aug 12
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	24 Oct – 4 Nov 11 5 – 15 Dec 11 30 Jan – 10 Feb 12 5 – 16 Mar 12 9 – 20 Apr 12 14 – 25 May 12 16 – 27 Jul 12 20 – 31 Aug 12
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050)	14 – 18 Nov 11 26 Mar – 30 Mar 12 4 – 8 Jun 12 10 – 14 Sep 12

<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	17 Oct – 4 Nov 11 28 Nov – 16 Dec 11 30 Jan – 17 Feb 12 5 – 23 Mar 12 7 – 25 May 12 11 – 29 Jun 12 23 Jul – 10 Aug 12 20 Aug – 7 Sep 12
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	24 Oct – 4 Nov 11 5 – 15 Dec 11 9 Jan – 20 Jan 12 5 – 16 Feb 12 26 Mar – 6 Apr 12 14 – 25 May 12 18 – 29 Jun 12 27 Aug – 7 Sep 12
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	9 – 13 Jan 12 (San Diego) 2 – 6 Apr 12 (San Diego) 30 Apr – 4 May 12 (San Diego) 4 – 8 Jun 12 (San Diego) 17 – 21 Sep (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

<b>Air Force Judge Advocate General School, Maxwell AFB,AL</b>	
<b>Course Title</b>	<b>Dates</b>
Paralegal Apprentice Course, Class 12-01	3 Oct – 22 Nov 2011
Judge Advocate Staff Officer Course, Class 12-A	11 Oct – 15 Dec 2011
Paralegal Craftsman Course, Class 12-01	3 Oct – 18 Nov 2011
Medical Law Mini Course, Class 12-A	15 – 18 Nov 2011
Article 32 Investigating Officer Course, Class 12-A	18 – 19 Nov 2011
Deployed Fiscal Law & Contingency Contracting Course, Class 12-A	5 – 9 Dec 2011
Pacific Trial Advocacy Course, Class 12-A (Off-Site, Japan)	12 – 16 Dec 2011
Trial & Defense Advocacy Course, Class 12-A	9 – 21 Jan 2012
Gateway, Class 12-A	9 – 20 Jan 2012

Paralegal Apprentice Course, Class 11-02	10 Jan – 2 Mar 2012
Homeland Defense/Homeland Security Course, Class 12-A	23 – 27 Jan 2012
CONUS Trial Advocacy Course, Class 12-A (Off-Site)	30 Jan – 3 Feb 2012
Legal & Administrative Investigations Course, Class 12-A	6 – 10 Feb 2012
European Trial Advocacy Course, Class 12-A (Off-Site, Kapaun AS, Germany)	13 – 17 Feb 2012
Judge Advocate Staff Officer Course, Class 12-B	13 Feb – 13 Apr 2012
Paralegal Craftsman Course, Class 12-02	13 Feb – 29 Mar 2012
Paralegal Apprentice Course, Class 12-03	5 Mar – 24 Apr 2012
Environmental Law Update Course-DL, Class 12-A	27 – 29 Mar 2012
Defense Orientation Course, Class 12-B	2 – 6 Apr 2012
Advanced Labor & Employment Law Course, Class 12-A (Off-Site DC location)	11 – 13 Apr 2012
Air Force Reserve and Air National Guard Annual Survey of the Law, Class 12-A (Off-Site Atlanta, GA)	13 – 14 Apr 2012
Military Justice Administration Course, Class 12-A	16 – 20 Apr 2012
Paralegal Craftsman Course, Class 12-03	16 Apr – 1 Jun 2012
Will Preparation Paralegal Course, Class 12-A	23 – 25 Apr 2012
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Cyber Law Course, Class 12-A	24 – 26 Apr 2012
Negotiation and Appropriate Dispute Resolution Course, Class 12-A	30 Apr – 4 May 2012
Advanced Trial Advocacy Course, Class 12-A	7 – 11 May 2012
Operations Law Course, Class 12-A	14 – 25 May 2012
CONUS Trial Advocacy Course, Class 12-B (Off-Site)	14 – 18 May 2012
CONUS Trial Advocacy Course, Class 12-C (Off-Site)	21 – 25 May 2012
Reserve Forces Paralegal Course, Class 12-A	4 – 8 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012

Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012
Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012
Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012
Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

## 5. Civilian-Sponsored CLE Courses

**For additional information on civilian courses in your area, please contact one of the institutions listed below:**

- AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990
- CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

FB: Florida Bar  
651 East Jefferson Street  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University Law School  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

MC Law: Mississippi College School of Law  
151 East Griffith Street  
Jackson, MS 39201  
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(803) 705-5000

NDAA: National District Attorneys Association  
44 Canal Center Plaza, Suite 110  
Alexandria, VA 22314  
(703) 549-9222

NDAED: National District Attorneys Education Division  
1600 Hampton Street  
Columbia, SC 29208  
(803) 705-5095

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 (in MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

**TLS:** Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

**UMLC:** University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

**UT:** The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

**VCLE:** University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

## **6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)**

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail [baucum.fulk@us.army.mil](mailto:baucum.fulk@us.army.mil).

## **7. Mandatory Continuing Legal Education**

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at [www.clereg.org](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

### 1. Training Year (TY) 2012 RC On-Site Legal Training Conferences

Date	Region, LSO & Focus	Location	Supported Units	POCs
27 – 29 Jan	Heartland Region 2d LSO  Focus: International Law, Legal Administrators	New Orleans, LA	1st LSO 128th LSO 214th LSO	CPT Louis Russo louis.p.russo@us.army.mil (504) 784-7144
24 – 26 Feb	Southeast Region 213th LSO  Focus: Trial Advocacy and Military Justice	Atlanta, GA	12th LSO 16th LSO 174th LSO	CPT Brian Pearce brian.pearce@usdoj.gov (404) 735-0388
18 – 20 May	Midwest Region 9th LSO  Focus: Expeditionary Contracting & Fiscal Law	Cincinnati, OH	8th LSO 91st LSO	CPT Steven Goodin steven.goodin@us.army.mil (513) 673-4277
15 – 17 Jun	Western Region 78th LSO  Focus: Rule of Law	Los Angeles, CA	6th LSO 75th LSO 87th LSO 117th LSO	CPT Charles Taylor charles.j.taylor@us.army.mil (213) 247-2829
20 – 22 Jul	Mid-Atlantic Region 139th LSO  Focus: Rule of Law	Nashville, TN	134th LSO 151st LSO 10th LSO	CPT James Brooks james.t.brooks@us.army.mil (615) 231-4226
17 – 19 Aug	Northeast Region 153d LSO  Focus: Client Services	Philadelphia, PA (Tentative)	3d LSO 4th LSO 7th LSO	MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391

### 2. Brigade Judge Advocate Mission Primer (BJAMP)

Dates: 12 – 15 Dec 11; 12 – 15 Mar 12; 4 – 7 Jun 12

Location: Pentagon

ATTRS No.: NA

POC: PDP@conus.army.mil

Telephone: (571) 256-2913/2914/2915/2923

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

#### **4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business

only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

## **5. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

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