



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-240

November 1992

Table of Contents

Articles

The Garnishment Equalization Act: Leveling the Playing Field or Upsetting a Delicate Balance?	3
<i>Captain Gerald E. Wuetcher, USAR</i>	

Domestic Counseling and Legal Assistance: A Systematic Approach	11
<i>Lieutenant Colonel Mark E. Sullivan, USAR</i>	

USALSA Report	16
<i>United States Army Legal Services Agency</i>	

The Advocate for Military Defense Counsel

DAD Note	16
Specific Intent for a Specific Offense	

Clerk of Court Notes	17
Court-Martial Processing Times; Court-Martial and Nonjudicial Punishment Rates	

TJAGSA Practice Notes	18
<i>Faculty, The Judge Advocate General's School</i>	

Criminal Law Notes	18
Court of Military Appeals Holds that Defense Counsel May Be Forced to Testify Against Her Client; "Inevitable Discovery" After <i>United States v. Allen</i> ; Army Court of Military Review Finds Clear and Convincing Evidence in Rule 313(b) Inspection; Court of Military Appeals Defines "Firearm" for Purposes of UCMJ Article 122	

Contract Law Notes	26
Fiscal Law Update: Funding of Contract Changes Policy Revised; Allowability of Environmental Cleanup Costs	

International Law Note	32
Systemizing Operational Law	

Legal Assistance Items	34
Tax Notes (Tax Update; IRS Makes Recordkeeping Easier for Taxpayers); Family Law Note (Using URESA and RURESAs to Obtain and Enforce Interstate Support Orders); VSI Entitlements; Disposition at Death of Recipient; Veterans' Law Notes (Retirement Points for Legal Assistance; State Law Remedies Available for Some Reservists)	

Claims Report	42
<i>United States Army Claims Service</i>	
Personnel Claims Recovery Notes (Fiscal Integrity; Looking for Mr. Goodbar Moving and Storage)	
Labor and Employment Law Notes	44
<i>OTJAG Labor and Employment Law Office and TJAGSA Administrative and Civil Law Division</i>	
Civilian Personnel Law Note (Classification Actions Versus Performance-Based Actions); Equal Employment Opportunity Notes (29 C.F.R. Part 1614 and <i>Army Regulation 690-600</i> ; Hidden Requirements of the New EEOC Regulations: Interim Relief, Improper Contact with a Complainant Represented by an Attorney, Discovery, and Reassignment of Individuals with Handicaps; Appeal Rights: Implementing the Civil Rights Act of 1991); Practice Pointer (Labor Counselor Review of Attorneys' Fees Petitions in Accordance with <i>Army Regulation 690-600</i>)	
Procurement Fraud Division Note	51
<i>Procurement Fraud Division, OTJAG</i>	
Advanced Procurement Fraud Advisor Course Rescheduled	
Professional Responsibility Notes	51
<i>OTJAG Standards of Conduct Office</i>	
Ethical Awareness; Case Summaries	
Regimental News From the Desk of the Sergeant Major	54
<i>Sergeant Major John A. Nicolai</i>	
CLE News	55
Current Material of Interest	57

The Army Lawyer (ISSN 0364-1287)

Editor

Captain Benjamin T. Kash

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Address changes: *Reserve Unit Members:* Provide changes to your unit for SIDPERS-USAR entry. *IRR, IMA, or AGR:* Provide changes to personnel manager at ARPERCEN. *National Guard and Active Duty:* Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

The Garnishment Equalization Act: Leveling the Playing Field or Upsetting a Delicate Balance?

Captain Gerald E. Wuetcher, USAR
100th Training Division, Louisville, Kentucky

One longstanding benefit of federal employment has been the general prohibition on garnishment of federal wages to satisfy commercial and personal debts.¹ This immunity from garnishment has had significant consequences. Because a federal employee's pay often will be his or her principal asset, immunity from garnishment essentially makes the employee judgment-proof.² Although the employee's creditors can attempt to locate and garnish the employee's other assets, these tasks frequently are difficult and time-consuming. Even if the creditors are successful, the employee simply can close his or her bank account or liquidate his or her assets.³

In *Applegate v. Applegate*,⁴ a federal district court judge cogently explained this benefit:

[Although] the Congress has seen fit to waive the immunity of the United States from suit in the case of certain money claims against it and also in the case of certain corporations created by it, it has so far never waived that immunity and permitted attachment or garnishee proceedings against the United States Treasury or its Disbursing Officers. . . .

This is not a question of any right of personal exemption on the part of the defendant . . . but of the sovereign immunity of the United States from suits [to] which it has not consented. . . . Until the Congress sees fit to grant such consent, the Courts are powerless to entertain such actions.⁵

Claiming that this protection is unfair and that it promotes a class of financially-irresponsible federal employees, legislators introduced bills in the House⁶ and Senate⁷ to waive garnishment immunity. These bills, collectively entitled the "Garnishment Equalization Act of 1991" (GEA), proposed to subject all federal wages, including military pay, to garnishment in the same manner as nonfederal pay. Members of both houses hurried to jump on the bandwagon and support the legislation.⁸ Ultimately, the GEA passed the Senate, but the House of Representatives failed to vote on the bill before Congress adjourned in October 1992. Nevertheless, the growing legislative support for the GEA suggests that it will pass both houses if it is reintroduced before the next session of Congress.

Although its purpose ostensibly is to level the playing field for all debtors, the GEA actually may harm military personnel by placing them at a relative disadvantage to the general public. It fails to account for the unique nature of military service, the greater susceptibility of military personnel to default judgments, and the limitations of the Soldiers' and Sailors' Civil Relief Act (SSCRA). Consequently, it may upset the delicate balance between the rights of creditors and the rights of military personnel that commanders, legislators, and judges have maintained painstakingly over the last five decades.

This article examines the Garnishment Equalization Act of 1991. It first reviews the history behind the immunity of federal pay. It then analyzes the proposed legislation. Finally, it discusses possible implementing regulations for the legislation that would help to protect military members from unfair garnishments.

¹As used in this article, the term, "garnishment," includes all legal proceedings brought to enforce a monetary judgment. The author includes within this term wage assignments, executions, and similar summary processes. Generally, garnishment involves the plaintiff (the garnisher), who is pursuing the funds to satisfy a judgment; the primary defendant (the debtor); and the secondary defendant (the garnishee), who owes wages to the primary defendant.

²To immunize a debtor from garnishment deprives his or her creditor of its most effective weapon. "[W]age garnishment is the most utilized, most effective and customer friendly means of recovering the full judgment balance on an account." *Garnishment Equalization Act of 1991: Hearings on S.316 Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs*, 102d Cong., 2d Sess. 81 (1992) [hereinafter *Senate Hearings*] (statement of John W. Johnson, Vice President, American Creditors' Association).

³But see TJAGSA Practice Note, *Direct Deposit Military Pay—Prime Target for Attachment by Judgment Creditors*, ARMY LAW., Sept. 1992, at 35.

⁴39 F. Supp. 887 (E.D. Va. 1941).

⁵*Id.* at 889-90.

⁶H.R. 643, 102d Cong., 1st Sess. (1991).

⁷S. 316, 102d Cong., 1st Sess. (1991).

⁸On March 5, 1992, House Bill 643 had 143 cosponsors and Senate Bill 316 had 25 cosponsors. See TJAGSA Practice Note, *Billwatch—House Bill 643 and Senate Bill 316: Garnishment of Federal Pay*, ARMY LAW., June 1992, at 48, 49. The GEA passed the Senate on September 24, 1992. See Billcast, S. 316, available in WL, Billcast file (last action date Sept. 24, 1992).

Historical Background

Sovereign immunity—the doctrine that no suit can be brought against a government without its consent—can be traced back to the English common-law maxim that “the King can do no wrong.”⁹ Initially considered a personal right of the sovereign, this doctrine evolved as modern constitutional states replaced personal monarchies. Eventually, sovereign immunity came to prohibit any legal action against the national government as an improper challenge to supreme executive power.¹⁰ The Framers of the Constitution¹¹ and early courts¹² readily accepted this dogma.

*Buchanan v. Alexander*¹³ was the first decision in which a federal court applied this doctrine to prevent the garnishment of federal pay. In *Buchanan*, innkeepers in Norfolk, Virginia, attempted to garnish the wages of several seamen of the frigate *Constitution* for unpaid debts. Writs of attachment were served on the ship's purser. When the purser refused to honor the writs, a state court entered judgment against him. On appeal, the Supreme Court found the state court could not attach unpaid federal wages and reversed the judgment. In reaching this decision, the Court declared,

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be sus-

ended. So long as money remains in the hands of the disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects.¹⁴

After *Buchanan*, courts consistently cited two policy reasons to uphold the immunity of federal pay from garnishment. First, garnishment unreasonably would interrupt the process of public administration.¹⁵ Second, it would apply public funds to purposes for which they had not been appropriated.¹⁶

In this century, the immunity of government pay from garnishment began to erode. By 1933, over half of the states had enacted legislation subjecting their employees' wages to garnishment.¹⁷ Similarly, federal courts refused to extend garnishment immunity to federal government corporations, such as the Reconstruction Finance Corporation,¹⁸ the Federal Housing Administration,¹⁹ and the Postal Service.²⁰ Finding the “sue and be sued” provisions contained in the enabling legislations of these corporations to evince a growing hostility to governmental immunity,²¹ the courts permitted the garnishment of wages owed to the employees of wholly-owned federal corporations, without inquiring into the validity of the claims against the federal employees.

⁹See generally Verne Lawyer, *Birth and Death of Governmental Immunity*, 15 CLEV.-MARSHALL L. REV. 529 (1966).

¹⁰W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

¹¹THE FEDERALIST No. 81, at 374 (Alexander Hamilton) (Hallowell ed. 1842).

¹²See, e.g., *Bears v. Arkansas*, 61 U.S. (20 How.) 527 (1857); *Merwin v. Chicago*, 45 Ill. 133 (1867); *Wallace v. Lawyer*, 54 Ind. 501 (1876); 1345 U.S. (4 How.) 20 (1846).

¹⁴*Id.* at 20-21.

¹⁵*McGrew v. McGrew*, 38 F.2d 541 (D.C. Cir.), cert. denied, 281 U.S. 739 (1930); *McCarl v. Pence*, 18 F.2d 809 (D.C. Cir. 1927); *Detroit Window Cleaners' Local 139 Ins. Fund v. Griffin*, 345 F. Supp. 1343 (E.D. Mich. 1972); *Allen v. Allen*, 291 F. Supp. 312 (S.D. Iowa 1968); *Applegate v. Applegate*, 39 F. Supp. 887 (E.D. Va. 1941). But see *Waterbury v. Board of Comm'rs*, 26 F. 1002 (Mont. 1891).

¹⁶*United States v. Shaw*, 309 U.S. 495 (1940); *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846); *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971).

¹⁷Jeff B. Fordham, *Garnishment of Public Corporations*, 39 W. VA. L.Q. 224, 239 (1933); see also R. Foster Scott, *The Government as a Garnishee*, 16 IND. L.J. 545, 560-62 (1941).

¹⁸*Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939).

¹⁹*Federal Hous. Admin. v. Burr*, 309 U.S. 242 (1940).

²⁰*Beneficial Fin. Co. v. Dallas*, 571 F.2d 125 (2d Cir. 1978); *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462 (3d Cir. 1977); *May Dep't Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Kennedy Elec. Co. v. United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974).

²¹For example, in 1939, the Supreme Court remarked,

Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.

Keifer & Keifer, 306 U.S. at 390-91.

The doctrine eroded further with the enactment of the Social Services Amendments of 1974 (SSA).²² This legislation reflected growing concerns about the widespread failure of federal employees to support their families, and the increasing financial strains this failure placed on federal and state governments. A 1971 study by the Rand Corporation revealed that courts and state agencies experienced extensive problems in enforcing support obligations. In particular, the study remarked on the inability of state agencies to use garnishment proceedings to collect child or spousal support from military personnel and other federal employees.²³ Members of Congress were familiar with the problem. Many had received requests from their constituents for help in enforcing support obligations. They readily saw the need for action.²⁴ Accordingly, they enacted the SSA.

Although the primary purpose of the SSA was to create and fund new child support programs, it also expressly waived federal governmental immunity for certain types of garnishment actions. In particular, section 459 of the SSA provided that any compensation that a federal employee might receive as "remuneration for employment" would be subject to legal processes brought to enforce the employee's legal obligations to pay alimony and child support.²⁵

Although the SSA waived governmental immunity to garnishment proceedings only for support obligations, it

undercut the policy reasons justifying blanket immunity of federal pay from garnishment.²⁶ To allow state courts to garnish federal wages for any reason, however important, suggested that garnishment neither would disrupt the functioning of government, nor would be unduly burdensome. Moreover, the SSA implicitly admitted that the garnishment of federal pay would not defeat the purpose for which federal funds had been appropriated. Once Congress discarded these policy reasons, no theoretical justification for blanket immunity remained.

Expanding on this limited waiver of immunity,²⁷ federal legislators introduced several bills in the House of Representatives to abolish federal sovereign immunity to garnishment of wages.²⁸ Each bill died in the House, defeated by a lack of legislative support and by staunch opposition from the executive branch.

Proposed Legislation— Senate Bill 316 and House Bill 643

On January 31, 1991, Senator Larry Craig of Idaho and Representative Andrew Jacobs of Indiana introduced the proposed Garnishment Equalization Act of 1991 in their respective chambers.²⁹ In its original form, the GEA would have directed state and federal courts to treat federal pay in

²²Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended in scattered sections of titles 26 and 42 U.S.C.); see also 1974 U.S.C.C.A.N. 8133 (legislative history); B. Ellis Phillips & Richard F. Dwork, *The Federal Garnishment Statute: Its Impact in the Air Force*, 18 A.F. L. Rev. 70 (1976).

²³The Rand Corporation researchers emphasize the number of well off physicians and attorneys whose families ultimately are forced on to welfare because of insufficient mechanisms for enforcement of obligations to support. This situation, they point out, is confirmed by investigators who point to the difficulty of proving the income of the self-employed, the ease with which unwilling fathers can conceal their assets, the statutory barrier to collecting from military personnel and federal employees and the low priority given child support investigations by the under staffed district attorneys' offices.

S. REP. NO. 1281, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8147 (emphasis added).

²⁴During the debate on the Social Services Amendments of 1974, Representative Al Ullman of the House Committee on Ways and Means opined,

Congress is going to have to face up to a very serious deteriorating situation where the Government is paying out money to individuals who are not living up to their family responsibilities and this is certainly true in many cases in the Armed Forces. A lot of the members of Congress have had experience in that regard. There certainly is at least a billion dollars involved in this whole area and unless we are willing to bite the bullet and face up to the real problem here it is only going to get further out of hand.

120 CONG. REC. 41,809 (1974).

²⁵Notwithstanding any other provision of law, effective January 1, 1975, monies (the entitlement of which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof or any wholly owned federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his [or her] legal obligation to provide child support or make alimony payments.

Pub. L. No. 93-647, § 459, 88 Stat. 2357 (codified as amended at 42 U.S.C. § 659(a) (1988)).

²⁶See *supra* text accompanying notes 15-16.

²⁷See *Overman v. United States*, 563 F.2d 1287, 1291 (8th Cir. 1977) ("The statute simply removed the bar of sovereign immunity to one narrow class of actions").

²⁸See, e.g., H.R. 3565, 100th Cong., 1st Sess. (1987); H.R. 128, 99th Cong., 1st Sess. (1985); H.R. 2129, 97th Cong., 1st Sess. (1981).

²⁹137 CONG. REC. S1389 (daily ed. Jan. 31, 1991).

the same manner as nonfederal pay.³⁰ Accordingly, it would have waived the existing federal immunity to garnishment actions, allowing courts to garnish a federal employee's pay to satisfy any commercial or personal debt the employee owed.³¹ The original legislation did not distinguish military personnel from other federal employees. It would not have created a new cause of action against the federal government, but merely would have subjected the United States to state garnishment laws.³²

On March 5, 1992, the Senate Subcommittee on Federal Services, Post Office and Civil Service, held hearings on Senate Bill 316.³³ The House Subcommittee on Civil Service held similar hearings on House Bill 643 on June 16, 1992.³⁴ Although the Bush Administration did not oppose the concept of the legislation, several executive agencies objected to specific provisions of the GEA and suggested a number of modifications. A compromise was reached and a substitute amendment was voted out of the Senate Government Affairs Committee.³⁵ As modified, Senate Bill 316 retained the

blanket waiver of immunity; however, it also addressed the criticisms of several federal agencies.³⁶

To justify the GEA's principal feature—that is, the removal of blanket immunity—the bills' proponents advanced several arguments. First, they asserted that equity requires the federal government to abandon blanket immunity from garnishment. All persons should be treated equally, whoever their employers might be. Second, they argued that the policy reasons for blanket immunity no longer are valid. Advances in computer technology and the centralization of government pay operations now permit government agencies to process garnishment orders without impairing government functions.³⁷ Federal agencies routinely have processed garnishment orders for child support or alimony since 1975;³⁸ moreover, the Postal Service successfully has handled garnishment orders for debts of all kinds since 1978.³⁹ Thirty-seven states⁴⁰ and the federal government of Canada⁴¹ have waived their immunities to public employment garnishments without experiencing any noticeable deteriorations in their daily operations.

³⁰Notwithstanding any Federal law to the contrary, the pay of any person employed by the United States shall be subject to garnishment in the manner applicable to pay of persons not employed by the United States." S. 316, 102d Cong., 1st Sess. § 2(a) (1991).

³¹As used in this Act—(1) the term 'person employed by the United States' means (A) an elected officer of the United States, and (B) a member of the civil service or of a uniformed service (as such terms are defined in Section 2101 of title 5, United States Code) . . . See *id.* § 3(1).

³²Senate Hearings, *supra* note 2, at 5 (statement of Sen. Craig).

³³See 138 CONG. REC. 0218 (daily ed. Mar. 5, 1992).

³⁴See 138 CONG. REC. 0731 (daily ed. June 15, 1992).

³⁵Letter from Dorothy Douglas, Chief Clerk, United States Senate Subcommittee on Governmental Affairs, to Gerald E. Wuetcher (Aug. 21, 1992) (on file with author); Telephone Interview with David Wilds, legislative aide to Rep. Andrew Jacobs (Aug. 28, 1992).

³⁶As amended, Senate Bill 316 would have the following effects: (1) Designates the method of service of legal process for garnishment; (2) requires the court issuing a garnishment order to provide notice to the affected federal employee; (3) protects the United States and its disbursing officers from liability when disbursing officers honor a legal process that is valid on its face; (4) prohibits disciplinary action or civil or criminal liability against an employee who answers an interrogatory related to garnishment orders; (5) limits the amount that may be garnished from an employee's salary; (6) excuses agencies from varying their disbursement cycles to comply with garnishment orders; (7) establishes a system of priorities that an agency may follow if it is served with more than one garnishment order for a single employee; and (8) delegates authority to promulgate regulations to implement the GEA. See generally S. 316; *supra* note 7, § 2.

³⁷Senate Hearings, *supra* note 2, at 82-85 (statement of John W. Johnson).

³⁸See also *id.* at 15 (testimony of Hon. Jean Barber) (conceding that federal government's experience with garnishment orders for child support and alimony demonstrate that administrative burden "can be met, provided that appropriate protections are built into the system").

³⁹*Id.* at 16 (statement of William P. Tayman, Jr.). In one recent pay period, the Postal Service processed 28,353 child support and alimony payments, totaling more than \$4 million, and 9475 commercial garnishments, totaling more than \$1.4 million.

⁴⁰See W. VA. CONST. art. 6, § 35; ALA. CODE § 6-6-481 (1977); ARIZ. REV. STAT. ANN. § 12-1601 (1982); ARK. CODE ANN. § 16-110-413 (Michie 1987); CAL. CIV. PROC. CODE § 706.011(b) (Deering 1983); COLO. REV. STAT. § 13-61-101 (1987) (immunity for salaries of state constitutional officers not waived); CONN. GEN. STAT. § 52-361a (1992); DEL. CODE ANN. tit. 10, § 3503 (1978); GA. CODE ANN. § 18-4-21 (Harrison 1990); HAW. REV. STAT. §§ 653-1 to 653-2 (1985); IDAHO CODE § 11-202 (1990) (immunity not waived for elective state officers); IND. CODE ANN. § 34-1-445 (Burns 1986); IOWA CODE ANN. § 642.2 (West 1992); KAN. STAT. ANN. § 60-723 (1986); KY. REV. STAT. ANN. § 427.130 (Baldwin 1991); LA. REV. STAT. ANN. § 13:3881(c) (West 1991); ME. REV. STAT. ANN. tit. 14, § 3137-B (West 1991); MD. COM. LAW II CODE ANN. § 15-607 (1990); MINN. STAT. ANN. § 571.45 (West 1988); MISS. CODE ANN. § 11-35-1 (1972); MO. ANN. STAT. § 525.310 (Vernon 1992); MONT. CODE ANN. § 27-18-406 (1991); NEB. REV. STAT. § 25-1012.01 (1989); NEV. REV. STAT. § 281.130 (1991); N.H. REV. STAT. ANN. § 512:9 (1983); N.M. STAT. ANN. § 35-12-10 (Michie 1988); N.Y. CIV. PRAC. L. & R. 5207 (Consol. 1991); N.D. CENT. CODE § 32-09.1-02 (1991); OHIO REV. CODE ANN. § 2715.12 (Anderson 1991); OKLA. STAT. ANN. tit. 12, § 1192 (West 1988); OR. REV. STAT. § 23.190 (1991); R. I. GEN. LAWS § 9-26-34 (1991); S.D. CODIFIED LAWS ANN. § 21-18-1 (1991); TENN. CODE ANN. § 26-2-221 (1991); UTAH CODE ANN. § 78-27-15 (1991); VT. STAT. ANN. tit. 12, § 3013 (1991); VA. CODE ANN. § 8.01-522 (Michie 1992) (salaries of state officers exempted); WASH. REV. CODE ANN. § 6.27.040 (West 1992); WIS. STAT. ANN. § 812.023 (West 1991).

⁴¹Garnishment, Attachment and Pension Diversion Act, R.S.C. ch. G-2 (1982). This act also covers the pay of members of the Canadian armed forces.

Proponents further noted that public employment garnishment does not frustrate the purpose for which public funds have been appropriated.⁴² By permitting state courts to garnish federal pay for child support and alimony, Congress implicitly recognized this point and rejected the reasoning underlying *Buchanan*. The federal government's position as garnishee essentially would be that of a temporary stakeholder. Garnishment would take no funds from the United States Treasury to satisfy a judgment creditor's claim. Instead, the garnishment order would offset a portion of the funds the United States already owes its employee. Accordingly, garnishment would impose upon the federal government only the ministerial task of establishing a conduit between the service of process by a state or local court and the payroll record of its employee.⁴³

Proponents of the legislation also contended that federal employees would benefit from the removal of blanket immunity. They claim that inability to garnish federal wages discourages creditors from extending credit to federal employees. Addressing the Senate Subcommittee on Federal Services, Post Office, and Civil Affairs, Senator Craig remarked, "Knowing garnishment is unavailable against a defaulting federal employee could influence a lender to withhold approval of loans. By extending the remedy of garnishment, this legislation may help prevent a credit crunch for credit-worthy federal employees."⁴⁴

Finally, proponents claimed that existing federal laws substantially protect federal employees from abuses of the garnishment process. They noted, for example, that Title III of the Consumer Credit Protection Act⁴⁵ limits the amount that a court may garnish from an individual's salary to satisfy a consumer debt.⁴⁶ One proponent of the GEA also testified that, by enacting the SSCRA, Congress eliminated the need to extend the protection that the immunity offers to military personnel.⁴⁷

Nevertheless, these arguments lose considerable force when applied to service members. The unique nature of military service would hamper the efforts of service members to defend against the garnishments of their wages. Moreover,

garnishments would disrupt the process of public administration by weakening military morale and efficiency.

The proponents of the GEA premised the waiver of blanket immunity on the assumption that a creditor and a debtor each would have the opportunity to represent his or her interests in court. If, after hearing both sides, the court decides for the creditor, the creditor should be able to use all legal remedies to enforce the court's judgment. The Act's proponents argued that prohibiting the use of a particular remedy, merely because of the debtor's status as a federal employee, is unfair.

Unlike other forms of federal employment, however, military service interferes with an individual's representation of his or her interests. The ability of service members to appear in courts and to defend against civil claims always is subordinate to, and often is restricted by, their military duties.⁴⁸ Moreover, the Armed Forces frequently subject service members to involuntary moves and extended world-wide deployments at short notice. Consequently, military personnel are very susceptible to default judgments. If Congress enacts the GEA or similar legislation, these default judgments may serve as the bases for garnishment orders.

A default judgment against a military debtor most commonly will occur when:

- the service member failed to appear because he or she had no notice of the pending proceedings;
- the service member received notice of the proceeding too late to appear; or
- the service member received notice of a proceeding and unsuccessfully requested a continuance or a stay of the proceeding.

Despite the arguments advanced by proponents of the GEA, the SSCRA affords only limited protection to military personnel. It permits a service member to apply for a stay at any stage of a proceeding and requires the court to grant this

⁴² Senate Hearings, *supra* note 2, at 8 (statement of Sen. Craig).

⁴³ *Id.*; see also *Garnishment of Pay of Federal Employees: Hearings on H.R. 3565 Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service*, 100th Cong., 2d Sess. 113 (1988) [hereinafter *House Hearings*] (statement of A. Charlene Sullivan).

⁴⁴ 137 Cong. Rec. S1389 (daily ed. Jan. 31, 1991) (statement of Sen. Craig).

⁴⁵ See generally 15 U.S.C. §§ 1671-1677 (1988).

⁴⁶ 15 U.S.C. § 1673(a) prohibits any garnishment in a single workweek that exceeds the lesser of (1) 25% of an employee's disposable earnings for that week, or (2) the amount by which his or her disposable earnings for that week exceed 30 times the minimum hourly wage prescribed by § 5(a)(1) of the Fair Labor Standards Act (29 U.S.C. § 206(a)(1) (1988)).

⁴⁷ Senate Hearings, *supra* note 2, at 83 (statement of John W. Johnson).

⁴⁸ *Id.* at 70-71 (statement of Lieutenant General Alexander).

application unless the court finds that the service member's military service does not affect his or her ability to conduct a defense.⁴⁹ In theory, this provision should prevent most default judgments. Department of Defense (DOD) officials, however, argue that, in practice, this provision often fails to protect military personnel.⁵⁰ Courts routinely refuse to grant SSCRA stays. Defense Department officials note that the SSCRA's stay provision failed so miserably during Operations Desert Shield and Desert Storm that Congress had to enact legislation imposing mandatory stays on legal actions against service members during that period.⁵¹

The SSCRA also allows default judgments to be reopened and set aside.⁵² The service member, however, must apply to the court that entered the default judgment.⁵³ Until the judgment is reopened, it is *not* void, but merely voidable.⁵⁴ Obtaining this relief may be a lengthy process. While the process is being played out, the service member's pay would be withheld.

The following example illustrates the practical limitations of the SSCRA as a protection against the wrongful garnishment of federal pay. Assume that a creditor improperly obtains a default judgment against a soldier whose military duties prevented him from appearing to defend against the creditor's claim. The judgment creditor then invokes the newly enacted GEA, obtains a writ of garnishment, and serves it upon the United States. The soldier receives notice of the garnishment and withholding begins shortly thereafter.

