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The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS



STANDING ON A STRONG FOUNDATION—
BUILDING TOMORROW'S LEADERS TODAY

The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

FROM TJAG

2 Thoughts on Foundational Leadership: Building Tomorrow's Leaders Today

TJAG's vision for shaping future JAG Corps leaders

TRAINING

4 When Opportunity Knocks...

Leadership success under the new Article 6 inspection process

10 The JAG Assignment Process: How TJAG Guides Your Professional Development

Uncovering how JAGs and assignments are matched

13 What Every Captain Should Know: Roadmap Part One—The Base-Level JAG

Foundational Learning Roadmap for new JAGs

17 How to Use a VTC: A Primer with Short Words and Pretty Pictures

A step-by-step guide for using basic VTC functions

MILITARY JUSTICE

20 Pre-Trial Witness Interviews

Trial counsel tips for getting the most out of witness interviews

25 AMJAMS: The Next Generation

Preview of the new military justice management system

TEAMING

28 Paralegals Save the Day at Joint Base Langley-Eustis: A Teaming Success Story

Effectively using paralegals to lighten the will production load

LEGAL ASSISTANCE

29 What Does It Take to Run an Effective Legal Assistance Program?

A five-step approach to maximizing legal assistance success

FIELDS OF PRACTICE

31 Defending Air Operations: Airfield and Aircraft Encroachment

An introduction to the JAG's role in encroachment disputes

36 Privacy After Death? A Primer on the Use and Disclosure of Protected Decedent Information

A look at the interplay between HIPPA, the Privacy Act, and the concept of family privacy

41 Property Values, Home Loans and the Publication of Noise Contours

Do published noise contours maps decrease property value?

BOOKS IN BRIEF

43 DRiVE: The Surprising Truth About What Motivates Us

Uncovering the tools that motivate us to succeed

45 The Last Mission of the Wham Bam Boys

An inside look at the first post-WWII war crimes trial



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LIEUTENANT GENERAL
RICHARD C. HARDING
*The Judge Advocate General
of the Air Force*

MAJOR GENERAL
STEVEN J. LEPPER
*Deputy Judge Advocate General
of the Air Force*

COLONEL HOLLY M. STONE
*Commandant
The Judge Advocate General's School*

MAJOR KENNETH A. ARTZ
MAJOR LISA M. RICHARD
CAPTAIN SIMONE V. DAVIS
Editors

THOMASA T. PAUL
Illustrator & Editor



Message from The Commandant

Once again *The Reporter* focuses on Foundational Leadership. For this particular edition, we are highlighting “Building Tomorrow’s Leaders Today,” a theme Lieutenant General Richard Harding highlighted at the 2011 KEYSTONE Leadership Summit. This edition has an abundance of savvy advice and information for everyone. We hope this publication will educate and inspire readers to focus not just on the present, but to also think about long-term training requirements in the years to come.

This edition includes a number of interesting and engaging articles.

TEAMING

The amazing effort of paralegals from Joint Base Langley-Eustis is described in an article written by Colonel Calvin Anderson. Paralegals there drafted nearly all of the office’s wills to overcome a serious manning deficit. You will find it a good read on how to make your own will production process a success for your clients.

TRAINING

We offer several articles to enhance training in your legal offices. First, Mr. John Martinez from TJAG’s Action Group and Major Dave Houghland, Chief of the ARC Training Division at the JAG School, provide us an article entitled, *What Every Captain Should Know*. We also have an article from Major Sheri Jones at HQ AF/JAX. She peels back the proverbial onion on how officer assignments work. And given our extensive use of video-teleconferencing these days, we are fortunate to have an article from Susan Turley from AFLOA/JAS. She offers straightforward guidance on how to use this technology more effectively.

MILITARY JUSTICE

Major Davis Younts, an experienced Military Justice instructor at the JAG School, penned a primer on interviewing witnesses. You will also find another article by Susan Turley on the future of AMJAMS, our current military justice data management system.

LEGAL ASSISTANCE

For those of you who are assigned to offices involving will preparation, you will want to read the article from Colonel Marlesa Scott, Chief of the Community Legal Services Division at Headquarters Air Force. Her office has gathered “best practices” from the legal assistance community.

FIELDS OF PRACTICE

Finally, we offer a number of civil law articles, to include an article on privacy by Major Charlie Kels; a discussion of airfield and airspace encroachments by Lieutenant Colonel Andrew Turner and Mr. Michael Casillo; and a primer on the effect of noise contours on obtaining a VA home loan by Cara Johnson.



Thoughts on Foundational Leadership: Building Tomorrow's Leaders Today

*by Lieutenant General Richard C. Harding, USAF
The Judge Advocate General*

What is the JAG Corps? We are a special people. Few will walk the path we have taken. Many will dream of what it must be to serve as we do, but few will be chosen. We are called to serve something much bigger than any one of us, and in this life, we make a difference.

As a people chosen to be special, we are strict adherents to our core values. We are forged in the fires of integrity, dedicated to selfless service, and committed to excellence.

As leaders, our compass is our core values. We are adherents to foundational leadership, which is leadership rooted in core values. Our leadership is built not only on a foundation of our core values, but also on our guiding principles. Our guiding principles—wisdom, valor, justice—spring from our core values and provide us a guide to conduct and comfort in difficult times.

As a special people, our Corps is organized as a meritocracy. We would have it no other way. In our meritocracy, leaders are selected by their demon-

strated potential to serve in higher grades based on the results they have achieved and the content of their character. In our meritocracy, leaders are not selected by whom they know, what schools they attended, what social strata they were reared in, or who their parents are.

In our meritocracy, it is vital we provide opportunity—equal opportunity—to each of our members to develop his and her leadership potential to its fullest. The health of our Corps, and the health of the Air Force, depends on this. But equal opportunity alone is not enough.

Building future leaders of the Corps is critical to ensure our Corps will be all it can be for the Air Force and the nation.

At KEYSTONE, I introduced the next focus area of Foundational Leadership—Building Tomorrow's Leaders Today. This is an important moment in the evolution of our JAG Corps. Building future leaders of the Corps is critical to ensure our Corps will be all it can be for the Air Force and the nation. To get there, we must mentor and train Corps members with equal vigor to realize their full leadership potential, and not merely provide them an equal opportunity to see how far they can progress on their own without guidance.

Foundational leaders recognize their responsibility to build tomorrow's leaders today. Both during KEYSTONE 2011 and in the weeks that followed, I had the opportunity to speak with many of you about leadership. I am encouraged by the enthusiasm I have seen from you to look at foundational leadership responsibilities through the lens of diversity and inclusion. I am excited that many of you have accepted the challenge to think deeply about your leadership responsibilities and style.

Foundational leaders mentor everyone with equal vigor, recognizing that all have leadership potential.

The JAG Corps is a force of leaders who possess superior legal talent and moral character. Our leaders hail from different backgrounds and possess varied talents, reflecting the Airmen they lead and the country they serve.

Foundational leaders are great leaders because they are mission-focused and leave something lasting behind when their job is done. Most importantly, they leave behind others whose potential to lead has been carefully challenged, grown and mentored by them. Foundational leaders mentor everyone with equal vigor, recognizing that all have leadership potential. Foundational leaders mentor not just those who remind them of themselves, but also those who come from different walks of life, and who may not look like them or come from a similar background.

How we identify, foster, and build leadership qualities in others will be the measure of our success as foundational leaders. If we move forward to present opportunities to both those who volunteer and those who don't...if we include in mentorship those with different backgrounds...if we challenge *all* to get the most from of their ability...then we will harvest the full strength of our Corps for the betterment of the Air Force and the nation we serve.

This edition of *The Reporter* contains articles and commentaries on foundational leadership initiatives and focus areas. Please review and consider carefully the ideas and practice pointers contained inside as we build tomorrow's leaders today. ➔

WHEN OPPORTUNITY KNOCKS...



by Colonel Douglas P. Cordova, USAF

Leadership can, often times, be a challenging proposition. This is especially true in today's fast-paced environment, but, it is leadership which remains at the very core of who we are and what we do as Air Force judge advocates and paralegals. The reality for those who have the distinct privilege to serve as a staff judge advocate (SJA) can be best amplified by a comment routinely used by one of my mentors, "It is supposed to be hard, that is why The Judge Advocate General (TJAG) made **you** an SJA!" Make no mistake, our SJAs and our law office superintendents (LOSs) are the cream of the crop. They were placed in critical leadership positions as the direct result of their demonstrated potential to make a difference and to effectively lead a legal office.

And yet, despite previous accomplishments, I routinely hear the same basic question from many young leaders moving into these positions: What is the roadmap, the right steps one must take to be a successful leader? It is the right question. In fact, we should be concerned if an SJA or LOS is headed into a leadership position and does not have some feeling

of uncertainty—a burning sensation deep in their belly. It is comparable to the feeling an athlete gets just before heading into the big game. It indicates an individual is mentally prepared and eager to take the field and get into the fight. Of course, the apprehension normally dissipates immediately after that first hit. It is equally disturbing when someone thinks they have it all figured out as there are simply too many variables to claim a one-size-fits-all solution. Leadership is not uniform; it is as unique to an individual as their personality. And while it is true we have all been blessed with strong mentors and have observed effective leadership, some of their best attributes do not easily translate to our personal leadership styles. The result is really one of the strengths of our profession. An individual's approach to leadership becomes a hybrid of lessons learned along the way tempered by our personal character, background, and experiences. How that leadership is employed by an incoming SJA or LOS will further be forged by the morale they inherit, by the attitudes of their subordinates, by the senior leadership in place, and by the overall mission. In

the end, being an SJA or a LOS merely provides an individual with an opportunity to discover, hone, and sharpen their skill set...an opportunity to create a synergy that has a positive, lasting impact on those they lead and the programs their team establishes.

Being an SJA or a LOS merely provides an individual with an opportunity to discover, hone, and sharpen their skill set...an opportunity to create a synergy that has a positive, lasting impact on those they lead and the programs their team establishes.

While I assert there is no cookie-cutter approach to effective leadership, there are still a number of basic objectives that all SJAs and LOSs strive to achieve. Judge advocates and paralegals are charged with furthering good order and discipline within our ranks for it is good order and discipline that propels our existence. Our SJAs and LOSs remain at the pointed end of that spear. Every SJA or LOS hopes to enhance the timely delivery of legal services and perfect the advice and guidance provided to our commanders and clients. They work diligently to promote the welfare of base populations through an effective preventive law and legal assistance program. The general nature of these broad concepts strikes at the heart of our mission and drives many questions and challenges facing base-level leadership. So, without a specific leadership formula, how does an SJA or a LOS strive to meet these objectives? How does a leadership team ensure they have addressed all of the requirements? How does a leadership team gauge their success or failure? What benchmarks are available to vector leadership? What processes are in place to ensure leadership properly prioritizes the plethora of responsibilities laid at its feet and how does one focus on the correct end game? It goes without saying the closer we can get to a consistent end state, the more successful we will be at charting the course to get there.

About this point, some of you might be scratching your heads and thinking, “I thought this was an introduction to the two-part Article 6 process. This sounds like another leadership article.” Well, if you find yourself here, mission accomplished. To be a successful SJA or LOS, the focus must be on leadership in its most basic sense. This was Lieutenant General Harding’s intent when he coined the phrase, “Foundational Leadership.” If you have had the benefit of listening to his message first-hand, you already appreciate the amount of passion and thought that went into this initiative. Foundational Leadership provides each of us with a clear vision for the future of our JAGC and our JAGC leadership begins with TJAG and his authority, pursuant to Title 10 § 806(a) of the United States Code...what we commonly referred to as Article 6, Uniform Code of Military Justice (UCMJ), as well as the TJAG’s authority to direct activities of judge advocates, pursuant to Title 10 § 8037(c)(2). The powers granted to TJAG by Congress are much more than a mere mechanism to conduct frequent inspections of the field. Rather, they recognize we must maintain an independent system of oversight within the Air Force to ensure our military legal system remains above reproach. Moreover, they underscore that, ultimately, the responsibility for ensuring accountability and maintaining leadership within our JAGC rests with TJAG.

TJAG’s renewed focus on Foundational Leadership has generated significant changes within our JAGC community. Many of these changes are designed to look at our practice, which includes examining avenues to standardize areas of our profession and increase the quality of service we provide our commanders and clients. Okay, so many of you may ask, “Where does the Article 6 inspection comes into play?” The answer is easy; the Article 6 inspection process will provide a number of opportunities to assist a SJA or a LOS in focusing their efforts on the questions posed earlier in the article—to train to the test. Just like the Air Force physical fitness test, legal offices will now know how many push-ups, sit-ups, and how fast one needs to run the mile and a half before TJAG or the Deputy Judge Advocate General (DJAG) arrive to inspect a legal office. Of course, for the analytical thinkers, the simple answer is never sufficient. Therefore, I offer these responses to some of the anticipated follow-on questions:

Some may argue there already was an inspection system provided through command channels to ensure compliance with the law and our regulatory requirements.

- **Why change our inspection process and why make the change now?** The short answer is that our revised two-part, synchronized inspection process more fully satisfies TJAG's leadership responsibilities under Article 6 and 10 U.S.C. 8037. Some may argue there already was an inspection system provided through command channels to ensure compliance with the law and our regulatory requirements. While a system may have been in place, the Article 6 inspection process was designed by statute to be much broader and to provide an effective layer of oversight to ensure the delivery of our advice and support for commanders is consistent across the Air Force. This was an issue TJAG discussed with The Inspector General (TIG) earlier this year. General Harding took the opportunity to explain the fundamental flaw of having two separate inspections designed to meet the same objective and how the two systems in place failed to complement one another. The problem highlighted how little information from the IG inspections reached TJAG and resulted, on occasion, with findings from the IG inspections that were inconsistent with the results of an Article 6 inspection. Although General Harding had envisioned a more gradual introduction of the improved Article 6 inspection process, TIG let TJAG know the Air Force was looking to consolidate all wing-level inspections and the opportunity to consolidate was now. Against the backdrop of TJAG's statutory authority, both agreed the best course of action was to create a single inspection system under Article 6. To ensure the process was consistent with the goal of reducing the inspection footprint on a wing's calendar, TJAG agreed to synchronize the Article 6, Part I inspections with the major command (MAJCOM) inspection schedules.
- **What drove TJAG's decision to change the inspection process?** As previously stated, little to no communication or continuity existed between the two independent inspection processes. To use a modern day analogy, the Air Force was maintaining two major components with incompatible programs on the same computer network. Further disconnecting the IG inspections from Article 6 inspections was the fact that each MAJCOM developed its own JA checklist which may or may not have satisfied TJAG's Article 6 inspection priorities. Conversely, TJAG or DJAG would travel to an installation and receive a four-hour PowerPoint briefing, meet with selected base leadership, and attend a social event providing an opportunity to meet and talk with members from the inspected legal office. Traditional Article 6 inspections took approximately 24-36 hours to complete. The quality of the Article 6 inspection and the information received by TJAG or DJAG were largely a function of statistical information presented against the landscape created by the office and its members without in-depth file examinations. There was little tangible information about office leadership, the people, or the programs prior to the visit. Moreover, there was no mechanism to follow-up on identified issues or to ensure that fixes or office initiatives were carried out past the date of the visit. A base office also knew that once the inspection concluded, it would be years before the IG inspectors or JAGC leadership would return. In some instances, this allowed an installation to turn its attention to the previous agenda prior to inspection preparation and to, occasionally, allow the initiatives and fixes identified at the Article 6 inspection to die on the vine. The current process ends that deficiency by providing two

parts to the same inspection. The Article 6, Part I inspection will now serve as the first four to five days of the inspection, followed by the Article 6, Part II, in essence functioning as the fifth or sixth day of the inspection six to eight months later. An office will now stay on task between the inspections and have the opportunity to permanently institute continuity in its programs that will hopefully outlast the inspected leadership team. To assure this outcome, TJAG will routinely ask during Part II of the synchronized inspection, “What did you do to repair deficiencies noted in the Part I report?”

The checklist in conjunction with the inspector’s assessment of the legal office will also serve as the basis for a numeric score based on a 100 point scale.

