

**DO WE DARE TO THINK OUTSIDE THE BOX?  
THE GREATEST CHALLENGE FACING LEGAL ASSISTANCE**

Major General Nardotti, a former Army Judge Advocate General, urged us to “think outside the box.” However, few dare to do so for fear of the lid falling on their heads should they deviate from the status quo. As one who has sustained lumps in the past, I venture forward once more.

**THE CHALLENGE:** The greatest challenge facing Legal Assistance for the Army as the largest military force that historically spearheads Legal Assistance, is to overcome its failure to evolve and adjust organizationally in order to cope with current professional needs. Often, the obvious escapes us, as quick fixes that provide immediate cosmetic solutions without long-term improvement to a program seem preferred. The introduction of computer software, laptops, e-mail communications and the like are trade tools and not true program changes. Unfortunately, the new tools with which to practice law have obscured other considerations. The following remarks are lengthy but necessary to identify and justify the significant recommended resolutions.

**THE PRACTICE:** Legal Assistance is by far the most complex, constantly changing, diverse and emotionally stressful area of law confronting Judge Advocate attorneys. Attorneys must continually keep abreast of the widest spectrum of domestic and foreign laws, including: court decisions, federal, state and county laws and regulations, and administrative rules and procedures. They are constantly confronted with a never ending conflicts of law practice presented by a transient clientele from across the nation and around the world.

Unlike military justice, procurement, environmental, labor law, administrative and claims practice, which all concentrate and focus on singular areas of law with much redundancy, legal assistance presents attorneys with complex dissimilar issues requiring the application of laws from different states and foreign countries. Whether it is estate law, contracts, elder law, real estate transactions, consumer affairs, federal and state taxation, domestic relations, medical boards, consumer fraud, immigration and naturalization, disability hearings and determinations, torts, or a dozen other areas, that would justify a dedicated attorney to properly handle each, the merging of all these unrelated specialties into one heading under the generic title of “Legal Assistance” unrealistically obfuscates and minimizes the difficulty of this practice.

**THE ACID TEST:** Legal assistance attorney efforts are judged daily not by other Judge Advocates, but rather by the civilian bar, civilian judges and agencies. Malpractice is a constant reality and threat to legal assistance attorneys as adversaries seek to win their cases regardless of

method, and disgruntled clients are not to be overlooked. Malpractice is unheard of in other branches of military practice, which further demonstrates the difficulty and scrutiny under which legal assistance attorneys function. The practice challenges legal assistance attorneys with a direct and immediate impact upon a client's career as well as the client's emotional, economic, and family welfare. Further, what the attorney does or fails to do at the outset of a case, even though it is not in court, often sets the stage for the future outcome of the case. The legal guidance, direction, negotiations, petitions for relief and pro se pleadings are not simply a "legal opinion" provided by one staff officer to another staff officer in the hope the latter will elect to follow it. Unfortunately, numerous client successes achieved by legal assistance attorneys, without having to go to court and without any court costs, are rarely recognized by superiors and commanders because the services are protected by the attorney-client rules of confidentiality that work against recognition of the legal assistance effort.

**MODUS OPERANDI:** The military services have excellent professional development courses for attorneys and paralegals. The Army's Legal Assistance Program as noted in AR 27-3 is comprehensive, but it has continued to function in the same realm for over 50 years without substantive improvements (electronic tax filing and use of computer software is not a substantive program improvement). For example, virtually nothing has been done to improve the operational environment, organizational structure, funding, professional opportunity, or position grading of its civilian attorneys, or to develop a career path just to mention a few significant shortfalls. When the Pentagon speaks of the "Quality of Life" of our active, retired and family members, the major Judge Advocate contribution to that goal is our Legal Assistance effort. Yet, it receives the least emphasis, assets and staffing grades as compared to other Judge Advocate disciplines.