The soldier cannot contest the garnishment with his local finance office. That the judgment creditor failed to comply with the SSCRA is irrelevant. The GEA provides that the writ of garnishment must be honored if it is regular on its face.⁵⁵ This provision is modelled after a federal statute that allows

courts to garnish federal pay for support obligations.⁵⁶ The Supreme Court has held that the latter statute prohibits the United States or its disbursing officers from ignoring a writ of garnishment simply because the obligor has revealed information that raises a doubt about the writ's legality.⁵⁷

The soldier's only remedy is to seek to reopen the default judgment in the issuing court. He cannot seek relief in federal court on a claim of a SSCRA violation. A 1991 decision by the District Court for the District of Kansas illustrates this point clearly. In *Shatswell v. Shatswell*,⁵⁸ a mother sought a stay of enforcement of a state court's child custody order pending her completion of a tour of armed service in Saudi Arabia. She based her petition on the stay provisions of the SSCRA. The court dismissed the action, holding that the SSCRA did not empower a federal court collaterally to review decisions of a state court. It concluded, "Judgments made in violation of the Act are subject to attack only in the courts which rendered the judgments."⁵⁹

This reasoning also precludes service members from obtaining injunctive relief against the United States. In *Scheidegg v. Department of the Air Force*,⁶⁰ an Air Force officer sought to enjoin the Air Force from garnishing child support from his wages pursuant to a state court order. He alleged, *inter alia*, that the garnishment was illegal because the state court had failed to comply with the SSCRA. Finding that the order was only voidable, not void, and that the SSCRA did not vest federal courts with jurisdiction to interfere with state court judgments, the District Court for the District of New Hampshire denied the requested relief.⁶¹

Even if a soldier succeeds in vacating a default judgment, he or she cannot compel the United States to pay the wages that it withheld. The GEA would relieve the federal

⁴⁹ 50 U.S.C.A. App. § 521 (West Supp. 1992).

⁵⁰ Senate Hearings, *supra* note 2, at 18 and 72 (statement of Lieutenant General Alexander).

⁵¹ See Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, § 6, 105 Stat. 34, 37.

⁵² 50 U.S.C.A. App. § 520(4) (West Supp. 1992).

⁵³ *Id.*; see also *Shatswell v. Shatswell*, 758 F. Supp. 662 (D. Kan. 1991).

⁵⁴ *Scheidegg v. Department of the Air Force*, 715 F. Supp. 11 (D.N.H. 1989), *aff'd*, 915 F.2d 1558 (1st Cir. 1990); *Sarfaty v. Sarfaty*, 534 F. Supp. 701 (E.D. Penn. 1982); *Davidson v. General Fin. Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968); *Ostrowski v. Pethick*, 590 A.2d 1290 (Pa. Super. Ct. 1991).

⁵⁵ See S. 316, 102d Cong., 1st Sess. § 2(d) (1991).

⁵⁶ 42 U.S.C. § 659 (1988).

⁵⁷ *United States v. Morton*, 467 U.S. 822, 829 (1984); see also Charles W. Hemingway, *Pouring Salt on Government Garnishment Liability: The Supreme Court Reverses Morton*, ARMY LAW., Aug. 1984, at 1.

⁵⁸ 758 F. Supp. 662 (D. Kan. 1991).

⁵⁹ *Id.* at 663.

⁶⁰ 715 F. Supp. 11 (D.N.H. 1989).

⁶¹ *Id.* at 13-14.

government and its disbursing officers of any liability for honoring "legal process [that is] regular on its face."⁶² Accordingly, the soldier's only recourse is to sue the judgment creditor.

In this regard, the GEA would reduce the protections afforded to military personnel under the SSCRA. Currently, military personnel are under no time constraints to reopen default judgments because judgment creditors cannot reach their military wages. If Congress enacts the GEA, however, a finance office could begin withholding a service member's pay within thirty days after a court enters a default judgment.⁶³

The SSCRA cannot alleviate the practical impediments facing a service member who must defend against a civil lawsuit. If the service member can afford to travel, has military leave available, and is not precluded from appearing because of military duties, he or she is not entitled to a stay of proceedings under the SSCRA.⁶⁴ Unfortunately, service members often would have to incur unacceptable travel and lodging expenses to defend lawsuits in distant forums. For example, to defend a \$500 small claims court action in Columbus, Georgia, a soldier stationed in Korea would have to incur travel expenses that far exceed the amount in controversy. Not surprisingly, the soldier probably would accept a default judgment, rather than appear—thereby forfeiting any right he or she might have under the SSCRA to reopen the default judgment.⁶⁵

Accordingly, the GEA may encourage a local creditor to delay acting against a service member on a small, disputed debt until the service member receives permanent change of

station (PCS) orders. Currently, local merchants realize the likelihood of collecting a disputed debt is greatest while the military debtor remains in the area. A merchant can exert pressure on a military debtor through his or her chain of command. Furthermore, because the member lives in the area, more of his or her personal assets are available for attachment. If Congress enacts the GEA, however, a creditor can wait until the service member's PCS, obtain a default judgment, and initiate immediate collection of the judgment by garnishing the service member's pay.

The GEA's proponents also have neglected to consider the impact of garnishment on military morale. Officials of the DOD have testified before the Senate that garnishment would weaken relations between soldiers and their commanders. The new legislation, they warned, could create the perception that commanders are debt collectors who care little about the problems of the soldiers they command.⁶⁶ The officials also worried that the legislation would distract service members from their military duties by forcing them to devote more attention to their personal financial concerns.⁶⁷

The proponents of the GEA also have failed to consider the unique approach that the military has adopted toward resolving its members' debts. Each uniformed service has promulgated regulations requiring service members to pay their debts promptly.⁶⁸ Failure to comply with these regulations may subject a member to disciplinary or administrative sanctions.⁶⁹ Moreover, deliberate nonpayment of a just debt is an offense punishable under the Uniform Code of Military Justice.⁷⁰ These sanctions far exceed those of any civilian federal agency.⁷¹

⁶²See *supra* note 36 and accompanying text.

⁶³Withholding would begin within 30 days if the writ of garnishment is issued and served the same day as entry of the default judgment. As amended, the GEA provides that legal process must be honored within 30 days of service.

⁶⁴50 U.S.C. App. § 521 provides that, upon application of service member, a court shall stay proceedings unless it finds that the service member's ability to prosecute the action or conduct his defense is not affected materially by his or her military service. Availability of military leave, financial resources to travel, and nature of military duties are among the factors that a court will consider in ruling upon a service member's application. See, e.g., *Palo v. Palo*, 299 N.W. 2d 577 (S.D. 1980).

⁶⁵50 U.S.C.A. App. § 520(4) (West Supp. 1992). To reopen a default judgment, a service member must show that he or she was "prejudiced by reason of his [or her] military service in making [a] defense" and that he or she had a meritorious defense. See *Swartz v. Swartz*, 412 So. 2d 461, 462 (Fla. Dist. Ct. App. 1982) ("A key factor in determining prejudice is the diligence with which a military member takes advantage of the opportunities to preserve the rights afforded him [or her] during the course of the litigation"). If the member failed to exercise or preserve his or her rights solely because of the expense involved, a court almost always will refuse to set aside the default judgment.

⁶⁶*Senate Hearings, supra* note 2, at 74 (statement of Lieutenant General Alexander).

⁶⁷*Id.* at 18.

⁶⁸See DEPT. OF DEFENSE, DIRECTIVE 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL (May 7, 1979); DEPT. OF AIR FORCE, AIR FORCE REG. 35-18, PERSONAL FINANCIAL RESPONSIBILITY (5 Apr. 1988); DEPT. OF ARMY, REG. 600-15, PERSONNEL—GENERAL: INDEBTEDNESS OF MILITARY PERSONNEL (14 Mar. 1986) [hereinafter AR 600-15]; DEPT. OF NAVY, NAVAL MILITARY PERSONNEL MANUAL, para. 6210140.

⁶⁹See, e.g., AR 600-15, *supra* note 68, para. 3-1.

⁷⁰UCMJ art. 134 (1988); MANUAL FOR COURTS-MARTIAL, United States pt. IV, ¶ 71 (1984).

⁷¹The DOD's failure to provide quantitative evidence on this point weakened the force of its arguments. See Letter, Deputy Assistant Secretary, Department of Defense, to Sen. David Pryor, Chairman, Sen. Subcomm. on Federal Servs. (May 19, 1992), reprinted in *Senate Hearings, supra* note 2, at 132.

The DOD has asked Congress to include special provisions for military members in the GEA. Among the ideas it asked Congress to consider were blanket exemptions for all active duty service members,⁷² for all service members stationed overseas or in deployable units,⁷³ or for all junior enlisted members.⁷⁴ Alternatively, the DOD proposed that Congress direct the Secretary of Defense to issue regulations "providing for the involuntary allotment of a military member's pay in satisfaction of a judgment by a court of competent jurisdiction for any indebtedness, including commercial indebtedness, under such terms and conditions as the Secretary prescribes."⁷⁵ Defense Department officials argued that this provision would allow the DOD to establish a single uniform standard, avoiding the complexity and inequity that could result from reliance on fifty different garnishment laws. More importantly, these regulations "would strike a balance between the rights of creditors and those of our military members and their families, ensuring that the circumstances of military life are fully considered as well as the rights of creditors."⁷⁶ Privately, DOD officials believed that adoption of this measure would allow the DOD to draw restrictive regulations that would limit the availability of garnishment severely.⁷⁶

The Senate Committee on Government Affairs rejected the DOD's proposals to exclude military personnel from the legislation. Nevertheless, members of the Committee were sympathetic to the DOD's concerns.⁷⁷ Although the Committee retained provisions in the GEA that would subject military personnel to garnishment, it added a provision that would require the President or the Secretary of Defense to promulgate regulations applying the GEA to the military. This provision specifically distinguishes military personnel from all other federal employees, including DOD civilian employees. The Committee believed that the DOD was best suited to deal with situations, unique to military service, in which conditions of federal employment impair an alleged debtor's ability to defend in a legal action.

Proposed Regulations

If Congress enacts the GEA, the DOD will face a difficult task in developing implementing regulations. The regulations must be broad enough to protect active duty military personnel from the practical problems of defending against claims, but narrow enough to avoid legal challenges claiming that the

regulations frustrate the purpose of the legislation. Further, the proposed regulations must not draw the DOD into private actions as a referee between a service member and his or her creditor. Finally, they must be easily administered to limit the potential exposure of the United States and its disbursing officers for improper payments. Some possible regulations are discussed below.

Blanket Exemptions

Place of Duty

One of the DOD's principal concerns about the GEA is the inability of military personnel stationed overseas, or with deployable units, to defend themselves against civil claims. A blanket exemption for these personnel would alleviate this concern. Unfortunately, this approach considers only a service member's status when the process is served upon the DOD—not when the court entered the judgment underlying the garnishment. Logically, if the DOD is concerned with whether a service member's military service has affected his or her ability to defend in the underlying action, then a garnishment exemption should cover only personnel against whom default judgments were entered while they were stationed overseas or in deployable units. Requiring the DOD to cross-check the assignment records of each service member facing garnishment against the date of the judgment underlying the garnishment would impose an arduous burden on the federal government.

Rank or Time in Service

Of all service members, junior enlisted personnel are most susceptible to legal actions and garnishment. Exempting these personnel from garnishment would eliminate most of the workload created by the GEA. A service member's youth or naivete, however, has little relationship to his or her ability to defend against a civil claim. Furthermore, many federal civilian employees could demand similar treatment to compensate for similar vulnerabilities. This exemption appears contrary to the GEA's intent.

⁷²Memorandum, Colonel Terry D. Bradley to Messrs. Scheer and Rush (Mar. 10, 1992), at 2.

⁷³Memorandum, Commander Kevin McMahon, Office of the Judge Advocate General of the Navy, to Lieutenant Baucino, Office of the Secretary of Defense (Feb. 24, 1992).

⁷⁴See Letter, *supra* note 71.

⁷⁵*Id.*

⁷⁶See, e.g., AR 600-15, *supra* note 68.

⁷⁷Telephone Interview with David Wilds, Legislative Aide to Rep. Andrew Jacobs (Aug. 28, 1992); Telephone Interview with Ed Gleiman, Staff Director, Senate Subcommittee on Federal Services, Post Office and Civil Service (Aug. 31, 1992).

Wartime Exclusion

The DOD regulation should immunize all service members from garnishment during a war or a declared national emergency. Under these circumstances, a blanket exemption for all military personnel would be needed to ensure that each service member is not distracted by personal problems and can focus his or her attention entirely on mission accomplishment.

Compliance with SSCRA

To protect a service member's interests, the implementing regulations should require DOD finance officials to ensure that the judgment underlying each garnishment order complies with the SSCRA. Finance officials can ensure compliance only if they (1) require creditors to submit court orders creating the obligations underlying the garnishments; and (2) honor only orders that state expressly that the provisions of SSCRA have been met. This proposal, however, fails to address the situation in which a court has not ignored the SSCRA, but has applied it improperly.

Member's Defense in the Underlying Action

Among the DOD's primary concerns with the GEA is the ability of a service member to appear in court, and to conduct his or her defense, given the demands of his or her military service. Accordingly, the implementing regulations could require a judgment creditor to demonstrate that the military member actually appeared and defended in the proceedings that created the underlying obligation. This approach, however, may create an incentive for military personnel to avoid court proceedings. Further, it penalizes service members who do appear, but are unsuccessful. Defining "appearance" and "conducting a defense" pose additional problems. Does answering the complaint constitute an appearance? Must the service member be physically present when the case is heard? If so, what happens if the court granted the creditor's petition for summary judgment without hearing the service member's evidence? Establishing a workable standard would be very difficult. This proposal would require the DOD to scrutinize the proceedings giving rise to each garnishment order and, in

some instances, to second-guess the courts that heard the actions.

Waiting Period

The regulations could provide a service member with an opportunity to object to the garnishment. If the service member objects, the finance office would withhold the sum named in the garnishment order from his or her pay, but would not forward it to the judgment creditor for ninety days. During this period, the service member could seek to reopen the judgment or pursue other legal remedies. If he or she fails to set aside the judgment within that period, the finance office would forward the withheld pay to the judgment creditor. This proposal does not provide a comprehensive solution, but does address the DOD's concerns about default judgments.

None of these proposals would resolve all the problems presented by the GEA. Moreover, any exclusion or precondition to garnishment that the DOD might impose in its implementing regulations could conflict with the literal language of the GEA, which proposes to subject a federal employee's pay to garnishment whenever the legal process is regular on its face.⁷⁸ Although the members of the Senate Committee on Government Affairs believe that implementing regulations adequately can address the unique nature of military service, their substitute amendment leaves the DOD little room to do so.

Conclusion

The purpose of the GEA is to remedy perceived inequities between federal government employees and private sector employees. In its present form, the proposed act largely achieves this objective. In choosing to permit the garnishment of military pay, however, the drafters of the GEA have failed to consider the unique nature of military service. Consequently, they have crafted a bill that, if enacted, would disturb the delicate balance between the rights of creditors and military members. Whether the DOD could restore the balance by promulgating regulations to implement the legislation remains to be seen.

⁷⁸ See S. 316, 102d Cong., 1st Sess., § 2(d) (1991).

Domestic Counseling and Legal Assistance: A Systematic Approach

Lieutenant Colonel Mark E. Sullivan
IMA, Legal Assistance Division, OTJAG

Introduction

Propping her head between her hands, Major Irene Smith tried to concentrate. As chief of legal assistance at Fort

Swampy, North Carolina, she faced a not-unexpected reduction in staff attorneys for her section of the staff judge advocate's (SJA's) office. She expected to lose two of her five legal assistance attorneys (LAAs) in the next month as the Army

continued to "build down" and restructure its forces. Unfortunately, Fort Swampy's population would not decrease by forty percent, nor would the build-down affect the volume of legal assistance clients or the number or complexity of the problems they would bring to her office. Remembering the emphasis her SJA placed on excellence in legal assistance, Smith felt frustrated by the need to "do more with less."¹

Major Smith knew that drafting wills, powers of attorney, and similar documents occupied about twenty-five percent of her attorneys' time. Her office, however, already was managing this process efficiently. All the LAAs used ENABLE and the Legal Assistance Army-Wide System software programs, including the Minuteman will.² A certain irreducible amount of work, she thought, is necessary for will interviews and execution. Any shortcuts in this area could jeopardize the competent preparation and execution of these important documents.³

Smith could do little to reduce the time her attorneys spent in assisting clients with consumer protection and landlord-tenant issues. These problems regularly demanded approximately twenty to thirty percent of her attorneys' time, but they varied so much from case to case that the LAAs could not develop a time-saving, uniform approach to client counseling and assistance. Smith previously had reduced the volume of clients seeking help for these problems by adopting a strong preventive law program; however, she could see no way to reduce the influx of clients further by enhancing existing preventive law efforts. She and her attorneys already were teaching preventive law classes on consumer and housing law problems to soldiers and family members.⁴ Smith also wrote or edited weekly columns on these topics for the post newspaper⁵ and kept several excellent handouts on evictions, door-to-door sales, used cars, and mobile homes in her waiting room.

The remaining problem area was family law. Each LAA at Fort Swampy routinely counseled clients about separations and divorces, augmenting an initial counseling session with follow-up action whenever a case required the preparation of a separation agreement or a nonsupport complaint. Initial family law interviews took up approximately twenty-five

percent of each attorneys' time. We seem to spend a lot of time performing some fairly simple tasks, Smith thought. She wondered if she could find a way to reduce the time spent counseling new domestic relations clients.

Analyzing the Problem

"Repeat business" may be good news for merchants, bankers, and real estate brokers, but too many repeated visits from family law clients can impair the efficiency of a military legal assistance office. Assisting new clients who are contemplating separation and divorce often will consume many hours of an LAA's work week. The attorney, however, essentially must provide every new client with the same initial counseling. In each session, he or she will advise the client about basic aspects of domestic relations, such as grounds for divorce, amount of child support, and the need for a separation agreement. A small legal assistance office typically will provide this basic counseling to approximately five clients per week. Most larger offices see ten to twenty domestic relations clients weekly.

A legal assistance office may apply preventive law measures to family law matters. The controlling Army regulation states specifically that LAAs must "prepare and participate in the active preventive law functions of publicity, education, and training to ensure that soldiers and their families are aware of . . . the importance of seeking legal advice before taking action that may lead to significant legal or financial obligations, such as . . . divorce settlements."⁶

Weekly Briefings

Recognizing the redundancy of individual domestic relations counseling for new family law clients, some offices have stemmed this drain on valuable attorney time by conducting weekly briefings to "educate and train" potential clients.⁷ Although clients still may make individual appointments for initial domestic counseling sessions, they are encouraged to attend comprehensive family law briefings instead. Each

¹The Army last faced a reduction in military attorney strength in the mid-1970s, when low retention rates contributed to a shortage of judge advocates. Appropriately, the theme for The Judge Advocate General's Worldwide Conference in September 1974 was "Doing More with Less." For an excellent discussion of ways to meet mandated goals with limited resources, see Chuck R. Pardue, *Ten Steps to a More Successful Legal Assistance Practice*, ARMY LAW., Oct. 1985, at 3.

²See Policy Memorandum 89-3, Office of The Judge Advocate General, U.S. Army, subject: JAGC Automation Standards, reprinted in ARMY LAW., Aug. 1989, at 3.

³See DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 2-1d (10 Mar. 1989) [hereinafter AR 27-3]; see also Beard, *Applying Professional Responsibility and Ethics in Estate Planning*, LEGAL ASSISTANCE NEWSL., Fall/Winter 1989, at 21-29.

⁴Mark E. Sullivan, *Preventive Law: The Speakers' Circuit*, ARMY LAW., Sept. 1985, at 44.

⁵Mark E. Sullivan, *Preventive Law: The Genuine Article*, ARMY LAW., Sept. 1984, at 35.

⁶AR 27-3, *supra* note 3, para. 4-2a.

⁷Rodgers, *Dissolution Orientation Class*, LEGAL ASSISTANCE NEWSL., Fall 1987, at 14.

week, an LAA briefs a group of new clients about basic family law issues and answers general questions. The office legal clerk then schedules appointments for the new clients, coordinating with other offices to obtain counseling for clients' spouses.⁸ Any specific questions a client may have are reserved for the client's office appointment.

This approach significantly reduces the time individual attorneys must spend each week in acquainting new clients with the basics of family law. It also standardizes the basic information that each client receives, ensuring that all clients obtain the same fundamental legal guidance for their separation and divorce problems.

The best way to organize comprehensive family law instruction is to set aside at least one time period each week for client briefings. Conducting frequent family law briefings will help to ensure that separating spouses do not feel required to attend briefings together. The legal assistance office must reserve a classroom or courtroom for each briefing; moreover, the office legal clerk should attend each briefing to schedule appointments, pass out brochures and pamphlets, and otherwise assist the presenter. By setting up appointments immediately after each briefing, the clerk can promote "one-stop service" and save time for clients.

Using Handouts

To help the audience to understand the issues discussed in the presentation, the briefer or the legal clerk should distribute pamphlets and handouts to the clients. These materials should be distributed after the briefing to allow the client to study them at his or her leisure. Whenever possible, a legal assistance office should order this literature in quantity from the state or local bar association. Most states have excellent sets of pamphlets that they will provide to legal assistance offices for nominal fees. Reserve judge advocates, local civilian attorneys, or LAAs also can prepare handouts for clients. Unlike bar association brochures, locally produced handouts can be tailored to address specific military family law issues, such as dividing military pension benefits, using the basic allowance for quarters for family support, and electing Survivor Benefit Plan coverage. The *TAKE-1* series of handouts, published by the XVIII Airborne Corps Legal Assistance Office at Fort Bragg, North Carolina, exemplifies this approach. Comprising more than a dozen handouts, this series informs clients about a wide variety of domestic relations topics.⁹

Practical Pointers for Briefings

The mechanisms for setting up weekly family law briefings will vary from office to office. A few basic observations, however, seem well suited to every program.

K.I.S.S.—"Keep It Short and Sweet"

A briefing that lasts longer than forty-five minutes will leave most members of the audience dozing or fidgeting in their chairs. Tight speech-writing or outlining will help to keep the program under control. A basic explanation of separation and divorce issues should take only twenty to thirty minutes. The briefer should try to present an overview—not an extensive dissertation.

"If It's Written, You Won't Get Bitten"

Write down what you are going to say before you say it. Most speakers use outlines, but some can use full-text speeches and still keep their presentations lively and effective. Referring to a written outline as you speak will help to keep you on track, ensuring that you cover every mandatory point even if questions interrupt your presentation.

Take Questions at the End

Ask the attendees to hold their questions until you finish—otherwise, you may *never* finish. Your legal clerk should distribute paper so your listeners can write down the questions generated by your speech.

Be Organized

The purpose of the separation briefing is to answer the most frequently asked questions about divorce and domestic relations. Write these questions down in advance and make sure that you answer them fully and accurately in your presentation. Use local lawyers and Reservists to double-check the answers and consult with other LAAs to make sure that you cover all the important questions. Some common inquiries are:

- "Can I get an annulment instead of a divorce since we've only been married two weeks?"
- "My wife says she won't give me a divorce until I sign a separation agreement. What should I do?"
- "Will my separation agreement ensure that my spouse pays child support?"
- "How much child support is my spouse supposed to send me?"
- "Couldn't I get a divorce in the Dominican Republic in a week instead of waiting six months to file here?"

⁸ Army Regulation 27-3 provides that, whenever possible, attorneys from a single legal assistance office should avoid representing both parties in a domestic relations case. See AR 27-3, *supra* note 3, para. 2-5a(1).

⁹ Mark E. Sullivan, *Preventive Law by Handout*, ARMY LAW., May 1984, at 29; see also AR 27-3, *supra* note 3, ch. 4.

- "My spouse doesn't want to sign a separation agreement—can't I make him [or her] give me a settlement?"

Advance knowledge of the right questions and answers will enhance your credibility and the usefulness of your presentation.

Visual Aids Improve Memory Retention

Use slides, overhead projections, or a tripod and easel. Graphics will help you to summarize important lessons. They also can be used to emphasize learning points and to list items such as grounds for divorce, elements of support, and procedures for dissolution.

Videotape Briefings

An even better idea can be applied to family law briefings—use videotapes. Live presentations will consume thirty to forty-five minutes of attorney time each week, exclusive of the time the attorney must spend answering the audience's questions. Using a well-edited videotape instead of a live briefer can save a legal assistance office approximately forty work hours a year. If possible, a videotape should be prepared by the installation at which it will be presented. Using slides or visual aids during the taped presentation will help to keep the attention of the individuals watching the tape. The legal clerk's presence in the classroom while the tape is running will ensure that the audience remains seated and alert. An LAA should arrive near the end of the tape to answer the audience's questions. If this approach works—and, with proper planning, it should work well—the legal assistance office should consider using it in other areas in which initial interviews and basic briefings are essential, such as wills, survivor assistance, and reports of survey.

Separation Agreement Questionnaires

Questionnaires are another vital aid to systemizing domestic relations counseling and assistance. A briefer should offer

each member of the audience a separation agreement questionnaire. This document should be prepared specifically for the briefer's legal assistance office and should reflect local law. If completed properly, a good questionnaire will take much of the tedium and guesswork out of drafting a separation agreement.

Preliminary Information

A questionnaire should start by asking the parties' full names, their states of residence, their dates of marriage and separation, and the names and birth dates of any children of the marriage.¹⁰ These facts will provide helpful background information to the attorney who drafts the agreement. A recitation of the children's names is particularly useful when the drafting attorney must outline visitation rights, custody provisions, child support and college expense obligations, or the allocation of dependency exemptions in the separation agreement.

Division of Debts and Property

The first substantive questions the parties will have to answer¹¹ involve debts. Although each party will promise in the boilerplate of the separation agreement not to incur any debts for which the other will be responsible, an agreement specifically should list and allocate the existing marital debts of both parties. Marital debts are the joint or individual debts the parties have incurred for marital purposes.¹² They include car loans, charge card accounts, and home mortgages. Precise identification of these debts is important; therefore, a questionnaire should allot space for the parties to fill in the names of their creditors, their account numbers and balances, and their monthly payments. The parties then should indicate who will be responsible for each debt once they have executed the separation agreement.

The parties then must divulge how they intend to divide their personal assets. A good questionnaire will arrange personal property into the following four categories: (1) household furnishings and personal effects; (2) motor vehicles; (3) intangible property, such as stocks, bonds, bank accounts,

¹⁰The blanks in a separation agreement questionnaire deal with specific information or promises that are unique to that separation agreement. They do not affect the standard clauses that usually will be found in every agreement. The standard clauses should state the following:

- The parties are separating (or have separated) and have the right to live separate and apart from one another as if each were single and unmarried.
- Neither party shall harass, molest, or interfere with the other.
- Neither party shall incur debts in the other's name.
- Each party waives all marital, estate, and inheritance rights.
- Each party waives all claims against the other, except a claim for marital dissolution or absolute divorce.
- Breach of the agreement will allow the nonbreaching party to recover attorney's fees, damages, and—if applicable—enforcement by specific performance.

¹¹Obviously, the parties actually need not fill out the questionnaire together, however, they will have to confer on the answers that will be entered into the question blanks.

¹²E.g., *Byrd v. Owens*, 358 S.E.2d 102 (N.C. Ct. App. 1987); *Geer v. Geer*, 353 S.E.2d 427 (N.C. Ct. App. 1987).

and certificates of deposit; and (4) other intangible personal property, such as retirement benefits and the cash value of life insurance. The parties must record the correct information in each section and must indicate how they want to divide these assets.

The questionnaire should ask the parties to list the addresses and the deed descriptions of any real property they may own and to state clearly which party will keep each parcel of property. If one spouse will keep land that both spouses presently hold jointly, a deed usually must be prepared. If one party intends to transfer to the other his or her interest in land that is encumbered by a mortgage, the separation agreement should contain an "assumption clause," making the party that will hold title responsible for the mortgage and binding him or her to hold harmless and indemnify the other party for the mortgage debt. A transfer of this sort generally will not trigger the "due on sale" clause in an institutional mortgage.¹³

Support Claims

The next section of the questionnaire should deal with spousal support—also known as alimony or maintenance. The waiver option in the questionnaire should state clearly that, if both parties wish to waive alimony, this waiver must be final and unconditional. If one party is to pay spousal support to the other, the parties should indicate in the questionnaire who will pay support, how much support will be paid, and when these payments will end.¹⁴

Parties with minor children should settle child support issues in their separation agreement. For example, a couple with more than one child ordinarily should allocate support between the children.¹⁵ An agreement also should state a specific ending date for the payor's obligation to support each child. Furthermore, the separation agreement should describe the parties' division of uncovered health care expenses—even though military medical care or the Civilian Health and Medical Program of the Uniformed Services should cover

most of a child's medical expenses as long as one parent remains on active duty. The agreement should set terms for the provision or continuance of life insurance to secure child support if one of the parents should die before all of the children reach majority. If the intended support payor agrees to continue child support after the children complete high school, the agreement should assign responsibilities between the parties for each child's higher education costs.¹⁶ Finally, the parties should indicate who may claim the income tax dependency exemption for each child.¹⁷ A good separation agreement questionnaire will ask the parties to address each of these issues in detail.