- **Where does the Article 6 inspection process begin?** It starts with a two-part Article 6 inspection checklist. The current Article 6 checklist is the consolidation of MAJCOM compliance checklists, combined with specific Article 6 inspection items into a single checklist. The Article 6 inspection items are a conglomeration of traditional JAGC focus areas further complemented by TJAG’s Foundational Leadership initiatives. The checklist was constructed by the Training and Readiness (T&R) three-person office, which is responsible for designing and implementing the first part of the Article 6 inspection process. It is comprised of a former two-time SJA with experience at both CONUS and OCONUS installations, a former military judge well-steeped in military justice and the challenges offices are experiencing in the courtroom, and a former division chief from the Judge Advocate General’s School with relevant and recent experience training young judge advocates and paralegals. The

checklist was vetted through the MAJCOM legal offices and twice through the appropriate headquarters directorates. Although those previous compliance items and those identified as Article 6 items are easily distinguishable, it only requires a quick review of the checklist in its entirety to see why it made sense to merge the two inspections. The checklist, along with interviews of commanders, first sergeants, and office personnel, forms the basis of the Article 6, Part I inspection report. The checklist in conjunction with the inspector’s assessment of the legal office will also serve as the basis for a numeric score based on a 100 point scale. That report and grade will be standardized by T&R and provided to TJAG and DJAG prior to the Article 6, Part II inspection. Some question the utility of a numeric score; however, bases should know where they stand among other installations and strive toward maximizing their score. If someone is concerned about being saddled with a previous leadership team’s issues, their focus is misplaced. Any information provided to TJAG or DJAG will include a real-time assessment, and the new leadership team will have the opportunity to demonstrate new direction for an office. Ultimately, this two-part process will arm TJAG or DJAG with a window in which to view relevant, real-time information about a legal office, its programs, its people, its strengths/weaknesses, and its leadership well in advance of the subsequent inspection. It will allow JAGC leadership the opportunity to see how office leadership and initiatives identified during the Part I inspection have progressed since the initial inspection. The two-part process will also provide an inspected legal office the opportunity to receive clear guidance and direction on TJAG’s vision for our future prior to and during the Part II inspection. It should be underscored that the Part I inspection will provide the inspected legal office insight into what needs to be done prior to the Article 6, Part II visit and allow an office to focus its energies in the right direction.

- **Who will conduct the Article 6, Part I inspections?** Bases will be inspected by a team of judge advocates and paralegals consisting of experienced SJAs and LOSs, and the traditional representatives from the MAJCOM. One of the consistent complaints of IG inspection process was that many times the inspectors sent out from the MAJCOMs, while experts on issues within the MAJCOM, had neither served as a staff judge advocate nor in a position to provide a unique perspective concerning the challenges of leading a legal office. General Harding recognized that if the two-part Article 6 inspection process was to be successful, Part I inspections needed to be manned by individuals with instant credibility among SJAs. Assigning experienced SJAs and LOSs to the inspection mix will bridge that gap and enhance the overall process. To that end, a pool of 50 SJAs, LOSs, and chiefs of training received inspection training during this year's KEYSTONE in New Orleans. The training was provided by a representative from the Air Force Inspection Agency to satisfy all IG requirements and by members of T&R on the specifics surrounding the Article 6 inspection process. Representatives from this elite group will synchronize with the IG to conduct Article 6, Part I inspections. These inspectors will complete the checklist items at each inspected installation and assess the overall health of the legal office, to include leadership, performance in the military justice and legal assistance arenas, and look specifically at Foundational Leadership initiatives, such as teaming and training. NAF inspectors will be available to participate in all inspections regardless of their MAJCOM. The mindset behind synchronizing and improving upon traditional MAJCOM and Article 6 inspections is that delivery of legal services and legal office leadership, with minor exceptions, should be uniform. This system will also allow more flexibility in assigning inspectors to specific Article 6, Part I inspections. This group of inspectors, armed with a current working knowledge of challenges facing JAGC leadership, will be in the best position to truly assess the programs within

a legal office. For new SJAs or LOSs, these teams will offer the opportunity to participate in the training and mentoring of our younger leadership teams. For the inspectors, regardless of their experience level, they will have the opportunity to see how other offices are working, collaborate, and possibly improve upon ideas or bring them back to their own installations. Over time, the Article 6 inspection process will create common ground and infuse a new generation of leaders who will possess a common approach to addressing the host of issues facing our legal offices. The process will also allow us to crossfeed new ideas and effective programs across the JAGC spectrum.

General Harding recognized that if the two-part Article 6 inspection process was to be successful, Part I inspections needed to be manned by individuals with instant credibility among SJAs.

- **How is this process going to make a difference?** Simply put, it provides an opportunity to make our JAGC stronger, to build consistent leadership, and to enhance all areas of our profession. There is no downside to the Article 6 inspection equation. Although some may believe that this inspection process will interfere with traditional MAJCOM “organize, train and equip” (OTE) functions, there is nothing under the Article 6 inspection process that affects how the MAJCOMs or senior JAGC leadership execute their day-to-day OTE responsibilities. It is an enhanced information flow between the very top JAGC leadership and our base-level offices, where many Air Force members first form their impression of our legal system. With time, our revised two-part Article 6 inspection process will allow our JAGC to move in concert and

in one direction. It provides a framework where SJAs and LOSs with current, relevant experience can reach out to our up and coming leadership—a methodology to decrease the learning curve. At the same time, these SJAs and LOSs can take advantage of the opportunity to keep their personal leadership skills sharp and maybe learn some new lessons along the way. The greatest benefit to our legal offices is all personnel can now train to the test and possess an understanding of what TJAG expects from our professions in the field. Change is sometimes difficult, but how can a process which offers so many benefits be a bad thing?

An office should be more concerned about the progress made between the Part I and Part II inspections, rather than how well they scored on the Article 6, Part I inspection.

The lead-in to this article centered on leadership and posed the common questions every leader in the JAGC, at some point, will need to address. To reiterate, there is no magic formula to be an effective leader. With that said, the current Article 6 inspection checklist does provide a number of critical variables which can provide a vector for both our youngest and most seasoned SJAs and LOSs. There is no shroud of secrecy surrounding this inspection process; the initiative is transparent. Moreover, the rationale supporting this change bolsters General Harding's message on meritocracy within the JAGC. Every leadership team will use the same basic framework and every office will be assessed using common standards. Beginning on 1 January 2011, every base office was required to use the new Article 6 checklist for their Article 6, Part I inspection. After 1 January, all inspected offices will receive a numeric score. As one of the few individuals charged with bringing the process on-line, I can tell you full implementation will not be without hurdles. For

When opportunity knocks, a true leader is always prepared to answer.

example, AF/JA is working on creating a validation process to ensure base offices clearly understand the results of the Article 6, Part I inspection prior to the subsequent Part II inspection and that base offices have the opportunity to comment on the findings of the inspection before a final report is drafted. There is also some angst about a numeric score being generated through the inspection process. Any concern is misplaced. The grading system is based on the strict application of a formula and is designed to encourage teamwork and improvement throughout the process. An office should be more concerned about the progress made between the Part I and Part II inspections, rather than how well they scored on the Article 6, Part I inspection. Recently I spoke with a senior judge advocate who served in multiple SJA billets. During the conversation, he commented that he always arrived at a new legal office with an expectation that the office was operating at some minimal standard; however, that was rarely what he found. For those who have found themselves in a similar situation, one is left wondering, "Why is there no consistency to our practice, and why do we in the JAGC constantly re-create the wheel?" Under this new construct, SJAs and LOSs will finally possess a realistic expectation of what will meet them in a new legal office. A consistent framework, one which remains relevant, flexible, and open to new ideas. However, this change will also require the right attitude. Embracing the inspection process with a positive perspective affords all the members within our JAGC the opportunity to succeed, regardless of the role one plays in the process. Success or failure really does turn on leadership. And one of the most fundamental attributes of a successful leader is the innate ability to recognize opportunity and to capitalize on it. In other words, when opportunity knocks, a true leader is always prepared to answer.

Well, opportunity is knocking.... 



The JAG Assignment Process: How TJAG Guides Your Professional Development

by Major Sheri K. Jones, USAF

VOODOO AND CHICKEN BONES: **DEBUNKING THE MYTH.** The JAG assignment process is sometimes mistakenly viewed as a mystical practice whose secrets are known only by TJAG and JAX—the forces behind the magic. This is a myth. No voodoo. No chicken bones. The truth is, every time TJAG makes a JAG assignment, he examines a composite of data points about that JAG to properly guide his or her professional development. TJAG’s goal when making assignments is to grow officers both in their legal profession and in the profession of arms. By guiding a JAG’s assignment path, TJAG puts each officer in a position to practice leadership skills and master a broad spectrum of legal competencies, building a robust cadre of versatilists who can lead the Corps next year, and into the next decade.

TJAG’s authority over JAG assignments is found in Title 10, U.S.C., Chapter 47, Section 806, Article 6 (a). It provides that “[t]he assignment for duty of judge advocates of the...Air Force...shall be made upon the recommendation of [T]he Judge Advocate General...” Title 10 specifically addresses officer assignments; it does not extend TJAG’s authority to enlisted members. Accordingly, paralegal assignments are made by AFPC, not JAX or JAY. The Judge Advocate General’s assignment authority, commonly referred to as “Article 6 authority,” was the product of Congressional intent to ensure JAGs in the U.S. military have the ability to provide independent, candid legal advice, free of improper and or unlawful command influence.

COMPOSITE OF DATA POINTS: MAKING OF AN ASSIGNMENT RECOMMENDATION

Every assignment action is a deliberate step in each JAG's professional development designed to build his or her officership, leadership, and legal skills, while at the same time meeting the needs of the mission. The assignments officer, AF/JAX, makes each assignment recommendation to TJAG based on a composite of data points that he or she collects about the person being assigned. JAX collects this information so TJAG has as comprehensive a view as possible of an individual's background, experiences (military and civilian), professional and personal goals, as well as any special family needs. These data points help TJAG place each person in the right job, at the right place, at the right time, with an eye toward each JAG's development and the institution's requirements.

TJAG takes into account both objective and subjective data points when making a JAG's assignment.

TJAG takes into account both objective and subjective data points when making a JAG's assignment. The objective data includes, but is not limited to, OPRs, training reports, CAPSIL transcripts, PDIs, and biographies. TJAG also considers subjective data, which the assignments officer collects from a variety of sources, including the JAG's supervisor, MAJCOM SJAs, military judges, senior trial and defense counsel, prior supervisors, and paralegal leadership. Furthermore, TJAG considers information gathered from DJAG and the Senior Paralegal Manager following their visits to legal offices throughout the Air Force. Finally, TJAG considers his personal knowledge of the offices gathered from Article 6 inspections.

MATCHING JAGS TO VACANCIES: STILL NO CHICKEN BONES

The process JAX uses to match JAGs with vacancies is fairly straight forward. We simply try to match JAGs with the right mix of experience, ability, and future potential, to places where that mix appears to be the best fit.

In preparation for a typical summer assignment cycle, the assignments officer begins the process approximately a year earlier by identifying where vacancies will likely be. JAX personnel ask each base-level SJA, AFLOA division chief, and other front-line supervisors questions to include: who he or she believes should PCS, what an appropriate next assignment for the potential PCSer might be, what amount of turnover the losing office can tolerate, and what the future workload for the office will likely be.

Ensuring that offices have an appropriate level of continuity during each summer PCS season is an important consideration. Since the general plan is to move no more than one-third of the JAGs in any particular organization in given assignment cycle, discussion about which particular JAGs should PCS is affected by the total number of JAGs in that organization who are eligible to move. Generally, any JAG in an office with two or more years on station will be considered eligible to PCS. Even though a particular JAG is eligible to move, he or she may not do so. TJAG also attempts to balance rotation requirements with the desirability of maintaining a certain level of continuity in an office.

When determining office continuity for OCONUS organizations, the assignments officer and the base-level SJA, AFLOA division chief, or MAJCOM SJA discuss each JAG's "Date Eligible for Return From Overseas" (DEROS). Although a DEROS can be curtailed involuntarily or extended voluntarily with the JAG's permission, the DEROS is a strong indicator of when a particular JAG will PCS. When more than one-third of the JAGs at one particular OCONUS location have the same DEROS, the continuity of an organization can be adversely affected unless it is managed proactively. The assignments officer attempts to mitigate the mission impact of "DEROS overload" with a number of remedies, including staggering Report No Later Than Dates of inbound and outbound JAGs.

The assignments officer, once it is determined where the vacancies will be, posts the Projected Vacancy List on the FLITE JAX webpage, linked under "Hot Notices." This posting is merely a snapshot in time of the possible vacancies for the following summer. It is important to understand that the list of projected vacancies always changes throughout an assignment

cycle as the unexpected invariably occurs. Typical changes include unanticipated separations, MEBs, and out-of-cycle PCSs to fill short-notice assignments and deployments.

Next, the assignments officer begins gathering the data points discussed above and reviewing PDIs. This is the least transparent part of the entire process, and the one that draws the most questions...and the most suspicion. Actually this process simply involves comparing an individual's skill set, background, and experiences against many different vacancies to determine which particular vacancy will present the best opportunity for an individual to enhance his or her professional development and meet the needs of the Air Force. We refer to this part of the process as "penciling-in."

Depending on a JAG's rank, years in service, and demonstrated leadership and maturity, the assignments officer looks for a vacancy that will challenge that JAG to grow professionally.

Depending on a JAG's rank, years in service, and demonstrated leadership and maturity, the assignments officer looks for a vacancy that will challenge that JAG to grow professionally. For example, he or she will look for a vacancy that will expose a junior JAG to a new legal practice area or afford the JAG an opportunity to gain courtroom experience. Alternatively, they may look for a vacancy that will allow a mid-grade officer to practice leadership skills as an SJA, Deputy SJA, AFLOA branch chief, or some other supervisory position.

When the assignments officer has formed his or her initial assignment recommendation, he or she will discuss their recommendations with the MAJCOM SJA, base-level SJA, or AFLOA division chief of the potential PCSer. These conversations include assignment recommendations for each JAG under that supervisor's JA chain who is projected for an

assignment the following summer. Specifically, the conversations include topics such as the projected PCSers' preferences, military justice experience, officership, and exposure to the various practice areas.

Following that process, the assignments officer notifies the potential PCSer of the assignment he or she is "penciled-in" for. Prior to notifying the JAG about his or her next possible assignment, the assignments officer will have thoroughly reviewed the individual's PDI and—if the individual requests—have spoken with him or her on the phone.

Once all the follow-up phone calls and coordinations have been completed, the assignments officer briefs all of the summer assignment recommendations to TJAG. During this mega-briefing, TJAG reviews all of the objective and subjective data points (referenced above) pertaining to JAGs being considered for a PCS the following summer. He asks the assignments officer a variety of questions about each assignment recommendation, including, but not limited to, the JAG's enthusiasm about the assignment recommendation, family considerations, and demonstrated leadership potential. TJAG often disapproves JAX's recommendations based on his insights and thoughts on how best to satisfy Air Force needs and a JAG's professional development needs. Once TJAG approves all of the assignments, the summer forecast is posted on the JAX webpage. At this point, the assignments are final.

**MYTH DEBUNKED:
BUT SOME SKEPTICISM WILL REMAIN**

Whenever a process is based in any part on subjective data points, it can invite skepticism. Differences of opinion about what constitutes "the right assignment" for one or more people will always exist. When considering JAG assignments, TJAG makes decisions only after reviewing a comprehensive portfolio of information about each person's professional growth and performance. The process isn't mystical or shrouded in secrecy. No voodoo. No chicken bones. It's about trying to place the right person in the right job at the right time, in a way that best supports the needs of the Air Force and every JAG's professional growth. 🦋



WHAT EVERY CAPTAIN SHOULD KNOW

Roadmaps Part One—The Base-Level JAG

by Mr. John J. Martinez, Jr. and Major David M. Houghland, USAF

What to Do—What to Learn. You might be surprised at how many people are interested in knowing the right answer to what seems to be a fairly simple question: “What should a base-level JAG know?” Obviously, base-level JAGs are interested because they want to know how to best prepare themselves for their current duties and for what may follow. SJAs are interested because they are responsible for providing the broad range of training and on-the-job experiences to those JAGs, immediately and for the long term. So too are MAJCOM and NAF legal offices as they need to be able to evaluate the quality of legal office training

programs. TJAG’s interest stems from the overall responsibility for ensuring that JAG Corps training fulfills individual and organizational requirements.

But there is another facet to TJAG’s interest, and this has to do with his assignment responsibilities. Visualize a JAX assignment briefing as TJAG is considering whether to assign a relatively junior JAG away from a base for the first time. Based on the information JAX provides him, he must determine whether that JAG has had a sufficiently broad exposure to base-level duties before being assigned elsewhere. This is a critically important issue, because that JAG may not return to base level duties for

a number of years, and then return perhaps as a deputy. If a new deputy departed base level without a broad enough experience base, then he or she may not be as well-prepared for deputy responsibilities as would be desirable. TJAG will be able to make better informed assignment decisions when he can compare a JAG's training and experience history against the foundational requirements applicable to all JAGs. These overlapping interests can be accommodated through a master list of base-level learning objectives that will describe the training and experiences available to attain them.



