



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-205

January 1990

Table of Contents

Articles

Bad Check Cases: A Primer for Trial and Defense Counsel..... <i>Major Henry R. Richmond</i>	3
Maximizing Survivor Benefits for Family Members..... <i>Major Thomas F. Dougall</i>	12
USALSA Report..... <i>United States Army Legal Services Agency</i>	18
The Advocate for Military Defense Counsel DAD Notes..... COMA Issues Landmark AIDS Decisions; Multiplicity Update—1989	18
Government Appellate Division Note..... Sentence Credit Revisited at the Appellate Level <i>Captain Timothy J. Saviano</i>	22
Trial Defense Service Note..... Using Experts to Prepare for Courts-Martial <i>Lieutenant Colonel Larry E. Kinder</i>	27
Regulatory Law Office Note.....	31
TJAGSA Practice Notes..... <i>Instructors, The Judge Advocate General's School</i>	32
Criminal Law Notes..... Burglary and the Requirement for a Breaking; Legal Efficacy as a Relative Concept; Using Circumstantial Evidence to Prove False Swearing; The Unenforceable Waiver and the Enforceable Promise; The Air Force Faces <i>Coy</i> ; Evidence Pamphlet; Military Rules of Evidence Update	32
Legal Assistance Items..... Consumer Law Notes (Tax Refund Anticipation Loans; Fair Credit Billing and Braniff Ticket Sales); Professional Responsibility Note (JAG Attorneys Following Military Ethics Rules Will Not Be Subject To Discipline For Violating Oregon Rules); Tax Notes (U.S. Savings Bonds: An Old Reliable, Now Even More Attractive; IRS Announces 1989 Mileage Rates); Estate Planning Notes (Property Settlement Agreement and Will Held Not	41

Effective To Change IRA Beneficiary Designation; Survivors' Education Benefits); Family Law Note (<i>Mansell v. Mansell</i>)	
Administrative and Civil Law Notes	46
Reports of Survey; Digest of Opinion of The Judge Advocate General	
Contract Law Note	47
Congress Changes, Then Suspends, Procurement Integrity Provisions	
Claims Report	49
<i>United States Army Claims Service</i>	
A Brief History of Claims Automation	
<i>Colonel Adrian J. Gravelle</i>	
Claims Notes	52
Personnel Claims Recovery Note (Maximum Carrier Liability on Basic Increased Released Valuation Shipments To and From Alaska); Personnel Claims Note (Substantiating the Loss of Original Stereo and Video Tapes); Affirmative Claims Note (The Federal Medical Care Recovery Act Relating to the U.S. Coast Guard)	
Labor and Employment Law Notes	52
<i>Labor and Employment Law Office, OTJAG, Office of the Staff Judge Advocate, FORSCOM, and Administrative and Civil Law Division, TJAGSA</i>	
Labor Law Developments (Mandatory Performance Awards Are Nonnegotiable; FLSA Claims; Contracting Out; Profit Sharing Plans); Equal Employment Opportunity (Past Drug Use; Last Change Agreements; Tolling of Time Limit to File Administrative Complaint; Foreign Accent May Be Nondiscriminatory Reason for Employment Action; EEOC Proposed Rules; Interest on EEO Awards; Equitable Waiver of Time Limits for Civil Actions; Bumping as EEO Remedy); Personnel Law (Security Clearance; MSPB Mitigates Shoplifting Removal; Denial of Leave Without Pay Improper; Board Rejects Disparate Treatment Claim; MSPB Rules Navy Petition Untimely; Board Lacks Jurisdiction Over Probationer Appeal; Office of Special Counsel; Drug-Free Workplace)	
Procurement Fraud Division Note	56
<i>Procurement Fraud Division, OTJAG</i>	
New Developments in Fighting Individual Surety Bond Fraud	
CLE News	57
Current Material of Interest	64

The Army Lawyer (ISSN 0364-1287)

Editor
Captain Matthew E. Winter

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 should also 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* (14th ed. 1986) and *Military Citation* (TJAGSA, July 1988). 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 *The Army Lawyer*, [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.

Bad Check Cases: A Primer for Trial and Defense Counsel

Major Henry R. Richmond
Chief, Criminal Law Division, Fort Stewart

Introduction

Increased reliance on bank checks and credit union share drafts translates into increased potential for criminal abuse of these financial instruments. This article will not attempt to cover the entire spectrum of offenses that might result from the abuse of checking privileges.¹ Rather, it will focus on prosecuting and defending two particular kinds of offenses: 1) making, drawing, or uttering a check/draft without sufficient funds, in violation of article 123a, UCMJ; and 2) making and uttering a worthless check by dishonorably failing to maintain funds, in violation of article 134, UCMJ. The article will address the differences between these offenses, how to charge them, and how to present a prima facie case. In addition, it will examine possible defense tactics and will discuss some special problems associated with these kinds of cases.²

The analytic framework for discussing these issues is *backward planning*. Backward planning involves deciding first what must be accomplished and then determining what evidence is necessary to meet that requirement.³ It is a planning method applicable to the trial or defense of any case, not only bad check cases. Used properly, the backward planning model will allow counsel to prepare their closing argument and then work through the case to the opening statement. It allows counsel to structure the case, present only the necessary evidence, and maintain continuity.