Custody and Visitation Issues

The last section of the questionnaire should provide sufficient space for parents to describe their plans for child custody and visitation. Some attorneys prefer to keep the choices simple for separating spouses. In the custody section of their questionnaires, they ask only, "Who will have custody of the children?" The rise of joint custody statutes and cooperative parenting arrangements¹⁸ over the last fifteen years has caused other lawyers to replace this simple question with descriptions of sole and joint custody alternatives. Many attorneys further subdivide joint custody provisions into provisions for joint legal custody—or "shared decision-making authority"—and joint physical custody—or shared time with the children.

The section dealing with visitation should permit parents to choose between a clause granting the noncustodial parent "reasonable and flexible" visitation rights and a clause setting forth the noncustodial parent's visitation rights in detail. The former clause typically will contain no visitation schedule. It will state only that the noncustodial parent may visit the child at any time that is agreeable to both parents. The latter clause is much more specific. For example, it might entitle the noncustodial parent to visitation every other weekend, during four weeks each summer, and on every other Christmas and

¹³Under the Garn-St. Germain Depository Institutions Act of 1982, a transfer of encumbered real property is exempt from the terms of a "due on sale" clause if the property contains fewer than five dwelling units and the borrower's spouse becomes an owner of the property. See 12 U.S.C. § 1701j-3(d)(6) (1988).

¹⁴That the parties set a termination date for spousal support payments is particularly important. Unless otherwise specified, alimony is taxable to the recipient and deductible for the payor. I.R.C. §§ 71, 215 (1988). For the payor to receive this tax treatment, however, alimony payments must end no later than the recipient's death. Temp. Treasury Reg. § 1.71-1T, Q-10 (1984). Most separation agreements terminate spousal support payments at the earliest of the following dates: the death of the recipient; the death of the payor; or the remarriage of the recipient. The questionnaire should include these options.

¹⁵Absent an allocation of child support between children, a parent may not reduce or modify his or her child support payments unilaterally when a child turns 18 or otherwise no longer is entitled to support. *Craig v. Craig*, 406 S.E.2d 656 (N.C. Ct. App. 1991); *Brower v. Brower*, 331 S.E.2d 170 (N.C. Ct. App. 1985); *Gates v. Gates*, 317 S.E.2d 402 (N.C. Ct. App. 1984). See generally Mark E. Sullivan, *Child Support: Shopping for Options*, ARMY LAW., July 1992, at 4, 6 (discussing issues relating to allocation of child support).

¹⁶Although a court generally cannot order a parent to support a child after the child attains majority, a contractual provision for postmajority support can be enforced between the parties, see *White v. Bowers*, 400 S.E.2d 760 (N.C. Ct. App. 1991), or even by a child in his or her capacity as a third-party beneficiary, see *Shaffner v. Shaffner*, 244 S.E.2d 444 (N.C. Ct. App. 1978).

¹⁷In the absence of an agreement to the contrary, the parent who has physical custody of a child for more than half of the year may claim the exemption for that child. I.R.C. § 152(e) (Maxwell McMillian 1991).

¹⁸See Sheila F.G. Schwartz, *Toward a Presumption of Joint Custody*, 18 FAM. L.Q. 225 (1984).

spring vacation. A questionnaire should leave plenty of space for the parties to describe long-distance visitation arrangements if one of the parties someday may have to move pursuant to military orders.

General Rules for Questionnaires

No single format is best for a separation agreement questionnaire. The following basic rules, however, should govern the preparation of this practice aid.

Try to cover all the options. Leave nothing unstated. For example, a good questionnaire will encourage the parties to agree upon a specific amount for alimony or to waive all alimony finally and absolutely.

Structure the questions to eliminate any "middle ground" that might confuse the parties. A question that provides the parties with alternatives should be phrased clearly, specifically outlining the parties' valid options. A proposed property division clause, for example, might read, "We have no joint property and all of our individual property will be divided as follows" The alternative clause that follows it might aver, "We have the following joint property and individual property, and it will be divided as follows" Try to structure the questions into *either-or* options—this will compel the parties to make clear choices.

A questionnaire briefly should explain why a clause is needed or a decision is important. For example, a questionnaire could describe how the dependency exemption may be transferred from one parent to the other, then indicate the outcome if the parties decline to make this transfer. Similarly, it could explain why the parties should decide how they will divide a child's college expenses, stating the consequences that might result if this decision is not made.¹⁹

¹⁹ A college-expense clause in a questionnaire could state,

College is not a luxury today—it is, in many cases, a necessity for a child. No court in [this state] can force you, without your consent, to provide, or assist in providing, a college education for a child of yours, but you may agree in a separation agreement to help with college expenses for a child. If you cannot reach an agreement, please answer the following for the *noncustodial* parent . . .

A questionnaire should encourage the parties to be realistic in their promises. Accordingly, in drafting a questionnaire, you should eschew options that would encourage extreme, unrealistic, or illegal choices. For example, a questionnaire should not mention clauses that absolutely deny visitation rights or permanently waive child support because these clauses probably would be unenforceable if incorporated into a separation agreement.

When you draft the questionnaire, use basic English, not arcane legalese. When you must use a difficult word, ensure that it is understood by accompanying it with synonyms or following it with a definition in parentheses. Emphasize clarity. Although a lawyer might think in terms of "equitable distribution," his or her clients more likely will understand the term "property division." Similarly, a lawyer can help a client to appreciate a discussion of "maintenance" or "alimony," by defining these terms as "support payments for a husband or wife."

Completing a separation agreement questionnaire makes the parties think seriously about issues upon which they must agree if they are to avoid litigation. It also requires them to confer on arrangements upon which they will have to agree in the future, such as custody, visitation, payment of debts, and support.

References and Resources

Two items that LAAs may find helpful in setting up a family law program are a model separation agreement questionnaire and the text and visual aids of a thirty-minute presentation on separation and divorce. Both are available from the XVIII Airborne Corps Legal Assistance Office, Fort Bragg, North Carolina 28307-5000.

USALSA REPORT

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Note

Specific Intent for a Specific Offense

In *United States v. DeAlva*,¹ the Army Court of Military Review set aside the appellant's conviction for burglary with

intent to commit murder because the military judge had instructed the appellant's court-martial erroneously on a separate offense of attempted murder. Specifically, the Army court held that burglary with intent to commit murder requires a showing that the accused had the specific intent to kill.² It found that the military judge's earlier, erroneous instruction

¹ 34 M.J. 1256 (A.C.M.R. 1992).

² See id. at 1258.

on the attempted murder offense may have tainted the findings on the offense of burglary with intent to commit murder.

Staff Sergeant Raul DeAlva was charged with attempted murder, two specifications of assault, burglary with intent to commit murder, and disorderly conduct.³ A panel of officers and enlisted members ultimately acquitted DeAlva of all but the burglary and disorderly conduct offenses.

During his instructions to the members on the attempted murder offense, the military judge incorrectly stated,

Proof that the offense of murder actually occurred, or was completed by the accused, is not required. However, it must be proved beyond a reasonable doubt that at the time of the act the accused intended every element of the offense of murder.

....
... And that at the time of the killing the accused would have had the intent to kill or inflict great bodily harm upon the victim.⁴

Later, while instructing on the elements of burglary with intent to commit murder, the military judge stated,

Third, [the Government must show] that the breaking and entering were done with the intent to commit the offense of murder. And before I go on and explain to you some of the terms applicable to this specification, would you desire that I go over the elements which constitute the offense of murder, or are you satisfied that you remember those elements?⁵

The members declined a second instruction on the elements of murder.⁶

Noting that attempted murder requires a specific intent to kill, the Army court stated that the intent to inflict great bodily harm is not sufficient to establish the offense of attempted murder.⁷ It then remarked that, although the court-martial acquitted DeAlva of attempted murder, the military judge incorporated into his instruction on the burglary charge the erroneous advice that the required intent for attempted murder

could include an intent to inflict great bodily harm. The court reasoned that the instructional error also applied to the burglary charge because one element of the burglary charge—the intent to commit murder—also required the showing of a specific intent to kill.⁸

Despite the trial defense counsel's concurrence with the military judge's instruction, the court held that the erroneous instruction created an appreciable risk that any findings of guilty were tainted. Because a military judge has a sua sponte duty to instruct the members fully and accurately on the elements of an offense, the judge's erroneous instruction amounted to "plain error" and required corrective action.⁹

Instructional omissions and mistakes that are substantive and prejudicial frequently will demand appellate relief if they meet the "plain error" standard. Defense counsel especially should be aware of the specific intent burden the Government bears when it prosecutes offenses charged under Uniform Code of Military Justice article 80. They also should ensure that military judges accurately instruct the members of courts-martial, who otherwise may believe that an attempt charge requires less proof than the underlying substantive charge. Captain Royer.

Clerk of Court Notes

Court-Martial Processing Times

The table below shows the Army-wide average processing times for general courts-martial and bad-conduct discharge (BCD) special courts-martial for the third quarter of fiscal year (FY) 1992. Averages for FY 1991 and the first and second quarters of FY 1992 are shown for comparison.

General Courts-Martial

	FY 1991	FY 1992 1st Qtr	FY 1992 2nd Qtr	FY 1992 3rd Qtr
Records received by Clerk of Court	1114	266	312	308
Days from charging or restraint to sentence	46	52	49	55

³See UCMJ arts. 80, 128, 129, 134 (1988).

⁴DeAlva, 34 M.J. at 1258.

⁵Id. at 1257.

⁶See id.

⁷Id. at 1258 (citing United States v. Roa, 12 M.J. 210 (C.M.A. 1982)).

⁸Id.

⁹Id. (citing United States v. Mance, 26 M.J. 244 (C.M.A.), cert. denied, 488 U.S. 942 (1988); United States v. Taylor, 26 M.J. 127 (C.M.A. 1988)).

General Courts-Martial (Con't)

	FY 1991	1st Qtr	2nd Qtr	3rd Qtr
Days from sentence to action	62	75	78	69
Days from action to dispatch	7	8	10	7
Days from dispatch to receipt by the Clerk	10	10	11	11

BCD Special Courts-Martial

	FY 1991	1st Qtr	2nd Qtr	3rd Qtr
Records received by Clerk of Court	350	78	80	95
Days from charging or restraint to sentence	33	46	41	36
Days from sentence to action	53	63	60	59
Days from action to dispatch	6	6	6	5
Days from dispatch to receipt by the Clerk	9	9	9	8

¹⁰These figures are based on average Army personnel strength of 671,271. The figures in parentheses are the annualized rates per thousand.

Court-Martial and Nonjudicial Punishment Rates

Rates per Thousand¹⁰

Second Quarter, Fiscal Year 1992
January-March 1992

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	0.45 (1.79)	0.42 (1.68)	0.54 (2.18)	0.65 (2.60)	0.87 (3.50)
BCDSPCM	0.24 (0.95)	0.22 (0.87)	0.32 (1.26)	0.27 (1.07)	1.05 (4.20)
SPCM	0.04 (0.15)	0.04 (0.15)	0.04 (0.17)	0.02 (0.08)	0.17 (0.70)
SCM	0.25 (0.98)	0.24 (0.95)	0.24 (0.97)	0.42 (1.68)	0.70 (2.80)
NJP	19.06 (76.23)	19.80 (79.19)	19.22 (76.89)	22.61 (90.45)	36.91 (147.65)

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Court of Military Appeals Holds that Defense Counsel May Be Forced to Testify Against Her Client

The Court of Military Appeals recently addressed the scope of the attorney-client privilege in *United States v. Smith*.¹ In doing so, the court established a test that the Government must satisfy before a military judge may compel a defense counsel to testify against his or her client. The court also reviewed the

law governing an attorney's request to withdraw from representation.

Rufus Smith, a former airman, has developed considerable familiarity with the military justice system. He first was convicted by a general court-martial in February 1988. His sentence included a bad-conduct discharge and confinement. After the Air Force executed his discharge on 27 December 1988,² Smith became "a [person] in custody of the armed forces."³

Smith was confined in a series of military jails. By January 1989, he had arrived at a confinement facility at Lowry Air

¹35 M.J. 138 (C.M.A. 1992).

²*Id.* at 139.

³See UCMJ art. 2(a) (7) (granting court-martial jurisdiction over a discharged military prisoner serving a sentence imposed by a court-martial).

Force Base, Colorado. There, Smith was enrolled in an enhanced minimum security custody program. Under this program, Smith lived in a dormitory, rather than a cell-block, and worked at a security police equipment warehouse.⁴

Confinement officials conducted a routine inspection of Smith's dormitory room in May 1989. There, they discovered a number of items of new military equipment and several security police badges.⁵ Smith soon faced a second general court-martial—this time for stealing military property.

On the morning that Smith's trial was to begin, Captain P, Smith's detailed defense counsel, gave the trial counsel, Captain H, a prison inventory form. The document purported to list personal property Smith had possessed during his confinement in England, many months before. The inventory included many items similar to those that Smith was charged with stealing. Captain P intended to introduce the form at trial.⁶ Captain H asked the defense counsel where she had obtained the inventory. Captain P replied that Smith had given her the form and had told her that it was prepared by a Sergeant Patterson at the confinement facility in England.⁷

Captain H suspected a hoax. He obtained a continuance and confirmed that Sergeant Patterson had not prepared the inventory. The Government then preferred an additional charge of obstruction of justice⁸ against the hapless Smith.⁹

When trial resumed some weeks later, Smith was represented by Captain R, an individually requested counsel, as well as Captain P. The defense moved *in limine* to prevent

the Government from calling Captain P as a witness on the obstruction charge. The defense asserted that forcing Captain P to testify about the false inventory would violate not only the attorney-client privilege,¹⁰ but also P's ethical obligations. The military judge denied the motion.¹¹

Captain P requested permission to withdraw as counsel after the judge's ruling. She maintained that she simultaneously could not represent Smith zealously and testify against him. Captain P also asserted that her state bar rules mandated that she withdraw.¹² Finding good cause to terminate the attorney-client relationship, the military judge granted Captain P's request in accordance with Rule for Courts-Martial 506(c).¹³

The court-martial convicted Smith for stealing military property and for obstruction of justice. It sentenced him to confinement for an additional three years.¹⁴ The Air Force Court of Military Review affirmed the findings and the sentence.¹⁵

Appearing before the Court of Military Appeals, Smith maintained that the military judge had erred in forcing Captain P to testify against him. He claimed, in essence, that this error improperly severed Smith's attorney-client relationship with P. Judge Gierke, writing for a unanimous court, found that the judge had acted properly.¹⁶

The court broke the issue into three questions. First, did the attorney-client privilege bar Captain P's testimony about the source and authenticity of the inventory? Second, was P's

⁴Smith, 35 M.J. at 139.

⁵United States v. Smith, 33 M.J. 527, 529 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992). The court observed that the inspectors "doubted that Smith, as a prisoner, was entitled to have these items." *See id.*

⁶Smith, 35 M.J. at 139.

⁷*Id.*

⁸UCMJ art. 134.

⁹Smith, 35 M.J. at 140.

¹⁰MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 502 (1984) [hereinafter MCM].

¹¹Smith, 35 M.J. at 140.

¹²Captain P relied on a state rule that is identical to rule 3.7(a) of the Army Rules of Professional Conduct for Lawyers. *See* DEP'T OF ARMY, REG. 27-26, ARMY RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 3.7(a) (1 May 1992) [hereinafter AR 27-26]. Rule 3.7(a) provides,

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and quality of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client.

¹³Smith, 35 M.J. at 140; *see also* MCM, *supra* note 10, R.C.M. 506(c) ("defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown").

¹⁴Smith, 35 M.J. at 139.

¹⁵United States v. Smith, 33 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992).

¹⁶Smith, 35 M.J. at 139.

testimony sufficiently relevant and necessary to justify an order compelling her to testify against her client? Finally, did the trial judge correctly excuse P?¹⁷

Citing Military Rule of Evidence (MRE) 502(a),¹⁸ the court held that a client may exercise an evidentiary privilege to prevent his or her attorney from disclosing a confidential communication from the client to the attorney if this communication was made to facilitate the client's representation. The court, however, noted that exceptions to this general rule of privilege exist. Citing *United States v. Lawrins*,¹⁹ it remarked that the privilege "does not apply to 'communications . . . which further a crime or fraud.'" The court also relied on *United States v. Marrelli*,²⁰ a 1954 decision in which it had ruled that the attorney-client privilege does not protect confidences relating to a future crime. Finding that Smith had attempted to obstruct justice by delivering the false inventory to Captain P and telling her that it was authentic, the court ruled that these acts fell within the "crime or fraud" exception to the privilege.²¹

Curiously, the court did not rely directly on MRE 502, which contains its own express crime and fraud exception to the attorney-client privilege.²² The court, however, did rely on MRE 502 in finding another justification for Captain P's testimony. Noting that the attorney-client privilege protects only "confidential communications," the court emphasized that "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for

the transmission of the communication."²³ The court observed that, when Smith gave the document to Captain P, he had expected her to disclose the form—and his statements about it—to the Government, and to use the form and his statements as evidence at trial.²⁴ Accordingly, Smith's communication was not confidential and therefore was not protected.²⁵

The court next addressed the relevance and necessity of Captain P's testimony. The court readily recognized that her testimony was relevant to the obstruction of justice charge. As Judge Gierke remarked, "the source of the false document . . . proved that [Smith had] represented the document as genuine, and proved that [he had] intended the document to be used as evidence at his court-martial."²⁶

The court acknowledged that the issue of necessity was "more complex."²⁷ Judge Gierke remarked on the court's "extremely protective [attitude toward] the relationship between an accused and his [or her] detailed counsel."²⁸ He then adopted a rule extracted from a number of civilian cases, requiring the Government to show "that . . . no other reasonably available source for the evidence" exists before a defense counsel may be compelled to testify and thereby jeopardize the attorney-client relationship.²⁹

Smith argued that the Government could have relied on another source for the evidence. Specifically, he maintained that the Government could have established the facts through the testimony of Captain H, who was replaced as trial counsel before Smith's case went to trial. Smith asserted that Captain P's remarks to Captain H were admissible "nonhearsay" under

¹⁷ *Id.* at 140.

¹⁸ MCM, *supra* note 10, MIL. R. EVID. 502(a). Rule 502(a) provides,

A client has a privilege to refuse to disclose or to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

¹⁹ 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

²⁰ 15 C.M.R. 276, 281-82 (C.M.A. 1954).

²¹ *Smith*, 35 M.J. at 141.

²² MCM, *supra* note 10, MIL. R. EVID. 502(d)(1). A client has no right to claim the attorney-client privilege if his or her "communication clearly contemplated the future commission of a fraud or crime or if the [client sought or obtained the lawyer's] services to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." *Id.*

²³ *Id.* MIL. R. EVID. 502(b)(4).

²⁴ *Smith*, 35 M.J. at 141.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (citing *United States v. Hanson*, 24 M.J. 377, 379 (C.M.A. 1987)).

²⁹ *Id.* (citations omitted).

MRE 801(d)(2)(D).³⁰ The court responded that, even if Smith's evidentiary theory were correct, it would not have resolved the matter. Smith denied his guilt. To maintain his plea, he had to assail the credibility of the evidence against him. Captain P remained the ultimate source of that evidence, regardless of the guise in which it was offered. Accordingly, Smith had to "attack [Captain P's] credibility [or] deny that she made the statement to Captain H."³¹ If Smith attacked Captain H instead of Captain P, the Government would have called Captain P as a rebuttal witness. Either way, Smith would have been left in the incongruous position of being represented by an attorney he had to portray as unbelievable. The court concluded that "no 'reasonable' alternatives to Captain [P's] testimony [existed] because none of the alternatives would have solved the problem."³² The court determined that the military judge properly compelled Captain P to testify.³³

The final issue the court addressed was whether the military judge had good cause to grant Captain P's request to withdraw.³⁴ The court indicated that testimony from counsel automatically does not warrant severance of the attorney-

client relationship.³⁵ Quoting from Judge Cox's concurring opinion in *United States v. Baca*,³⁶ Judge Gierke wrote, "It is only when the lawyer's own credibility must be put in issue as a witness before the finders of fact that we run afoul."³⁷ At Smith's trial, Captain P's credibility actually was in issue because her testimony "went to the heart of the matter of the prosecution."³⁸ The court found good cause for Captain P's excusal, noting that, in any event, her excusal had not left Smith without counsel because Captain R had remained on the case.³⁹

Judge advocates should find *Smith* instructive for a number of reasons. First, *Smith* emphasizes that the evidentiary attorney-client privilege is narrower than the ethical rule of confidentiality.⁴⁰ Arguably, the ethical rule would have prevented Captain P from testifying about Smith's delivery of the false inventory form and his remarks about it. Both matters related to Smith's legal representation.⁴¹ Neither fell within the categories of future crimes that Army Rule of Professional Responsibility 1.6 requires attorneys to disclose.⁴² The Government might have argued convincingly that Smith consented to disclosure under the ethical rule;⁴³ however, the

³⁰ MCM, *supra* note 10, MIL. R. EVID. 801(d)(2)(D) (statement by a party's agent).

³¹ *Smith*, 35 M.J. at 142.

³² *Id.*

³³ *Id.*

³⁴ See MCM, *supra* note 10, R.C.M. 506(c).

³⁵ *Smith*, 35 M.J. at 142 (citing *United States v. Baca*, 27 M.J. 110, 118-19 (C.M.A. 1988); *United States v. Babat*, 18 M.J. 316, 325 (C.M.A. 1984)).

³⁶ 27 M.J. at 120.

³⁷ *Smith*, 35 M.J. at 142.

³⁸ *Id.*

³⁹ *Id.*; see also AR 27-26, *supra* note 12, rule 3.7(a)(3).

⁴⁰ AR 27-26, *supra* note 12, rule 1.6. Rule 1.6 provides,

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

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft or weapons system.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.

(d) An Army lawyer may reveal such information when required or authorized to do so by law.

For a general exposition of the distinctions between the rules, see Gary J. Holland, *Confidentiality: The Evidentiary Rule Versus the Ethical Rule*, ARMY LAW., May 1990, at 17.

⁴¹ AR 27-26, *supra* note 12, rule 1.6(a).

⁴² *Id.* rule 1.6(b).

⁴³ See *Smith*, 35 M.J. at 141.

scope of the ethical rule ultimately had no bearing on the court's decision. *Smith* plainly demonstrates that the attorney-client privilege will not protect an accused from disclosure of frauds or future crimes. An unscrupulous client who plies counsel with lies straddles the proverbial petard, brazenly holding a flame to the fuse.

Government counsel, however, should not consider defense attorneys as fertile new sources of evidence. *Smith* imposes a rule of necessity. The Government will not be able to compel testimony from opposing counsel, absent a showing that no reasonable alternative to this testimony can be found.

Finally, *Smith* reiterates the rule that testimony from counsel not always will mandate termination of the attorney-client relationship. Testimony about uncontested issues or collateral matters ordinarily will not constitute good cause to excuse a defense attorney.⁴⁴ On the other hand, if a lawyer must testify about a central issue, he or she can and should seek to withdraw from representation. Major Jacobson.

"Inevitable Discovery" After *United States v. Allen*

In *Nix v. Williams*,⁴⁵ the United States Supreme Court approved "inevitable discovery" as an exception to the exclusionary rule.⁴⁶ The Military Rules of Evidence were amended in 1986 to permit trial courts to admit evidence on this basis.⁴⁷ Over the next five years, however, no Court of Military Appeals decision directly addressed the doctrine of inevitable discovery in light of *Nix* or the Military Rules of Evidence.⁴⁸ In *United States v. Allen*,⁴⁹ however, the court recently decided a case solely on the basis of inevitable discovery. *Allen* is important for several reasons. First, it is a true "opinion of the court" because all five judges agreed in one opinion written by Judge Wiss. This result shows that the inevitable discovery exception to the exclusionary rule is grounded firmly in military law. Second, *Allen* reveals that the Court of

Military Appeals takes an expansive view of how inevitable discovery acts to admit evidence that otherwise would be excluded by the exclusionary rule.

Seaman Calvin A. Allen was convicted of beating and sexually assaulting a female sailor. Naval Investigative Service (NIS) agents investigating the assault quickly summed up that the male perpetrator had used an adding machine to strike the victim on the head. After finding "bloody latent finger and palm prints" on the machine, the agents also calculated that the perpetrator had cut himself at the crime scene. Except for these finger and palm prints, investigators had only a general description of the attacker. The victim described him as "a black man, 5'11", 200 pounds with a slightly protruding stomach, short hair, and no glasses or facial hair."⁵⁰ Consequently, the NIS "decided to identify, interview, fingerprint and photograph all men fitting [that] description."⁵¹

Three days after the attack, the victim told an NIS agent that she had heard about a sailor called "Weird Al" who resembled the assailant and who "had . . . been involved in a similar assault."⁵² The NIS contacted the ship to which "Weird Al" was assigned and eventually interviewed, photographed, and fingerprinted him. The victim subsequently identified this sailor as the man who had attacked her. He was Calvin Allen, the accused.

At trial, Allen's defense counsel argued that NIS agents seized Allen unlawfully when they first contacted him aboard his ship, averring that this seizure was unlawful because it lacked probable cause. Consequently, the defense argued that all evidence obtained as a result of that unlawful apprehension must be suppressed as tainted.

The Navy-Marine Corps Court of Military Review refused to decide whether an illegal seizure had occurred.⁵³ It held that this issue was unimportant because the NIS inevitably would have discovered the accused's finger and palm prints.⁵⁴

⁴⁴*Id.* at 142; see also AR 27-26, *supra* note 12, rule 3.7(a)(1) to (2).

⁴⁵467 U.S. 431 (1984).

⁴⁶See *id.* at 444.

⁴⁷See MCM, *supra* note 10, MIL. R. EVID. 311 analysis, app. 22, at A22-16 (C2 15 May 1986).

⁴⁸Chief Judge Sullivan referred to the inevitable discovery doctrine in several separate opinions. These opinions, however, did not reflect the majority view. See, e.g., *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987) (Sullivan, J., concurring in the result). The courts of military review have been less hesitant than the Court of Military Appeals to discuss the doctrine. See, e.g., *United States v. Chick*, 30 M.J. 658 (A.F.C.M.R.), *petition for review denied*, 31 M.J. 436 (C.M.A. 1990).

⁴⁹34 M.J. 228 (C.M.A. 1992).

⁵⁰*Id.* at 229.

⁵¹*Id.*

⁵²*Id.*

⁵³*United States v. Allen*, CM 894043 (7 Feb. 1991), *aff'd*, 34 M.J. 228 (C.M.A. 1992); see *Allen*, 34 M.J. at 231.

⁵⁴See *Allen*, 34 M.J. at 231.

Judge Wiss, writing for a unanimous court, agreed. Did an illegal seizure occur? Did Allen consent? Was any taint from an illegal seizure attenuated? Judge Wiss concluded that all these inquiries were irrelevant. "[W]e need not answer these questions because, in any event, evidence of appellant's fingerprints and palm print would have been inevitably discovered."⁵⁵

The court apparently predicated *Allen* on the following factors:

- Allen involved a "high profile" investigation;
- The victim herself "felt" the NIS needed to investigate the accused;
- The accused fit the general description of the assailant, and the NIS fingerprinted everyone who met that description.

From these factors flowed the inescapable conclusion that the NIS inevitably would have questioned the accused and inevitably would have obtained his finger and palm prints. In reaching this decision, the Court of Military Appeals expressly adopted the justifications the Government and the Navy-Marine Corps court had advanced for applying inevitable discovery.