THE ROADMAP SOLUTION

To create this list, TJAG directed the development of a tool that will identify specific learning objectives and record and monitor their accomplishment. That tool will be the Foundational Learning Roadmap (Roadmap). It will consist of a list of “knowledge, skills, and abilities” (KSA) that encompass the full range of tasks that base-level practitioners should be exposed to during their initial series of assignments. Note that this list will not include every conceivable task that may arise at a base legal office. Instead, it will include only those that are most important to developing well-rounded JAGs.

Under each KSA there will be one or more associated tasks which, when completed, will give JAGs a basic knowledge of the KSA. Completing those tasks won't create experts, but will give them a “been there”

sense of what is involved in dealing with a particular practice area. Completing those tasks will also instill a sense of confidence in the JAG and in his or her supervisors that the JAG is ready for more.

Each KSA will include references to available online training (such as Webcasts), task aids, and templates.

A FOIA EXAMPLE

Within the Administrative Law major field of practice is Information Law. One of the KSAs under Information Law will be handling Freedom of Information Act (FOIA) requests. Experienced JAGs know that many tasks and questions have FOIA implications, even if a request hasn't been submitted. So a working knowledge of FOIA is an important element of any JAG's development. Predictably, one of the Roadmap tasks associated with FOIA will be to review a request, examine the requested material, and prepare a legal opinion with recommendations. JAGs will attain the KSA's learning objective by completing that task.

The JAGs who routinely handle FOIA duties will typically complete the FOIA portion of their Roadmaps as they do their day-to-day jobs. As for other JAGs, SJAs will see which of them have already experienced FOIA work, perhaps at another assignment, and those who haven't. Then, the SJA will know which JAGs should be given the opportunity to review one or more FOIAs, or perform some other work involving FOIA, before they move to another assignment.

Obviously, not every office will have enough work in every FOIA area to give each JAG a task to perform. What then? This is where another facet of the Roadmap will come into play. Each KSA will include references to available online training (such as webcasts), task aids, and templates. When the Roadmaps are fully developed, online training will include realistic exercises that will step a JAG through the FOIA request process. Those exercises will be

useful not only for people who haven't done any FOIA work; they will also serve as an instructive primer for those who are about to review their first FOIA request.

CAPSIL PROVIDES THE VEHICLE

We expect that a typical reaction to this concept will be: "Sounds like something we've needed for a long time, but I sense a lot of paperwork." Yes, and no. JAGs currently don't have a Corps-wide learning guide for base-level duties. The Roadmap will fill that gap because it will give a "big-picture" perspective on what JAGs and their supervisors should work towards during the first few assignments of a JAG's career. But this won't be a paperwork exercise, thanks to CAPSIL.

The Foundational Learning Roadmap will be part of the new CAPSIL Portfolio system and will consist of major fields of practice, sub-fields, and KSAs and associated tasks. A separate Roadmap will automatically be available for all JAGs and they will be able to see theirs when they access CAPSIL. However, everyone won't be required to make entries on their Roadmaps. The requirement will apply only to those for whom recording base-level experience is important to their development—primarily captains and some majors.

At the outset, each person's Roadmap will have no data concerning completion of any of the KSAs. As JAGs gain experience by performing tasks within KSAs they will easily be able to check off task completion and, just as easily, supervisors will be able to validate the entries. JAGs will be able to record the KSAs they completed before the Roadmap was released. SJAs will be able to monitor staff-wide progress through Portfolio's Office Training Dashboard. TJAG will be able to review each captain's training status when determining future assignments.

After a year or so, each JAG's list of completed KSAs will be somewhat different. The differences will be due to the fact that they will have performed different sets of assigned duties and will have had varying opportunities to perform additional tasks. From then on, individuals and supervisors will focus on the gaps. The Roadmap will make it obvious when someone has had no experience in a field of practice. It will then be incumbent on JAGs and their

supervisors to affirmatively seek out ways to gain the elements of experience they are lacking. If the office workload doesn't present such opportunities, then it will be necessary to seek out and provide appropriate training, whether in residence, online, or internally.

By the time JAGs have served for a few years at one or two base-level assignments, along with a possible Area Defense Counsel tour, their Roadmaps will reflect a combination of experiences and training that will reveal to them and their supervisors what they've done and what they should do next.

The Roadmap will give a "big-picture" perspective on what JAGs and their supervisors should work towards during the first few assignments of a JAG's career.

THE CONNECTION WITH RESIDENT TRAINING

The JAG Corps coordinated and TJAG-approved learning objectives described in the Foundational Learning Roadmap will provide a guide for portions of AFJAGS post-JASOC basic courses. Course content designed with the Roadmap requirements in mind will include specific training and realistic exercises that will enable students to attain some, and perhaps many, of the learning objectives for the fields of practice covered in the course.

A LEARNING TOOL, NOT A COMPETITION

For the Roadmap to be successful, JAGs at all levels will have to hold true to the principles of a comprehensive training process. That is, viewing training as a gradual journey rather than as a list of things to do as quickly as possible. Therefore, while the Roadmap may have the appearance of a checklist, it is not intended to prompt an on the job training race where people rush to finish theirs in the first year. That is not only undesirable, it should be impossible. Supervisors will first want their JAGs to focus their experiences and training on their primary duties. Only as they get a handle on those duties should they begin to branch out.

Similarly, the Roadmaps are not designed to provide a basis for stoplight charts or metrics such as percentages of items completed versus items required. Instead, they are to be evaluated much like progress is on enlisted Career Field Education and Training Plans. That is, each Roadmap is an individual training history. Measuring progress must be based on individual analysis that factors in time in service, primary duties, and the scope of tasks available in the offices to which people were assigned.

FUTURE ROADMAPS

The title of this article refers to the base-level roadmap as “part one.” That is because we envision the development of a variety of roadmaps over the coming years. For example, many of our specialized fields of practice would be perfect for “advanced practitioner” learning objective guides, and some fields already have the KSAs identified in one form or another. Specialized CAPSIL roadmaps would be particularly applicable to civilian attorneys, thus expanding the concept beyond JAGs. These guides would make it easier for those in senior field of practice positions to broadcast and monitor how new practitioners are doing in their development. Viewing these roadmaps will also enable those seeking positions within a specialized field to understand what would be required of them. Roadmaps could also be developed for joint duties, selected

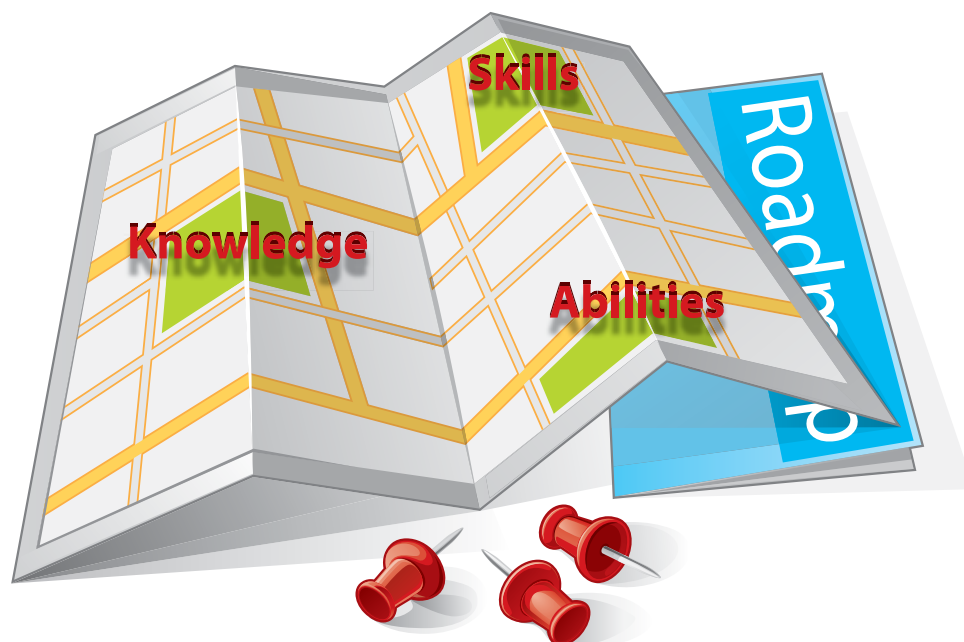
deployments, Air Staff action officers, AFJAGS instructors, and any number of other aspects of the JAG Corps practice.

In addition to professional legal knowledge areas, roadmaps would also be useful for a variety of universal skill topics. For example, envision one for base-level leadership and management for SJAs and deputies. Or something similar for NAF and MAJCOM SJA positions. We could also design one for JAG Corps strategic leadership, including information on the overarching issues involving Air Force and Department of Defense requirements and policies.

The roadmap concept won't have to be limited to attorneys. It could also be created for selected paralegal responsibilities beyond upgrade training, and for civilian support positions, such as court reporters and medical cost recovery program staff members.

THE WAY AHEAD

The Foundational Leadership Roadmap is being developed simultaneously with the broader Portfolio system. The Portfolio system began beta testing in December 2011 and initial release is planned for early 2012. Since the Roadmap will be an element of Portfolio, it will be released a month or so after people begin to gain familiarity with Portfolio. 🐦



HOW TO USE A VTC:

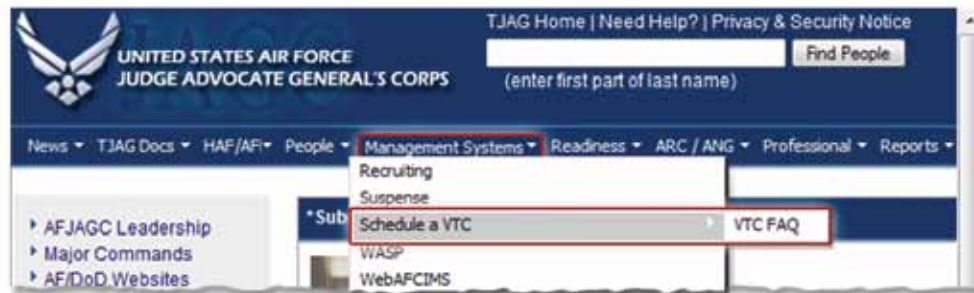
A Primer with Short Words and Pretty Pictures

by Ms. Susan L. Turley

1. START WITH THE BASICS

Go to the FLITE Home Page and look under “**Management Systems**”¹ dropdown menu.

- 1) Click the **Schedule a VTC** link.
- 2) Go over to the **VTC FAQ** and you’ll get a menu of basic information.²
- 3) Under “**Reference Materials**,” you will find a link to a VTC tutorial on CAPSIL.³



2. DON'T FEAR THE REMOTE

Just like your television, the system is controlled with a remote control. Use the arrow keys and OK button to navigate the menus. The menu appears on the VTC screen/monitor. Shortcuts to the system’s most commonly used functions are also accessible directly from the remote control.

When the VTC system is not in use, it is in standby mode. The screens are black. Wake up the system by picking up or pressing any key on the remote control. If your screen stays dark after you’ve accomplished the above steps, your machine may be in presentation mode or the monitor is switched off. Try pressing the Presentation button on your remote to switch



¹ For official guidance on VTC technology in the JAG Corps, see AFI 51-105, Chapter 3. U.S. DEPT OF AIR FORCE, INSTR. 51-105, AUTOMATED LEGAL INFORMATION SERVICES AND LIBRARY SYSTEM (16 Apr. 2010) [hereinafter AFI 51-105].

² All the information that follows is from the online FAQs.

³ <https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=821>. You can also access help guides from the manufacturer (Tandberg), VTC conference procedures and other helpful materials at this location.

back to camera view. If that fails you may need to turn the monitor on using the separate remote provided for the monitor or check that the system is plugged in properly.

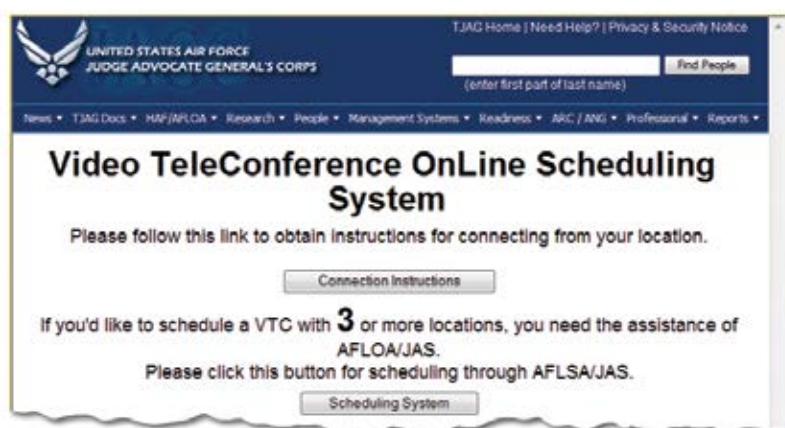
3. NAVIGATING THE WELCOME SCREEN

When the system is switched on, you will see the welcome screen. The welcome screen presents the menu and displays your Main Camera image in the background (Main Camera is the system default). Your dial-in numbers and system name are displayed in the upper right corner. Your ISDN Number and IP Number are the numbers that your contacts need to place a video call to you.

You can directly dial another VTC unit over ISDN using your machine without using the bridge to facilitate the call. To make a call, choose “Make a call” from the main menu. If you are already in a call, choose “Add another call” to call another participant. Favorite call numbers can be saved in your machine’s phonebook.

4. HOW TO SCHEDULE A VTC

To schedule a conference, use the “Schedule a VTC” link from the FLITE home page⁴ (https://aflsa.jag.af.mil/apps/VTC/vtc_main.php). If you run into problems using the online scheduler, you can call the VTC hotline at DSN 493-4VTC or commercial 334-953-4VTC⁵ or contact the JAS VTC team via email at JAS.VTC@maxwell.af.mil.



When scheduling a VTC, please provide the date, time, and number of audio and video attendees. Don't assume that your desired slot is unavailable because another VTC is already scheduled at the same time. The bridge has the capacity of hosting up to 20 conferences simultaneously, within certain channel and bandwidth limitations. After you schedule the VTC, JAS will assign a phone number, which you will need to disseminate to the participants. If you make any changes to the schedule, please make sure you pass those onto JAS before the conference.

5. INCOMING!

Relax. There are four basic ways to handle an incoming call:

- 1) To accept an incoming call, press **OK** or the **green key** on the remote.
- 2) Press the **red key** on the remote control to reject the incoming call.
- 3) You can set your machine to **auto-answer**. The machine will automatically accept any incoming calls. You may optionally set the microphone to mute when using this setting.
- 4) If you don't want any incoming calls, choose **Do Not Disturb**. If Do Not Disturb is on, the system will automatically reject all incoming calls. (This feature is perfect for those machines installed in courtrooms. This keeps you from having to disconnect everything.)



⁴ See the very first screen shot, *supra*. See also AFI 51-105, *supra* note 1, at Section 3B, dealing with scheduling a VTC.

⁵ Even the number is easy to remember. Translated to numbers only, 4VTC = 4882.

6. HOW TO END A VTC

If you remember nothing else, remember this: **Turning off the VTC monitors will not end the call.** To end a call, press the **red key** on the remote control or **End Call** from the main menu. An End Call dialog box appears to confirm that you wish to end the call. Press the red key on the remote control again or OK to end the call. Until then, the other participants can still hear you.

7. DEALING WITH TECHNICAL DIFFICULTIES

If you experience technical problems with your VTC unit or connecting to the JAS bridge, please call the VTC hotline at DSN 493-4VTC or commercial 334-953-4VTC. We prefer phone calls, but you can also email us at JAS.VTC@maxwell.af.mil, and one of our technicians will contact you to resolve the problem.

All JAG Corps-purchased VTC equipment is manufactured by Tandberg and is covered by a warranty contract. JAS will arrange any needed service under the warranty after doing some initial troubleshooting. When you contact JAS, please have the serial number for your machine available because this drives the warranty. You can access your serial number by following these few steps:

- 1) From the main “**Make a call**” screen navigate to the icon that looks like a wrench (the Control Panel) and hit the OK button on the remote.
- 2) The **General** button should be highlighted. If so, click the OK button. If not, navigate to the General button on the screen and hit the OK button.
- 3) Now navigate using the remote to the **software options** on the screen and hit the OK button. This should bring up the serial number for your machine. ➔

Important On Screen Icons



Volume Off

Shows when the volume is turned off. Press Volume + to turn back on.