**THE PRACTITIONERS:** With few exceptions, inexperienced Judge Advocates on their first tour of duty, who are recent graduates from the Officer Basic Course, are assigned to perform legal assistance duties behind closed doors in a confidential manner. Senior and experienced legal assistance attorneys usually are not available to mentor and oversee the attorney's confidential dealings with clients. This presents serious quality concerns, not to mention a mounting use of paralegals and clerks or handouts to provide "advice" in lieu of counsel by attorneys. This somewhat unprofessional condition is not normally found or tolerated by civilian law firms. Staff Judge Advocates insist they are available to help young attorneys, but in reality, they, too, may not have had much professional development in this field and are often preoccupied with other command matters and meetings that preclude meaningful daily

professional development of legal assistance attorneys. Compounding the inexperience factor is the growing effort to expose young attorneys to every aspect of a Judge Advocate Office practice during their initial tour of duty. This often results in reassignment within a 12 month period to another discipline without ever returning to practice legal assistance over a typical 20 year career. Hence, what the young attorney did for a few months (punctuated by absences to perform additional duties) becomes their perceived standard of excellence as they escalate to become Deputy and Staff Judge Advocates. This further perpetuates and magnifies the problem.

**CONFLICT:** Legal Assistance provides services to individual members, retirees and their families rather than the commander and his/her staff on command operations. Rarely does a commander know or understand legal assistance qualities and achievements, as opposed to the other Judge Advocate disciplines which the commander experiences weekly, and which influence the performance evaluations of the SJA and Deputy SJA. Therefore, it is not surprising that SJA's tend to place priority and emphasis of assets in areas of environmental law, military justice, labor law, administrative law and government contracting. "Emphasis" includes ensuring higher grades for certain employees, adequate staffing, and performance awards.

Another area of conflict exists since legal assistance attorneys are often at odds with commanders when representing clients against adverse actions taken by command that the SJA had previously advised as being appropriate. Whether it concerns pecuniary liability for reports of survey, flagging actions, line of duty determinations, letters of reprimand, military evictions from government quarters, etc., it is a chilling situation to be rated by the superior against whom the attorney seeks to prove in error. This identical condition was finally overcome for military justice defense counsel in the 1970's by the creation of the regional Senior Defense Counsel Advisor duty that rated and mentored defense attorneys. This was followed by the establishment of the Trial Defense Service, which achieved attorney independence from local SJAs. I served as the Senior Defense Counsel Advisor for all of South Korea and observed its success.

**MONEY TALKS:** Although Legal Assistance now has a statutory mandate under 10 USC 1044, it is a totally unfunded program. Military directives such as AR 27-3 proclaim that a commander should provide personnel, but it fails to provide the funding to accomplish it. Historically, the ability to accomplish this mission is left up to each Staff Judge Advocate, who has to arm wrestle with the other staff officers over annual local funds, and thereafter, has to place priority where the SJA believes his or her best interests lie. When referring to funding, the "program" totally ignores resources and any related standards. No effort is made to even

“reimburse” Judge Advocate Offices by tenant organizations through existing intraservice and interservice support agreements that provide reimbursements for other services. An installation such as Fort Belvoir, having over 100 tenant organizations from all of the armed services both on and off post, would be able to fund several attorney spaces if reimbursement were available. As the number of tenants increased from 50 to over 100 on Fort Belvoir, no comparable funding or staffing was provided for Legal Assistance resulting in an inability to cope with an increasing flood of clients.

Another lack of program fund management is evidenced by certain base closures. For example, when INSCOM (Arlington Hall in Virginia) was moved to Belvoir and the installation returned to Virginia, all of the garrison SJA assets disappeared without a single space shifted to the Belvoir SJA. Similarly, when the Defense Logistics Agency and others at Cameron Station, Virginia, and the US Army Criminal Investigation Command from Falls Church, Virginia moved to Belvoir, the same lack of increased staffing resulted. The list of shortfalls is large. There appears to be no one responsible for ensuring that money is provided and resources are preserved. It is evident that SJAs, who serve an average two year tour, lack an ongoing knowledge of conditions, fail to meet the challenge, and have no say in the loss of assets during base closures or movement of organizations. Lacking budget and asset control, the Legal Assistance Program is a policy statement akin to an empty drum that makes loud noises.