Significantly, *Allen* shows that inevitable discovery should be applied expansively to search and seizure questions. Judge Wiss quoted with approval a passage from *Nix* in which the Supreme Court observed, "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct."⁵⁶

Allen implies that police misconduct during a search or seizure is irrelevant when a court considers the Government's claim of inevitable discovery. The issue actually is whether the Government would have obtained a conviction in the absence of this misconduct. If so, the inevitable discovery exception applies.⁵⁷

Allen has several shortcomings. First, the opinion contains virtually no analysis of *how* and *why* the court decided that the

NIS inevitably would have discovered Allen's finger and palm prints. After reciting the facts at length, Judge Wiss simply wrote that, in deciding to apply "the principle and the rationale of the inevitable-discovery rule to the facts of this case," the Court of Military Appeals "agree[d] with [the] government[']s reasoning."⁵⁸ The analytical steps the court used to reach this conclusion are absent, leaving practitioners with no test or rule for determining the applicability of inevitable discovery. That this test would have been helpful is readily apparent. For example, a fair reading of *Allen* suggests that illegally seized primary or derivative evidence in a "high profile" case may qualify more easily for the inevitable discovery exception than evidence seized in a less urgent or visible investigation. Suppose that an investigator's supervisor tells her to "leave no stone unturned" in solving a case. Accordingly, she decides to interview and fingerprint all 5000 soldiers on an installation. Is any illegal seizure the investigator commits while searching for the perpetrator irrelevant if the perpetrator actually is assigned to the installation and inevitably would have been fingerprinted and identified through the installation personnel roster?

In *Allen*, the Court of Military Appeals apparently found that, once the victim identified a sailor named "Weird Al" as a strong suspect, the NIS's decision to take his fingerprints was inescapable. From this finding, could one argue that, whenever a victim identifies a suspect, law enforcement agents inevitably will investigate that suspect? Does *Allen* recognize that the inevitable discovery exception will not excuse an illegal search or seizure unless, when the search or seizure occurred, the police possessed, or were in active pursuit of,⁵⁹ evidence or leads that inevitably would have led to the lawful discovery of the evidence? Should it recognize this requirement? If the inevitable discovery doctrine contains no "active pursuit" requirement, what are the limits on its applicability?

Finally, *Allen* fails to mention MRE 311(b)(2)⁶⁰ and its relevance to inevitable discovery determinations. This evidentiary rule provides, "Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made."⁶¹ Considering that this language was added to MRE 311 in 1986 to reflect the Supreme Court's decision in *Nix v. Williams*,⁶² the court's failure to identify the nexus—if any nexus existed—between *Allen* and

⁵⁵*Id.*

⁵⁶*See id.* (quoting *Nix v. Williams*, 467 U.S. 431, 443 n.4 (1984)).

⁵⁷The apparent breadth of the Court of Military Appeals's analysis in *Allen* is important because lower courts have tended to view inevitable discovery quite narrowly. In *United States v. Chick*, 30 M.J. 658 (A.F.C.M.R. 1990), for example, the Air Force Court of Military Review declined to apply the inevitable discovery doctrine, opining that the doctrine could "blow the exclusionary rule to smithereens." In highlighting the policy behind the inevitable discovery doctrine, the Court of Military Appeals has signaled that it will not follow the conservative approach reflected in cases like *Chick*.

⁵⁸*Allen*, 34 M.J. at 231.

⁵⁹*See, e.g.*, MCM, *supra* note 10, Mil. R. Evid. 311(b) analysis, app. 22, at A22-16 (C2 15 May 1986); *see also* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

⁶⁰MCM, *supra* note 10, Mil. R. Evid. 311(b)(2) (C2 15 May 1986).

⁶¹*Id.*

⁶²*See id.* Mil. R. Evid. 311(b) analysis, app. 22, at A22-16 (C2 15 May 1986).

the Military Rules of Evidence is surprising. Practitioners need guidance from the court on the interpretation of MRE 311(b)(2). For example, the drafters avoided the word "inevitable" when they amended MRE 311(b)(2). Does this choice of language imply an even broader exception to the exclusionary rule than the inevitable discovery exception discussed in *Allen*—or is it of no consequence?

Allen provides judge advocates with important guidance. Unfortunately, it also leaves many questions for future development of the inevitable discovery doctrine in military criminal law. Major Borch.

Army Court of Military Review Finds Clear and Convincing Evidence in Rule 313(b) Inspection

A recent TJAGSA Practice Note⁶³ discussed how the "clear and convincing" evidence standard of MRE 313⁶⁴ might be satisfied in an administrative inspection. This note stated that only the Air Force Court of Military Review had held expressly that the Government can meet this enhanced burden of proof when an inspection triggers the subterfuge rule. In *United States v. Campbell*,⁶⁵ the Army Court of Military Review recently joined the Air Force court in upholding as lawful an inspection that triggered the subterfuge provisions of MRE 313(b).

Campbell is an important case for Army criminal lawyers. Like the Air Force court's decision in *United States v. Alexander*,⁶⁶ it points the way for counsel arguing the lawfulness of an inspection under the "clear and convincing" evidence standard.

Military Rule of Evidence 313 governs the admissibility of evidence obtained in an inspection. To introduce contraband under this rule, a trial counsel normally must show by a preponderance of the evidence that the inspection was lawful.

⁶³TJAGSA Practice Note, *Can the Government Ever Satisfy the Clear and Convincing Evidence Standard Under Military Rule of Evidence 313(b)?*, ARMY LAW., June 1992, at 33.

⁶⁴MCM, *supra* note 10, MIL. R. EVID. 313(b).

⁶⁵CM 9102318 (A.C.M.R. 30 Sept. 1992).

⁶⁶MCM, *supra* note 10, MIL. R. EVID. 313(b).

⁶⁷See, e.g., *United States v. Parker*, 27 M.J. 522, 528 (A.F.C.M.R. 1988) ("This case illustrates that [MRE 313(b)] contains a triggering mechanism which imposes a burden of proof on the government that can be difficult to overcome") (emphasis added).

⁶⁸See, e.g., *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989), reversing 21 M.J. 909 (N.M.C.M.R. 1986); *United States v. Parker*, 27 M.J. 522 (A.F.C.M.R. 1988).

⁶⁹32 M.J. 664 (A.F.C.M.R. 1991), *aff'd on other grounds*, 34 M.J. 121 (C.M.A. 1992).

⁷⁰For a discussion of the Air Force court's decision in *Alexander*, see TJAGSA Practice Note, *supra* note 63, at 33.

⁷¹See *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992).

⁷²*Campbell*, CM 9102318, slip op. at 1 (A.C.M.R. 30 Sept. 1992).

⁷³*Id.*

⁷⁴*Id.* slip op. at 1-2.

preponderance of the evidence that the inspection had an administrative purpose. Military Rule of Evidence 313(b), however, provides that the Government must present clear and convincing evidence to prove that an inspection's purpose was administrative if "a purpose" of an inspection was "to locate weapons or contraband" and the defense shows that the inspection: (1) was directed immediately after the report of a crime and was not previously scheduled; (2) targeted specific persons for inspection; or (3) subjected the persons being examined to intrusions that were "substantially different" from intrusions that other persons experienced during the inspection.⁶⁶

Given this enhanced burden of proof, most practitioners have concluded that evidence generally is inadmissible if it is seized during an inspection that triggered the subterfuge rule.⁶⁷ Reported appellate decisions uniformly supported this view⁶⁸ until the Air Force Court of Military Review decided *Alexander*.⁶⁹ In *Alexander*, the court concluded that, although a commander's inspection had triggered the subterfuge rule, the evidence showed clearly and convincingly that the purpose for that inspection was administrative. Consequently, it held that evidence seized during that inspection was admissible.⁷⁰ The Court of Military Appeals later declined to address the legality of the administrative inspection, choosing to affirm *Alexander* on other grounds.⁷¹

In *United States v. Campbell*, the Army Court of Military Review joined the Air Force Court of Military Review when it decided that a urinalysis inspection that triggered the subterfuge rule was lawful. *Campbell* had provided a urine specimen as part of a "command-directed urinalysis."⁷² The company commander ordered the urinalysis "based on information" obtained by the company first sergeant.⁷³ The first sergeant had "heard rumors of drug use in the barracks" from a noncommissioned officer who was "leaving the Army" and who was "considered trustworthy."⁷⁴ This trustworthy source had emphasized that members of two of the company's

platoons were using illegal drugs in the company barracks. "[C]oncerned that this possible drug use would destroy the morale and discipline in the unit," the first sergeant identified by name the soldiers he saw "interacting" between the two platoons.⁷⁵ The company commander then ordered a urinalysis for these soldiers. After Campbell's sample came back "positive" for cocaine use, he was court-martialed for this and other offenses.

At trial, Campbell moved to suppress the urinalysis as an illegal search. He argued that this test was not a valid inspection and that, in any event, the subterfuge provisions of MRE 313(b) applied to the test. The trial judge agreed that the inspection was lawful—and the urinalysis results admissible—only if the Government could show by clear and convincing evidence that the purpose for the inspection was administrative.

After hearing the Government's evidence, the trial judge ruled that the United States had met this enhanced burden. In particular, the trial judge found that the commander's "sole basis . . . for directing that a health and welfare inspection urinalysis be conducted was to ensure the unit was free of illegal contraband and to ensure that the unit was prepared to perform its mission."⁷⁶ The judge based this factual decision, at least in part, on the first sergeant's testimony that "his concern at the time of the urinalysis was the 'health and welfare of the soldiers . . . in the unit.'"⁷⁷

On appeal, the Army Court of Military Review used its fact-finding authority⁷⁸ to uphold the trial judge's ruling. After considering the requirements of MRE 313(b), the court concluded that the trial judge "correctly found that the [G]overnment [had] established by clear and convincing evidence that the urinalysis was an inspection and not a subterfuge for a search."⁷⁹

In *Campbell*, the Army court signaled that trial counsel can meet MRE 313(b)'s enhanced burden of proof. Moreover, the per curiam opinion by Judges Crean, Werner, and Gonzales revealed no disagreement among the judges over the sufficiency of the facts to meet the clear and convincing evidence standard in the instant case. Consequently, a fair reading of *Campbell* indicates that some urinalysis inspections ordered after rumors or reports of illegal drug use are lawful.

Campbell is an unpublished memorandum opinion. Nevertheless, it also is a decision with precedential value.⁸⁰ Consequently, trial and defense counsel may rely on *Campbell* in litigating MRE 313(b) issues involving the subterfuge rule. Major Borch.

Court of Military Appeals Defines "Firearm" for Purposes of UCMJ Article 122⁸¹

The *Manual for Courts-Martial* provides that robbery ordinarily is punishable by confinement for up to ten years.⁸² If the perpetrator uses a firearm to commit the robbery, however, the offense is punishable by confinement for as long as fifteen years.⁸³ The meaning of the term "firearm" in this sentence-enhancement provision was the subject of a recent Court of Military Appeals decision.⁸⁴

In *United States v. Henry*,⁸⁴ the accused, a Marine Corps corporal, pleaded guilty to committing robbery with a firearm. During the plea inquiry, he told the military judge that the firearm he had used "was inoperable" because it did not have "a locking lug."⁸⁵ He was convicted as charged. Henry later appealed this conviction. Appearing before the Court of Military Appeals, he argued that, because the firearm he had used was inoperable, his plea of guilty to committing robbery with a firearm was improvident.⁸⁶

⁷⁵*Id.* slip op. at 2.

⁷⁶*Id.* slip op. at 3.

⁷⁷*See id.* slip op. at 2-3.

⁷⁸Under UCMJ article 66, the military courts of review have "awesome, plenary, de novo power [to] review [facts]." *See United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984); *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985).

⁷⁹*Campbell* CM 9102318, slip op. at 3.

⁸⁰The *Rules of Practice and Procedure Before the Courts of Military Review* do not address the precedential value of published versus unpublished opinions. *See* 22 M.J. CXXVII (1985). Logically, published and unpublished opinions have equal precedential weight. Practically, however, the limited discussion in a particular memorandum opinion, and its absence from West's *Military Justice Reporter*, may prevent counsel from using it as precedent in arguments.

⁸¹UCMJ art. 122.

⁸²*See* MCM, *supra* note 10, pt. IV, § 47e(2).

⁸³*Id.* pt. IV, § 47e(1).

⁸⁴35 M.J. 136 (C.M.A. 1992).

⁸⁵*Id.* at 137.

⁸⁶*Id.*

The court rejected Henry's argument. Finding "that the enhanced punishment prescribed in the Manual for Courts-Martial . . . applie[d] . . . even though the firearm was not operable," it held that Henry "providently pleaded guilty to robbery 'committed with a firearm.'"⁸⁷ Explaining this decision, the court first pointed out that the *Manual for Courts-Martial* espouses the same definition of the term "firearm" that is found in the civilian federal criminal code and the federal sentencing guidelines.⁸⁸ This definition describes a firearm as "any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive."⁸⁹ The court then opined that Henry's weapon met the definition of a firearm because Henry easily could have converted the handgun to operable status simply by adding a locking lug.

This case offers another teaching point for counsel. The court noted that a firearm that is unloaded when a perpetrator uses it to commit a robbery also can justify a charge under the enhanced sentence provision of UCMJ article 122 because the perpetrator easily could convert the unloaded weapon to an operable firearm.⁹⁰ Major Hunter.

Contract Law Notes

Fiscal Law Update:

Funding of Contract Changes Policy Revised

The 1991 National Defense Authorization Act (NDAA)⁹¹ dramatically changed the rules governing the use of expired

appropriations. In this legislation, Congress imposed notice and approval requirements on executive agencies that propose to obligate expired funds for certain "contract changes."⁹² This note discusses rules for funding contract changes that existed before 1991, three Department of Defense (DOD) policy memoranda interpreting the NDAA, and the Department of the Army's regulatory implementation of this guidance.⁹³

Pre-1991 Funding of Contract Changes

Before June 1991, the DOD followed several decisions in which the Comptroller General held that, to pay for within-scope changes to a contract, a federal agency must use the funds it originally obligated on that contract.⁹⁴ These decisions are based upon the "relation-back" theory. This theory posits that an upward price adjustment is not a new liability. Rather, the adjustment "renders fixed and certain the amount of the [g]overnment's pre-existing liability to adjust the contract price."⁹⁵ Accordingly, a contract price adjustment is a bona fide need of the fiscal year in which the government obligated the appropriation and awarded the contract.⁹⁶

Typically, a preexisting liability will be created when the government includes the standard changes clause in a contract;⁹⁷ however, this liability also may be established by the incorporation into the contract of other clauses, such as the economic price-adjustment clauses,⁹⁸ the differing site conditions clause,⁹⁹ or the price redetermination clauses.¹⁰⁰ That an agency should fund a within-scope contract price adjustment with the appropriation the agency originally cited on the

⁸⁷*Id.*

⁸⁸See 18 U.S.C. § 232 (1988); UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.1, application note 1(e), at 12. ⁸⁹MCM, *supra* note 10, R.C.M. 103 (12).

⁹⁰Henry, 35 M.J. at 137.

⁹¹Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1485, 1676-81 (1990) (codified at 31 U.S.C.A. §§ 1551-1557 (1992)).

⁹²Department of the Army activities must comply with the following notice and approval requirements:

- If the period of availability for a fixed appropriation has ended, and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change, as defined in the statute, the head of the agency must approve all changes in excess of \$4 million.
- If the change exceeds \$25 million, the head of the agency must notify Congress of the intent to obligate the expired funds together with legal and policy justifications in support of the proposed obligation, and wait 30 days before incurring the obligation.

See 31 U.S.C.A. § 1553(c) (West Supp. 1992); DEP'T OF THE ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, para. 9-5g(3) (30 Apr. 1991) [hereinafter AR 37-1].

⁹³See generally AR 37-1, *supra* note 92, and DOD, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, para. 9-5g(3) (30 Apr. 1991).

⁹⁴See, e.g., Administrator, Small Business Admin., B-155876, Jan. 14, 1965, 44 Comp. Gen. 399.

⁹⁵*Id.* at 401; see also Environmental Protection Agency—Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶ 491.

⁹⁶Secretary of the Navy, B-41903, June 12, 1944, 23 Comp. Gen. 943.

⁹⁷GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.243-1 (Apr. 1, 1984) [hereinafter FAR].

⁹⁸See *id.* at 52.216-2 to .216-4.

⁹⁹*Id.* at 52.236-2.

¹⁰⁰*Id.* at 52.216-5 to .216-6.

contracts it sought to adjust was well established in the Comptroller General's decisional law,¹⁰¹ the DOD *Accounting Manual*,¹⁰² and the pertinent Army regulation.¹⁰³

Conversely, under the pre-1991 rules, changes in the scope of the contract—that is, changes that did not stem from any preexisting contractual liability—required the use of appropriations currently available for obligation when the government agreed to, or directed, the change. The rationale for this was simple—a change in scope was a new liability, unrelated to the original contractual obligations. Accordingly, it required funds that were currently available for obligation when the liability was created.¹⁰⁴ The Department of the Army and the DOD incorporated this position into their regulations before the publication of the first DOD memorandum.¹⁰⁵

The principles discussed above apply to fixed-price contracts. Slightly different rules apply to cost increases that are not based upon preexisting contractual requirements under cost-reimbursement contracts. The Comptroller General has ruled that, if an increase in cost requires no increase in the ceiling price of a contract, funds from the fiscal year cited in the original contract should be used.¹⁰⁶ If the change requires an increase in the ceiling price, the agency must obligate funds to cover the cost of the change from funds available for obligation in the fiscal year in which the contracting officer approved the change.¹⁰⁷

1991 DOD Comptroller Policy Memorandum

The NDAA and its implementing agency guidance define a contract change as “a change to a contract under which the

contractor is required to perform additional work.”¹⁰⁸ The statutory definition of the term “contract change” does not include adjustments to pay contract claims or price increases under an escalation clause.¹⁰⁹

The Comptroller of the Department of Defense (DOD Comptroller) issued the DOD's first policy memorandum on the NDAA on 13 June 1991. This memorandum significantly changed the DOD position on using expired funds for contract changes. These changes are discussed below. The first memorandum was “superseded” in part by a DOD Comptroller memorandum dated 20 April 1992. The latter memorandum returned the DOD policy to the status it had held before June 1991.

The first policy memorandum interpreted the NDAA's rules for closing accounts and using expired appropriations.¹¹⁰ Paragraph 4 of the memorandum established DOD policy on the use of expired funds for contract changes. In doing so, it expanded on the statutory definition of a contract change. Paragraph 4a of the memorandum “extended” the statutory definition of a contract change to “include changes in scope as well as any other change that results in *additional contractor billable costs*.”¹¹¹ Paragraph 4b required federal agencies to “charge [all contract changes as defined in paragraph 4a] to current accounts.”¹¹² As an exception to the general rule set forth in paragraph 4b, paragraph 4c permitted agencies to use appropriations that had expired, but were not yet cancelled, to fund obligation adjustments for incentive or award fees under cost reimbursement contracts, and contractually-required adjustments under economic price-adjustment clauses.¹¹³

¹⁰¹ E.g., *Recording Obligations Under EPA Cost-Plus-Fixed-Fee Contract*, B-195732, June 11, 1980, 59 Comp. Gen. 518; *Secretary of Commerce*, B-136383, June 27, 1958, 37 Comp. Gen. 861; *Secretary of the Navy*, B41903, June 12, 1944, 23 Comp. Gen. 943.

¹⁰² DEP'T OF DEFENSE, MANUAL 7220.9-M, ACCOUNTING MANUAL, ch. 25, para. D.II.a (C8 Feb. 1988) [hereinafter DOD MANUAL 7220.9-M].

¹⁰³ See AR 37-1, *supra* note 92, tbl. 9-9.

¹⁰⁴ *Secretary of the Interior*, B-50425, Oct. 9, 1945, 25 Comp. Gen. 332.

¹⁰⁵ DOD MANUAL 7220.9-M, *supra* note 102, ch. 25, para. D.II.b; AR 37-1, *supra* note 92, tbl. 9-9.

¹⁰⁶ *Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases*, B-219829, July 22, 1986, 65 Comp. Gen. 741, 743-44.

¹⁰⁷ See *id.* at 744; see also *Environmental Protection Agency—Request for Clarification*, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 611-12, 82-2 CPD ¶ 491.

¹⁰⁸ 31 U.S.C.A. § 1553(c)(3) (West Supp. 1992).

¹⁰⁹ *Id.*

¹¹⁰ See Memorandum, Comptroller of the Department of Defense, to Under Secretary of Defense (Acquisition); Assistant Secretary of Defense (Production & Logistics); Assistant Secretaries of Army, Navy, and Air Force for Financial Management; Directors of the Defense Agencies; and Director, Washington Headquarters Services; subject: Revised DOD Guidance on Accounting for Expired Accounts, Including “M” and Merged Surplus Accounts (13 June 1991). The memorandum implements all of the NDAA's changes to title 31 of the United States Code concerning the closing of fixed appropriations and the use of expired funds. The memorandum also contains a lengthy attachment detailing procedures for implementing the new account closing laws.

¹¹¹ See *id.* (emphasis added).

¹¹² See *id.*

¹¹³ See *id.*

In requiring agencies to use current funds for any contract changes that would cause contractors to incur additional billable costs, the first memorandum departed radically from well-established rules governing the funding of within-scope contract changes. The expanded definition arguably abolished the relation-back theory, requiring the government to use current appropriations to fund any contract change that would increase contractor-incurred costs—including increases authorized by the *Federal Acquisition Regulation (FAR)* standard changes clause.¹¹⁴ Neither the NDAA, nor any decision of the Comptroller General required the expansive reading of the term "contract change" contained in the first memorandum. Had this definition remained in effect, the long-term budgetary impact of the first memorandum would have been significant.

The 1992 DOD Comptroller Memorandum

On 20 April 1992, the DOD Comptroller reversed the policy articulated in the first memorandum. Without detailed explanation, the second memorandum withdrew paragraph 4 of the first memorandum and advised the military services to follow existing guidance in chapter 25 of the *DOD Accounting Manual*.¹¹⁵ The DOD Deputy Comptroller for Management Systems simultaneously issued a separate memorandum to provide additional guidance.¹¹⁶ This third memorandum featured a table illustrating the funding rules of chapter 25 of the *Accounting Manual*.¹¹⁷ The memorandum, however, also noted cryptically that the table "should not be used as a sole source of reference by itself. Rather, it should be used in conjunction with all other applicable guidance regarding the use of current, expired, and cancelled accounts."¹¹⁸

In relevant part, the table in the third memorandum showed that DOD agencies should pay for within-scope contract changes—including within-scope amendments, error corrections, formalization of informal agreements not resulting in new procurements, and within-scope claims and settlements—with expired or M account funds. Changes in scope—including increases in quantity, increases in required levels of service, and change-in-scope claims and settlements—should be funded with current year appropriations. That the NDAA

requires DOD agencies to maintain auditable fiscal year identifications for all fixed appropriations¹¹⁹ implies that the term "expired funds" means funds of the fiscal year originally obligated on the contract.

The current DOD guidance concerning funding of contract changes is summarized in the *DOD Accounting Manual*. Based upon the pre-1991 Comptroller General decisions and the relation-back theory, the *Accounting Manual* never was revised to reflect the changes introduced in the first memorandum. When the DOD issued the second and third memoranda, it simply returned to the funding policy that existed prior to the first memorandum. Unfortunately, the same is not true for the Army's current implementing regulation.

Army Regulation 37-1

On 18 February 1992, the Defense Finance and Accounting Service distributed a change to *Army Regulation 37-1* (AR 37-1). This change, which became effective on 30 April 1992,¹²⁰ completely revised AR 37-1, paragraph 9-5. As amended, the regulation requires Army activities to obligate unexpired funds—that is, current funds—for all contract changes that "are changes in scope, require additional contractor work, or require additional contractor billable costs."¹²¹ Clearly, the current Army regulation embodies a superceded DOD policy and is inconsistent with the current guidance on funding contract changes.

The Defense Finance and Accounting Service plans to revise AR 37-1 completely. This revision should resolve the inconsistencies between the DOD policy and the Army regulation. Lieutenant Colonel Dorsey.

Allowability of Environmental Cleanup Costs

Department of Defense contractors spend millions of dollars annually to comply with federal and state environmental cleanup laws. These costs probably will increase.¹²² If costs do increase, contractors undoubtedly will attempt to charge

¹¹⁴ See FAR, *supra* note 97, at 52.243-1.

¹¹⁵ See generally DOD MANUAL 7220.9-M, *supra* note 102.

¹¹⁶ Memorandum, Deputy Comptroller of the Defense Department, to Under Secretary of Defense (Acquisition); Assistant Secretary of Defense (Production and Logistics); Assistant Secretaries of Army, Navy, and Air Force for Financial Management; Directors of Defense Agencies; and Director, Washington Headquarters Services; subject: DoD [sic] Accounting Guidance for Contract Changes, (Apr. 20, 1992).

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ See 31 U.S.C.A. § 1553(a) (West Supp. 1992).

¹²⁰ This change exceeds 120 pages. Many of the changes are "pen and ink" changes. Others involve complete revisions of several paragraphs and at least one revises an entire chapter.

¹²¹ AR 37-1, *supra* note 92, para. 9-5c(4) (C2 30 Apr. 1992).

¹²² The General Accounting Office recently estimated that nine DOD contractors will incur environmental cleanup costs exceeding \$900 million. See GENERAL ACCOUNTING OFFICE, GAO/NSIAD-92-253FS, DOD ENVIRONMENTAL CLEANUP (1992).

them to their government contracts. This note focuses on the allowability of contractors' indirect environmental costs—that is, costs that are not identified with any particular contract, but are included in the contractor's overhead or general and administrative pools and charged to government contracts as indirect costs. A contractor can incur these costs when it responds to an environmental agency's determination that the contractor has violated federal or state environmental laws¹²³ or when it independently decides to forestall an agency finding of noncompliance by investigating and correcting environmental problems.

When a contractor attempts to allocate environmental cleanup costs to a government contract, a DOD attorney often will have to evaluate the allowability of these costs. Unfortunately, the FAR offers no guidance on this matter and only a few cases address the issue specifically. Although a FAR environmental cost principle has been drafted,¹²⁴ it will not be issued as a proposed rule until the President's regulatory moratorium expires.¹²⁵ Meanwhile, an attorney must determine the allowability of environmental cleanup costs by applying the

general guidance contained in FAR part 31.¹²⁶ In determining allowability, he or she must consider whether the cost is reasonable, allocable, in accordance with applicable cost accounting standards or generally accepted accounting practices, and not made specifically unallowable by the FAR or the terms of the contract.¹²⁷

Reasonableness

That a contractor incurred a cost to correct an environmental problem does not create a presumption that the cost is reasonable.¹²⁸ The FAR states, "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."¹²⁹ An ordinary cost that is necessary for the conduct of the contractor's business generally will be considered reasonable.¹³⁰ An issue arises, however, when a contractor incurs costs to correct a condition caused by its prior noncompliance with applicable environmental laws. If the gov-

¹²³For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), imposes liability for cleanup costs and fines upon current and former owners of property found to be in violation of applicable environmental standards. See *id.* §§ 9607-9609.

¹²⁴In relevant part, the draft FAR environmental cost principle provides,

31.205-9.

(a) Environmental Costs—

(1) are those costs incurred by a contractor for:

(i) the primary purpose of preventing environmental damage; properly disposing of waste generated by business operations; complying with environmental laws and regulations imposed by Federal, State, or local authorities; or

(ii) correcting environmental damage.

(2) do not include any costs resulting from a liability to a third party.

(b) Environmental costs in paragraph (a)(1)(i) of this subsection, generated by current operations, are allowable, except those resulting from a violation of law, regulation, or a compliance agreement.

(c) Environmental costs in paragraph (a)(1)(ii) of this subsection, incurred by the contractor to correct damage caused by its activity or inactivity, or for which it has been administratively or judicially determined to be liable (including where a settlement or consent decree has been issued), are unallowable, except where the contractor demonstrates that it:

(1) was performing a Government contract at the time the conditions requiring correction were created and performance of that contract contributed to the creation of the conditions requiring correction;

(2) was conducting its business prudently at the time the conditions requiring correction were created, in accordance with then-accepted relevant standard industry practices, and in compliance with all then-existing environmental laws, regulations, permits, and compliance agreements;

(3) acted promptly to minimize the damage and [the] costs associated with correcting it; and

(4) has exhausted or is diligently pursuing all available legal and contributory (e.g., insurance or indemnification) sources to defray the environmental costs.

¹²⁵The moratorium currently is scheduled to expire in August 1993.