Microphone Off

Shows when the microphone is turned off. The icon will flash if audio is detected in the room during a call and the microphone is turned off. Press the Mic off button again to turn the microphone back on.



Floor

Shows when you are displayed in full screen in a MultiSite call.



Call Not Secure

Shows when your call is not using encryption and is not secure.



PRE-TRIAL WITNESS INTERVIEWS

by Major R. Davis Younts, USAF

Time is a critical asset to all JAGs and paralegals and the time pressures imposed by the moving parts and deadlines of a court-martial can be overwhelming. Often trial counsel has a paralegal sitting on the sidelines ready and willing to assist. This begs the question: How do we take advantage of the skills, experience and perspective paralegals provide to create an effective and efficient trial team?

One critical area where paralegals can be used is assisting with and conducting pre-trial witness interviews. The added value of utilizing paralegals to assist attorneys with interviews is significant. Paralegals with proper training and experience may elicit more information from witnesses because

witnesses are more comfortable speaking with an NCO or Airman than with an officer. Additionally, paralegals can be utilized to vet and identify the most critical witnesses for the attorney. This teaming approach helps make better use of valuable trial preparation time.

THE PURPOSE OF WITNESS INTERVIEWS

Witnesses are the focal point of nearly every criminal prosecution. Witnesses tell us if a crime occurred, when it occurred, and who may have committed it. In many cases, without witnesses, much of the physical evidence diminishes in value or cannot be admitted. If little attention is paid to the witness interview process, or if the witness interview is conducted in an inefficient or ineffective manner, that shortcoming will be reflected in the trial's result.

THE IMPORTANCE OF CASE FAMILIARIZATION

Before interviewing a witness, in fact before potential witnesses can even be identified, a review of written materials associated with a case is absolutely necessary. Witness interviews require JAGs and paralegals to be as familiar with the facts as possible before they can accurately assess the need for a specific witness. By reviewing documents such as blotter entries and reports of investigation (ROIs), the trial team will be able to identify who needs to be interviewed and why.

Practical ways to become familiar with a case for the purpose of identifying witnesses include:

- 1) Carefully reviewing blotter entries, ROIs, OSI or SFOI agent notes, witness statements, and statements made by the accused.
- 2) If there is physical evidence associated with the case, determining which individuals are necessary to lay foundation at trial. This may include the individual that discovered the piece of evidence or in the case of lab reports or other documents, the individual that prepared the report or document.
- 3) Reviewing applicable MCM provisions, the Military Judges' Benchbook, and case law guidance as they relate to witness interviews.

Additional materials that should also be reviewed:

- 1) Personnel records such as Unit Personnel Record Group (UPRG), the Personal Information File (PIF), the Unfavorable Information File (UIF), Officer Performance Reports (OPRs), Enlisted Performance Reports (EPRs), and any other administrative or derogatory documents which may exist.
- 2) Finance records, if applicable.
- 3) Medical records or records under the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program.
- 4) Air Force Personnel Command (AFPC) maintains records, such as prior Article 15 records, which may be relevant and reveal potential witnesses.

PLANNING THE INTERVIEW

Prior to scheduling an interview, determine the appropriate approach to take based on the type of witness and the potential role they will have at trial. Are they a fact witness? Did they witness the crime, or do they have relevant circumstantial evidence testimony to offer? Are they an expert or a foundational witness necessary to ensure the admission of physical evidence?

When planning the interview, the trial team should answer the following questions:

- 1) Where will the interview be conducted?
 - In the legal office? If interviewing an adverse witness, such as a friend of the accused, the legal office is likely the best place to conduct the interview. The JAG and paralegal will be in a position of safety and authority that will make it easier to keep the interview professional.
 - In the courtroom? The courtroom is also an excellent location to conduct a witness interview, regardless of whether the witness is adverse or friendly.
 - At the unit or witness' office? Interview convenience may assist in gaining witness cooperation with the trial. A victim or reluctant witness may be more comfortable talking in a familiar environment. Additionally, the trial team may gather valuable information by walking around and talking to people in the accused's unit.
- 2) How much time is needed for the interview?
 - Be sure to set aside an appropriate amount of time for interviews. For example, if the witness is an alleged sexual assault victim, 30 minutes will not be enough time.
 - Let witnesses know how long the interview will take in advance and try to maintain a reasonable schedule. Witnesses tend to get frustrated and less cooperative if they are told they are needed for 30 minutes but are then kept for two hours.

- 3) How will the witness be used?
- Will the witness be needed for findings, sentencing, or both? Are they a fact witness, foundational witness, or character witness? The answers to these questions will not only help determine just how long the interview should take, but will also provide the background necessary to develop appropriate questions.
 - Is the witness adverse or friendly? Will the Government be calling the witness, or are they a defense witness? Remember, you should use the interview to prepare for possible cross examination.
- 4) Who will observe the interview?
- Even if a witness appears to be cooperative and straight-forward, outside influences often impact a witness' testimony before or even during trial. Having a competent observer and note-taker at the interview will enable them to provide testimony if the witness changes their story during trial.
 - Who should be your observer? The most common choice is a paralegal, preferably someone who is a good note taker and who will be able to accurately testify to statements made by the witness during pre-trial interviews.

CONDUCTING THE INTERVIEW

The first step of the interview is to establish a rapport with the witness to enable efficient professional communication in an environment of mutual respect. To build a proper rapport with witnesses, the interviewer should keep in mind these simple steps:

- 1) Being on time sets the right tone and lets the witness know their time is respected.
- 2) The interviewer should introduce themselves and explain their role in the court-martial process. Never assume that a witness knows who you are or which side you represent. Make it clear from the beginning that the interviewer represents the Government (or

defense) and that the witness' only responsibility throughout the interview process and at trial is to tell the truth.

- 3) Go over the ground rules for the interview and give the witness a reasonable estimate of how long you anticipate the interview will last.

Once you have established a rapport, it is time to gather information from the witness and begin to develop the potential role they will have at trial. As you conduct the interview, keep in mind the following practical tips:

- 1) One person should be the primary or only person asking questions to avoid confusing or intimidating the witness with too many questions from different sources.
- 2) Once rapport has been established, give the witness an opportunity to review any prior written statements they made prior to asking any questions.
- 3) Begin the interview by asking broad, open-ended questions. As the interview continues, begin to focus the witness on relevant or critical issues similar to a direct examination.
- 4) Remember to let them tell their story. Begin with "tell me what happened," listen carefully, and follow up as appropriate.
- 5) Encourage the witness to elaborate. Develop all details to fill in any gaps in the story and to formulate explanations for possible inconsistencies or weaknesses.
- 6) Do not avoid or rush through negative information. It will come out eventually and you do not want to hear about it for the first time while the witness is testifying.
- 7) Be professional and do not intimidate. Avoid being confrontational in the interview unless it is absolutely necessary and the proper ground rules have been established. Ideally, save the real confrontation for the courtroom.

Always prepare the witness for the experience of testifying. A critical element of the witness interview process includes addressing the issues surrounding the witness' actual testimony in court. Testifying in a courtroom full of strangers can be very intimidating, even for a senior commander or seasoned OSI agent.

Always prepare the witness for the experience of testifying.

- 1) Whether you are trial or defense counsel, explain to the witness that they will need to speak to the other side prior to testifying. Do not use this as an opportunity to disparage counsel or their abilities. In fact, the Air Force Standards for Civility in Professional Conduct, Rule 3, requires counsel to "abstain from directing disparaging personal remarks or acrimony toward" other participants in the trial process.
 - Witnesses should be encouraged to participate in a defense interview, but they cannot be compelled. *U.S. v. Morris*, 24 M.J. 93 (1987); *U.S. v. Alston*, 33 M.J. 370 (1991).
 - Failure to submit to an interview could result in a ruling by the military judge prohibiting the witness from testifying.
- 2) Incorporate a mock cross-examination into the witness interview process, either at the end of the initial interview or during a subsequent interview.
- 3) Familiarize the witness on the physical layout of the courtroom and on the proper decorum while in the courtroom. Specifically, counsel should instruct witnesses to avoid chewing gum or tobacco, wearing sunglasses, or using profanity, slang or colloquialisms except as required as part of their testimony.
- 4) Explain to the witness proper courtroom attire. Military witnesses will need to testify in service dress unless the military judge approves some other uniform in advance.

Civilian witnesses should be reminded to wear conservative clothing suitable for court.

- 5) Ensure that witnesses are familiar with the exhibits. If exhibits will be introduced during the witness' testimony, ensure they are fully versed in the required foundational questions. Have the witness explain not only the basis for their foundation testimony, but also the relevance that the particular piece of evidence has to them and the case. Do not wait until trial to have a witness examine a piece of evidence.
- 6) Explain to the witness that in the event they cannot recall certain information while testifying (usually due to nerves), attorneys have the ability to refresh their recollection by showing them a copy of their previous statement. Be sure they understand how the procedure works, so if during the course of their testimony they cannot recall something their memory can easily be refreshed with a previous statement.

OTHER IMPORTANT CONSIDERATIONS

Child witnesses present special challenges for counsel. In cases involving children the trial team needs to consult with an expert prior to conducting interviews and counsel need to pay particular attention to rapport, communication skills of the child, questioning technique and courtroom set-up.

The testimony of police officers and OSI agents can be absolutely critical, thus the importance of thorough witness preparation should not be overlooked. Do not assume that officers or agents have experience testifying simply because they are in law enforcement. Because of their importance to the case, they may be subjected to credibility and competency attacks at trial and should be prepared to respond appropriately and professionally. Remember to pay special attention to the officer's schedule and assist in arranging an interview with opposing counsel.

Often the defense's only witnesses in sentencing will be the accused's family. The trial team should approach these witnesses with delicacy. Sometimes the biggest decision will be whether or not to cross these witnesses.

When either side is interviewing character witnesses it is critical to ensure that they are aware of the nature of the charges in the case and the potential uses of their testimony at trial. Consider reading them the instruction on character testimony from the Military Judges' Benchbook. One of the critical issues to cover in these witness interviews is the actual foundation of the witness to provide a particular opinion.

***It is completely appropriate,
and in fact encouraged,
to ask a witness what
they have discussed with
opposing counsel.***

AFTER THE INTERVIEW

After interviews are complete, remember to keep witnesses informed of potential trial dates and hearings. If necessary, schedule witnesses for subsequent interviews and trial preparation sessions. Remind witnesses to contact you for a follow up interview after they have spoken to opposing counsel. It is completely appropriate, and in fact encouraged, to ask a witness what they have discussed with opposing counsel. Provide all witnesses with a final reminder of the importance of courtroom etiquette and professionalism in dealing with other witnesses and all participants in the trial.

THE JAG SCHOOL TRAINING PROGRAM

Based on the principles outlined above, the JAG School has implemented a witness interview training program for JAGs and paralegals that involves a combination of lectures, expert question and answer sessions, and training exercises requiring JAG and paralegal teaming. The goal of this student-focused training program is to ensure that JAGs and paralegals understand the importance of properly conducting witness interviews and are competent to put into practice basic techniques to make interviews successful.

Currently this training involves a one hour lecture block for paralegals in the Paralegal Apprentice Course (PAC). This is designed to teach new paralegals basic interviewing techniques enabling

them to build on this skill set through practical experience and additional training as they advance in the career field. Paralegal Craftsman Course (PCC) students receive three hours of lecture from experienced litigators and Air Force Office of Special Investigation agents (AFOSI) assigned to the Federal Law Enforcement Training Center (FLETC). In addition, the students attend a panel discussion where they have an opportunity to ask questions and learn from the experiences of experts in the field of witness interviews. Finally, the students are required to conduct two witness interviews which are graded and critiqued by JAG School faculty. The first practical exercise requires paralegals to team with a Judge Advocate Staff Officer Course (JASOC) student to obtain information from a witness the JAG will need to be successful in their JASOC moot court. The second exercise requires the PCC students to set up and conduct an interview of a potential witness. In this exercise, the student must call the witness to schedule the interview, conduct the interview and gather critical information without the assistance of a JAG. The paralegal is graded and critiqued based on their ability to obtain data that would be critical if the scenario involved a real world case.

JASOC students receive a lecture on witness interview strategies and techniques and are expected to demonstrate these skills during a joint exercise with paralegals, as well as, in preparation for their JASOC moot courts.

The current training is designed to provide a foundation that will enable legal offices to leverage the abilities and talents of paralegals in creating effective and efficient trial teams. In the future, the JAG School will continue to partner with AFOSI and FLETC to expand classroom training and add at least two additional practical exercises to the PCC curriculum.

If you would like more information on this program or training the JAG School provides, please contact Major Lynn Schmidt at lynn.schmidt@maxwell.af.mil or DSN 493-4454. 🐦



AMJAMS

AUTOMATED MILITARY JUSTICE ANALYSIS AND MANAGEMENT SYSTEM

The Next Generation

by Ms. Susan L. Turley

When the JAG Corps hatches a new information technology, finding the right moniker can be difficult. Currently, JAS and JAJM have just begun to develop a new military justice program that will take the process from cradle to grave. Because we are still in the “incubation” stage—that is, determining what the program will look like—we also have yet to name the “new” AMJAMS. We have floated around *AMJAMS 2020*, *NextGen AMJAMS*, *Son of AMJAMS*, *The AMJAMS Redux*, and similar labels, but all these designations share the same flaw: They imply that the still-embryonic program will be a reworked Automated Military Justice Analysis and Management System—a better and enhanced version, but still an offspring of the existing AMJAMS.

In reality, the vision is far, far more than a new and improved AMJAMS clone. “There is nobody in the JAG Corps today who has ever had the chance to change military justice technology like we do,” said David Stazel, AMJAMS program manager at JAS. “We have to think outside the box, because nothing is off the table.”

It was almost 50 years ago that forward-leaning members of the Air Force community suggested automating military justice processes.¹ From the beginning, JAS partnered with JAJM to create the system, but we were always constrained by the technology of the time. In the 1970s, while AMJAMS was in its infancy, base-level users entered information into their computers and then transferred the data to an Air Force mainframe via disk sent by U.S. mail. While serving as TJAG, Major General William Moorman wrote in 2002:

Twenty years ago...I was the base SJA at Luke AFB. I can remember the frustration of maintaining our two big data systems in those days. The military justice data system required our paralegals to submit separate cards for each step in the court-martial and Article 15 processes. These

¹ Then-Major Joseph R. Lowery initially conceived of the program in 1965, calling it JEMS (Justice Electronic Management System). LIEUTENANT COLONEL PATRICIA KERNS (USAF RESERVE), *THE FIRST 50 YEARS OF THE USAF JAG DEPARTMENT 106* (2001) (internal citations omitted). The history of AMJAMS stretches back to the early 1970s. On 25 April 1972, the Air Force Director of Data Automation authorized implementation of AMJAMS. Michael G. McCormack, *The Automated Military Justice Analysis and Management System (AMJAMS)—an update*, 8 Rep. 151, 152 (1979).

cards were mailed to the GCM, where they were double-checked and then mailed to who-knows-where, to be put into the system. There was no local ability to retrieve any information; reports came out on microfiche periodically (some of you will remember microfiche);² and they were of historical value only (at base level, we were already working on the next batch of cases). Washington said it needed the information, but at base level, we sure didn't.³

Over the next three-plus decades, the Air Force continued to develop and enhance AMJAMS, well in advance of the Army and Navy JAG Corps. During the 1980s, the JAG Corps moved AMJAMS from the Air Force main computer system to a smaller, faster JAG-owned server at JAS and added features such as printing essential military justice forms and incorporating real-time information inputs and access.⁴ In the 1990s, AMJAMS became compatible with Microsoft Windows, the standard Air Force operating system, and incorporated some appellate processing and statistical reporting. By 2009, AMJAMS had moved entirely to the web and was no longer a desktop-based system.

The JAG Corps needed a complete, ground-up design of a new military justice program.

However, just as with any other Air Force weapon system or program, whether it be a tanker aircraft or battlestaff communications, at some point, we can no longer rehab, repair and refurbish the existing machinery or technology. For several years, JAS and JAJM have been constantly striving to keep

² For those of you who don't, microfiche is "a flat sheet of microfilm in a form suitable for filing, typically measuring 4 by 6 inches and containing microreproductions, as of printed or graphic matter, in a grid pattern." DICTIONARY.COM, <http://dictionary.reference.com/browse/microfiche>.