**THE PROGRAM:** Although it is referred to as the Legal Assistance Program with a Chief of Policy at HQ DA, it is an illusory program. There is no program management except for being the proponent of the Legal Assistance regulation, AR 27-3, and a Notary regulation, AR 27-55. There is no career track, career progression, professional staffing qualification standards, office organizational structure, quality assurance, or position grade enhancements for the attorneys.

As a matter of fact, one may argue that civilian legal assistance attorneys are discriminated against in the determination of their grades, since the OPM grading manual of 1950 does not treat legal assistance attorneys as those who provide “personal individual” legal services. The 1950 manual was authored before civilian attorneys replaced military Judge Advocates, and it is calculated to provide grading standards for federal agencies having “staff attorneys” that service agency programs rather than individuals. Accordingly, legal assistance position grading suffers by not being able to receive points above the lowest score levels, since the scoring is of staff attorneys and measured by criteria such as: the dollar value of the funded program, the overall economic impact of the attorney’s work, the grades and echelon within the agency of those staff persons who receive the legal services, the level within the organization that the supervisor of the

attorney serves in, etc. Legal Assistance attorneys do not fit into this mold, and are fortunate to achieve the grade of GS-12, even though their practice is more difficult than others that routinely receive GS-13 and 14, as entry levels. Legal Assistance attorneys deserve the Grade of GS-13 as the entry level with GS-14 as the supervisory attorney that is normally the chief of the division or branch. A viable “program” would have identified this situation and corrected it years ago.

**RESOLUTION:** The shortfalls noted above demonstrate that the Legal Assistance Program labors under adverse conditions that must be corrected to provide a professional foundation for development. Concentrating on one item at a time will not cure the overall problems presented.

What is needed:

\*Establishment of a separate Legal Assistance Agency commonly described as a “stove pipe” that is directed by a chief in the Washington, D.C. area, thereby removing responsibility for command and control from local Staff Judge Advocates (similar to our Trial Defense Service). Legal Assistance has nothing to do with providing legal services to the commander and his/her staff. There is no need to continue this practice under the SJA, who is primarily serving the commander and the staff, and not individual service members, retirees and their families.

\*Supervision, performance evaluations, and awards of personnel both military and civilian assigned to the Legal Assistance Agency, should be administered by its own chain of command providing for the first time an unbiased system with genuine evaluations of services provided to clients.

\*Establishment of a standard, organizational legal assistance office Table of Distribution and Allowances (TDA) that contains attorneys, paralegal specialists, legal technicians, legal clerks, and receptionists. A standard office TDA scheme should also provide job descriptions for each administrative support position to include the GS-13 and GS-14 attorney positions rather than relying upon each office in the world to invent their own organizations and job descriptions based upon the whims (and often unsatisfactory actions) of local Civilian Personnel Advisory Centers. We should demand what is truly needed, not what the CPAC staffers feel comfortable with (DA approved job descriptions will eliminate the disparities presently found in JA offices).

\*Designate a civilian attorney as the Chief of each Legal Assistance Office, rather than a short-term, inexperienced Judge Advocate Officer, to ensure experience, continuity, and professional development of the staff for whose performance and evaluation he or she is responsible. Similarly, establish a Program Manager as the Director of the Legal Assistance Agency who will actually administer a program and ensure it is properly staffed and functioning professionally.

\*Determine funding costs for the program and obtain a budget to fund the Legal Assistance Agency with its offices worldwide. I believe this is possible because this is exactly what I helped accomplish in 1971 with the creation of the U.S. Army Criminal Investigation Command that took felony investigations away from local Provost Marshals and placed them into a funded worldwide organization.

\*Establish a career program for legal assistance practitioners that deals with assignment changes, professional development (including LLM degrees) and tours or guest speaker presentations at the Judge Advocate General' School as legal assistance instructors.

\*Coordinate with County and State Bar Associations to establish a formal system for the referral of pro bono cases after they have been screened by the Chiefs of Legal Assistance. Presently, much talk exists but nothing formal is in place to accomplish it professionally.