¹²⁶On 14 October 1992, the Defense Contract Audit Agency (DCAA) issued guidance stating that "environmental costs are normal costs of doing business and are generally allowable if reasonable and allocable." Letter, Defense Contract Audit Agency, subject: Audit Guidance on the Allowability of Environmental Costs (Oct. 14, 1992). This guidance essentially follows the same analysis used to determine allowability under the FAR cost principles.

¹²⁷FAR, *supra* note 97, at 31.201-2.

¹²⁸*Id.* at 31.201-3(a). But see *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

¹²⁹FAR, *supra* note 97, at 31.201-3(a). This definition comports with the standard recommended in the DCAA letter. See generally Letter, *supra* note 126.

¹³⁰FAR, *supra* note 97, at 31.201-3(b).

ernment allows these cleanup costs, it inadvertently may provide the contractor with an opportunity for creative accounting. For example, a contractor might attempt to reduce the direct costs of its commercial work by declining to comply with environmental requirements and delaying cleanup efforts until it can charge a substantial portion of the cost of these efforts to a government contract.¹³¹ When a contractor apparently intends to induce the government to pay for the contractor's past environmental violations, a finding of unreasonableness and unallowability is appropriate.¹³² On the other hand, when a contractor has incurred costs to correct a condition caused by practices that were lawful and reasonable when performed, these costs should be considered reasonable and—if all other requirements are met—allowable. Government attorneys should note, however, that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict liability upon all "handlers" of hazardous waste.¹³³ Accordingly, a contractor's "reasonable" cleanup costs may be specifically unallowable.¹³⁴

Allocability

To be allocable to a government contract, indirect environmental cleanup costs must benefit that contract and other contracts or must be "necessary to the overall operation of the [contractor's] business."¹³⁵ Remediation of environmental problems arising under a previous contract generally will not confer any benefit on a current contract. Accordingly, the cost

of this remediation would be allocable only if it was necessary to "the overall operation" of the contractor's business. Recognizing the consequences that could befall a contractor that fails to remediate a "dirty" facility, government attorneys generally will find that remediation costs are "necessary."¹³⁶ Nevertheless, additional considerations exist. The costs that a contractor incurs in one accounting period may not be allocated to final cost objectives—such as contracts—in different accounting periods. Consequently, a contractor cannot allocate its environmental cleanup costs to a government contract in the current accounting period if it incurred those costs in a prior accounting period.¹³⁷

If a contractor *does* incur cleanup costs in an accounting period in which it is performing a government contract, it may contend that the government should allocate these costs to the contract. This conclusion, however, does not necessarily follow. To be allocable, the cost the contractor incurred must have some beneficial or causal relationship to contracts in the same accounting period.¹³⁸ A government attorney should be alert for deception when a contractor reports a significant increase in its environmental cleanup costs while it is performing more government contracts than it normally would. This ostensible increase actually may indicate that the contractor has delayed its remediation efforts until it could get the government to pay for them. Although detection of these strategies generally is an auditor's function, a reviewing attorney should verify independently that the auditor actually considered this possibility.¹³⁹

¹³¹ A contractor would have no similar incentive to delay reporting the environmental compliance costs it incurs in the performance of a government contract because these costs generally will be fully reimbursable as direct costs. See *id.* at 52.223-3(b)(3) (requiring a contractor to "use [its] best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed").

¹³² This position comports with the draft environmental cost principle, which provides that the costs of correcting environmental damage caused by prior violations are unallowable. See *supra* note 124. Likewise, the DCAA letter states, "Contractors should not be reimbursed for increased costs incurred in the clean up of contamination which they should have avoided. . . . Increased costs due to contractor delay in taking action after discovery of the contamination are not allowable." See Letter, *supra* note 126.

¹³³ See 42 U.S.C. § 9607(a) (1988).

¹³⁴ See FAR, *supra* note 97, at 31.205-15 (fines and penalties); *id.* at 31.205-47 (costs related to legal and other proceedings).

¹³⁵ FAR 31.201-4 provides, in pertinent part,

[A] cost is allocable to a Government contract if it—

- (a) is incurred specifically for the contract;
- (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

¹³⁶ If a contractor fails to take remedial action after the EPA has directed it to do so, it can be held liable for up to three times the cost the EPA incurs "as a result of such failure to take proper action." 42 U.S.C. § 9607(c)(3) (1988). Moreover, with limited exceptions, a federal agency may not enter into, renew, or extend a contract with a firm proposing to use facilities listed by the EPA as violating the Clean Air Act, see 42 U.S.C. § 7606(a) (1988), or the Clean Water Act, see 33 U.S.C. § 1368(a) (1988). See generally Exec. Order No. 11,738, 38 Fed. Reg. 25,161 (1973); FAR, *supra* note 97, at 23.103(b).

¹³⁷ "The [general and administrative] expense pool of a business unit for a cost accounting period shall be allocated to final cost objectives of that cost accounting period" 4 C.F.R. § 410.40(b)(1) (1992). The DCAA letter adopted this well-established cost accounting standard without change. See generally Letter, *supra* note 126.

¹³⁸ See 4 C.F.R. §§ 410.50(a), 418.50(b) (1992).

¹³⁹ The *Defense Contract Audit Agency Manual* suggests that auditors should question "out-of-period" costs. See DEFENSE CONTRACT AUDIT AGENCY, DEP'T OF DEFENSE, DCAA CONTRACT AUDIT MANUAL ¶ 6-608.3(b)(1) (July 1992) ("The object . . . is to disclose those indirect costs which have been assigned to a current period when the cost was incurred for the purpose of benefitting a future or past period").

Although the FAR does not disallow environmental cleanup costs specifically, a contracting officer may disallow these costs if he or she determines that they are generally unallowable under FAR part 31. For example, reimbursement for fines and penalties is unallowable if they resulted from the contractor's "violations of, or failure . . . to comply with, Federal, State, local, or foreign laws and regulations."¹⁴⁰ Only rarely, however, may environmental cleanup costs fairly be characterized as "fines or penalties." A fine or penalty is imposed as a punishment; it is not intended to measure the actual costs of correcting past violations.¹⁴¹

Another possible basis for disallowing remediation costs may be FAR 31.205-47.¹⁴² This provision identifies as unallowable any costs a contractor incurs in connection with a civil or administrative proceeding or investigation brought by a federal, state, or local government to inquire into allegations that the contractor has violated a law or regulation if the tribunal or investigator: (1) finds the contractor liable for fraud or similar misconduct; or (2) fines the contractor for the violation without concluding that this violation involved fraudulent misconduct.¹⁴³ Because the government probably could not characterize the contractor's remediation costs as a "penalty,"¹⁴⁴ it would have to premise disallowance on a finding of contractor fraud or "similar misconduct." Accordingly, if an Environmental Protection Agency (EPA) investigation revealed that a contractor willfully violated environmental laws, and the contractor incurred remediation costs in response to that determination, these costs would be unallowable under FAR 31.205-47. Because CERCLA imposes strict liability for environmental violations, however, a contractor could incur remediation costs pursuant to an EPA determination of liability in the absence of any evidence of contractor fraud or similar misconduct. These costs would not be rendered unallowable by FAR 31.205-47.

Perhaps the soundest basis for disallowing remediation costs is FAR 31.205-24, which governs maintenance and repair costs.¹⁴⁵ Maintenance and repair costs are expenses "necessary for the upkeep of property . . . that neither add to the permanent value of the property, nor appreciably prolong its intended life."¹⁴⁶ Environmental cleanup can be analogized to any other extraordinary facility cleanup effort, and both can be included within the category of maintenance operations. The FAR states that extraordinary maintenance costs "are allowable [only if] . . . those costs are allocated to the applicable periods for purposes for determining contract costs."¹⁴⁷ Accordingly, if a contractor attempts to charge the government for the costs of remedying environmental problems created in prior accounting periods, the government may invoke this provision to disallow these costs.

Preventive Measures

This note provides several bases upon which contracting officers could disallow a contractor's environmental cleanup costs. Nevertheless, because the FAR contains no specific guidance on allowability of environmental cleanup costs, the reception these arguments would receive from the boards of contract appeals or the Claims Court is uncertain. In new procurements, a contracting officer seeking to limit potential governmental liability for a contractor's environmental costs should consider including in his or her contract a clause implementing the draft environmental cost principle discussed above.¹⁴⁸ Another approach would be to establish the allowability of these costs in an advance agreement with the contractor.¹⁴⁹

In addressing environmental costs arising under existing contracts, contracting officers could consider conditioning allowability on the contractor's compliance with the draft cost principle. In the absence of contrary guidance, many con-

¹⁴⁰FAR, *supra* note 97, at 31.205-15(a).

¹⁴¹*Black's Law Dictionary* defines a "penalty" as "an elastic term . . . involv[ing] the idea of punishment." See BLACK'S LAW DICTIONARY 1021 (6th ed. 1990). A "fine" is "a pecuniary punishment imposed by a lawful tribunal." *Id.* Similarly, the DCAA has opined that "the incurrence of cleanup costs to correct environmental damage is not a penalty; it is a legal obligation." Letter, *supra* note 126. Significantly, CERCLA discusses remediation costs separately from punitive damages and penalties. Compare 42 U.S.C. § 9607(c)(1) (1988) (remediation costs) with *id.* § 9607(c)(3) (punitive damages) and *id.* § 9609 (penalties).

¹⁴²See FAR, *supra* note 97, at 31.205-47 (governing costs related to legal and other proceedings).

¹⁴³*Id.* at 31.205-47(b).

¹⁴⁴See *supra* note 141 and accompanying text.

¹⁴⁵See generally FAR, *supra* note 97, at 31.205-24.

¹⁴⁶*Id.* at 31.205-24(a).

¹⁴⁷*Id.* at 31.205-24(a)(2).

¹⁴⁸See *supra* note 124.

¹⁴⁹The FAR states that the contracting officer and the contractor "should seek advance agreements on the treatment of special or unusual costs." See FAR, *supra* note 97, at 31.109(a). It adds that advance agreements may be "particularly important" in the case of deferred maintenance costs. *Id.* at 31.109(h)(3).

tracting officers already have done so. Eleanor R. Spector, the Director of Defense Procurement, has not discouraged this practice, although representatives of the National Security Industrial Association have urged her to do so.¹⁵⁰ This strategy, however, involves some risk. Mandatory FAR clause 52.216-7¹⁵¹ states that a contracting officer must determine allowability "in accordance with [FAR] Subpart 31.2 . . . in effect on the date of the contract."¹⁵² If the contractor challenges the contracting officer's reliance on the draft cost principle, the agency may have to convince reviewing authorities that the draft principle does not represent a change, but merely describes the allowability analysis that contracting officers have been using all along. This argument has met with mixed success before the boards of contract appeals.¹⁵³

Finally, if a contracting officer knows that the contractor is incurring environmental cleanup costs, he or she should ensure that the contractor does not infer mistakenly that the agency considers these costs allowable. Generally, the government cannot disallow costs retroactively if the contractor incurred them while performing an activity with the government's acquiescence or approval.¹⁵⁴

Conclusion

Of course, an agency occasionally will agree to reimburse contractors for their environmental cleanup costs because many contractors otherwise would hesitate to submit offers. In these situations, the contracting parties should delineate the extent of the government's responsibility in an advance agreement. In other situations, contracting officers and their legal staffs should be familiar with the various possible bases for finding cleanup costs unallowable. Major Tomanelli,

International Law Note

Editor's Note—Lieutenant Colonel H. Wayne Elliott, Director of the International Law Department, TJAGSA, presented these

remarks in an address to the American Bar Association's National Security Law Conference in Washington, D.C., on 29 October 1992.

Systemizing Operational Law

I appreciate the opportunity to discuss how we in the Army have integrated operational law into military operations—how we have systemized operational law. About a year ago, I spoke here on essentially the same topic, but focused on our teaching methodology. The panel then was called "National Security Law: An Overview of the New Field." As I indicated last year, operational law is the umbrella term that we use in the Army to describe the legal rules that affect military operations overseas in peacetime and wartime. The umbrella continues to expand. Now, operational law also includes military operations within the United States, such as riot control in Los Angeles and disaster relief in Florida. That, in just one year, a panel was formed to discuss how operational law should be incorporated systematically into operational decisions is clear evidence of how far the military legal community has come in a relatively short time. It also is another indication that the civilian bar and the civilian international law community continue to recognize the important role of military lawyers in the development of law.

One year ago, the Judge Advocate General's Corps was only beginning to examine how Army lawyers served the needs of the Army in the Gulf War. At the direction of Major General John L. Fugh, The Judge Advocate General of the Army, a "lessons learned" conference was held at The Judge Advocate General's School in Charlottesville, Virginia, to review the performance of judge advocates during the war. This was not done after the Vietnam War and General Fugh thought that the experiences of Operation Desert Storm should be captured while they were fresh in the minds of those who participated in the war effort, both in the United States and in the Gulf region. This conference led to the formation of a group in Washington, D.C., that would review the data from throughout the Army, spot issues and doctrinal problems, and propose solutions. This process is continuing.

¹⁵⁰ See Spector Says No "Loophole" Exists for Improper Recovery of Environmental Cleanup Costs, 34 GOV'T CONTRACTOR ¶ 567 (1992). Practitioners should be aware that Director Spector participated in the drafting of the DCAA policy letter. See generally *supra* note 126. In many ways, the DCAA letter closely resembles the draft cost principle; the letter, however, does not create a presumption of unallowability, as does the draft cost principle. Cf. *supra* note 124. Arguably, this indicates that Director Spector does not support implementation of this presumption before the draft principle is issued as a final rule.

¹⁵¹ See FAR, *supra* note 97, at 52.216-7 (allowable cost and payment).

¹⁵² *Id.* at 52.216-7(a).

¹⁵³ See Franklin W. Peters and Assocs., IBCA No. 762-1-69, 71-1 BCA ¶ 8615. In this case, a contracting officer disallowed a contractor's claim for bid and proposal costs and employee bonus costs after concluding that cost principles with effective dates subsequent to the contract's formation rendered these costs unallowable. The contractor appealed. The Department of the Interior Board of Contract Appeals found that the principle disallowing bid and proposal costs was inapplicable. It stated, however, that because the principle pertaining to bonuses "represent[ed] a reasonable guide as to the allowability of this item, [it would] consider the claim under [that] section." But see Cotton & Co., ENG BCA No. 426-6-89, 90-2 BCA ¶ 22,828 ("Cost principles promulgated subsequent to the date of the contract may not be used to disallow costs").

¹⁵⁴ *Liton Sys., Inc. v. United States*, 449 F.2d 392 (Cl. Cl. 1971); *General Dynamics Corp.*, ASBCA No. 31359, 92-1 BCA ¶ 24,698.

One conclusion was clear. Generally, judge advocates did an outstanding job of providing operational law advice to commanders. The December 1991 *ABA Journal* published an article on the role of lawyers in the Gulf War, describing the war as the most legalistic war ever fought. The article was entitled "Lawyers in the War Room"—a title from which one would have concluded a few years ago that the article must be fiction.

The Judge Advocate General's School has developed a new handbook on operational law issues. Designed as a stand-alone source of information for judge advocates who work in the operational law area, this book is a major step in the systematic incorporation of operational law advice into military operations.

The operational law handbook presently is not being distributed to attorneys in the field; however, it serves as the core text for military officers who attend a five-day seminar on operational law at The Judge Advocate General's School. This seminar is open to American lawyers and nonlawyers and to foreign military personnel.

Of course, the handbook is simply a source for judge advocates who work in the various commands. It does not purport to create doctrine or rules on how a judge advocate should get into the planning process and enter the decisional "loop." In the past, the degree to which a judge advocate became involved in operational decisions often depended on the personalities of the lawyer and the commander. Of course, an arrangement dependent on personalities is not a very workable solution and does not ensure that the operational lawyer will be an integral part of the planning process. The Army now has taken steps to regularize the role of the lawyer in that process.

A central part of the lawyer's role in military operations continues to be ensuring that the troops comply with their obligations under the law of war. The murders at My Lai during the Vietnam War demonstrated the need for increased emphasis on the law of war. In response to My Lai, the Army directed that judge advocates become part of the training system. Army lawyers serve as the primary instructors in teaching the law of war to deploying troops. The requirement that soldiers comply with the law of war is found in *Department of Defense Directive 5100.77*.¹⁵⁵ Each of the services must implement that directive. The Army has implemented it by providing formal classroom instruction on the law of war. We now go a step further, however, by integrating law of war

training into field exercises. When properly completed, each field exercise reinforces the classroom training and demonstrates to our soldiers the military utility of complying with the law of war.

Additionally, the Joints Chiefs of Staff have mandated that legal advisors must be available immediately to provide law of war advice during joint and combined operations.¹⁵⁶ This directive ensures that judge advocates will be part of all joint and combined military operations. The memorandum requires a judge advocate to advise the command not only on the law of war, but also on the legal right to employ force under international law. A judge advocate now reviews every deployment order—whether for an exercise or for a real-world contingency operation—to ensure that it will cause no violation of United States statutory law or international law.

United States Army Forces Command, the command that provides Army troops to the combatant commands,¹⁵⁷ similarly requires that every operational plan and order be reviewed by a judge advocate to ensure that it contains no unresolved legal issues.¹⁵⁸ This directive puts lawyers into the planning process. The operations officer now must work with the lawyer and the lawyer must work with the operations officer. Thus, the loop is closed.

The staff judge advocates of several Army combat divisions have put a judge advocate in the operations section of each division. This ensures that all operations plans are reviewed as they are developed. Legal issues are resolved before they could have a detrimental effect on the battlefield. The presence of a lawyer in the operations section also helps to integrate realistic law of war play into division exercises.

On a higher level, current regulations¹⁵⁹ require a judge advocate or military attorney to review every weapons system to ensure that it complies with the law of war. This review takes place before the military will approve the weapon for purchase. Essentially, the review determines that, if used as intended, the weapon will not violate a specific treaty provision or cause unnecessary suffering. The lawyers who advise the Department of the Army on military weapons procurement must understand the basic rules of the law of war to complete these evaluations.

Additionally, weapons systems must not contravene the terms of arms control treaties, such as the Antiballistic Missile Treaty¹⁶⁰ or the INF Treaty.¹⁶¹ Military lawyers increasingly are called upon to provide advice on arms control agreements.

¹⁵⁵ See generally DEP'T OF DEFENSE, DIRECTIVE 5100.77, THE DEPARTMENT OF DEFENSE LAW OF WAR PROGRAM (July 10, 1979).

¹⁵⁶ JCS Memorandum 0124-88, subject: Implementation of the Department of Defense Law of War Program (4 Aug. 1988).

¹⁵⁷ United States Central Command, also known as CENTCOM, was the primary combatant command in the Gulf War.

¹⁵⁸ Message, Commander, Forces Command, AFJA-RP, subject: Review of Operations Plans (292030 Oct. 1984).

¹⁵⁹ DEP'T OF DEFENSE, DIRECTIVE 5500.15, REVIEW OF THE LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (Oct. 16, 1974); DEP'T OF ARMY, REG. 27-53, LEGAL SERVICES: REVIEW OF THE LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 Jan. 1979).

¹⁶⁰ Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435.

¹⁶¹ Elimination of Intermediate Range and Shorter Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., 27 I.L.M. 90 (1988).

Judge advocates are instrumental in developing the rules of engagement (ROE) that tell our soldiers the conditions under which they may use force. These rules take into account not only legal constraints, but also the political conditions under which the force must operate. Several years ago, very few judge advocates would have been involved in the process of writing the rules under which our soldiers fight. The situation has changed because judge advocates increasingly are seen as having skills that can help units to fight better and win more quickly. In the case of ROE, the judge advocate is viewed as a person trained in the use of language, and as the staff officer who should be best qualified to reduce complicated, fact-specific scenarios to an understandable rule for individual soldiers. Moreover, having a lawyer involved in the drafting and implementation of ROE will help commanders if an incident arises that requires an interpretation of the rules. This essentially is what happened after the bombing of the Marine barracks in Beirut a few years ago. That incident, and the allegation that it resulted from inadequate ROE, convinced many commanders that lawyers must be involved in developing ROE. Clearly worded ROE protect soldiers, help them to accomplish their missions, and protect commanders from after-the-fact criticism. Of course, to create useful ROE, a lawyer must understand the mission, the weapons, and the tactical situation that these rules will cover. The lawyer gains this understanding by taking part in the planning process.

Today, judge advocates are recognized as having greater roles than their traditional capacities of maintaining discipline in the Armed Forces. The lawyer brings to the command a skill with language that is very important in drafting command policies and directives that must be easily understood by soldiers of all ranks. Accordingly, the lawyer's role in all military operations is becoming fixed, recognized, and accepted.

The law can be viewed as a weapon in the commander's arsenal. A lawyer can help ensure that this weapon is used with maximum effectiveness. Used properly, the law can serve as a combat multiplier. Compliance with the law enhances the unit's ability to complete its mission. Moreover, compliance with the law always is tactically sound. Law can be used offensively. The skilled operational lawyer can identify actions by the enemy that violate the law of war, can explain why our actions are lawful, and can protect the command from specious, politically motivated accusations. One wonders what the level of political support for the Vietnam War might have been had well-versed operational lawyers advised the United States command on the conduct of the war and stressed the enemy's violations of the law to the press and to the American people. The advent of operational law as a recognized discipline in the military legal community should help the United States to avoid the mistakes of Vietnam in the future.

To find a lawyer in the tactical operations center, advising the commander and the staff, no longer is unusual. This legal advice now might address issues such as diplomatic immunity, the rights of neutrals, the acquisition of property and supplies,

the treatment of prisoners of war, the investigation of war crimes, and the legality of weapons and targets. This is the result not of a change in the law, but of a change in the lawyer. The Judge Advocate General's School now devotes a substantial amount of time to operational law subjects. It trains not only the lawyers who will advise on operational law matters, but also the commanders who will receive that advice.

The loop is closed—the lawyer and the client are educated on the law. We now recognize that a great deal of law is involved when soldiers prepare for deployment and possible combat. Many United States statutes are triggered by war or the military's preparations for war. One need only read the papers or watch television to learn of these statutes and their possible impacts on a particular operation. For instance, the War Powers Resolution¹⁶² is a part of virtually every news story about the deployment of United States forces to an area in which combat might occur. Military officers are aware that the law may impact on their mission. They take law into account in planning operations. Commanders now are taught that military lawyers can advise them on all aspects of the law affecting military operations. Most commanders welcome lawyers onto their operations teams.

Recognizing the increasing need for lawyers who are well trained in the statutes, treaties, and customary rules of law that affect our military operations, then Secretary of the Army John O. Marsh directed in 1988 that a Center for Law and Military Operations would be established at The Judge Advocate General's School. The Center's mission is to help ensure that law is taken into account in all military operations. The Center also publishes articles on the law and its impact on military operations. Notes written by instructors at the Center, describing various aspect of operational law, often appear in *The Army Lawyer*. Just over two years ago, the Center sponsored a symposium to discuss legal issues that arose during Operation Just Cause in Panama. Last year, it sponsored a symposium on the Gulf War. The Center currently is planning a symposium on the Army's role in disaster relief. The Center is clear evidence of the lawyer's changing role in planning for and conducting military operations. It also is a symbol of the Army's commitment to the rule of law. Military lawyers now are part of the system.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys (LAAs) of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADALA, Charlottesville, VA 22903-1781.

¹⁶²See 50 U.S.C. §§ 1541-1548 (1988).

Tax Notes

Tax Update

Legal assistance offices around the world now are preparing for the 1992 income tax filing season. The following update may be of assistance in publicizing information of particular interest to military taxpayers.¹⁶³

Tax Update for 1992 Federal Income Tax Returns

What Form Must Be Used? Many military taxpayers must file federal income tax returns to obtain refunds. The tax form you should use depends on your filing status and income level and on the deductions and credits you intend to claim. The Internal Revenue Service (IRS) has established the following guidelines for choosing tax forms:

- You may use *Form 1040EZ*¹⁶⁴ if (1) you are single, are less than sixty-five years old, and have no dependents; (2) your earned income is less than \$50,000; and (3) your interest income does not exceed \$400. If you use this form, you may not itemize deductions, claim credits, or take adjustments.
- You may use *Form 1040A*¹⁶⁵ if your taxable income from wages, salaries, tips, interest, and dividends is less than \$50,000. If you use this form, you may not claim any itemized deductions; however, you may claim an IRA adjustment and credits for child care, dependent care, and earned income.

- If you intend to itemize deductions, or have taxable income over \$50,000, you must file *Form 1040* (the long form).¹⁶⁶

When Should You File? Tax returns for most military taxpayers are due on 15 April 1993. Nevertheless, you may request additional time to file a *Form 1040* or *Form 1040A*. The length of the delay available to you will depend upon whether you live in the United States or overseas.¹⁶⁷

If you live within the United States or Puerto Rico, you may request a four-month extension to file *Form 1040* or *Form 1040A*. This extension, however, does not allow you to defer paying any federal income taxes you may owe. If you ask for this extension, you must estimate your tax liability and pay any expected balance due by filing *Form 4868*¹⁶⁸ no later than 15 April 1993.

If you are living outside the United States or Puerto Rico on 15 April 1993, you are allowed an automatic extension of two months. You do not have to file a request to obtain this extension.¹⁶⁹ This automatic extension applies not only to filing your 1992 federal income tax return, but also to paying any tax due. The IRS, however, will charge you interest on your unpaid federal income tax, from 15 April 1993—the normal filing deadline—until you actually pay your taxes. If you use the automatic extension, you should attach a statement to your return, stating that you were living outside the United States and Puerto Rico on 15 April. You may obtain an additional two-month extension—until 15 August 1993—by filing *Form 4868* no later than 15 June 1993. To obtain this additional extension, you must pay any tax due when you file the *Form 4868*. You also must write, "Taxpayer Abroad," in the top margin of the form.

What Are the 1992 Tax Rates? The tax rates for 1992 are fifteen percent, twenty-eight percent, and thirty-one percent. The following tables show the adjusted tax rates for 1992 by filing status:

¹⁶³ This update will be included in *JA 269, Tax Information Series*, a handbook that The Judge Advocate General's School publishes annually in January. This publication contains a series of camera-ready tax information handouts that may be reproduced for use in local preventive law programs. This update also has been uploaded in ASCII format on the Legal Automation Army-Wide System Bulletin Board System as 92FTAXUP.ZIP. The 1993 edition of *JA 269* will be uploaded before the end of January 1993.

¹⁶⁴ Internal Revenue Serv., *Form 1040EZ, Income Tax Return for Single Filers with No Dependents* (1992).

¹⁶⁵ Internal Revenue Serv., *Form 1040A, U.S. Individual Income Tax Form* (1992).

¹⁶⁶ See Internal Revenue Serv., *Form 1040, U.S. Individual Income Tax Form* (1992).

¹⁶⁷ Another deadline extension provision is available to members who served or are serving in a combat zone. The deadline for filing federal income tax returns is extended for at least 180 days after the later of:

The last day a soldier is in a combat zone (or the last day the area qualifies as a combat zone); or

The last day of any continuous qualified hospitalization for injury from service in the combat zone.

For more information, consult INTERNAL REVENUE SERV., PUB. 945, *TAX INFORMATION FOR THOSE AFFECTED BY OPERATION DESERT STORM* (1991).

¹⁶⁸ Internal Revenue Serv., *Form 4648, Application for Automatic Extension of Time to File U.S. Individual Income Tax* (1992).

¹⁶⁹ This benefit no longer is available to taxpayers who merely are traveling outside the United States or Puerto Rico on the filing deadline.