³ Major General William A. Moorman, *A Message From TJAG—Legal Information Technology*, TJAG ONLINE NEWS SERVICE (6 Feb. 2002), <https://aflsa.jag.af.mil/FLITE/notices/TJAGOLNS6Feb02.htm>.

⁴ THE JUDGE ADVOCATE GENERAL'S COMMISSION ON THE FUTURE OF LEGAL INFORMATION SERVICES IN THE AIR FORCE, REPORT 35 (1992).

AMJAMS current but eventually concluded that the JAG Corps needed a complete, ground-up design of a new military justice program for a number of reasons, including the following:

- The significant technological advances in databases and delivery technologies that have occurred since AMJAMS' initial release;
- The need for more logical data entry; and
- The current version's lack of adaptability to changing requirements.

THE WAY AHEAD

In early 2011, The Judge Advocate General, Lieutenant General Richard Harding, approved a way ahead to create a system that supports four primary groups—installation-level legal offices, trial courts, appellate courts, and users of statistical data and reports analysis. The plan calls for a system that would have the following interactive capabilities: case management, court calendar docket scheduling, electronic record of trial production, electronic filing, court-member management, document management, victim-witness assistance management, interfaces with other related JAG Corps applications and data feeds with AFPC and other Air Force systems.

At the foundational level, Mr. Stazel says, the goal is "to provide a fully functional case management tool for base-level military justice practitioners and a better, more responsive, more detailed reporting capability." For example, this could mean giving attorneys, paralegals and judges the ability to file, exchange and manage charge sheets, indorsements/transmittals, Article 32 reports and evidence, pleadings, orders, decisions, and the full body of military justice records online.

When deciding how to approach the significant challenge posed by designing a new military justice application, JAS and JAGC leadership considered and evaluated several options. For example, we considered using a commercial product or obtaining a system from another government agency. However, no agency, in or out of DoD, currently has a system that meets our requirements, and most face the same technological challenges as the existing AMJAMS

does. Additionally, the unique nature of the military justice system, the required customizations, and the restricted data rights of commercial products made it unlikely that the existing market could provide a product to satisfy our needs.

Eventually, TJAG approved a phased, modular contracting approach that enables us to harness the creativity, innovation, broad range of skills, expertise and resource flexibilities of private IT contractors while also allowing us to make in-course revisions that take advantage of changes in technology, resources, policy and requirements. This approach focuses on using performance-based contracting as much as possible, in which we will describe our requirements “in terms of the required results rather than ‘how’ the work is to be accomplished.”⁵ In other words, the government will describe the functions the modernized AMJAMS will need to carry out and the level of performance needed and let the potential contractors propose solutions to meet our requirements.

We also intend to use “modular contracting,” a process to “acquire information technology systems in successive acquisitions of interoperable increments.”⁶ Modular contracting reduces the government’s risk and divides the acquisition of an IT system into several smaller acquisition increments that:

- Are easier to manage than a huge, comprehensive acquisition;
- Address our IT objectives incrementally to “enhance the likelihood...for attainment of those objectives;”
- Deliver “workable systems or solutions in discrete increments” that do not depend on the next increment to perform as needed; and
- Allow the later modules to exploit evolving technology and adapt to changed needs.⁷

⁵ Fed. Acq. Reg. pt. 37.602(b)(1) (July 2011) [hereinafter FAR].

⁶ FAR 39.002.

⁷ FAR 39.103(b).

As Mr. Stazel said, this project represents an incredible opportunity for JAG Corps users to shape the future of military justice technology. To ensure we maximize input, JAS has contracted with a private IT company to help gather and define our requirements. After evaluating several highly qualified small businesses, we selected eSolution Architects (eSA), a company headquartered in Montgomery, AL, also home to Maxwell AFB and JAS. Over the next 12 to 18 months, eSA will be working with JAS and JAJM to conduct workshops for various user groups, such as trial judges, base offices, appellate counsel, higher headquarters and so on, where participants will tell us what they need in the new system. Additionally, eSA will help the Air Force leverage and encourage industry participation and involvement in the acquisition process by assisting JAS and JAJM to conduct “industry days” and other presolicitation conferences.⁸

This kind of ground-floor partnership—although an uncommon approach for JAS—has already proven valuable to the JAG Corps. “The contractors have the experience in helping to draw out the requirements,” Mr. Stazel said. “They bring a new set of eyes to the project—they can help us get past our preconceived notions of what the limitations are” based on past AMJAMS experiences.

***We have to get out of the
mindset of doing business
the same old way.***

In the future, JAS and JAJM will be asking legal offices at various levels for nominees for the requirements workshops, as well as surveying the field for ideas. “Not everything is going to make it into the final product,” Mr. Stazel said. However, he encourages JAGC members to send him their unfiltered suggestions, no matter how off-the-wall or improbable they may seem. “We have to get out of the mindset of doing business the same old way.” 🐦

⁸ See A.F. FAR Supp., pt. 5307.104(a): “In order to help develop a sound acquisition strategy, the acquisition team shall provide appropriate opportunities for the early involvement of industry in all acquisitions....”

Paralegals Save the Day at Joint Base Langley-Eustis: A Teaming Success Story

by Colonel Calvin N. Anderson, USAF

In a matter of two months, the Joint Base Langley-Eustis legal office (JBLE) went from no paralegal participation in will preparation to four 7-levels preparing nearly all wills at the busiest legal assistance base in ACC.¹ It has been an amazing feat considering the recent reduction in attorney manning together with an increased workload. The success can be directly attributed to TJAG's attorney-paralegal teaming initiative.

JBLE is responsible for providing legal assistance support to nearby Ft Eustis. Originally, two full-time civilian legal assistance attorneys were slated to handle the workload. However, JBLE lost one attorney and has been unable to hire a replacement because of the recent federal hiring freeze. JBLE was forced to fill in the gaps with active duty legal assistance attorneys from Langley AFB's legal office until that office lost four captains and only gained one new replacement JAG this past summer. As a result of this attrition, the office was forced to reduce legal assistance hours and were turning away clients because of excessive wait times during walk-in periods. This all ended when paralegals put on their capes and stepped in to help.

Inspired by the JAG Corp's teaming vision, we unleashed our program. JBLE sent paralegals to the Will Preparation for Paralegals Course at the JAG School ultimately giving the base four fully-trained and ready to roll 7-level paralegals. The office now has five paralegals handling wills from initiation to attorney review. This process is working fabulously! Occasionally, paralegals will solicit attorney input on complicated wills and the office has discovered the final attorney review usually takes less than ten minutes. With the added legal assistance manpower,

JBLE has found it easier to schedule legal assistance appointments, and they no longer turn away walk-in clients.

JBLE has found several practices and tools vital to turning this into a successful program. The first was leadership support. Despite some initial reservations from the staff, leadership made it clear the base was going to make it work—period. Next, we directed the captains to develop an agreed upon, standardized and written set of JBLE preferences as a tool for the paralegals to avoid the problem of having each paralegal learn every attorney's individual will preferences. Standardization has been an efficiency multiplier. JBLE also limits the number of attorneys who review wills to one or two whenever possible.

The base also schedules will appointments in blocks recently resulting in two paralegals drafting an impressive 13 wills and 39 total estate documents during one legal assistance period. JBLE's goal has been to schedule four paralegals to draft, and one attorney to review wills every 30 minutes. At times, an additional attorney has been needed to review complicated wills (or screen them early) or schedule three paralegals to draft wills instead of four. Further, increasing web usage and incorporating web-based worksheets into the process is next on the radar.

Prior to beginning the initiative, I briefed TJAG on all the reasons why paralegal-drafted wills would not work. However, the past few months have convinced me, and the entire office, that we would not be able to do our mission without it or would be so stretched that other areas would suffer deeply. Attorney-paralegal teaming works because it's the right vision. ✈

¹ JBLE sees more clients than the rest of 9th AF combined.

What Does It Take To Run An Effective Legal Assistance Program?



by Colonel Marlesa K. Scott, USAF

As a first lieutenant or a captain you were likely told, “Congratulations, you’re the new Chief of Legal Assistance” but were given little to no guidance on running the program. As a base level staff judge advocate, you knew you were responsible for having a legal assistance program, and knew that it was inspectable, but again, received little to no guidance on how to structure it.

Although there are nuances from base to base, I propose a five step approach that will maximize the effectiveness of your program: know the applicable laws and regulations; know your clients; know your resources; know your tools; and know your local bar.

As my maintenance officer flight mate from Squadron Officer School always said, “Read your regs!” If you’re in the military, particularly in the legal career field, these are words to live by. Start by re-reading Air Force Instruction (AFI) 51-504, *Legal Assistance, Notary, and Preventive Law Programs*. It implements 10 USC 1044, Legal Assistance, and provides a basic roadmap to understanding the eligibility guidelines for legal assistance and what is or is not covered under the auspices of Air Force legal assistance. It also provides guidance on the types of assistance that can and should be covered. AFI 51-504 mandates that all Air Force bases operate individual income tax programs and makes staff judge advocates responsible for supervising and managing these programs. In addition, AFI 51-504 incorporates other mandates

from the Office of the Secretary of Defense, such as requirements for dependent care plans and the provision of legal assistance to victims of crime. In the near future, expect the AFI to be amended to incorporate training requirements for legal assistance.

You must know your client base to offer the best program for your installation. After you have a clear understanding of the services you should be offering, take a look at your client base. Are the majority of your clients active duty or members of the air reserve component (ARC)? Both populations require basic estate planning services, but your ARC clients will require a more in-depth understanding of the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act. While Air Force members and their families will most likely constitute the majority of your active duty and ARC clients, it is important to determine if your client base also has a sizeable number of sister-service members. That may affect how you shape your program. Do you have a large retiree clientele? Elderly clients, or clients responsible for elderly parents, can greatly affect estate planning needs. Does your base have a lot of shift workers? If so, this could affect when you want to offer your appointments and walk-in hours.

Next, it is essential that you know your resources. Is Google the first place you turn when you don't know the answer to a problem? While a useful tool, Google should not be your primary legal research avenue. Useful and reliable information is available on the Air Force Legal Assistance Website (LAWS), CAPSIL Learning Centers, and state and federal statutes. Also, your office may have reservists who are experts in certain areas of practice and can offer you advice. You can also seek an expert willing to answer your questions by using "People Finder" in Roster or the ABA LAMP Committee's project Operation Stand-By.

It is also essential that both legal assistance attorneys and their leadership are familiar with the tools available to help run an effective legal assistance program. WEBLIONS, for example, does much more than merely check clients in and out and maintain the data you pull for annual legal assistance reports. It can help you track trends in client demographics, types of assistance being sought, the types of docu-

ments drafted, and the legal assistance workload of individual attorneys and paralegals.

One of the primary purposes of LAWS is to help make clients' lives easier, but it also offers valuable information to leadership about the legal services rendered to clients such as allowing for the tracking of additional trend data as well as insights into program improvement through client feedback.

Next, it is essential that you know your resources. Is Google the first place you turn when you don't know the answer to a problem?

While myriad other tools are available, DL Wills is the last one I'll mention—it is essential that legal assistance practitioners are familiar with the ins and outs of the program and know how to use it effectively to produce documents that meet their clients' needs. But relying solely on DL Wills to determine what the testator's state law requires is ill-advised. FLITE offers many detailed state law resources that should be consulted to verify the accuracy of will clauses that DL Wills generates for your client.

Military legal assistance programs offer a terrific value to our clients, but they do have limitations. By building relationships with your local bar associations, law schools, and local clinics, you will gain a greater familiarity with the resources available in your local area. Conversely, they will gain a greater understanding of the military community and the legal assistance needs of our clients. Many civilians want to help military members and their families, but don't know what is needed. Positive interaction with your local legal community will only benefit our clients.

Every base legal office is different, but every office can have a successful legal assistance program. By following this five step approach, you will know what is needed to provide the best, most effective assistance possible to your clients. 🦋



LEFT: Photograph of transmission lines and structures damaged by a civilian aircraft strike in East Palo Alto, CA in February 2010, which resulted in three fatalities. **RIGHT:** This photo of the fatal civilian aircraft crash in East Palo Alto demonstrates how transmission lines may pose a flight safety hazard and a risk to the public health, safety and welfare of the community.

Defending Air Operations: Airfield and Airspace Encroachment

by Lieutenant Colonel Andrew J. Turner, USAF and Mr. Michael L. Casillo

Mission sustainment is an essential part of ensuring the effectiveness of our Air Force.¹ Air Force attorneys and paralegals routinely provide a multitude of legal services that help support mission operations. One especially direct role that JA personnel sometimes take to help sustain mission operations is the prevention of airfield and airspace encroachment. The following discussion addresses the role Air Force attorneys play in identifying and taking action to prevent incompatible development, provides recent examples of litigation, and offers practice pointers for Air Force attorneys facing encroachment-related issues.

¹ The Air Force is charged with training for “prompt and sustained offensive and defensive air operations” and “the preparation of the air forces necessary for the effective prosecution of war.” 10 U.S.C. § 8062 (c).

IMPACT OF ENCROACHMENT

Many Air Force installations were built in the 1940s and 1950s in relatively remote areas. Urban and suburban growth, however, has since extended into the vicinity of these installations. Although it may be argued that this growth constitutes “moving to a nuisance,” the hard fact is that it is extremely difficult to reverse such growth. Except in limited circumstances, the Air Force neither holds an ownership interest, nor controls land use decisions, for lands “outside the fenceline.”² Yet, the effectiveness of flying missions requires unobstructed access to—and use of—navigable airspace for air operations. Land development near military airfields and below military training routes

² The Air Force has several options involving lease or purchase of interests in real property. See AFI 32-900, ACQUISITION OF REAL PROPERTY (27 July 1994). Funding and post-acquisition land use considerations, however, can significantly limit acquiring a leasehold or fee interest in real estate. See *id.* at paras. 2.1, 3.1, and 3.13.

The AICUZ program defines required and desirable restrictions on land use, including heights of objects near military airfields, to provide for safety of flight and to assure that people and facilities are not concentrated in areas susceptible to aircraft accidents.

can encroach upon and potentially jeopardize Air Force missions. The Air Force has, at times, been successful at preventing incompatible development and encouraging state and local governments to implement anti-encroachment laws. But elsewhere, incompatible encroachment has been a contributing factor to the cessation of flying missions and base closures such as at Lowry AFB in Colorado, Chanute AFB in Illinois, and Laredo AFB in Texas.³ Incompatible development does not typically cause immediate damage to mission operations. Rather, it slowly manifests in strife with local communities and erosion in the efficacy of mission operations. Recent examples of potentially incompatible development “outside the fenceline” of several installations include proposals to construct transmission lines and residential development in mission critical areas. It is in these scenarios that JA personnel have effectively applied legal principles and skills to directly sustain mission operations.

AIR INSTALLATION ENCROACHMENT

The Air Force initiated the DoD-wide Air Installation Compatible Use Zone (AICUZ) program, which was developed in response to growing incompatible development around military airfields.⁴ The AICUZ program defines required and desirable restrictions on land use, including heights of objects near military airfields, to provide for safety of flight and to assure that people and facilities are not concentrated in areas susceptible to aircraft accidents. The AICUZ program addresses three primary concerns: (1) height limitations based on Air Force height and obstruction criteria; (2) noise concerns due to flight operations; and (3) land use compatibility.⁵

Generally, the first category (height) concerns development that interferes with navigable airspace designated by the FAA including, but not limited to, the Approach-Departure Clearance Surface (commonly referred to as the “glide slope”).⁶ The second category (noise) concerns calculation of noise levels from daily aircraft operations, plotted on maps in 5 dB interval contours. The third category (land use) consists of specific guidelines on what types of development are compatible for safety zones extending from the end of the runway.⁷ Each air installation prepares an AICUZ study that is shared with the local community, and a Joint Land Use Study (JLUS) prepared in conjunction with local governments. Both types of studies are periodically updated, and seek to apply programmatic principles to the specific and often changing circumstances of that installation’s AICUZ area of influence.

The AICUZ program and studies for each installation are designed to be adaptive to individualized needs and concerns of installations. The noise contours are used in conjunction with land use guidelines to assist local, regional, state, and federal officials make land use decisions that protect public health, safety, and welfare and preserve the operational capacity of the installation. This is achieved through active monitoring and engagement with local governments and communities, providing education, information and guidance as it relates to land use decisions that could potentially place incompatible development near air installations.