**Married Individuals Filing Jointly
and Surviving Spouses**

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not over \$35,800	Fifteen percent of the taxable income
Over \$35,800, but not over \$86,500	\$5370, plus twenty-eight percent of the income over \$35,800
Over \$86,500	\$19,566, plus thirty-one percent of the income over \$86,500

Heads of Households

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not over \$28,750	Fifteen percent of the taxable income
Over \$28,750, but not over \$74,150	\$4312.50, plus twenty-eight percent of the income over \$28,750
Over \$74,150	\$17,024.50, plus thirty-one percent of the income over \$74,150

**Unmarried Individuals
(Other Than Surviving Spouses and Heads of Households)**

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not over \$21,450	Fifteen percent of the taxable income
Over \$21,450, but not over \$51,900	\$3217.50, plus twenty-eight percent of the income over \$21,450
Over \$51,900	\$11,743.50 plus thirty-one percent of the income over \$51,900

Married Individuals Filing Separate Returns

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not over \$17,950	Fifteen percent of the taxable income
Over \$17,950, but not over \$43,250	\$2685, plus twenty-eight percent of the income over \$17,950
Over \$43,250	\$9783, plus thirty-one percent of the excess over \$43,250

What Are 1992's Standard Deductions? The following table shows the standard deduction amounts for 1992:

<u>Filing Status</u>	<u>Amount</u>
Joint return or surviving spouse	\$6000
Head of household	\$5250
Unmarried individual other than surviving spouse or head of household	\$3600
Married individual filing separately	\$3000

The IRS allows the elderly and the blind to claim higher standard deductions. Moreover, a minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction. A child who is claimed as a dependent by his or her parents, and who has only investment income, has a \$600 standard deduction, no matter how high his or her investment income may be. On the other hand, a dependant child who earned wages exceeding \$600 may claim a standard deduction equal to his or her wages, or the regular standard deduction for nondependents, whichever is less.¹⁷⁰ Accordingly, the standard deduction for an eighteen-year old dependant who earned \$3650 in wages in 1992 is \$3600—the maximum deduction for a single dependent who is under age sixty-five and who is not blind.

What Is the 1992 Personal Exemption? This year, the IRS increased the personal exemption to \$2300. You may not claim a person as your dependent if he or she may be claimed as a dependent on another taxpayer's return.¹⁷¹ Personal exemption phaseouts begin at \$157,900 for taxpayers filing joint returns and surviving spouses; \$131,550 for taxpayers filing as heads of household; \$105,250 for unmarried taxpayers, other than surviving spouses or heads of household; and \$78,950 for married taxpayers filing separately.

Personal Interest. A taxpayer may not deduct interest paid on personal loans, credit card bills, car loans, or educational loans; however, if the taxpayer intends to itemize deductions, he or she may use a home equity loan to avoid this personal interest restriction and deduct some interest. Major Hancock.

IRS Makes Recordkeeping Easier for Taxpayers

The IRS traditionally has accepted a taxpayer's assessments of his or her income, credits, and deductions when the taxpayer can provide physical evidence to support these assessments.¹⁷² That this burden of proof lies with the taxpayer is

¹⁷⁰This revision also raises the 1992 exemption for the "kiddie tax" from \$1100 to \$1200.

¹⁷¹If you wish to claim a personal exemption for a child aged one or over, you must report the child's social security number. See I.R.C. § 6109(e)(2) (Maxwell MacMillan 1991). If your child has not been assigned a social security number, you should contact your local legal assistance office or social security office as soon as possible to obtain an application for a social security number. See generally TJAGSA Practice Note, *Social Security Numbers for Dependents*, ARMY LAW., Dec. 1991, at 51.

¹⁷²See, e.g., *Davis v. United States*, 495 U.S. 472, 484 (1990).

well established.¹⁷³ In the past, the IRS generally would accept only cancelled checks or sales receipts as evidence. Modern society, however, is moving rapidly toward paperless transactions. Many banks no longer return a taxpayer's cancelled checks. Recognizing this trend, the IRS recently issued *Revenue Procedure 92-71*,¹⁷⁴ which allows a taxpayer to use certain financial statements as evidence of payments.

Internal Revenue Code § 6001 requires a taxpayer to maintain sufficient records to justify his or her reported income, deductions, or credits and to establish his or her tax liability.¹⁷⁵ Accordingly, the IRS once held that a taxpayer could submit a cancelled check as proof of payment in a transaction, but not an account statement prepared by the financial institution that served as drawee on the check. If a taxpayer's financial institution did not return cancelled checks, but only microfilmed them for future reference,¹⁷⁶ the taxpayer had to ask the bank to prepare a certified copy of the particular check and submit it to the IRS to prove payment.

Under *Revenue Procedure 92-71*'s expanded definition of proof,¹⁷⁷ the IRS will accept as proof of payment certain account statements of check clearances, electronic funds transfer records, and credit card statements. This change should reduce significantly the volume of records a taxpayer must maintain to substantiate payments.

Most banks maintain records of cancelled checks electronically or on microfilm. Under the new revenue procedure, the IRS will accept a checking account statement prepared by a financial institution¹⁷⁸ as proof of payment if the statement meets a four-part test. The account statement must show the check number, the amount of the check, the date the check amount was posted to the account,¹⁷⁹ and the name of the payee. The statement also must evince a high degree of readability¹⁸⁰ and legibility.¹⁸¹

Electronic fund transfer (EFT) statements also are permissible proof of payments under *Revenue Procedure 92-71*. These statements are generated by a number of systems, including merchants' point of sale and utility payment systems. In most instances, an account holder will not receive individual notification of each payment, but only an itemized statement detailing the previous month's activities. An EFT statement will qualify under the new rule if it shows the amount of the transfer, the date the transfer was posted to the account, and the name of the payee.

The IRS also will accept credit card statements from financial institutions as proof of transactions. A taxpayer now may use these statements if he or she no longer has the carbon receipt slip a merchant normally will give to a customer upon completion of a sale. The IRS will accept a credit card statement if it shows the amount of the charge, the date of the charge, and the name of the payee. Consequently, a taxpayer no longer must retain his or her credit card receipts to establish proofs of payments.

Most credit card and EFT statements will satisfy the requirements of *Revenue Procedure 92-71*, but many checking account statements will not. Eventually, financial institutions may include the names of payees in more detailed statements to further ease the recordkeeping burdens on their customers. Until they do so, however, taxpayers should retain selected checks or other proofs of payment for tax-significant transactions.

Of course, most taxpayers realize that proof of payment alone will not justify every tax deduction. Although a taxpayer no longer may need to retain a check or sales receipt to prove payment for a particular item, he or she may have to keep similar documents, such as check registers, receipts, sales slips, and charge slips, to establish the tax-deductible nature of his or her purchases. Captain Covey.¹⁸²

¹⁷³ *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

¹⁷⁴ Rev. Proc. 92-71, 1992-35 I.R.B. 17.

¹⁷⁵ I.R.C. § 6001 (Maxwell MacMillan 1991). Section 6001 provides, "Every person liable for any tax imposed by this title [26 U.S.C.] . . . shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe." *Id.*; see also *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991); *Jones v. Commissioner*, 903 F.2d 1301, 1303 (10th Cir. 1990).

¹⁷⁶ The Bank Secrecy Act regulations generally require a bank to maintain cancelled checks for five years. See 31 C.F.R. 103 (1991). This limitation ordinarily is not a concern for taxpayers because the statute of limitations for assessing a tax deficiency is three years from the later of the actual, or the legally prescribed, filing date. I.R.C. § 6501 (Maxwell MacMillan 1991).

¹⁷⁷ *Revenue Procedure 92-71* deals only with the topic of proof. It does not change a taxpayer's entitlement to a credit or deduction under the Internal Revenue Code. See generally Rev. Proc. 92-71, 1992-35 I.R.B. 17.

¹⁷⁸ *Revenue Procedure 92-71* permits the IRS to accept records prepared by a third party for a financial institution if that third party is obligated under contract to produce these records for the financial institution's customers. See *id.*

¹⁷⁹ This date is not dispositive for establishing the appropriate tax year for a particular check. Determination of tax year depends whether the taxpayer uses the cash basis or the accrual basis for accounting. For example, a cash basis taxpayer is entitled to a deduction on the date he or she mails the check to the payee. See Rev. Proc. 80-335, 1980-2 C.B. 170.

¹⁸⁰ The IRS defines readability as "the quality of a group of letters or numerals being recognizable as words or complete numbers." See Rev. Proc. 92-71, § 3.04.

¹⁸¹ The IRS defines legibility as "the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters and numerals." See *id.*

¹⁸² Captain William R. Covey presently is assigned to Military Traffic Management Command Headquarters, Eastern Area, Bayonne, New Jersey.

Using URESA and RURESА to Obtain and Enforce Interstate Support Orders

Few members of American society are more mobile than individuals serving in, or accompanying, the Armed Forces. Accordingly, LAAs must be familiar with the Uniform Reciprocal Enforcement of Support Act¹⁸³ (URESА) and the Revised Uniform Reciprocal Enforcement of Support Act¹⁸⁴ (RURESА). Understanding these acts is important because they provide a relatively simple and inexpensive means of overcoming the problems associated with obtaining and enforcing child support orders across state lines and national boundaries.

Congress promulgated URESА in 1950 and amended it in 1952 and 1958. Congress promulgated RURESА in 1968. The second act improved on the first by encouraging reciprocity with the courts of other nations,¹⁸⁵ establishing specific provisions for paternity determinations,¹⁸⁶ and espousing simplified methods for enforcing existing support orders.¹⁸⁷

Sixteen states, territories, and the District of Columbia currently follow URESА.¹⁸⁸ The other thirty-seven states have adopted RURESА.¹⁸⁹ Thirty-nine states also have agreed with Germany to use URESА and RURESА reciprocally to enforce child support obligations.¹⁹⁰

Congress designed these acts to facilitate the entries of foreign support orders against support obligors¹⁹¹ in the states in which they reside. The acts impose no substantive support requirements on an obligor. Instead, they set forth procedural methods for courts to follow in establishing or enforcing support obligations.

A URESА or RURESА action begins when the legal custodian of a minor files a petition with a state court, seeking child support from a person who resides in another state.¹⁹² The court reviews the petition to determine whether the putative obligor owes a duty of support and whether the responding court can obtain jurisdiction over the obligor or the obligor's property. It then forwards the petition for filing to the appropriate court¹⁹³ in the responding state.¹⁹⁴ Neither court will assess filing fees against the obligee;¹⁹⁵ however, either court may assess fees against the obligor.¹⁹⁶

¹⁸³9B U.L.A. §§ 1-43 (1958) [hereinafter URESА].

¹⁸⁴9B U.L.A. §§ 1-43 (1968) [hereinafter RURESА].

¹⁸⁵Congress promoted international reciprocity by broadening the definition of the term "state" to include "any foreign jurisdiction in which [RURESА] . . . or any substantially similar reciprocal law is in effect." See *id.* § 2(m).

¹⁸⁶*Id.* § 27.

¹⁸⁷*Id.* §§ 39-40.

¹⁸⁸Alabama, Alaska, Connecticut, Delaware, the District of Columbia, Guam, Indiana, Maryland, Massachusetts, Mississippi, Missouri, New York, Puerto Rico, Tennessee, Utah, the Virgin Islands, and Washington have adopted URESА.

¹⁸⁹Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming have adopted RURESА.

¹⁹⁰The German agency responsible for enforcing support orders may be reached at the following address:

Generalbundesanwaltschaft
bei dem Bundesgerichtshof
—Zentrale Behörde—
Postfach 11 06 29
D-1000 Berlin 11

As of 16 September 1992, the following states had entered into reciprocal agreements with Germany for the enforcement of support orders or the establishment of paternity: Alaska, Arizona, Arkansas, California, Colorado (child support only), Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia (child support only), Washington, West Virginia, Wisconsin, and Wyoming.

¹⁹¹"Obligor" means any person owing a duty of support." URESА, *supra* note 183, § 2(g); see also RURESА, *supra* note 184, § 2(g) ("Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced").

¹⁹²URESА, *supra* note 183, § 13; RURESА, *supra* note 184, § 13.

¹⁹³Under RURESА, venue is proper in any court with jurisdiction over the obligor or the obligor's property. See RURESА, *supra* note 184, § 11(b). URESА does not address the issue of venue.

¹⁹⁴URESА, *supra* note 183, § 14; RURESА, *supra* note 184, § 14.

¹⁹⁵"Obligee" means a person including a state or subdivision to whom a duty of support is owed or a person including a state or political subdivision that has commenced a proceeding for enforcement of support or registration of a support order. [Whether] . . . person to whom a duty of support is owed is a recipient of public assistance [is immaterial].

RURESА, *supra* note 184, § 2(f); see also URESА, *supra* note 183, § 2(h) ("Obligee" means "any person to whom a duty of support is owed and a state or political subdivision thereof").

¹⁹⁶URESА, *supra* note 183, § 15; RURESА, *supra* note 184, § 15.

After reviewing the case, the responding court assigns it to a local prosecutor.¹⁹⁷ This prosecutor then assumes representation of the obligee.¹⁹⁸ Ultimately, a hearing is held. The court normally will order the obligor to pay support in an amount consistent with: (1) his or her financial resources; and (2) the laws of any state in which the obligor resided during the period for which the obligee is seeking support.¹⁹⁹ An obligor is presumed to be present in the responding state during the period for which support is sought, "unless otherwise shown."²⁰⁰

A putative obligor may find that mounting an effective defense to a URESA or RURESAs action is not easy. The obligee will be represented by an attorney provided by the state at no expense to the obligee. The obligor, however, probably will not be provided with free counsel unless he or she is indigent and his or her case involves recovery of public support²⁰¹ or a determination of paternity.²⁰² Moreover, a court generally will not require an obligee to appear at a hearing if the obligor has other means of confronting the obligee. This places a premium on understanding the means and methods of discovery—concepts beyond the comprehensions of many putative obligors. Finally, a putative obligor cannot use a URESA or RURESAs action to obtain jurisdiction over an obligee for any other proceeding.²⁰³ As a result, he or she cannot take advantage of the leverage that could be realized from filing a counterclaim against the obligee.

Enforcing a support order in a foreign jurisdiction once was an extremely arduous task. To receive full faith and credit in a sister state, the support order had to be reduced to judgment in the state in which it originally was issued.²⁰⁴ Because a

hearing was involved, the obligor would have to be served with process, pursuant to the forum state's long-arm statute. Once served, the obligor could present a variety of defenses, ranging from claims of changed financial circumstances to allegations that he or she actually owed no support because the obligee had interfered with the obligor's right to visitation. In essence, the obligor could relitigate the support proceeding in his or her home state.

This situation has improved. The Bradley Amendment of 1986 required the states to enact statutes that would transform each installment of a support obligation into a judgment by operation of law as that installment came due.²⁰⁵ Since then, retroactive modifications of support orders largely have become matters of merely historical interest.²⁰⁶

The acts also provide for a process called "registration." Registration essentially transforms an existing support order into an order issued by the state in which the obligor resides. The obligee's representative then can undertake to enforce the order pursuant to the law of the obligor's state of residence.

Under URESA and RURESAs, the registration process is initiated by obligees. An obligee must file three certified copies of the support order—including any modifications—and one copy of the reciprocal enforcement of support act of the state in which the order originally was entered with a clerk of court in the state in which the obligor resides.²⁰⁷ The obligee also must submit a verified statement listing the following: (1) his or her post office address; (2) the obligor's last known place of residence and post office address;²⁰⁸ (3) the amount of support that remains unpaid under the order; (4)

¹⁹⁷ Neither RURESAs, nor URESA, prohibit an obligee from hiring a private attorney to represent him or her against the defendant-obligor; however, an obligee's attempts to collect the costs of this representation from an obligor may fail. See *Olson v. Olson*, 534 S.W.2d 526 (Mo. Ct. App. 1976) (attorneys' fees not recoverable when the obligee could have obtained the assistance of a prosecuting attorney pursuant to state statute at no charge).

¹⁹⁸ URESA, *supra* note 183, § 18; RURESAs, *supra* note 184, § 18.

¹⁹⁹ URESA, *supra* note 183, § 7; RURESAs, *supra* note 184, § 7. The support guidelines of the jurisdiction in which the obligor resides constitute a rebuttable presumption of the extent of the obligor's support obligation.

²⁰⁰ URESA, *supra* note 183, § 7; RURESAs, *supra* note 184, § 7.

²⁰¹ See, e.g., *County of Ventura v. Tilden*, 183 Cal. Rptr. 741 (Ct. App. 1982).

²⁰² See, e.g., *Salas v. Cortez*, 593 P.2d 226 (Cal. Ct. App. 1979).

²⁰³ URESA, *supra* note 183, § 31; RURESAs, *supra* note 184, § 32.

²⁰⁴ U.S. CONST. art. IV, § 1; see also 28 U.S.C. § 1738 (1988).

²⁰⁵ See 42 U.S.C. § 666(a)(9) (1988).

²⁰⁶ This situation still arises, however, when parents change physical custody arrangements without seeking court ratification of their decision or modification of the existing support order. Unless the parties modify the support order, installments of support obligations will continue to accrue as judgments when due and later can be enforced against the obligor by the obligee. To avoid unjustly enriching an obligee who no longer has custody of the children for whom the original court ordered support, some courts have chosen to disregard the rule against retroactive modification of judgments. See, e.g., *Acree v. Acree*, 342 S.E.2d 68 (Va. Ct. App. 1986); *Karypis v. Karypis*, 458 N.W.2d 129 (Minn. Ct. App. 1990). Other courts, however, have applied the rule strictly, despite its harsh result. See, e.g., *Goold v. Goold*, 527 A.2d 696 (Conn. App. Ct. 1987); *Waple v. Waple*, 446 N.W.2d 536 (Mich. Ct. App. 1989).

²⁰⁷ RURESAs, *supra* note 184, § 39; URESA, *supra* note 183, § 36 (URESAs imposes no requirement that the petitioner include a copy of the reciprocal enforcement of support statute for the state in which the order originally was entered).

²⁰⁸ The Federal Parent Locator Service (FPLS) can assist a custodial parent to determine this information. To help obligees to locate noncustodial parents, the FPLS provides access to tax, police, driving, unemployment insurance, postal, and military records maintained by the federal and state governments. Only state authorities, however, can access the service directly and the federal government charges a fee for its use. See 42 U.S.C. § 653 (1988).

a description of property belonging to the obligor that is available for execution; and (5) every state in which the order has been registered.²⁰⁹ The clerk of the court then registers the support order with the state's registry of foreign support orders, docket the case, notifies the prosecutor, and sends a copy of the registered support order to the obligor by registered or certified mail.²¹⁰

An obligor has twenty days to contest a registered order before the order is "confirmed."²¹¹ Once the order is confirmed, the obligor can raise only the defenses that normally are available in an action to enforce a money judgment entered by the court of a foreign state.²¹²

Registering a foreign support order often will benefit an obligee. Nevertheless, an LAA should consider *all* the possible effects of advising a client to use registration. Because an order registered pursuant to URESA or RURESA is considered "native" to the registering state, it could be subject to modification pursuant to that state's laws and support guidelines. This modification could reduce the obligor's prospective support payments²¹³—although this adverse effect is tempered somewhat by the general rule²¹⁴ that an order entered under URESA or RURESA will not nullify, modify, or supersede a preexisting order unless the entering court specifically so provides.²¹⁵ In those cases, differences in amounts between original and subsequent orders entered under the acts constitute arrearages. A court typically will rule that these arrearages will continue to accrue, and will permit the obligee to collect them in subsequent proceedings. At least one court, however, has ruled that a court operating pursuant to URESA or RURESA "globally" modifies the amount of support owed for any future pro-

ceedings, effectively eliminating the accrual of arrearages resulting from orders for differing levels of support.²¹⁶

Under RURESA, an obligee may find another means of enforcing a foreign support order in the obligor's state of residence. The act provides that an obligee may submit a certified copy of a foreign support order to a court, which must consider this document as evidence of the obligor's duty of support.²¹⁷ The obligor, however, can raise the same defenses against this order that he or she could raise against a registered foreign support order. A male obligor also can raise nonpaternity as a defense, if this claim does not appear frivolous to the court.²¹⁸

An LAA whose client has been named as the defendant in an action pursued under URESA or RURESA can play a critical role in protecting his or her client's interests. The LAA can advise the client on the merits of obtaining civilian counsel and, if necessary, can refer the client to a specific attorney. If the client lacks civilian counsel, the LAA can help the client to answer discovery requests. The LAA also can help the client to elicit information that will bolster the client's case by drafting a discovery request and serving it on the plaintiff.

An LAA whose client is the plaintiff in a URESA or RURESA action also has a role to play. States' attorneys representing the plaintiffs in actions brought under these acts frequently are overworked and inexperienced. In many jurisdictions, the attorney representing the plaintiff will be a prosecutor who has only limited civil discovery experience. The combination of a huge caseload and inexperience frequently will result in the slow prosecution of a plaintiff's case.²¹⁹ Worse yet, it can result in the dismissal of the

²⁰⁹ RURESA, *supra* note 184, § 39; *cf.* URESA, *supra* note 183, § 36 (requiring only that the petitioner list the amount of support unpaid under the order and any other states in which the order has been registered).

²¹⁰ RURESA, *supra* note 184, § 40; *cf.* URESA, *supra* note 183, § 37 (declining to specify the duties of the clerk, but stating that service on the defendant must be accomplished pursuant to state law).

²¹¹ RURESA, *supra* note 184, § 40; URESA, *supra* note 183, § 37. Under URESA, no time limit is set for a defendant's contesting a registered order. Instead, confirmation occurs if the obligor defaults, or is judged to owe support after appearing to contest the order. *See id.*

²¹² To defend against foreign money judgments, an obligor may allege that the obligee has committed fraud, that the court that entered the original judgment lacked subject matter or in personam jurisdiction, or that the action was barred by the statute of limitations.

²¹³ A court in the state of registration most likely would reduce a support obligation if the original support order was entered in a state whose support guidelines were more generous than those employed in the registering state.

²¹⁴ *See* RURESA, *supra* note 184, § 31.

²¹⁵ *See, e.g., Georgia v. McKenna*, 315 S.E.2d 885 (Ga. 1984); *Minnesota ex rel. McDonnell v. McCutcheon*, 337 N.W.2d 645 (Minn. 1983).

²¹⁶ *Harris v. Harris*, 512 So. 2d 968 (Fla. Dist. Ct. App. 1987) (trial court did not err in assessing arrearages based on a reduced amount of child support ordered by a Connecticut court that entered the order pursuant to URESA).

²¹⁷ RURESA, *supra* note 184, § 23.

²¹⁸ *Id.* §§ 23, 27.

²¹⁹ A recent study disclosed that the average time needed to establish an interstate support order is eight months. U.S. GEN. ACCOUNTING OFFICE, INTERSTATE CHILD SUPPORT: CASE DATA LIMITATIONS, ENFORCEMENT PROBLEMS, VIEWS ON IMPROVEMENTS NEEDED 15 (1989). On average, establishing a support order *within* a state takes three months. *See id.*

plaintiff's case or in a substantial reduction in the support to which the plaintiff is entitled.²²⁰ Consequently, an LAA should be prepared to monitor the progress of a client's case to ensure that discovery requests are filed and answered and that court dates are set and kept. Major Connor.

VSI Entitlements: Disposition at Death of Recipient

Many soldiers are accepting voluntary discharges under the Voluntary Separation Initiative (VSI) Program.²²¹ The VSI program entitles a qualified service member to receive an annuity for twice the number of years the service member spent in active military service.

The statute creating the VSI entitlement states that an annuitant may designate beneficiaries who will receive VSI payments if the annuitant dies before his or her entitlement to the annuity terminates.²²² Ideally, an annuitant should designate his or her beneficiaries when he or she elects to receive VSI, using a form created specifically for this purpose. Reports from the field, however, indicate that a service member generally will not designate beneficiaries when he or she completes the election paperwork.²²³ Instead, many soldiers go to legal assistance offices just before they are discharged, seeking to revise their wills to include testamentary instructions disposing of their VSI benefits.

If a client indicates that he or she has not designated VSI beneficiaries outside of a will, and he or she desires a provision in his or her will disposing of VSI entitlements in a manner different from the residuary disposition, an LAA should incorporate the following language into the will:

"To (name of beneficiary), I give all my rights to payments made pursuant to the Voluntary Separation Initiative (VSI) Program. This gift extends only to VSI payments that I have not yet received as of the date of my death. I understand that if I should designate a VSI beneficiary outside this will, VSI payments may not be considered part of my estate and may not pass pursuant to this will."

²²⁰ See, e.g., *Thelen v. Thelen*, 281 S.E.2d 737 (N.C. Ct. App. 1981). In *Thelen*, the public prosecutor made a pro forma appearance on behalf of a URESA plaintiff. The defendant-obligor was represented by private counsel. Largely because of the public prosecutor's gross ineffectiveness, the trial court denied the plaintiff's claim for \$3900 in arrearages and reduced the obligor's support obligation from \$800 per month to \$400 per month.

²²¹ 10 U.S.C.A. § 1175 (West Supp. 1992).

²²² *Id.* § 1175 (f).

²²³ According to Major Bob Mindeola, Headquarters, Department of the Army, Deputy Chief of Staff for Personnel, Program, Budget, and Compensation Policy Division, a form for designation of beneficiaries still is being staffed. The form may not be approved and distributed for use until late in 1992.

²²⁴ See DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS, para. 2.4b(3) (15 Nov. 1979) *id.* tbl. 2-1, rule 16.

²²⁵ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992).

The proposed language warns the client that, like insurance proceeds, VSI entitlements will not become part of the estate if the client has executed an inter vivos agreement for their disposition. The proposed language also precludes any claim by the ultimate VSI beneficiary that the VSI gift was intended to encompass the value of past—as well as future—VSI payments. Major Peterson.

Veterans' Law Notes

Retirement Points for Legal Assistance

In a note published in this issue of *The Army Lawyer*, Major Leonard D. Kachinsky discusses a case in which he represented Reserve Component (RC) soldiers in exchange for retirement points pursuant to *Army Regulation 140-185*.²²⁴ In this case, he appeared in court on behalf of two brothers who lost their part-time summer jobs while they were attending two weeks of annual training (AT) with their Reserve unit.

Before Operation Desert Storm, a judge advocate could provide legal assistance to RC soldiers only when they were on active duty. Moreover, even within the Active component, a judge advocate could not represent a client in court unless this representation was part of a formal program that had been approved by The Judge Advocate General. Under the procedures that existed before Operation Desert Storm, Major Kachinsky's clients would have had to hire a civilian lawyer to recover the wages they lost when their employer unlawfully discharged them.

Headquarters, Department of the Army dispatched a number of messages during and after Operation Desert Storm authorizing legal assistance for RC soldiers in a number of situations in which it never was available before. The Legal Assistance Division, Office of The Judge Advocate General (OTJAG), subsequently incorporated the language in these messages, with some modification, into *Army Regulation 27-3* (AR 27-3).²²⁵

Under AR 27-3, paragraph 2-5a(3), RC soldiers now can obtain legal assistance from RC judge advocates "on personal

legal problems and needs that may adversely affect readiness or that have arisen from or been aggravated by military service," subject to the availability of RC legal resources and expertise. Furthermore, pursuant to paragraph 3-7g of this regulation, an RC judge advocate can provide in-court representation in appropriate cases—for example, to assist a soldier in a Veterans Reemployment Rights Law²²⁶ (VRRL) case, or when hiring a civilian lawyer "would entail substantial financial hardship to [the soldier or his or her] family"—after obtaining the approval of the Chief, Legal Assistance Division, OTJAG. In Major Kachinsky's case, this approval was granted telephonically.

All LAAs are encouraged to submit articles and notes on interesting cases and initiatives to Headquarters, Department of the Army, Office of The Judge Advocate General, Legal Assistance Division, ATTN: DAJA-LA, Washington, D.C. 20310-2200. Colonel Arquilla.

State Law Remedies Available for Some Reservists

Most RC soldiers and their servicing judge advocates are aware of the remedies the VRRL affords to a veteran or a Reservist who is denied the opportunity to return to his or her civilian job after being released from active duty or returning from drills or AT.²²⁷ Unfortunately, when an employer resists settling a case, the soldier may face a prolonged, costly legal battle at his or her own expense. Many soldiers rely upon the Department of Labor and local United States attorneys' offices for assistance; however, some have found that these agencies show little interest in their cases. In some states, relief is available more quickly and conveniently through state antidiscrimination laws.

Recently, a RC judge advocate represented two RC soldiers who initiated a discrimination claim against their employer for

²²⁶ 38 U.S.C.A. §§ 2021-2027 (West 1991).

²²⁷ *Id.* § 2024.

²²⁸ See WIS. STAT. ANN. § 111.321 (West 1991).

dismissing them while they attended AT. Their claim derived from a Wisconsin statute that prohibits discrimination based upon "membership in national guard, state defense force or any reserve component of the military forces of the United States or this state."²²⁸

L and S are brothers who worked as part-time summer employees for a Wisconsin foundry. The foundry had a very flexible and generous policy of accommodating full-time employees who belonged to the Army Reserve. While L and S attended AT, however, the foundry discharged them. The employer attempted to justify the firing, claiming that it had dismissed L and S because of certain incidents that had occurred shortly before they left for AT. This explanation, however, did not satisfy the administrative law judge (ALJ), who noted that the foundry actually did not discharge the brothers until it completed its summer shutdown and needed to hire new employees. The ALJ also emphasized that, when L and S returned from AT, the foundry's personnel manager had informed them that they had been replaced not only because of the minor incidents that had occurred before they left, but also because the foundry had needed to keep production going.

Finding that the brothers' discharges had resulted, at least in part, from their employer's concern about their inability to report for work immediately after the summer shutdown ended, the ALJ determined that the employer had discriminated against L and S because of their membership in the Army Reserve. Accordingly, the ALJ awarded L and S the wages they would have received had they remained with the foundry for the rest of summer before returning to school, minus the wages each of them earned while working for a temporary employment agency. The employer also had to pay out-of-pocket expenses for the RC judge advocate who handled the case. Major Kachinsky.

Claims Report

United States Army Claims Service

Personnel Claims Recovery Notes

Fiscal Integrity

Neither *Army Regulation 27-20*,¹ nor *Department of Army Pamphlet 27-162*,² specifically require field claims offices to reconcile recovery accounts with their servicing finance and

accounting offices. Although this oversight undoubtedly will be resolved in the future, recovery account managers should not wait to assume this responsibility on a regular basis.

The centralized funding of claims operations in the Army and the scarcity of claims resources make proper management of claims funds—including recovery deposits—essential. The

¹ DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

² DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989).

United States Army Claims Service (USARCS) has seen far too many cases in which claims offices have recorded deposits inaccurately, mistakenly have deposited affirmative claims funds in recovery accounts, and persistently have used improper fiscal year codes. The failure of field offices periodically to reconcile their records with local finance offices has forced USARCS to correct these problems.

The impact of these inaccuracies is substantial. Recovery dollars fund soldier claims. The Claims Service uses funds deposited by field offices to modify or increase claims expenditure allowances. A claims office's failure to maintain accurate deposit records not only casts doubt on the wisdom of allowing judge advocates to manage claims accounts, but also hurts individual soldiers. Moreover, fiscal problems that are left uncorrected for several months often are extremely difficult to resolve.

At times, our responsibilities for fiscal integrity are easily overlooked. When one manages an account running into millions of dollars, an error of a few thousand dollars hardly seems to matter. Nevertheless, when multiplied by the large number of field offices in the claims system, the cumulative effect of these errors is considerable. All claims personnel, from clerks to staff judge advocates, must remember their fiscal responsibilities. A claims office must reconcile accounts, particularly at the beginning of a fiscal year. Account managers must not assume that finance officials always will get things right. Remember, you will use the dollars that you save today to pay claims tomorrow. Colonel Bush.

Looking for Mr. Goodbar Moving and Storage

Some field offices have encountered a persistent problem—carriers who fail to enter their complete addresses in block 9 of *Department of Defense (DD) Form 1840*.³ These omissions place a field office in a difficult position. Looking up addresses can require considerable effort; however, if claims personnel fail to dispatch a *DD Form 1840R*⁴ to a carrier's present address, the carrier may claim that the government failed to notify the carrier of the loss or damage.

The carrier industry and the military services jointly developed *DD Forms 1840* and *1840R*. The instructions note in part A of *DD Form 1840* indicates that the carrier's representative is responsible for completing this portion of the form, which includes block 9. In the *Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules*,⁵ the carrier industry and the military services further agreed

that, when notifying a carrier of damage or loss, military claims personnel would mail the *DD Form 1840R* to the address the carrier provided in block 9 of *DD Form 1840*.⁶ The General Accounting Office has held consistently that a carrier waives its right to timely service if its agent fails to complete block 9 properly.⁷

Obviously, a carrier that has provided no address at all on its *DD Form 1840* has little basis for complaint if it does not receive a *DD Form 1840R* within the prescribed notification period. Less clear, however, are cases in which a carrier has entered an incomplete address in block 9. For example, a carrier's agent occasionally will list only the carrier's name. Alternatively, the agent will state the carrier's name and address, but not its zip code. To help claims personnel to deal with these problems, the Claims Service offers the following guidance:

- When a carrier leaves block 9 completely blank, a claims office *may* note this deficiency on the claims chronology sheet and *may* refrain from dispatching a *DD Form 1840R* to the carrier. If the claims office chooses to look up the address, so much the better; however, USARCS will not require it to do so.
- When a deficiency is isolated or minor, a claims office should correct the deficiency and dispatch proper notice, then seek correction from the offending carrier. Systemic deficiencies that cannot be corrected in the field should be brought to the attention of USARCS.
- When a deficiency is substantial, the claims office must apply a common-sense test, balancing its limited ability to look up addresses against the desirability of ensuring proper notice. Although the Army can defend an offset more easily when a claims office has notified the errant carrier properly, routinely attempting to correct major systemic deficiencies can force a claims office to spend more time looking up addresses than it can spare.

The Claims Service discussed this issue with carriers at conventions in September and October. It advised the carriers that they must complete block 9 properly, warning them that

³Dep't of Defense, Form 1840, Notice of Loss or Damage (Jan. 1988).

⁴Dep't of Defense, Form 1840R, Notice of Loss or Damage (Jan. 1988).

⁵Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), reprinted in *ARMY LAW.*, Mar. 1992, at 45.

⁶See *id.* pt. I, para. A, *ARMY LAW.*, Mar. 1992, at 46.

⁷See Settlement Certificate Z-1348910-54 (Gen. Accounting Office Dec. 9, 1991); Settlement Certificate Z-2861632 (Gen. Accounting Office Nov. 7, 1989); Settlement Certificate Z-2862806 (02) (Gen. Accounting Office Oct. 2, 1989).

the Army may penalize carriers that fail to do so by pursuing offsets regardless of notice. This approach should resolve the problem. In the meantime, claims personnel should balance the need to notify a carrier against the difficulty caused when

the claims office has to complete this task. As a claims system, we should seek to avoid frivolous disputes, but we also should seek to compel carriers to satisfy their responsibilities under their contracts and agreements. Colonel Bush,

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office and
TJAGSA Administrative and Civil Law Division

Civilian Personnel Law Note

Classification Actions

Versus Performance-Based Actions

The Office of Personnel Management (OPM) discovered that some agencies improperly have used classification actions, rather than performance-based actions, to downgrade employees. Accordingly, it issued a directive explaining OPM policy on the distinctions between reductions in grade resulting from classification actions and reductions in grade resulting from performance-based actions.¹ To exemplify an improper downgrade, it described a "reclassification" that led a federal employee to appeal to a Merit Systems Protection Board (MSPB) regional office.² Although the decision on this appeal was issued by an MSPB administrative judge (AJ)—and, therefore, lacks precedential value—the OPM believes that it illustrates the need for a clarification of OPM policy.

The Appeal

An agency downgraded a research scientist from GS-14 to GS-13 by reclassifying his position. The agency took this action after a qualified panel determined that the incumbent's position no longer merited its GS-14 classification. The panel ostensibly based its decision on an objective application of a "Research Grade-Evaluation Guide." The agency, however, stipulated that the appellant's poor performance of his duties was the "primary factor" in the evaluation that led to the grade reduction.

The employee appealed the downgrade before the MSPB, contending that the downgrade was a performance-based action in which the agency denied him the protections required by federal law, including the right to appeal the action to the MSPB. The agency responded that the downgrade was a position classification action in which the employee received grade retention. Accordingly, it argued that the MSPB lacked jurisdiction to hear the appeal.

The AJ found that the agency's failure to follow adverse action procedures was a harmful procedural error that warranted reversal of the action. Accordingly, the AJ ordered the agency to cancel the reduction in grade.

Discussion

An agency may reduce a position to a lower grade through a position classification action to execute a new OPM classification standard or to correct a classification error. It also may reduce a position's grade because erosion of duties has changed the nature of the position, unless this action is subject to reduction-in-force (RIF) procedures.³

Under some circumstances, an agency may reduce the grade of a position if management has removed duties and responsibilities from that position. The OPM, however, considers removal of duties to be a reorganization.⁴ To effect this action, the agency must follow RIF procedures, unless the agency reassigns all affected incumbents to vacant positions at their same grades.⁵

¹FPM Letter 511-11, Director, Office of Personnel Management, subject: Classification Actions Versus Performance-Based Actions (Apr. 7, 1992).

²See *id.* para. 2.

³See OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, SUPP. 351-1, REDUCTION IN FORCE, para. S2-4 (Sept. 18, 1989).

⁴See, e.g., FPM Letter 511-11, *supra* note 1, para. 3a.

⁵See *id.*

An agency may initiate a performance-based action under chapter 43 or chapter 75 of title 5 of the United States Code. Chapter 43 affords an employee the substantive right to attempt to improve his or her performance before he or she may be rated unsatisfactory.⁶ Under chapter 75, an employee facing an adverse action may claim various procedural protections set forth at 5 U.S.C. § 7513.⁷ Before an agency may initiate a performance-based, adverse action against an employee, it must inform the employee of his or her rights under chapter 43 or chapter 75. The agency cannot abrogate these rights by pretending that any action it takes against the employee is merely incidental to its reclassification of the employee's position.

Retained grade is intended to protect employees whose positions are downgraded through reclassifications or RIFs. An employee who is downgraded because of poor performance is not entitled to retained grade.

A labor counselor generally will not become involved in a position downgrade unless an employee appeals a position classification. Nevertheless, the OPM guidance discussed above shows that labor counselors should coordinate closely with managers and civilian personnel officials on any personnel action that might affect employees adversely.

Equal Employment Opportunity Notes

29 C.F.R. Part 1614

and

Army Regulation 690-600

Codified at 29 C.F.R. part 1614,⁸ the Equal Employment Opportunity Commission's (EEOC's) new regulations for federal sector employment entered into effect on 1 October 1992. *Army Regulation 690-600*⁹ (AR 690-600) currently is being updated to incorporate major revisions in Army equal employment opportunity (EEO) policy. Before the revised regulation is published, the Army's Equal Employment

Opportunity Compliance and Complaints Review Agency (EEOCCRA) will circulate drafts of the new regulation as guidance to personnel in the field. In the meantime, labor counselors must remember that the current version of AR 690-600, which became effective on 18 September 1989, does *not* reflect the new EEOC regulations. Until the Army issues its updated regulation, labor counselors must look outside the Army regulation to ensure that Army activities meet current EEOC deadlines, appeal rights notice standards, and other processing requirements. Installation labor counselors should obtain and review copies of the EEOC regulations from their staff judge advocates' libraries or their EEO officers. If they cannot obtain copies of the regulations from these sources, they should contact their major command labor counselors or the Labor and Employment Law Office, Office of the Judge Advocate General (OTJAG).

Hidden Requirements of the New EEOC Regulations: Interim Relief, Improper Contact with a Complainant Represented by an Attorney, Discovery, and Reassignment of Individuals with Handicaps

The EEOC's new regulations were intended to provide greater protection to complainants and to speed up agency processing of complaints. For instance, a complainant previously had thirty days from the occurrence of the alleged discriminatory event to contact an EEO counselor.¹⁰ The new regulations extend this timeliness requirement to forty-five days.¹¹ The EEOC previously did not require an agency to process a complaint within a given period; however, its new regulations provide that, in most instances, an agency must complete its investigation into an EEO complaint in 180 days.¹²

Although the new time limits described above may draw the most attention from labor counselors, other provisions in the new regulations actually are more revolutionary. One new regulation mirrors the MSPB's interim relief requirements.¹³ When an agency asks the EEOC's Office of Federal Operations (OFO) to reconsider a decision, and the case involves

⁶See 5 U.S.C. § 4304 (B) (1988) ("An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance").

⁷See *id.* § 7513.

⁸See 29 C.F.R. §§ 1614.101 to .607 (1992).

⁹DEPT OF ARMY, REG. 690-600, CIVILIAN PERSONNEL: EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (15 Sept. 1989) [hereinafter AR 690-600].

¹⁰29 C.F.R. § 1613.214 (1992).

¹¹*Id.* § 1614.105.

¹²*Id.* § 1614.108.

¹³When an employee prevails in an MSPB appeal, the AJ normally will include in his or her initial decision an order instructing the agency to grant the employee interim relief. If the agency petitions the MSPB to review the AJ's initial decision, this "petition . . . must be accompanied by evidence that the agency has provided the interim relief required." See 5 C.F.R. § 1201.115(b)(1) (1992). For a detailed discussion of MSPB interim relief requirements, see Dennis S. Hansen, *Federal Agency Practice: Complying with Merit Systems Protection Board Interim Relief Orders*, ARMY LAW., Oct. 1992, at 3.

removal, separation, or a suspension that continues beyond the date of the request for reconsideration, then the agency "temporar[ily] or conditional[ly] must] restor[e] the employee to duty status in the position recommended by the [EEOC], pending the outcome of the agency request for reconsideration."¹⁴ This requirement, however, is easy to overlook because the interim relief mandate is not contained within the EEOC regulation governing requests for reconsideration.¹⁵ A second significant change in the EEOC's regulations is that the regulations now distinguish between complainant representatives who are attorneys and representatives who are not. For instance, the new regulations provide that an attorney may sign a client-employee's formal complaint, but a complainant represented by a layperson must sign the formal complaint personally.¹⁶ More importantly, when a complainant is represented by a layperson, the agency not only must serve all official correspondence on the representative, but also must provide copies of each document to the complainant.¹⁷ When the representative is an attorney, however, the regulations require service of documents only on the representative.¹⁸

A third provision that will affect labor counselors significantly is a new rule governing formal discovery.¹⁹ Practically speaking, AJs always have ensured that agency records were available to complainants during prehearing conferences. The new regulation, however, provides that *either* party may develop evidence "through interrogatories, depositions and requests for admissions, stipulations or production of documents."²⁰ If used effectively, this procedure can help an agency not only to defend against a complaint, but also to decide whether a complaint should be settled before hearing.

A fourth provision warrants consideration by civilian personnel officers, as well as by EEO officers and labor counselors. This provision compels an agency to reassign an

¹⁴ See 29 C.F.R. § 1614.502(b) (1992).

¹⁵ 29 C.F.R. § 1614.407—not 29 C.F.R. § 1614.502—provides the bases and requirements for filing a request for reconsideration. Compare *id.* § 1614.407 ("Reconsideration") with *id.* § 1614.502 ("Compliance with Final Commission Decisions").

¹⁶ *Id.* § 1614.106.

¹⁷ *Id.* § 1614.605(d).

¹⁸ *Id.*

¹⁹ *Id.* § 1614.109(b).

²⁰ *Id.*

²¹ *Id.* § 1614.203(g).

²² *Id.*

²³ *Id.*

²⁴ Cf. Civil Rights Act of 1991, Pub. L. No. 102-66 § 114(1), 105 Stat. 1071, 1079 (amending 42 U.S.C. § 2000e-16 (1988) to extend filing time from 30 to 90 days).

²⁵ See generally Equal Employment Opportunity Note, *Retroactive Application of the Civil Rights Act of 1991*, ARMY LAW., July 1992, at 44; Michael J. Davidson, *The Civil Rights Act of 1991*, ARMY LAW., Mar. 1992, at 3, 8.

employee who becomes unable to perform the essential functions of his or her position because of a handicap.²¹ If possible, the agency must reassign the employee to a "funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation."²² If such a position does not exist, or if posting the employee to the position would impose an undue hardship on the agency, the agency must offer to reassign the employee to a vacant position at the highest available grade below the employee's current grade.²³

The four provisions described above are by no means the only significant changes to a labor counselor's EEO practice. Every labor counselor should obtain a copy of the new EEOC regulations and should read it carefully.

Appeal Rights:

Implementing the Civil Rights Act of 1991

The EEOC has notified the Department of the Army (DA) that several Army final decisions on discrimination complaints, stemming from incidents occurring on or after 21 November 1991, contain erroneous appeal notices. These notices incorrectly advise complainants that, if they wish to file civil actions in federal district courts, they must do so within thirty days. This advice directly contradicts a provision of the Civil Rights Act of 1991 that states that a complainant has ninety days to file an action.²⁴

Although the federal courts have not decided conclusively whether the Civil Rights Act of 1991 must be applied retroactively,²⁵ the changes inherent in the Act clearly apply to discriminatory acts occurring on or after 21 November 1991.

Accordingly, *effective immediately*, any final agency decision on a Title VII,²⁶ Age Discrimination in Employment Act,²⁷ or Rehabilitation Act²⁸ complaint that derives from an incident occurring after 20 November 1991 must state that the complainant has *ninety* days to file a civil action in federal district court. Likewise, if the complaint involves issues occurring both before and after 20 November 1991, the complainant should have ninety days to file a civil action in federal district court. Deadlines for appeals to the EEOC remain unchanged.

Any activity that has issued a final EEO complaint decision with an incorrect notice must issue an amended notice. The amended notice should discuss only the deadline for filing a civil action. If the agency fails to issue a correct civil action notice, the EEOCRA or the OFO will remand the case.

Practice Pointer

Labor Counselor Review of Attorneys' Fees Petitions in Accordance with Army Regulation 690-600

Army Regulation 690-600 requires local labor counselors to review requests for attorneys' fees.²⁹ If an issue cannot be resolved at the activity level, the labor counselor must prepare a written review of the amount claimed and recommend action on the claim. The Labor and Employment Law Office, OTJAG, must review the labor counselor's recommendation. It then must forward the review through the Army Office of the General Counsel to the EEOCRA, which will issue the Army's final decision on the claim.³⁰

Fee petitions often present extensive problems to field labor counselors and DA reviewers alike. To edify labor counselors who, as yet, have not faced this quagmire personally, the Labor and Employment Law Office offers the following near-verbatim transcription of an OTJAG review of an attorneys' fee petition.³¹

DAJA-LE (27-1a)

MEMORANDUM FOR Office of General Counsel

SUBJECT: Attorneys' Fees—EEO Complaint of Doe

²⁶ Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 701-716, 78 Stat. 287, 302-17 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1988)).

²⁷ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988)).

²⁸ See 29 U.S.C. §§ 701-796i (1988).

²⁹ AR 690-600, *supra* note 9, paras. 5-4 to 5-5.

³⁰ *Id.* para. 5-4.

³¹ The complainant in the instant case alleged that her supervisor had created a hostile work environment by subjecting her to racial and sexual discrimination. She asserted that these discriminatory practices culminated in her wrongful suspension from employment for two days. The EEOC hearing lasted six days and involved eight approved complainant witnesses. The responding management official testified for an entire day. The attorneys in this case requested \$38,269.16. One attorney sat through all six days of the hearing, but apparently did not participate actively. The attorneys did not plead that they had worked on separate issues, they failed to submit contemporaneous billing records, and the affidavits they submitted were extremely cursory.

1. Complainant's attorneys request a total of \$38,269.16, itemized as follows: \$24,481.66 for the services of attorney M (132.2 hours from 1990 to 1992 at \$185 per hour) and \$13,787.50 for the services of attorney P (91.55 hours from 1991 to 1992 at \$150 per hour). As a preliminary matter, the following corrections in the computations by the complainant's attorneys are made:

a. Mr. M incorrectly totaled the number of hours he claimed. His hours do not add up to 132.2 hours, but to 125.4 hours. Accordingly, his claim, if paid at the \$185 hourly rate he has requested, would total \$23,199—not \$24,481.66.

b. Ms. P also totaled the number of hours she claimed incorrectly. Her hours do not add up to 91.55 hours, but to 88.75 hours. Accordingly, her claim, if paid at the \$150 hourly rate she has requested, would total \$13,312.50—not \$13,787.50.

2. The complainant is a prevailing party. According to the labor counselor's 2 July 1992 memorandum, the Army accepted the EEOC administrative judge's recommended finding of discrimination. The personnel action at issue was a two-day suspension of the complainant for failure to follow her supervisor's instructions. The relief granted consisted of reinstatement for the two days the complainant was suspended, back pay, and a posting.

3. In his July 1992 memorandum, the installation labor counselor recommended payment of a total of \$20,518.75 (117.25 hours at \$175 per hour), calculated as follows:

a. Reduction in the 132.2 total hours claimed by M by 14.95 hours. The labor counselor disallowed 10.5 hours that M

claimed for services he allegedly performed before the formal complaint and 4.45 hours he alleged spent preparing the fee petition. (Note: the labor counselor erred in disallowing the 10.5 hours. See paragraph 4e, below.)

b. Reduction in the \$185 hourly rate claimed by Mr. M to \$175 per hour.

c. Denial of the entire claim for fees by the complainant's second attorney, P, based upon lack of documentation showing that a second attorney was required to represent the complainant in this case and that P's efforts were not merely duplicative of M's representation. The labor counselor recommended that, if Ms. P is paid, she be paid at an hourly rate no greater than \$125. The affidavits furnished in the petition establish that \$150 per hour is the prevailing community hourly billing rate of attorneys with ten to fifteen years of experience. They also show, however, that Ms. P has just over two years' experience. (I opine that P's hourly rate is compensable at no higher than \$100 for 1991 services and \$110 for 1992 services, based on her inexperience relative to attorneys who have practiced law for ten to fifteen years.)

4. I concur in the labor counselor's recommendation to pay a reduced number of hours and a reduced hourly rate for Mr. M, and to deny all time claimed for the services of Ms. P.

5. Petitions claiming reasonable attorneys' fees when prevailing parties are entitled to the same are no more than claims against the federal government. The amount of the fees requested—that is, the claim for reimbursement or payment—must be pleaded and supported adequately. Under the Civil Rights Attorney's Fees Awards Act, the fee applicant bears the burdens of establishing entitlement to an award and documenting the appropriate hours expended and hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); see also *Blum v. Stenson*, 465 U.S. 886 (1984). In the absence of adequate pleadings and supporting documentation, the government may not assume that the amount requested is reasonable. It must determine reasonableness based upon the information supplied by the complainant. The hourly rates claimed in the fee petition submitted in this case were not pleaded or supported adequately. To the comments and

recommendations of the labor counselor, I add the following:

a. *The entire claim should be denied because no contemporaneous billing records were provided.* The EEOC has ruled that ex post facto estimates of the time spent in representing employees in EEO matters are insufficient to support a fee award. *Jackson v. Department of Army*, No. 01831806 (Equal Employment Opportunity Comm'n 1985). In that case, the EEOC cited *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), in which the court stated,

Casual, after-the-fact estimates of time expended on a case are insufficient to support an award of attorney's fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney. The Statement of Attorneys Fees submitted by the attorneys in the instant petition was clearly prepared for purposes of the fee petition itself and was not contemporaneous with the services performed as evidenced by the June 16, 1992 date of notarization. In addition to not providing the contemporaneous billing records, neither of the attorneys' affidavits attests that contemporaneous billing records were kept and that the statement of fees submitted were prepared from such records. Without the contemporaneous billing records, the Army has no way to verify that such records were in fact kept contemporaneous with the services being performed and that the fee statements submitted are not merely after-the-fact estimates of time expended. Therefore, the complainant has not met her burden to plead and establish the hours expended.

b. *The complainant's attorneys failed to provide the degree of specificity or documentation that would support the hourly rate claimed.* Both of the complainant's attorneys evidently made minimal

efforts to prepare the fee petition. Other than merely stating their hourly rates, the attorneys have provided no information in their affidavits to support the hourly rates they have claimed.

(1) The attorneys cited no cases in which they were awarded the hourly rates of \$185 and \$150.

(2) The services by the attorneys in this case spanned a three-year period, from 1990 to 1992. Each attorney, however, claimed only one hourly rate for all the years in which he or she represented the complainant. In other words, the attorneys failed to establish that the rates of \$185 (*M*) and \$150 (*P*) were the prevailing community rates for similar work for attorneys with similar background and experience for 1990, 1991, and 1992. They also failed to establish that \$185 and \$150 actually were their rates for those years. Instead, the attorneys in this case have requested that they be compensated for all three years' services at their 1992 hourly rates.

(3) The attorneys provided no specific evidence of their actual billing practices during the relevant time period, either in relation to the complainant or to other clients. See *National Association of Concerned Veterans*, 675 F.2d at 1325. The attorneys also declined to provide copies of their fee agreements with the complainant to evidence the contingency arrangements and the actual fees agreed upon by the parties.

(4) Additionally, the complainant's attorneys provided virtually no discussion of their experiences and backgrounds in federal discrimination law, except for one-sentence declarations that they have had such experiences. No affidavits from other attorneys in the community attesting to Ms. *P*'s hourly rate, background, and experience were provided. The affidavits provided on behalf of Mr. *M* appear to be *pro forma* and cursory—they lack specifics and do not demonstrate substantive personal knowledge of his expertise.

(5) Based upon the scanty information submitted in the petition, the following hourly rates would recompense *M* fairly:

1992. \$175, as recommended by the labor counselor, but only for services that *M* actually performed in 1992.

1991 and 1990. \$165 per hour for services *M* performed in 1991 and \$155 per hour for services he performed in 1990. These rates reflect a hourly reduction of ten dollars per year.

Fee Petition Preparation Time. Mr. *M* should be compensated at a reduced hourly rate for the time he spent to prepare the attorneys' fee petition. In *Jackson v. Department of the Army*, No. 01831806 (Equal Employment Opportunity Comm'n 1985), the EEOC held that a reduced hourly rate—specifically, two-thirds of the prevailing rate—was appropriate compensation for fee preparation time. See *id.* (citing *Richardson v. Jones*, 506 F. Supp. 1259, 1265 (E.D. Pa. 1981)). In *Richardson*, the court held that fee preparation work did not require great legal skill and that the hourly rate allowed for this service should not equal the rate permitted for the case in chief. In this case, *M* expended 7.75 hours of the ninety-two hours he claimed for services in 1992 on fee petition preparation. I concur in the labor counselor's conclusion that 7.75 hours is excessive for fee preparation and in his recommendation to disallow at least 4.45 hours of this time. I recommend payment of the remaining 3.3 hours at two-thirds the 1992 hourly rate—that is, at \$117 per hour—for fee preparation by *M*, for a total of \$386.10. I recommend denial of all Ms. *P*'s fee preparation time (2.05 hours), consistent with paragraph 4d, below.

c. *The request for a twenty-five percent multiplier is wholly unsupported and should be denied.* The attorneys cited absolutely no legal basis, case law, or facts in the petition to support entitlement to a multiplier on the basis of "extreme harassment." In any event, "extreme harassment" is not a legal basis for awarding a multiplier relating to attorneys' fees. *M* and *P* did not even plead the one recognized legal basis for awarding a multiplier—that is, that an upward adjustment is necessary to award a reasonable fee to compensate for the risk of loss. See *Maldonado v. Secretary of the Navy*, 811 F.2d 1341 (9th Cir. 1987); see also *Hensley v. Ekerhart*, 461 U.S. 424 (1983) (the burden of justifying any enhancement to a reasonable fee rests on the party proposing the deviation). Furthermore, in *Pennsylvania v. Delaware Valley City Council*, 478 U.S. 546 (1986), the Supreme Court held that a multiplier or enhancement to compensate for risk of loss generally is impermissible and should be

reserved for exceptional cases. No evidence whatsoever was offered to show that the complainant's case warrants an enhancement.

d. *No reimbursement for the services of a second attorney should be made.* I concur in the recommendation of the labor counselor to deny the entire 91.5 hours claimed by Ms. P. The labor counselor accurately observes in his 2 July 1992 memorandum that this case was not complicated. Rather, it was a simple, straightforward administrative hearing, involving a two-day suspension. Attorney P did not appear officially as the complainant's counsel until the day of the EEOC hearing and did not examine a single witness at the hearing. What her contribution was—and why her 91.5 hours were necessary, given the 132 hours claimed by Mr. M in this case involving a two-day suspension—is difficult to determine. Ms. P and Mr. M wholly failed to establish in their petition that two attorneys were necessary to represent the complainant. They neither specified which issues were handled and researched by which attorney, nor explained why P's work was not duplicative of M's work. Moreover, their efforts actually appear to be duplicative. Many courts have held that, when more than one attorney is in attendance at a hearing, the possibility of duplication of effort must be considered. *In Re Donovan*, 877 F.2d 982, 996 (D.C. Cir. 1989); *Norman v. Housing Authority*, 836 F.2d 1292, 1302 (11th Cir. 1988); *Grendel's Den v. Larkin*, 749 F.2d 945, 953 (1st Cir. 1984); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). The hearing was not sufficiently complex to justify the presence of two attorneys, one of whom did not question a single witness or participate actively. See *Woloszky v. Department of the Army*, No. 01902053 (Equal Employment Opportunity Comm'n June 7, 1990). Again, this issue was pleaded inadequately and was unsupported by the attorneys in the fee petition.

e. The labor counselor erred when he stated that Mr. M may not be compensated for any time spent on the case before the date of the formal complaint (26 October 1990). Army Regulation 690-600, paragraph 5-4c provides:

Attorney fees are paid only for services performed after a formal

complaint has been filed under this regulation and after the complainant has notified the Army that he or she is represented by an attorney. However, the attorney may be compensated for a reasonable amount of time spent to make the decision to represent the complainant.