⁶ See 14 C.F.R. § 77.

⁷ The Air Force conducted studies of aircraft accidents within 10 nautical miles of all airfields between 1968 and 1972, and again in 1999 and 2008. The Air Force determined that 91% of all aircraft accidents were related to takeoff and landing operations. Based on its findings, the Air Force has designated three safety zones for areas beyond the ends of runways, each of which reflect a relative statistical incidence of accident potential. These safety zones are the Clear Zone (CZ), Accident Potential Zone (APZ) I, and APZ II 32 C.F.R. § 256.3(c); see also AFH 32-7084, Atch 3 at A3.1 *supra* note 3.

³ AFH 32-7084, AICUZ PROGRAM MANAGER’S GUIDE, ¶1.1.1 (1 Mar. 1999).

⁴ See 32 C.F.R. Pt. 256.

⁵ See 32 C.F.R. § 256.3; see also AFH 32-7084, Atch 5, ¶ 3.1 *supra* note 3.

My staff's working on the Dyess AFB threat emitter case was a great opportunity for attorneys and paralegals in our office to represent base pilots, weapons system officers, and air traffic controllers—our negotiation efforts connected them with the mission.

– Patrick J. Dolan, Lieutenant Colonel, USAF, Staff Judge Advocate, Dyess AFB

MILITARY TRAINING ROUTE ENCROACHMENT

Military training routes (MTRs) are airspace areas used for training or operation purposes by military aircraft in the interests of national defense.⁸ To be proficient, military aircraft, pilots and navigators must be able to train in a wide range of airborne tactics,⁹ including the use of “low level” routes at various airspeeds.¹⁰ Information on MTRs is not publicized as widely as installation AICUZ studies, but MTRs are critical to mission operations. Because developers and local communities may not know of the existence of or the need for MTRs, installation personnel need be especially mindful of potential development affecting, or near, MTRs.

JA PERSONNEL INVOLVEMENT IN MISSION SUSTAINMENT MATTERS

Air Force attorneys and paralegals at all levels play a key role in defending against encroachment that threatens the conduct of military air operations. We assist in the preparation of the AICUZ Studies.¹¹ We also review proposed state and local legislation that impacts land use decision making.¹² We counsel our clients to be alert to activities that may encroach upon Air Force use of airfields or airspace. When potential encroachments are identified, we help our clients engage with appropriate officials and stakeholders to attempt to promptly and effectively resolve the matter. In addition, where early engagement does not

prevent encroachment, we represent the Air Force in proceedings to defend the Air Force's mission and interests and can negotiate for acceptable resolutions to such legal actions.¹³



Part of the Threat Emitter potentially impacted by the transmission lines proposed near Dyess AFB.

RECENT EXAMPLES OF ANTI-ENCROACHMENT LITIGATION

DYESS AFB: ELIMINATION OF THREAT TO SNYDER TEST RANGE

In August 2010, an electric company proposed to build a new transmission line that would pass directly in front of a remote threat emitter, part of the Snyder test range attached to Dyess AFB. The Air Force intervened in the matter and JA personnel, including the Dyess AFB legal office and JACE attorneys, worked closely with technical personnel from Eglin AFB, as well as air traffic controllers and weapon systems officers (WSOs). We submitted testimony explaining that, as proposed, the transmission lines would interfere with the operation of the threat emitter, and by extension the entire Snyder range. JACE engaged with the electric company

⁸ See 49 USC 40103(b).

⁹ See e.g. *Scruggs v. United States*, 959 F. Supp. 1537, 1546 (S.D. Fla. 1997) (discussing MTRs in the context of a tort claim filed by a private pilot navigating near or within a designated MTR).

¹⁰ See FAA JO 7400.2 and FAA JO 7610.4.

¹¹ See AFH 32-7084, para. 2.3.2.1, *supra* note 3 (SJA Office's roles include identifying the legal framework, including applicable state and local land use regulation and current case developments, affecting each installation as it relates to the AICUZ area of influence).

¹² DoDI 4715.02 authorizes the DoD Regional Environmental Coordinator (REC) to engage with state and local legislative and regulatory officials. Counsel to RECs play an invaluable role in this process.

¹³ See AFI 51-301, CIVIL LITIGATION, paras. 5.2.2.4 and 5.3.1.5 (1 July 2002).



Although rare, aircraft accidents do occur like the C-5 accident depicted in this photo near Dover AFB. AICUZ land use compatibility criteria contemplate this possibility and seek to protect public health, safety, and welfare and preserve the operational capacity of Air Force installations and assets.

and brokered a settlement, resulting in the electric company agreeing to construct the lines below a specified angle and distance to avoid interference with the threat emitter. The terms of this agreement were incorporated in a joint-stipulation and proposed order. JA personnel also negotiated an agreement with the electric company wherein the electric company agreed to share information about the design and construction of the relevant lines to allow Air Force monitoring for compliance. In January 2011, the state commission approved the Air Force negotiated provisions as part of its final order concerning the proposed project.

SHEPPARD AFB: AVERTING MILITARY TRAINING ROUTE ENCROACHMENT

In May 2010, an electric company proposed a new electrical transmission line project near Sheppard AFB, that included multiple links to be placed below “Class Delta” and “Alert” airspace. The new proposed transmission line could impermissibly interfere with Sheppard AFB’s training mission. The issue was raised to AFLOA/JACE’s attention. We promptly intervened on behalf of Sheppard AFB in a state proceeding to determine whether the project

would be allowed and if so, where the lines would be located. During the course of the proceeding, the Sheppard AFB legal office and JACE attorneys and paralegals worked closely with pilots to articulate Air Force concerns. Air Force submissions included direct testimony by an instructor pilot who explained Sheppard AFB’s training mission, including the relative inexperience of student pilots, number of sorties and use of multiple patterns and instrument approaches, and how pilots routinely fly and perform maneuvers at reduced airspeeds and low elevations above and in proximity to the proposed transmission line.

Air Force attorneys navigated the complex legal issues and voluminous pleadings, identified and coordinated with other parties with aligned interests and negotiated a settlement with the electric company assuring minimal mission impact. Under the terms of the settlement, the electric company agreed to lower the proposed height of the transmission lines and agreed to file an action to move an existing transmission line closer to the installation and bundle it with the new transmission lines.

LEGAL ACTION TO PREVENT RESIDENTIAL DEVELOPMENT IN APZ I AT BASE X¹⁴

In this case, a local government adopted zoning regulations that restrict development in accordance with the land use recommendations contained in Base X's AICUZ study. The zoning regulations also provided an opportunity for affected landowners to be exempt from its restrictions upon a showing that they met certain specified criteria. A landowner submitted a petition seeking to be exempt from the regulation's prohibition of residential development in APZ I. Base X countered and submitted arguments that the landowner failed to meet the exemption criteria. The locality held a hearing on the matter, and despite Base X's comments and objection, granted the landowner's petition, thereby allowing residential development in APZ I. Base X alerted AFLOA/JACE, who after receiving necessary client approvals, referred the matter to the appropriate U.S. Attorney's Office, who filed a lawsuit challenging the locality's decision to exempt the landowner from the AICUZ-compatible zoning regulations.

KEY POINTERS

- Review your installation's APZs and use of MTRs, recent JLUS and AICUZ studies, and relevant local ordinances and zoning restrictions.
- Engage with clients early and advise them to be alert to encroachments, such as:
 - New land uses in APZs
 - Structures being constructed below MTRs
- If a potential encroachment is identified, determine whether the activity would constitute an encroachment.
 - Be prepared to dig beneath the surface.
 - If you are told that an activity will jeopardize the mission, ask for specific details of the potential impacts.
- If you are told that an activity will not jeopardize the mission, be alert to the fact that our operators are trained to adjust to and overcome obstacles (after all, flexibility is the key to air power) and may see a single new activity as easily overcome.
- We sometimes need to help operators and commanders look beyond the immediate obstacle to understand the broader risks; e.g., the death of a thousand cuts.
- If an activity may constitute an encroachment, help your command engage with appropriate officials and stakeholders to attempt to promptly and effectively resolve the matter.
- Help your clients speak with local officials who have jurisdiction, and with landowners, project proponents and other stakeholders.
- Ensure that officials and stakeholders understand the potential mission impact.
- Be prepared to be flexible in the search for acceptable alternatives.
- Assist in the articulation of Air Force concerns and conveying the importance of those concerns.
- If early engagement does not work and it appears that an actual encroachment will result, advise your MAJCOM/JA and contact the Environmental Litigation Center at AFLOA/JACE.
- Contact JACE at any time if you are unsure or have any questions. 🦋

¹⁴The name of the base is withheld because the case is active and its outcome pending.



PRIVACY AFTER DEATH?

A PRIMER ON THE USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION ABOUT DECEDENTS

by Major Charles G. Kels, USAFR

In the realm of federal privacy law, the protections afforded to individuals under the Privacy Act of 1974¹ terminate upon death. In its original regulatory implementation, the Office of Management and Budget (OMB), statutorily assigned to provide policy guidance to federal agencies on the Privacy Act,² determined that “the thrust of the [Privacy] Act was to provide certain statutory rights to living as opposed to deceased individuals.”³ Federal courts have since affirmed the principle that decedents do not possess Privacy Act rights.⁴ Decedents are omitted from the definition of

“individual” under agency Privacy Act regulations. Moreover, Privacy Act rights generally cannot be exercised by other interested parties after the subject’s death,⁵ thereby precluding relatives from invoking the statute on behalf of departed loved ones. Yet given the implication that death extinguishes a person’s protectable privacy interests,⁶ courts have sometimes looked to other privacy protections that may survive the deceased.

right to privacy does not survive one’s death.”).

⁵ OMB Guidelines, *supra* note 3, at 28951.

⁶ *But see* DEF. PRIVACY Bd., ADVISORY OP. 2, PRIVACY RIGHTS AND DECEASED PERSONS [hereinafter DEF. PRIVACY Bd.], available at <http://privacy.defense.gov/opinions/op0002.shtml> (last visited 19 Oct. 2010) (analyses under the FOIA must be accomplished on a case-by-case basis because (1) the public interest-personal privacy balancing test may still apply, and (2) the records may also implicate the Privacy Act rights of living individuals); *Kiraly v. Federal Bureau of Investigation*, 728 F.2d 273, 277 (6th Cir. 1984) (“[Plaintiff] argues that because [the subject of the records] is now dead, [the subject] has no surviving privacy interests which would justify the withholding of documents or other information relating to him. . . . [The fact] that the right to recovery for invasion of privacy lapses upon the person’s death does not mean that the government must disclose inherently private information as soon as the individual dies, especially when the public’s interest in the information is minimal.”). *Compare id.* at 280 (Merritt, J., concurring) (“I disagree with that portion of the Court’s opinion holding that the government may withhold a dead man’s information under the privacy exception to the [FOIA]. . . . A dead man retains no right to privacy after his death.”).

¹ Privacy Act of 1974, 5 U.S.C. § 552a (2006).

² See 5 U.S.C. § 552a(v).

³ Off. Mgmt. & Budget, Privacy Act Guidelines [hereinafter OMB Guidelines], 40 Fed. Reg. 28,948 28,951 (9 July 1975).

⁴ See *Crumpton v. United States*, 843 F. Supp. 751, 756 (D.D.C. 1994), *aff’d on other grounds sub nom. Crumpton v. Stone*, 59 F.3d 1400 (D.C. Cir. 1995) (“This is not a case under the Privacy Act. The releases complained of are not covered by the Privacy Act because [plaintiff’s husband] is deceased and because all of the records released were contained within systems of records retrievable in the name of plaintiff’s husband or by some identifying number, symbol or other identifying particular assigned to him. The Privacy Act and its prohibitions do not apply to any of the information released in this case.”); *Monk v. Teeter*, No. 89-16333, 1992 WL 1681, at *2 (9th Cir. 8 Jan. 1992) (“The

THE CONCEPT OF FAMILY PRIVACY

One such development is the evolving concept of “family privacy concerning a family member who has died.”⁷ For instance, the District of Columbia Circuit upheld the military policy of prohibiting media access to the arrival of remains at Dover Air Force Base against a First Amendment challenge, largely out of deference to “the privacy of families and friends” of the fallen.⁸ Similarly, the Supreme Court held that a privacy provision of the Freedom of Information Act (FOIA)⁹ “recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.”¹⁰ Specifically, the Court found that the family of deceased White House deputy counsel Vincent W. Foster, Jr. had a “personal stake”¹¹ in preventing the release of certain investigative photographs, so as “to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility.”¹²

What unites these two decisions is the locus of the delineated privacy rights, which rest with the surviving loved ones, not the deceased. The privacy interest in properly honoring the dead, free from harassment and intrusive publicity, belongs to the families in their own right, as opposed to being exercised on behalf of the departed.¹³

The application of this principle in the context of military investigations is suggested by an Air Force civil law opinion recommending denial of a deceased Airman’s medical records embedded in an Office of Special Investigations (AFOSI) suicide file as “an unwarranted invasion of personal privacy of the surviving family members.” The opinion noted that although “deceased persons have no protectable privacy interests, the case law is equally clear that when release of information regarding a deceased member is likely to shock the sensibilities of surviving family

members, the information may be withheld as an unwarranted invasion of the survivors’ personal privacy.” In particular, the Airman’s autopsy report was “sufficiently graphic as to clearly upset surviving family members if released,” while the mental health records could produce a “stigmatizing effect” on relatives in the form of “public speculation” as to whether they suffered from similar psychiatric diseases.¹⁴

Presumably, an equivalent analysis would apply in the case of a deceased defendant’s surviving family members, with the caveat that an invasion of privacy presupposes a reasonable expectation of privacy in the first place. The public nature of a court martial, for example, would theoretically diminish the privacy interest of the deceased defendant’s relatives in the record of trial, as compared with the considerably less public record of nonjudicial punishment.¹⁵

HANDLING MEDICAL RECORDS

In the context of medical privacy, however, the “demise of a record subject”¹⁶ is not so definitive an event. While Privacy Act protection may lapse with the patient’s death, the obligation of a covered entity to adhere to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule¹⁷ continues. The HIPAA Privacy Rule specifically mandates compliance “with respect to the protected health information [PHI] of a deceased individual.”¹⁸ The accompanying Department of Defense (DoD) regulation notes that the term “individuals” encompasses “both [the] living and deceased.”¹⁹ In short, the Military Health System is tasked with treating the PHI of decedents “the same as when they were alive.”²⁰

As both components of agencies subject to the Privacy Act, as well as covered entities under the Privacy Rule, military medical treatment facilities

⁷ George J. Annas, FAMILY PRIVACY AND DEATH—ANTIGONE, WAR, AND MEDICAL RESEARCH, 352 NEW ENG. J. MED. 501 (2005).

⁸ *JB Pictures v. Dep’t of Def.*, 86 F.3d 236, 241 (D.C. App. 1996) (“In any event we do not think the government [is] hypersensitive in thinking that the bereaved may be upset at public display of the caskets of their loved ones.”).

⁹ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (specifically referring to the law enforcement personal privacy exemption at 5 U.S.C. § 552(b)(7)(c)).

¹⁰ *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004).

¹¹ *Id.* at 168.

¹² *Id.* at 166.

¹³ See Annas, *supra* note 7, at 504.

¹⁴ Op. JAGAF 1989/38 (21 June 1989).

¹⁵ See Maj Paul L. Luedtke, *Open Government and Military Justice*, 87 MIL. L. REV. 7, 20-21, 23-24 (1980).

¹⁶ DEF. PRIVACY Bd., *supra* note 6.

¹⁷ Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160, 164 (2002).

¹⁸ 45 C.F.R. § 164.502(f).

¹⁹ DoDREG 6025.18, DoD HEALTH INFORMATION PRIVACY REGULATION [hereinafter DoDREG 6025.18] ¶ C1.2.1 (24 Jan. 2003).

²⁰ TRICARE MGMT. ACTIVITY, PRIVACY OFF. INFO. PAPER, DECEDENTS: USES AND DISCLOSURES (Sept. 2006) [hereinafter TMA INFO. PAPER], available at <http://www.tricare.mil/tma/privacy/downloads/2010513/Info%20Paper%20-%20Decedents%20Uses%20and%20Disclosures.pdf> (last visited 29 Oct. 2010).

(MTFs) are bound by all applicable federal law. Medical records that contain PHI and comprise part of a Privacy Act system of records are thus jointly governed by the DoD's privacy and HIPAA programs, and "may only be disclosed if disclosure is authorized under both regulations."²¹ Even if a medical record no longer qualifies for Privacy Act protection due to the death of the patient, any potential use or disclosure of PHI derived from that record may still require a HIPAA analysis by the MTF that maintains the information.