The labor counselor incorrectly totaled the hours M claimed for services he performed before 26 October 1990. The correct total is 8.95 hours, not 10.5 hours. The 8.95 hours M claimed for services performed before the formal complaint are excessive. I recommend the attorney be compensated for no more than the 2.3 hours he claimed for the initial interview with the complainant on 24 March 1990 as reasonable time spent to decide whether or not to represent the complainant. Accordingly, I recommend that you disallow 6.65 hours, or 10.5 hours as the labor counsel suggested.

6. In summary, I recommend denial of the entire fee petition, based on the complainant's failure to provide contemporaneous billing records as discussed in paragraph 4d, above. Had contemporaneous billing records been provided, the petition would have supported a payment of no more than \$19,565.10 for Mr. M's services, calculated as follows:

2.3 hours x \$155 per hour in 1990	= \$356.50
20 hours x \$165 per hour in 1991	= \$3,300.00
3.3 hours x \$117 per hour in 1992 (fee preparation)	= \$386.10
88.7 hours x \$175 per hour in 1992	= \$15,522.50
TOTAL:	\$19,565.10

No fees claimed by Ms. P would be supported by the petition, even if contemporaneous billing records had been provided.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your EEO officer.

Procurement Fraud Division Note

Procurement Fraud Division, OTJAG

Advanced Procurement Fraud Advisor Course Rescheduled

In the October 1992 issue of *The Army Lawyer*, the Procurement Fraud Division (PFD) announced its plans to conduct its first Advanced Procurement Fraud Advisor Course in Arlington, Virginia, during the week of 18 May 1993. See Procurement Fraud Note, *Restructuring of Army Procurement Fraud Advisor Training Begins 30 November 1992*, Army Law., Oct. 1992, at 48. The PFD subsequently rescheduled the

course to avoid a scheduling conflict with the Army Material Command's annual legal conference. The course now will be held during the week of 23 March, 1993. Instructors from the PFD will present a series of lectures, discussions, and practical exercises from Tuesday through Friday morning. For a more detailed description of the topics that will be presented, see *id.* at 49. Monday and Friday afternoon are planned as travel days. Individuals with questions about the Advanced Procurement Fraud Advisor Course should contact Mrs. Christine McCommas at (703) 696-1548.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The first case summary that follows describes a civilian court's decision on an issue addressed in the *Army Rules of Professional Conduct for Lawyers (Army Rules)*.¹ The second case summary describes the application of the *Army Rules* to an actual professional responsibility case. To stress education and to protect privacy, neither case summary reveals the names of the subjects. Lieutenant Colonel Fegley.

Army Rule 4.2

(Communication with Person Represented by Counsel)

*In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.*³

Case Summaries

Army Rule 8.5 (Jurisdiction)

*Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities.*²

The District Court for the District of New Mexico recently ruled that federal lawyers are subject to state ethics rules. Another court previously had determined that a federal prosecutor had violated *Model Code of Professional Responsibility (MCPR)* disciplinary rule (DR) 7-104, which prohibits a lawyer representing a party in interest from knowingly communicating with a party represented by another lawyer, unless the first lawyer is "authorized by law" to communicate with that party or has obtained the prior consent of the other lawyer to do so.⁴

¹See DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA Pam. 27-26]. When the opinions summarized below were published, *Department of the Army Pamphlet (DA Pam.) 27-26* was the controlling version of the *Army Rules of Professional Conduct*. On 1 June 1992, *Army Regulation 27-26* superseded DA Pam. 27-26. See generally DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

²AR 27-26, *supra* note 1, rule 8.5 (f).

³*Id.* rule 4.2.

⁴In re John Doe, No. CIV-90-1020-JB (D.N.M. Aug. 4, 1992) (order granting motion to remand). See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (A) (1) (1980).

Between 24 August 1988 and 8 December 1988, John Doe, an assistant United States attorney (AUSA), allegedly communicated personally, or through his investigator, with a criminal defendant, Mr. Smith. Doe did so knowing that Smith was represented by an attorney, Ms. Gardiner. Doe claimed that Smith had initiated the conversations and had volunteered information only after Doe warned him that Gardiner would not approve. Doe admitted, however, that he never sought or received Gardiner's permission to speak with Smith.

When she learned that Doe had communicated with Smith, Gardiner moved to suppress evidence that Doe had obtained from her client. The judge declined to suppress the evidence; however, she found that Doe had violated DR 7-104 and referred the matter to the District of Columbia's disciplinary board.⁵ Because Doe was admitted only to the New Mexico Bar, and was permitted to practice as an AUSA in the District of Columbia solely by virtue of his New Mexico license, the disciplinary board concluded that it lacked jurisdiction to proceed against him. The board, however, specifically rejected Doe's suggestions that "Disciplinary Rule 7-104(A)(1) does not apply to criminal proceedings . . . [or] to criminal prosecutors performing their duties . . . [and] that the Supremacy Clause of the United States Constitution creates a bar to the prosecution of an AUSA in a state disciplinary proceeding for a disciplinary violation." Accordingly, it referred the matter to the New Mexico state disciplinary board.

Doe removed the disciplinary proceeding to federal district court. The New Mexico disciplinary board responded by filing a petition to remand. The district court found that it lacked jurisdiction over the case. It declared that 28 U.S.C. § 1442,⁶ the statute endowing federal courts with removal authority in actions against federal officers, does not encompass disciplinary proceedings because they are neither civil actions, nor criminal prosecutions.⁷ A disciplinary proceeding

is conducted not to redress criminal wrongs by punishing the respondent, but to determine the respondent's fitness to function as an officer of the court and to protect the courts and the public from persons unfit to practice law. Similarly, a disciplinary action is not a civil proceeding because it does not involve two parties, litigate a cause of action, or provide personal remedies to complainants. The court also found support for its conclusion in the preamble to the *Model Rules of Professional Conduct*⁸ and the tendency of federal courts to defer to states' decisions on attorney discipline.

The court then observed that, to remove an action pursuant to 28 U.S.C. § 1442, a movant must allege that his or her federal office entitles him or her to a colorable federal defense. It expressly rejected Doe's assertion that the Supremacy Clause of the Constitution,⁹ "federal law" authorizing prosecutors to communicate with represented parties, and the doctrine of prosecutorial immunity gave rise to such a defense.

Examining Doe's Supremacy Clause argument, the court found no conflict between an individual's duties as a prosecutor under federal law and his or her duties as a lawyer under state law. That Doe could cite no law demonstrating a clear and manifest congressional or judicial intent to preempt or contradict the applicable state ethical codes did not surprise the court. It remarked pointedly that the ban on communicating with a represented party is a fundamental principle of both state¹⁰ and federal¹¹ law that has its roots in America's common-law tradition. The court also observed that the Department of Justice (DOJ) has incorporated the provisions of the *MCPR* into the DOJ standards of conduct.¹²

Next, the court turned to Doe's argument that his communications with Smith were "authorized by law." Doe cited legal authority stating that United States attorneys are "authorized" not only to prosecute, but also to "investigate" crimes. Accordingly, he asserted that federal prosecutors are "authorized by

⁵United States v. Smith, No. CR-F-9938-88 (D.C. Sup. Ct. 1992).

⁶28 U.S.C. § 1442 (1988) (expressly authorizing removal of a "civil action" or a "criminal prosecution" against a federal officer).

⁷See generally Franklin D. Cleckley, *Clearly Erroneous: The Fourth Circuit's Decision to Uphold Removal of a State Disciplinary Proceeding Under the Federal Officer Removal Statute*, 92 W. VA. L. REV. 577 (1990), cited with approval in, Ernest F. Lidge, III, *Government Civil Investigations and the Ethical Ban on Communications with Represented Parties*, 67 IND. L. J. 549, 628 (1992).

⁸See MODEL RULES OF PROFESSIONAL CONDUCT, preamble (1983) (stating that the rules are not designed to be a basis for civil liability).

⁹See U.S. CONST., art. VI.

¹⁰Canon 9 of the American Bar Association Canons of Professional Ethics, the predecessor to DR 7-104 (A) (1), provided, in relevant part, "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he [or she] undertake to negotiate or compromise the matter with him [or her], but should deal only with his [or her] counsel." See CANONS OF PROFESSIONAL ETHICS, Canon 9 (1908); see also United States v. Lopez, 756 F. Supp. 1433, 1447 (N.D. Cal. 1991).

¹¹United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988); United States v. Thomas, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973); United States v. Batchelor, 484 F. Supp. 812 (E.D. Pa. 1980); cf. United States v. Ryan, 903 F.2d 731, 740 (10th Cir. 1990) (DR 7-104(A)(1) does not apply when defendant "had not been charged, arrested or indicted or otherwise faced with the prosecutorial forces of organized society"). In the instant case, Smith had been arrested and released on his own recognizance pending further investigation.

¹²See 28 C.F.R. § 45.735-1(b) (1991) (stating that DOJ attorneys "should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association").

law" to communicate with represented parties because this communication constitutes an "investigation." To support this reasoning, Doe cited DOJ directives which assert that a federal prosecutor does not violate DR 7-104 by maintaining contacts with a represented individual. The court dismissed this argument. It first noted that to accept this position would create a blanket exemption from ethical obligations for nearly all of a prosecutor's functions. It then remarked that DOJ directives are not binding authority, opining that to accept them as such would allow any agency to issue a regulation exempting itself from ethical restrictions.

Finally, the court examined Doe's argument that he was entitled to prosecutorial immunity—that is, that as a prosecutor, he was not amenable to disciplinary proceedings. The court concluded that prosecutorial immunity is premised on the belief that disciplinary proceedings, rather than civil proceedings, are the appropriate means of addressing a prosecutor's unethical conduct. It noted that many federal and state courts have stated consistently that government attorneys are not immune from state bar disciplinary proceedings.¹³ Without determining whether Doe actually acted unethically, the court granted the disciplinary board's motion and remanded the proceeding. Lieutenant Colonel Fegley.

Army Rule 4.4 (Respect for Rights of Third Persons)

Attorneys acted properly in advising Criminal Investigation Command (CID) investigators not to provide rights warning statements to two witnesses whom the CID previously had considered to be suspects.

Attorneys who monitored CID interviews, advised CID investigators to continue questioning two former suspects despite their repeated requests to consult attorneys, and advised the CID to charge one witness with failure to obey a lawful order for refusing to answer questions, acted properly.

Two trial counsel (TCs) allegedly violated rule 8.4(d) of the *Army Rules*,¹⁴ article 98 of the Uniform Code of Military Justice (UCMJ),¹⁵ and the Fifth and Sixth Amendments to the United States Constitution. These allegations stemmed from

reports that both TCs knowingly allowed or encouraged a CID agent to continue questioning two soldiers after the soldiers clearly asked to consult with attorneys.

The ethical inquiry arose from a criminal investigation in which law enforcement agents discovered that an officer and two noncommissioned officers (NCOs) had smuggled nine or ten AK-47 assault rifles, three crew-served weapons, and more than 3000 rounds of ammunition into the United States. Investigators questioned every member of the suspects' unit after advising them of their rights under UCMJ article 31.¹⁶ Every unit member, including the two soldiers whose testimonies later triggered the ethical investigation, invoked their rights to remain silent and to consult with counsel. The investigation languished.

Six months later, in an attempt to revive the investigation, the two TCs directed the CID to reinterview the two soldiers. Before beginning the interviews, the CID agent asked the soldiers if they had consulted with counsel after the earlier interrogations. The agent also informed the soldiers that they were not suspects, that they would be questioned only about the offenses committed by the officer and the two NCOs, and that the interrogator would terminate each interview if, at any time during the questioning, he began to suspect that the soldier he was interviewing had committed a criminal offense. During the interrogations, which the TCs watched through a one-way mirror, each soldier expressed a desire to remain silent and asked to consult with counsel. Both times, the soldiers' commander responded by ordering the soldiers to answer the investigator's questions. One of the soldiers, Specialist J, subsequently was titled for disobeying the commander's lawful order to make a statement. When the other soldier, Specialist K, made an incriminating statement, the investigator promptly stopped the questioning, provided a rights warning statement, and titled him with three theft offenses. The two soldiers later complained through their Trial Defense Service attorneys¹⁷ that, after taking them into custody, the CID investigator wrongfully had continued to question them, despite their repeated requests for counsel.

The TCs' supervisory judge advocate (JA) appointed a preliminary screening official (PSO) to investigate the TCs' alleged ethical violations. Quickly finding the soldiers' factual allegations to be true, the PSO focused his analysis on the motivations and concerns of the two TCs.

¹³See Cleckley, *supra* note 7, at 607.

¹⁴See AR 27-26, *supra* note 1, rule 8.4(d) (prohibiting a lawyer representing the Army from engaging in conduct that is prejudicial to the administration of justice).

¹⁵See UCMJ art. 98 (1988) (proscribing the knowing and intentional failure to enforce, or comply with, UCMJ procedures).

¹⁶*Id.* art. 31.

¹⁷The defense counsel were detailed to represent J and K after the second round of interrogation. The attorneys reported the soldiers' allegations against the TCs pursuant to rule 8.3 of the *Army Rules*. See generally AR 27-26, *supra* note 1, rule 8.3 (imposing an obligation to report any ethical violation that raises a substantial question about a lawyer's honesty, trustworthiness, or fitness to practice).

The TCs argued that the critical issue was whether the government believed, or reasonably should have believed, that when the CID last interviewed the two soldiers, the soldiers were suspected of having committed offenses. They pointed out that the CID agent had asked no questions that were designed to elicit incriminating responses. Every question concerned offenses committed by other soldiers. The TCs believed that J and K refused to answer because they hoped to protect other unit members or because they mistakenly believed that they would be punished for failing to report the offenses of others. Accordingly, the TCs asked the investigator to call the unit commander and ask the commander to order the soldiers to answer the questions. Significantly, when the CID conducted the second interrogations, neither the TCs, nor the investigating agent, considered either soldier to be a criminal suspect.

Both TCs independently conducted legal research and constantly sought advice from their immediate supervisor, an attorney from CID, and another attorney from the soldiers' unit. They mapped out a strategy that took all relevant case

law into account, limited their interviews to specific issues, and avoided any inquiries into each of the interviewee's own conduct. The care with which the TCs approached the second interviews implicitly rebutted the allegations that they had violated ethical rules intentionally or by gross indifference.

That neither soldier was represented by counsel when the CID interviewed them clearly was important to the two prosecutors. They declined to interview a third soldier who actually had consulted with an attorney, evidently believing that questioning an individual represented by counsel would be unethical, even though that individual was not a suspect, but only a witness. The PSO concluded that the TCs' actions demonstrated concern for the rights of others, knowledge of the ethical rules, and understanding of why, and for whom, the rules exist.

The Standards of Conduct Office, Office of The Judge Advocate General, agreed with the supervisory JA. It found no professional misconduct. Mr. Eveland.

Regimental News From the Desk of the Sergeant Major

Sergeant Major John A. Nicolai

Upon assuming the position of Sergeant Major of the Judge Advocate General's Corps, I made a conscious decision not to publish any articles until I had an opportunity to get a sense of the enlisted issues within the Corps. This first note will deal with general observations over the first six months of that assessment. Subjects and topics for subsequent articles will be solicited from the field and will reflect current items of interest and concern.

My initial impression of the overall state of the enlisted Corps is extremely favorable. The young noncommissioned officers (NCOs) and specialists are the best I ever have observed. They are smart, dedicated and professional. I have seen some areas, however, that need extra attention. Some fall within the purview of select noncommissioned officers in key positions, but most are the responsibility of all legal NCOs, specialists, and court reporters.

One Corps

The Army Judge Advocate General's Corps consists of men and women from the Active Army, the Army Reserve, and the National Guard. As we individually carry out our duties, we

need to remember that we are one Corps. We must be committed to serving the collective interests of each of the components in enhancing cooperation and interoperability. Personnel involved with developing and executing Army Reserve and National Guard training must reemphasize the importance of that training throughout the Corps. We should train as one Corps. Quality training must be the watchword. This is an area that will become more important as changes to the total force structure are implemented.

Schools

The resident and nonresident courses available for the enlisted force are among the best in the Army. They provide for excellent soldier development and career enhancement. The prerequisites for resident and nonresident schools at The Judge Advocate General's School have been established for some time. Although the prerequisites are widely known, we have not been following our own rules. This must change. Only soldiers who meet the criteria for attendance shall be selected for attendance. Soldiers who do not measure up will not attend. Only in unusual cases will a waiver of eligibility be approved; waivers will be the exception and not the rule.

Put the word out—soldiers who expect to attend resident courses or to enroll in nonresident courses will be expected to meet all published prerequisites.

Communications

I am confident that we generally do a good job in getting the word out. I am just as confident that we can do a better job in the future. Information must be disseminated. Each day, soldiers make decisions that affect their careers, futures and families. They must have access to *all* available information so they can make *informed* decisions. The NCOs—especially the chief legal NCOs—play key roles. Information concerning the Voluntary Separation Initiative and Special Separation Benefits Programs, unit deactivations and movements, the Army Legal Placement Service, and the Army Career Alumni Program, to name a few, are important to all of us. Keep soldiers informed.

Records

Personnel assignments are based upon qualifications, needs of the Army, and personal concerns of the individual soldier and families. To manage assignments effectively, assignment managers must have current, accurate information. Each soldier is responsible for ensuring that his or her official records reflect all pertinent data—that is, marital status, exceptional

family members, promotion status, and schooling. At present, many personnel records need updating.

Evaluations

Many of the calls I receive are from leaders asking, "Why wasn't Staff Sergeant A selected for sergeant first class?" On review of that soldier's record, the reason usually is obvious—the leader asking the question did not render a substantive evaluation or the senior rater failed to comment on the soldier's potential. We must ensure that evaluations correctly reflect an NCO's performance and potential. I have received an equal number of calls from senior NCOs and officers complaining about the substandard performance of NCOs under their charge, only to find out later that the persons calling rated those NCOs exceptionally high for the same rating period. This indicates to me that we need to reinforce candor and courage when preparing individual evaluations. If we are to have a credible system of assessing individual qualification for assignment and promotion, we must be credible and candid in the evaluation process.

There is a tremendous amount of talent, dedication, and energy in the Judge Advocate General's Corps. I am proud to be part of it. These are challenging times for the Army and the Corps. We all must get involved. We have made significant progress over the years, but much remains to be done.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

- 4-6 January: 1993 USAREUR Tax CLE (5F-F28E).
- 4-8 January: 115th Senior Officers' Legal Orientation (5F-F1).
- 6-9 January: 1993 USAREUR Legal Assistance CLE (5F-F23E).
- 11-15 January: 1993 Government Contract Law Symposium (5F-F11).
- 11-15 January: 1993 PACOM Tax CLE (5F-F28P).
- 19 January-26 March: 130th Basic Course (5-27-C20).

1-5 February: 30th Criminal Trial Advocacy Course (5F-F32).

1-5 February: 1993 USAREUR Contract Law CLE (5F-F15E).

8-12 February: 116th Senior Officers' Legal Orientation (5F-F1).

22 February-5 March: 130th Contract Attorneys' Course (5F-F10).

8-12 March: 32d Legal Assistance Course (5F-F23).

15-19 March: 53d Law of War Workshop (5F-F42).

22-26 March: 17th Administrative Law for Military Installations Course (5F-F24).

29 March-2 April: 5th Installation Contracting Course (5F-F18).

5-9 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).

12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

20-23 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys' Course (5F-F10).

17-21 May: 36th Fiscal Law Course (5F-F12).

17 May-4 June: 36th Military Judges' Course (5F-F33).

18-21 May: 1993 USAREUR Operational Law CLE (5F-F47E).

24-28 May: 43d Federal Labor Relations Course (5F-F22).

7-11 June: 118th Senior Officers' Legal Orientation (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JAOAC, Phase II (5F-F58).

14-25 June: JATT Team Training (5F-F57).

14-18 June: 4th Legal Administrators' Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19-30 July: 132d Contract Attorneys' Course (5F-F10).

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officers' Legal Orientation (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

February 1993

4-5: GWU, Procurement Law Research Workshop, Washington, D.C.

4-5: GII, Advanced Environmental Laws & Regulations Course, Orlando, FL.

4-6: NCDA, Asset Forfeiture, San Francisco, CA.

8-10: GWU, Schedule Contracting, Washington, D.C.

8-12: GWU, Administration of Government Contracts, Washington, D.C.

14-18: NCDA, Trial Advocacy, New Orleans, LA.

17-19: GWU, ADP/Telecommunications Contract Law, Washington, D.C.

21-25: NCDA, Experienced Prosecutor Course, Santa Fe, NM.

For further information on civilian courses, please contact the institution offering the course. The addresses are in the August 1992 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month	
**Alabama	31 December annually	
Arizona	15 July annually	
Arkansas	30 June annually	
*California	1 February annually	
Colorado	Any time within three-year period	
Delaware	31 July biennially	
**Florida	Assigned month every three years	
Georgia	31 January annually	
Idaho	Every third anniversary of admission	
Indiana	31 December annually	
Iowa	1 March annually	
Kansas	1 July annually	
Kentucky	30 June annually	
**Louisiana	31 January annually	
Michigan	31 March annually	
Minnesota	30 August triennially	
**Mississippi	1 August annually	
Missouri	31 July annually	
Montana	1 March annually	
Nevada	1 March annually	
New Mexico	30 days after completing each CLE program	
**North Carolina	28 February annually	
North Dakota	31 July annually	
*Ohio	31 January biennially	
**Oklahoma	15 February annually	
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; triennially thereafter	
**Pennsylvania	Annually as assigned	
**South Carolina	15 January annually	
*Tennessee	1 March annually	
Texas	Last day of birth month annually	
Utah	31 December biennially	
Vermont	15 July biennially	
Virginia	30 June annually	
Washington	31 January annually	
West Virginia	30 June biennially	
*Wisconsin	20 January biennially	
Wyoming	30 January annually	

For addresses and detailed information, see the July 1992 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay

five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, Defense Switched Network (DSN) 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the

ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A239203 Government Contract Law Deskbook, vol. 1/ JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, vol. 2/ JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A248421 Real Property Guide—Legal Assistance/ JA-261-92 (308 pgs).

- AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

- AD B164534 Notarial Guide/JA-268(92) (136 pgs).

- AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

- AD A246325 Soldiers' and Sailors' Civil Relief Act/ JA-260(92) (156 pgs).

- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

- AD A244032 Family Law Guide/JA 263-91 (711 pgs).

- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

- AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

- AD A245381 Tax Information Series/JA 269/92 (264 pgs).

- *AD A256322 Legal Assistance: Deployment Guide/ JA-272(92)

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

- AD A255038 Defensive Federal Litigation/ JA-200 (92) (840 pgs).

- AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

- *AD A255064 Government Information Practices/ JA-235(92) (326 pgs).

- AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

- AD A239202 Law of Federal Employment/ JA-210-91 (484 pgs).

- *AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, & Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

- AD B135506 Criminal Law Deskbook Crimes & Defenses/ JAGS-ADC-89-1 (205 pgs).

- AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

- AD A251120 Criminal Law, Nonjudicial Punishment/ JA-330(92) (40 pgs).

- AD A251717 Senior Officers' Legal Orientation/ JA 320(92) (249 pgs).

- AD A251821 Trial Counsel & Defense Counsel Handbook/ JA 310(92) (452 pgs).

- AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Guard & Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam. 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 5-3	Installation Management and Organization	9 Oct 92
AR 25-12	Communications Security Equipment Maintenance and Maintenance Training	14 Aug 92
AR 40-1	Medical Services, Interim Change I03	4 Sep 92
AR 55-38	Reporting Transportation Discrepancies in Shipments (RCS:MTMC-54)	31 Aug 92
AR 135-382	Reserve Component Military Intelligence Units and Personnel (S/S AR 140-192 (Apr. 1980))	19 Oct 92
AR 420-41	Acquisition and Sale of Utilities Services	30 Sep 92
AR 525-20	Command and Control Countermeasures (C2CM)	31 Jul 92
AR 600-8-14	Identification Cards, Tags, and Badges (S/S AR 640-3 (Aug. 1984))	15 Jul 92
AR 600-75	Exceptional Family Member Program, Interim Change I03	1 Oct 92

Number	Title	Date
AR 608-1	Personal Affairs, Interim Change I01	28 Aug 92
AR 690-400	Civilian Personnel, Interim Change I05	4 Sep 92
AR 750-6	Ground Safety Notification System	21 Sep 92
Cir. 11-92-2	Army Management Control Plan	1 Oct 92
Pam. 351-4	U.S. Army Formal Schools Catalog	30 Oct 92
UPDATE 16	Morale, Welfare, and Recreation, Interim Change I01	31 Aug 92

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the "ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the "ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new "DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

Ac. TJAGSA Publications Available Through the LAAWS BBS.

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
93CLASS.ASC	July 1992	FY 1993 TJAGSA class schedule (ASCII).
93CLASS.EN	July 1992	FY 1993 TJAGSA class schedule (ENABLE 2.15).

FILE NAME	UPLOADED	DESCRIPTION
93CRS.ASC	July 1992	FY 1993 TJAGSA course schedule (ASCII).
93CRS.EN	July 1992	FY 1993 TJAGSA course schedule (ENABLE 2.15).
ALAW.ZIP	June 1990	<i>The Army Lawyer and Military Law Review</i> Database (ENABLE 2.15). Updated through 1989 <i>The Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	November 1990	Fiscal Law Deskbook (Nov. 1990)
FSO_201.ZIP	October 1992	Update of FSO Automation Program. Download to hard disk, unzip to floppy disk, then enter A:\INSTALLA or B:\INSTALLB.
JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	March 1992	Law of Federal Employment
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235-92.ZIP	August 1992	Government Information Practices (July 1992). Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide

FILE NAME	UPLOADED	DESCRIPTION
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	July 1992	Crimes and Defenses Handbook
JA4221.ZIP	May 1992	Operational Law Handbook, vol. 1
JA4222.ZIP	May 1992	Operational Law Handbook, vol. 2
JA509.ZIP	October 1992	Contract Claims Litigation, and Remedies Deskbook (Sept. 1992).
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military

needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crank(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 934-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Errata.

Major Fraud Against the United States, an article published in the September 1992 issue of *The Army Lawyer*, stated inaccurately that "absent aggravating circumstances, a violation of the mail fraud or wire fraud statutes carries a maximum penalty of five years' imprisonment and a \$1000 fine." See Scott W. MacKay, *Major Fraud Against the United States*, *Army Law.*, Sept. 1992, at 7, 8 (emphasis added). Introduced during the editorial revision of the article, this error in no way reflects Major MacKay's interpretation of federal criminal law. As Major MacKay correctly pointed out, the maximum fine for these offenses actually is \$250,000 for an individual, or \$500,000 for an organization, subject to various statutory provisions. See 18 U.S.C. § 3571 (1988); see also *id.* §§ 1341, 1343.

7. TJAGSA Telephone Number Changes.

Effective 25 November 1992, the DSN—formerly AUTOVON—telephone number for The Judge Advocate General's School was changed from 274-7115 to 934-7115.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

Milton H. Hamilton

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army

03078

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Distribution: Special

SECOND CLASS MAIL