Covered entities within the DoD may disclose PHI about decedents to two special classes of recipients. First, Military Health System (MHS) facilities can disclose a decedent's PHI to a coroner or medical examiner (including Armed Forces medical examiners) "for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law."²² Second, the MHS can generally disclose such PHI to funeral directors "as necessary to carry out their duties concerning the decedent."²³ For example, MTFs may make "a disclosure to funeral directors about the fact that an individual has donated an organ or tissue because of its possible implications to funeral home staff duties associated with embalming."²⁴ Disclosures to both medical examiners and funeral directors are further governed by HIPAA's "minimum necessary" rule, which requires covered entities to make reasonable efforts to limit the amount of PHI disclosed "to the minimum necessary to accomplish the intended purpose" for which the Privacy Rule permits the disclosure.²⁵

In addition, because decedents' records are protected by covered entities in much the same way as before the patient died, other exceptions under the Privacy Rule permitting uses and disclosures of PHI may also apply in the case of the deceased. For instance, a covered entity may use or disclose PHI to help notify a family member, personal representative, or other responsible person of the individual's death.²⁶ If the

covered entity suspects that the patient's death "may have resulted from criminal conduct," the facility may disclose the individual's PHI to law enforcement officials in order to alert them of the death.²⁷

A covered entity may also disclose decedents' PHI for research purposes if the researcher provides assurances that the requested PHI is sought only for research on the decedents and is necessary to the research. The MTF may, at its discretion, also require the researcher to provide proof of death of the research subject.²⁸ These permissible disclosures of decedents' PHI are similarly circumscribed by the aforementioned "minimum necessary" rule.

***The dilemma often faced
in the wake of a patient's
death is how to oblige
grieving family members
who are seeking access to the
individual's medical record
or autopsy report.***

THE MTF'S DILEMMA

As a practical matter, the dilemma often faced by MTFs in the wake of a patient's death is how to oblige grieving family members who are seeking access to the individual's medical record or autopsy report. Clearly, this is an emotionally sensitive period for the deceased's loved ones, and thus a particularly inopportune moment to place bureaucratic hurdles between the family and the individual's records. If the requesting family member has been appointed an executor or administrator of the decedent's estate, thankfully the situation may be easily resolved. The Privacy Rule provides that "if under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate," then "a covered entity shall treat such person as a personal representative... regarding [PHI] relevant to such personal representation."²⁹

²¹ DoDREG 5400.11, DoD PRIVACY PROGRAM ¶ C4.4.2 (14 May 2007).

²² DoDREG 6025.18, *supra* note 19, at ¶ C7.7.1.

²³ *Id.* at ¶ C7.7.2.

²⁴ TMA INFO. PAPER, *supra* note 20.

²⁵ DoDREG 6025.18, *supra* note 19, at ¶ C8.2.1.

²⁶ *Id.* at ¶ C6.2.1.2.

²⁷ *Id.* at ¶ C7.6.4.

²⁸ *Id.* at ¶ C7.9.1.3.

²⁹ *Id.* at ¶ C8.7.4.

Disclosure of PHI to a family member may also be possible without additional authorization if the decedent has executed a valid healthcare power of attorney (POA) designating the requestor as attorney-in-fact. However, this option is only viable to the extent that the healthcare POA in question includes specific authority that extends beyond the death of the subject for limited purposes, such as organ donations, autopsy authorizations, burial arrangements, or records disposition. Generally, POAs terminate at death and do not automatically carry a presumption of post mortem control of records. Moreover, a general POA will typically not be sufficient for this purpose, because the Privacy Rule requires that the person have authority to act on the individual's behalf "in making decisions related to healthcare" in order to be treated as the individual's personal representative regarding the receipt of PHI.³⁰

Absent appointment as an executor, administrator, or healthcare attorney-in-fact, the authority of a relative to receive a decedent's PHI from the covered entity becomes less clear. Unlike a natural parent vis-à-vis a minor child, one's status as a surviving spouse or other relative does not necessarily confer authority as a personal representative under HIPAA. However, in light of the Privacy Rule's instruction that a person with authority to act on behalf of the decedent "under applicable law" will be treated as the decedent's personal representative,³¹ another opportunity exists to find a legal basis for disclosing PHI to a distraught relative. Specifically, if the covered entity can find a provision in state law granting authority to a decedent's next of kin, that authority can be viewed as a lynchpin for gaining status as a personal representative under the Privacy Rule.³² Such state law provisions are sometimes found in probate codes, and other times in health or medical codes. By proactively referencing the appropriate state statute in their local operating instructions, individual MTFs can set a consistent policy and avoid having to scramble to find a basis for disclosure to family members in the event of a patient's death.

³⁰ *Id.* at ¶ C8.7.2.

³¹ *Id.* at ¶ C8.7.4.

³² AFI 36-809, CIVILIAN SURVIVOR ASSISTANCE, Atch. 1 (1 July 2003) provides a definition of "next of kin" that MTFs and legal offices may be comfortable using where that term is not elaborated in state codes.

Even though state rules regarding healthcare delivery generally do not bind DoD medical activities,³³ there is no bar to interpreting provisions of applicable state law as providing the next of kin with a degree of authority so as to trigger HIPAA's personal representative clause for decedents. In addition to the sound ethical justifications for being as open and forthcoming as possible in providing information to a grieving relative, there is also the possibility that the same next of kin may end up serving as the release authority for disclosing the decedent's health record to other requestors.

For example, the Air Force Medical Service (AFMS) requires that either "the next of kin or a court appointed executor or administrator signs written consent and provides proof of death" in order to release information from the decedent's medical record to other persons or agencies.³⁴ It would be a sadly ironic result to deny the next of kin access to the medical record, while at the same time seeking their authorization to disclose the record to other requestors. Looking to state law to authorize a surviving loved one's access to the decedent's PHI under the Privacy Rule may be the best method to reach a resolution that is both compliant with HIPAA and sensitive to the needs of the mourning family.

A PERSONAL PRIVACY INTEREST?

Significantly, the Privacy Rule first proposed by the Department of Health and Human Services (DHHS) suggested that PHI retain its protection under HIPAA for two years after the record subject's death.³⁵ However, in response to comments arguing that the two-year time frame was "not sufficiently protective" of medical privacy, DHHS revised its policy in the final rule "to extend protections on the [PHI] about a deceased individual to remain in effect for as long as the covered entity maintains the information."³⁶

³³ DoDREG 6025.18, *supra* note 19, at ¶ C2.4.2.1.

³⁴ AFI 41-210, PATIENT ADMINISTRATION FUNCTIONS ¶ 2.3.6.1 (22 Mar. 2006).

³⁵ Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918, 59,950 (3 Nov. 1999).

³⁶ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82631-32 (28 Dec. 2000). In 2010, DHHS published a proposed rule change to cease HIPAA protection of "individually identifiable health information of persons who have been deceased for more than 50 years," by excluding such information from the definition of PHI. Moreover, DHHS noted its awareness of "concerns that family members, relatives, and others... have had difficulty obtaining access to such information after the death of the individual." As such, the agency proposed permitting "covered entities to disclose a decedent's information to family members and others who were involved

While acknowledging that “traditional privacy law has historically stripped privacy protection on information at the time the subject of the information dies,” DHHS nevertheless maintained that a more robust regulatory standard was appropriate in light of “the dramatic proliferation of electronic-based interchanges and maintenance of information.” These new technologies rendered obsolete the de facto protection such personal information had once enjoyed on account of its inaccessibility.³⁷

Given the agency’s conscious decision to extend the regulatory protection of a decedent’s medical record for as long as the covered entity maintains the information, it is natural to ask whether HIPAA created a recognizable personal privacy interest after death. From a professional ethics perspective, the American Medical Association (AMA) has opined that confidentiality retains substantially the same significance regardless of whether the patient is living or deceased. According to the AMA Code of Medical Ethics, “all medically related confidences disclosed by a patient to a physician and information contained within a deceased patient’s medical record, including information entered postmortem, should be kept confidential to the greatest possible degree.” Physicians are counseled to weigh a number of factors in determining whether to disclose medical information after the patient’s death, including the individual’s prior expressed wishes and any potential impact on the reputation of the deceased.³⁸

However, the HIPAA Privacy Rule explicitly precludes private causes of action stemming from alleged violations of its provisions.³⁹ It further specifies that HIPAA violations, in and of themselves, do not constitute Privacy Act violations or give rise to causes of action under that statute.⁴⁰ Potential remedies for HIPAA violations are strictly limited to those contemplated in the law and regulation,

which can include civil monetary penalties imposed by the Secretary of DHHS and referral to the Department of Justice (DoJ) for action under the statute’s criminal enforcement provision.⁴¹ Moreover, in the evidentiary context, courts have consistently held that “HIPAA did not create a federal physician/patient privilege,” but rather “a process for determining legal uses and disclosures of PHI.”⁴²

The Privacy Rule is best understood as a procedural blueprint for covered entities to follow in their use and disclosure of individuals’ PHI. This framework is binding upon the covered entity, but unlike the Privacy Act, it does not generally vest individuals with new substantive rights. Under HIPAA, the covered entity must protect the decedent’s medical record for as long as it maintains it, which in the case of MTFs is typically until the record is retired to the Federal Record Center or another central depository.⁴³ The fact that the covered entity’s responsibilities with respect to the decedent’s PHI continue under the Privacy Rule does not thereby create a personal privacy right for the deceased individual. In fact, the regulatory history reflects that the drafters of the Privacy Rule did not view any of its provisions as creating a privacy interest cognizable under federal information law, but instead conceded that “privacy rights are extinguished at death” and that “the privacy interests of a decedent’s survivors” remain paramount.⁴⁴

Ultimately, the Privacy Rule is about the legal obligations of the healthcare-related entities that are subject to it. These duties are intended to protect personal health data from the perils inherent in electronic transactions, even after the patient’s death. The heart of substantive privacy rights, however, still rest with the living. Death continues to extinguish the right to privacy, but it does not end the MTF’s responsibilities. ➤

in the care or payment for care of the decedent prior to death, unless doing so is inconsistent with any prior expressed preference of the individual that is known to the covered entity.” To date, these proposed rule changes have not been adopted as final. See Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the Health Information Technology for Economic and Clinical Health Act, 75 Fed. Reg. 40,868, 40,874, 40,894-95 (14 July 2010).

³⁷ *Id.* at 82,632.

³⁸ AM. MED. ASS’N, CODE OF MED. ETHICS, OP. 5.051, CONFIDENTIALITY OF MEDICAL INFORMATION POSTMORTEM (2001).

³⁹ DoREG 6025.18, *supra* note 19, at ¶ C2.7.1.

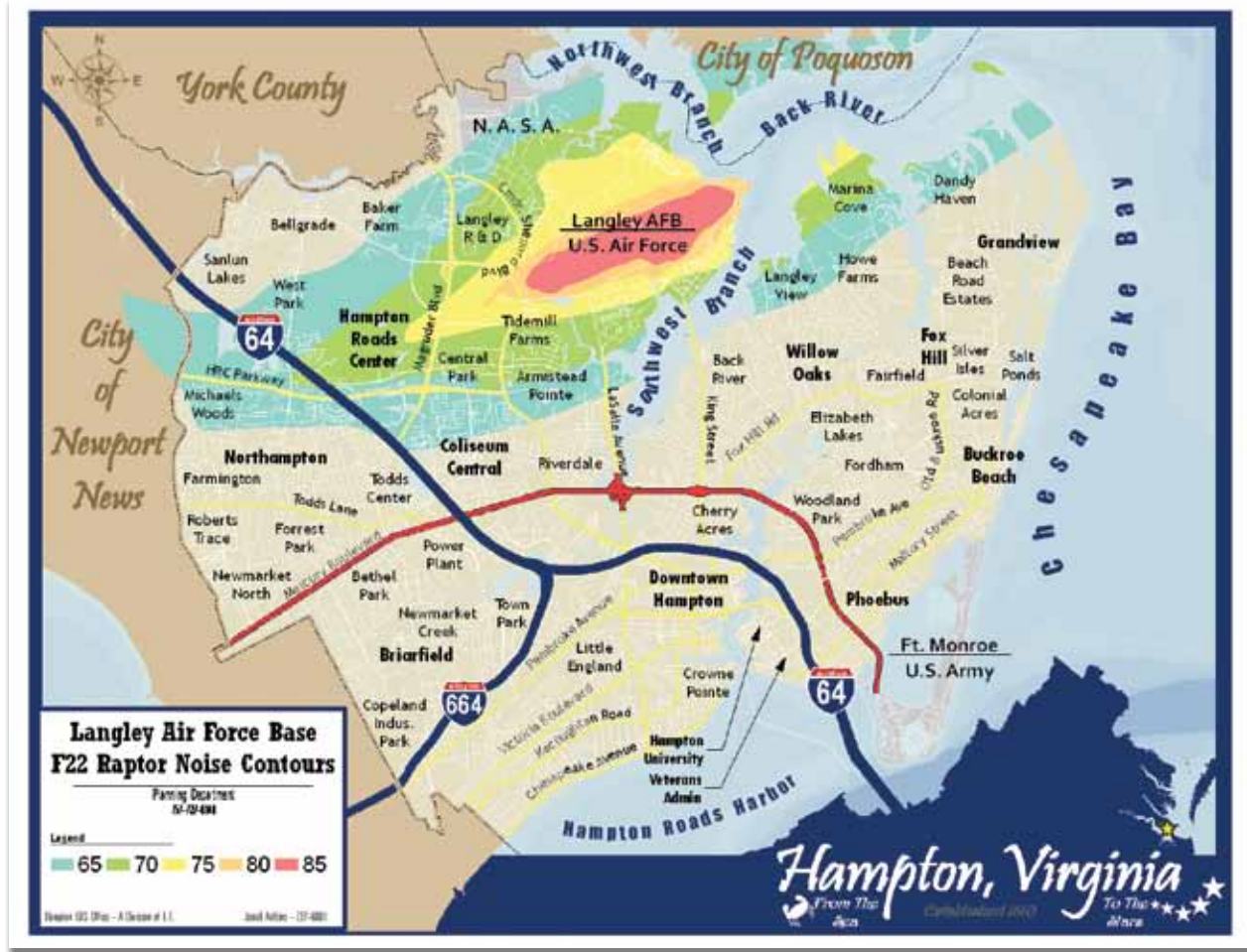
⁴⁰ *Id.* at ¶ C2.7.2.

⁴¹ *Id.* at ¶ C1.1.3.

⁴² Sara Rosenbaum et al., *Does HIPAA Preemption Pose a Legal Barrier to Health Information Transparency and Interoperability?*, BUREAU NAT’L AFF. HEALTH CARE POL’Y REP., 19 Mar. 2007 (Vol. 15, No. 11), at 11.

⁴³ TMA INFO. PAPER, *supra* note 20. This does not mean that the HIPAA Privacy Rule no longer applies, given that the Federal Records Center could be reasonably construed as acting as the business associate of the MTF. “PHI retired to the Federal Record Center or other storage locations become the responsibility of the maintaining location.” *Id.*

⁴⁴ 65 Fed. Reg. 82,482.



Example of a noise contours map.

Property Values, Home Loans and the Publication of **Noise Contours**

by Ms. Cara M. Johnson

Recently, local landowners have raised concerns regarding the effect the publication of a Joint Land Use Study or Air Installation Compatibility Study may have on home values in their surrounding community. Specifically, local government officials and homeowners have raised concern that the publication of noise contours may decrease property values or may make it difficult to obtain financing for their homes.

There is no “bright-line” rule about noise exposure for conventional loans. Instead, the lender looks to whether the appraised value of the home supports the requested loan amount. Homes located in the approach/departure surface of an active military runway may be less valuable than comparable homes not located in high noise zones, but that determination is based on the market value of the property, not merely the noise exposure of the parcel. FHA and HUD approach the question much like a conventional

lender, viewing high noise exposure as a negative mark in the overall marketability of the home, but cognizant of the fact that many high-noise areas may have other, offsetting benefits. For example, in highly congested areas with a large base population seeking housing close to the installation, homes located in high noise contour areas may have significant value.

The FHA's Minimum Property Standards state, "[e]xisting properties are not to be rejected solely because of airport influences if there is evidence of acceptance in the market."¹ Regulations for existing property likewise note that environmental noise is a marketability factor which HUD will consider in determining whether assistance will be granted.² For new construction, HUD will support development in the 65-75 decibel contour if the area is at least 50% developed, (reflecting HUD's policy of "in-filling" into areas that are already developed), but will not insure a loan for new construction in the greater than 75 decibel contour.

The VA Loan Guaranty noise policy takes a more detailed approach, separately analyzing three noise zones (VA-One: properties that are located in a noise zone less than 65 Day-Night Average Sound Level (DNL); VA-Two: properties located in the 65-75 decibel (dB) contour; and VA-Three: all properties over 75 dB), as well as properties located in the Clear Zone and Accident Potential Zones.³


The VA does not require a special analysis of noise impact on existing or proposed construction in the less-than 65 dB noise contour (VA-One) but the VA appraiser's market data analysis must include a consideration of the effect on value, if any, of the property being located near an airport.⁴

For existing homes located in the 65-75 dB contour (VA-Two) the VA appraiser's market data analysis must include a consideration of the effect on value, if any, of the property's location near an airport and the purchaser must sign a statement which indicates his

or her awareness that the property being purchased is located in an area near an airport and that aircraft noise may affect livability, value, and marketability of the property. For new construction in the 65-75 dB contour, the VA requires, in addition to the analysis and disclosures required for existing homes, evidence of available comparable sales indicating market acceptance of the proposed construction, and that sound attenuation features be built into the proposed dwelling to bring the interior DNL of the living unit to 45 decibels or less. Because the inclusion of sound attenuation measures is comparatively simple to work into proposed construction, but is often prohibitively expensive to retrofit into existing construction, the VA makes this requirement mandatory only for new construction

Existing homes in the greater than 75 decibel contour (VA-Three) are treated just like existing homes in the 65-75 contour, the VA requires market data analysis and a disclosure statement. However, the VA will not insure a loan for new construction in the greater than 75 decibel contour.⁵

Existing homes in the Clear Zone and Accident Potential Zones of a runway are acceptable as the security for a VA loan. The VA appraiser's market data analysis must include a consideration of the effect on value, if any, of the property's proximity to the airfield, available comparable sales must indicate market acceptance of the subdivision in which the property is located, and the buyers must sign a statement that they are aware that the property is located near the end of an airport runway and that this may impact the livability, safety, value and marketability of the property.

Ultimately, concerns about the effect of published noise contours on property values are largely overstated. Although extremely high noise exposure will rule out VA financing for new development, more commonly, noise exposure is only one factor in the complex and subjective process of property appraisal. 

¹ FED. HOUS. ADMIN., U.S. DEPT OF HOUSE AND URBAN DEV'G., MINIMUM PROPERTY STANDARDS 7-8 (2008)

² 24 C.F.R. § 51.101 (1996). For new projects, such as construction loans or project development, HUD applies more stringent requirements found at 24 C.F.R. § 51.103(1996), Site Acceptability Standards.

³ DEPT' OF VET AFF., PAM 26-7 (hereinafter VA PAM. 26-7) REVISED, PROPERTIES NEAR AIRPORTS, para. 11.12

⁴ The VA pamphlet refers to "airports" without making a distinction for military airfields.

⁵ VA PAM. 26-7, CHANGE 3, PROPERTIES NOT ELIGIBLE FOR APPRAISAL (LOCATION RELATED PROBLEM) para. 10.06 (14 Jul 03).

DRIVE:

The Surprising Truth About What Motivates Us

(by Daniel Pink)

reviewed by Captain Christopher T. Stein, USAF

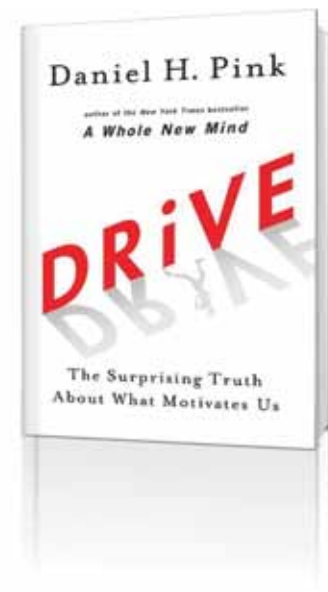
Employees are volunteers. They may be obligated by contract or service commitment to show up, but only they can choose to give their very best. I was reminded of this while reading Daniel Pink's best seller *Drive: The Surprising Truth About What Motivates Us*. *Drive* teaches a supervisor how to lead troops from mere compliance to innovative engagement in pursuit of mastery and purpose.

Have you ever looked up something on Wikipedia? Jotted a message on a Post-it? Shopped online at Zappos? Wikipedia is the most popular encyclopedia in the world with 19 million articles in 280 languages and they don't pay contributors a dime. Scientist Art Fry invented Post-its during 3M-designated free time. Zappos grew a billion dollar business built on customer service without telling its call center employees what to say. Daniel Pink explains how these and other organizations flourish by unleashing the intrinsic motivation of their people. Rather than pay packages and pep talks, people are driven to excellence by autonomy, mastery, and purpose.

Pink uses the story of software company Atlassian to illustrate how employees thrive when given autonomy over tasks and time. Scott Farquhar

and Mike Cannon-Brookes led Atlassian from a \$10 thousand dollar start-up to an industry leader in just a few years. To foster innovation, they held, once each quarter, a "FedEx Day"—so named because the employees had to deliver something overnight. With 24 hours to work on whatever they wanted—as long as it was not part of their regular job—many employees labored through the night simply because they enjoyed the challenge. The free day generated such great results that the company expanded it; now Atlassian developers can spend 20 percent of their time on whatever projects they want. This expensive investment has paid dividends with new products, zero turnover in employees, and highly motivated people passionate about perfecting the company's products.

In 1999, Zappos joined the dot-com frenzy as an online shoe retailer. As many Internet companies quickly crumbled around them, Zappos blew past its goal of \$1 billion in sales in 2008 and was acquired by Amazon in 2009 for over \$1.2 billion. Zappos succeeded by creating an unorthodox company culture that empowers employees and gives them autonomy over technique—their job is to serve the customer, how they do so is up to them. Leadership instilled core values to guide them on their way—deliver "WOW" through



service; embrace and drive change; be adventurous, creative, and open-minded—and watched as they delivered beyond their wildest dreams and had a great time doing so.

Pink suggests that organizations perform an autonomy audit. Often those in charge lose sight of the employee experience. By regularly asking employees for honest feedback about their perceived levels of autonomy, supervisors can diagnose cultural ills that intimidate employees into mere compliance and mediocrity. It is not easy for ambitious managers to surrender control, but as the Atlassian and Zappos success stories show, employees thrive when given autonomy. When employees feel as if they have control over input—task, time, and technique—they are invested in, and take ownership of, output. Whether it is choosing which project to work on, at what time during the day, or how to approach it, organizations can get better results by empowering employees and giving them responsibility over their contribution to the mission.

Enabled by autonomy, employees are propelled to pursue mastery over their craft. Pink cites Gallup research showing more than 50 percent of employees are not engaged at work; this disengagement costs employers about \$300 billion a year in lost productivity. Autonomy is the first step toward engagement, but employees also need perceived progress toward mastery. The key is a growth mindset. Stanford Professor Carol Dweck found that explaining to children that “the brain is like a muscle that grows when you learn”—without any change in the underlying curriculum—resulted in better test scores and more intrinsic enjoyment of the subject. To inspire optimal performance, supervisors should remind their people that work is not a measure of inborn aptitude, but rather an opportunity to learn, grow, and become better beings. Catch employees doing something great, and praise effort and technique, not intelligence or the end result. Also, continuously increase employees’ level of responsibility and challenge them with new tasks that stretch their limits and highlight how much they have grown.

Pink explains the pursuit of mastery is made easier by enjoyment. Psychologist Mihaly Csikszentmihalyi

discovered employees are most effective when they reach flow—the state of being fully engaged and finding joy in a task perfectly matched to interests and aptitude. In flow, the activity becomes its own reward. To improve organizational output and help employees live more fulfilling lives, supervisors can make work fun and engaging. They can also vary team composition and try task shifting to keep work fresh. All this should occur in a nonthreatening, collaborative environment where employees can be themselves and infuse their work with creativity and joy.

Empowered by autonomy and driven through mastery, employees are sustained by purpose—the “activation energy for living.” In 2007, the prestigious Mayo Clinic surveyed job satisfaction among its clinical faculty. Doctors unable to spend more than 20% of their time on work that was meaningful to them had nearly twice the burnout rate—and many planned to leave their job soon. Pink recounts that former U.S. Secretary of Labor, Robert Reich, would judge the health of organizations he visited by the “pronoun test”—whether the workers referred to the company as “they” or “we.” Humans long for meaning in work; if they don’t find it, they’ll either take their talents elsewhere by quitting or give only the minimum necessary to get by. For great results, leaders must point to a meaningful destination, give continuous feedback on how individual actions move the organization forward, and encourage a “we” mindset that though employees have different roles, they’re moving together toward a worthy purpose. The military has a noble purpose—to defend the nation and protect our people. Supervisors just need to connect the daily tasks to the broader mission and help troops find meaning in their contribution.

Pink’s *Drive* gives leaders the tools to persuade employees to voluntarily invest themselves in the organization. If we ignore his advice, our employees may continue to show up for work, but our organization will be one that barely gets by on compliance and mediocrity. Science and experience shows that we get far more out of employees by empowering them with autonomy, encouraging them toward mastery, and directing them toward a meaningful purpose that is worthy of their best efforts. ✨



THE LAST MISSION OF THE *WHAM BAM* BOYS

(by Gregory A. Freeman)

reviewed by Lieutenant Colonel Thomas W. Murrey, USAFR

In August 1944, a nine-man crew of young American Airmen took off in their B-24 in what was to become their first and last mission of the war. Shortly after dropping their bomb load on Langenhagen Airfield near Hannover, Germany, an anti-aircraft shell severely damaged the B-24 nicknamed the *Wham Bam*, forcing the rookie crew to bail out over enemy territory where they were immediately rounded up. One crew member broke a leg upon landing and was taken to a German military hospital. The remaining eight Airmen began their

trek to a prisoner of war camp by train. When the train stopped because the rail line had been damaged by Allied bombers, the *Wham Bam's* aircrew was forced to leave the train and march through the German town of Russelsheim. Instead of proceeding to the next train and then to a prisoner of war camp, the luckless aircrew took a wrong turn into history. Russelsheim was home to an Opel factory and had been the target of numerous bombing raids during the war. The morning the *Wham Bam* crew marched through town, inhabitants were digging out of the

rubble from the previous night's RAF bombing. A crowd of civilians began to follow the Airmen when two middle-aged women started yelling to the crowd to kill the Allied prisoners. Incitement led to action and before the day was over, the angry German mob had beaten six of the eight Airmen to death and left the other two for dead. Remarkably, during another air raid, the two survivors thought to be dead escaped from Russelsheim, only to be recaptured a few days later. They ultimately survived their war-time imprisonment and, eventually, returned to civilian life in America.

***In this new publication,
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town's Nazi leader.***

In this new publication, Gregory Freeman relays the forgotten tale of Airmen brutally murdered by a mob of civilians, led by the local town's Nazi leader. While most Americans are familiar with the Nuremberg war crimes trials of the Nazi Party leadership, the story of what became of the first war crimes trial after World War II is virtually unknown. Freeman divides the book neatly into two halves. The first half provides a background of the individual crew members, the story of the mission, and the attack in Russelsheim. Freeman begins by traveling back in time seventy years to the pre-Army life of the *Wham Bam's* aircrew. Through letters and family interviews, the author re-creates a picture of these middle class young men who sought only to serve their country. The effect is the humanization of the victims-to-be, their lives and their loves. The author does a masterful job of re-creating the horrific scene in Russelsheim with an almost minute by minute account of the mob violence allowing the reader to visualize the sickening scene.

The second half of the book details the criminal investigation of the incident followed by the trial of several of the assailants. Freeman creates a vivid picture of the chaos and confusion that reigned in post-war Germany, helping the reader understand the great difficulty of finding the perpetrators and piecing together what happened. Most readers will be familiar with the prosecutor in the case, Colonel Leon Jaworski, who rose to fame decades later as the special prosecutor in the Watergate scandal. The story recreates the trial by combining portions of the actual transcripts with a description of events occurring inside the courtroom. Freeman provides the reader just enough information to give a sense of how the case was tried and why the court came to its conclusion.

The Last Mission of the Wham Bam Boys will be of interest to judge advocates as well as World War II enthusiasts. The chaotic situation in which the case was tried is highlighted by the fact that the two survivors of the Russelsheim attacks learned of the Russelsheim war crimes trial from their local newspapers. The prosecution had presumed the other two men were dead (which also highlights how much easier things are for us in the Information Age). Fans of military history will also enjoy this obscure tale finally brought to light. Although the book touches on the air war over Europe and the horrors air crews endured, it only gives a small taste of the subject. Readers wanting more in-depth treatment should read *Bomber Command* by Max Hastings, which addresses the British bombing campaign over Germany or *The Mighty Eighth: The Air War in Europe as Told by the Men Who Fought It* by Gerald Astor. *The Last Mission of the Wham Bam Boys* is both touching and historically relevant, and thanks to Freeman is finally being told after a sixty-five year wait. ✈

CONTRIBUTORS

Colonel Douglas P. Cordova (B.A., New Mexico State University; J.D., University of New Mexico School of Law) is Director, Training and Readiness, Headquarters Air Force, Joint Base Andrews Naval Air Facility, Maryland.

Colonel Calvin N. Anderson (B.S., Virginia Military Institute; J.D., William & Mary School of Law) is the Staff Judge Advocate, 633d Air Base Wing, Joint Base Langley-Eustis, Virginia.

Colonel Marlesa K. Scott (B.A., California State University; J.D., University of the Pacific, McGeorge School of Law) is the Chief of The Community Legal Services Division, AFLOA, Joint Base Andrews Naval Air Facility, Maryland.

Mr. John J. Martinez, Jr. (B.A., Rutgers College; J.D., New York University Law School) serves in the Policy and Special Projects Branch of the TJAG Action Group, Office of The Judge Advocate General.

Lieutenant Colonel Thomas W. Murrey (B.A., Millsaps College; J.D., University of Memphis School of Law) is a Reserve instructor assigned to the International Law/Operations Law Division at the JAG School, Maxwell Air Force Base, Alabama.

Lieutenant Colonel Andrew J. Turner (B.A., Florida Atlantic University; J.D., West Virginia University College of Law) is a Reserve judge advocate assigned to JACE of AFLOA. In his civilian capacity, he is Counsel at Hunton & Williams, LLP, in Washington, D.C.

Major David M. Houghland (B.A., University of Wisconsin-Parkside; J.D., Hamline University School of Law) is the Chief of Air Reserve Component Training at the JAG School, Maxwell Air Force Base, Alabama.

Major Sheri K. Jones (B.A., University of Montana; J.D., University of Wyoming School of Law) is the Chief, Officer Assignments Branch, Professional Development Division, Office of The Judge Advocate General.

Major Charles G. Kels (B.A., Harvard University; J.D., University of Pennsylvania School of Law) is an individual mobilization augmentee attached to the TJAG Action Group, Office of The Judge Advocate General.

Major R. Davis Younts (B.S., Liberty University; J.D., Pennsylvania State University, Dickinson School of Law) is an instructor in the Military Justice Division at the JAG School, Maxwell Air Force Base, Alabama.

Captain Christopher T. Stein (B.A., University of California, Los Angeles; J.D., University of Nevada School of Law) is an assistant staff judge advocate at the 35th Fighter Wing, Misawa Air Base, Japan.

Ms. Susan L. Turley (B.A., University of Arizona; J.D., University of Texas at Austin School of Law) is an attorney-advisor with AFLOA/JAS, Maxwell Air Force Base, Alabama.

Mr. Michael L. Casillo (B.A., Washington & Lee University; J.D., American University School of Law) is a litigation attorney in JACE of AFLOA.

Ms. Cara M. Johnson (B.A., Seattle University; J.D., University of Washington School of Law) is the Takings and Land Use Litigation attorney in JACE of AFLOA.

Where in the World?



Stratford-upon-Avon, England

The Holy Trinity Church (a.k.a. Shakespeare's Church) in the background is where William Shakespeare is buried. Photo by Major Shane Smart, USAF.

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please e-mail the editors at kenneth.artz@maxwell.af.mil or thomasa.paul@maxwell.af.mil.



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Hatra Ruins in the Jazeerah Desert in Iraq. DoD photo by Lance Corporal Albert F. Hunt, U.S. Marine Corps.