All too often, the first thing that trial and defense counsel do is review the potential evidence and decide what documents and witnesses they are going to present. Only later do counsel consider the objective they hope to accomplish. This is not an efficient or effective way to present a case. Counsel should first determine what needs to be accomplished and should then consider the

evidentiary requirements for reaching that objective. The backward planning approach in litigating bad check cases will be discussed from the perspective of both the trial counsel and the defense counsel.

Trial Counsel

Generally

The backward planning model is a useful methodology for trial counsel.⁴ It can be especially helpful in bad check cases, because these trials often require the evaluation and organization of various charging options, stacks of documentary evidence, and several lay and expert witnesses.

An important preliminary question is how to charge the accused. The proper answer requires the trial counsel to become familiar with the facts of the case and with the law that applies to bad checks. Initially, trial counsel should list on a sheet of paper the elements of the potential offenses that may be charged.

Next, trial counsel should evaluate the evidence, piece by piece, and note the evidence necessary to prove each element. Often, counsel will be surprised that only a small portion of the evidence gathered by the United States Army Criminal Investigation Command (CID), the Military Police, or the commander is relevant in proving the case. The mere fact that CID has included a witness statement or piece of evidence in the report of investigation does not mean that it must be offered into evidence at trial.

Article 123a vs. Article 134

Two different offenses may be prosecuted under article 123a: 1) intentionally writing a bad check to obtain a thing of value; and 2) intentionally writing a bad check to pay off a past debt.⁵ Article 134 envisions

¹ Generally included in this category are violations of article 121 (larceny), article 123 (forgery), article 123a (worthless checks), and article 134 (dishonorable failure to maintain sufficient funds in a checking account). Uniform Code of Military Justice arts. 121, 123, 123a, 134, 10 U.S.C. § 921, § 923, § 923a, § 934 (1982), respectively [hereinafter UCMJ].

² The trial of bad check cases, as with any trial, can encompass an almost endless number of potential issues. In order to stay within the limits of this article and narrow the scope of the topic to its most basic elements, topical discussions have been necessarily limited.

³ See Appendix 3 for a backward planning model for a bad check case.

⁴ For a general discussion of the duties and procedures of trial counsel, see Dep't of Army, Pam. 27-10, Military Justice Handbook for the Trial Counsel and the Defense Counsel, chap. 1 (October 1982) [hereinafter *Handbook*].

⁵ Manual for Courts-Martial, United States, 1984, Part IV, para. 49b(1) and (2) [hereinafter MCM, 1984]. The two offenses and their elements are as follows:

1. Making, drawing, or uttering check, draft, or order without sufficient funds for the procurement of any article or thing of value, with intent to defraud:
 - a. that the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;
 - b. that the accused did so for the purpose of procuring an article or thing of value;
 - c. that the act was committed with intent to defraud; and
 - d. that at the time of making, drawing, uttering or delivering of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or depository for the payment thereof upon presentment.
2. Making, drawing, or uttering check, draft, or order without sufficient funds for the payment of any past due obligation, or for any other purpose, with the intent to deceive:
 - a. that the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

a single bad check offense: writing a check for which the accused negligently failed to maintain sufficient funds in his or her account.⁶ While the differences in these offenses are subtle, they are important and will affect how the prosecutor charges bad check offenses.⁷

Article 123a specifically provides that any person who makes, draws, utters, or delivers a check, knowing that he or she does not or will not have sufficient funds to cover the check upon presentment, *for the procurement of something valuable and with the intent to defraud*, commits a crime.⁸ Article 123a also provides that a person who makes, draws, utters, or delivers a check with the requisite knowledge, *for the payment of any past due obligation or any other purpose and with the intent to deceive*, also commits a crime.⁹

These two offenses can arise in several ways. For example, assume a soldier goes to the PX and cashes a check or uses a check to buy the latest Mel Torme album. Assume also that the soldier knows he does not or will not have sufficient funds to cover the check when it will be presented. In this case, the soldier has procured something of value with the intent to defraud, as proscribed by article 123a. Similarly, assume this same soldier owes his roommate money and pays him back with a check, knowing there will be insufficient funds to cover it when it will be presented. Under these circumstances, the soldier has paid a past due obligation with the intent to deceive and has likewise violated article 123a.

Intent to defraud and intent to deceive are concepts with subtle distinctions that must be carefully considered by trial counsel.¹⁰ Intent to defraud means to *obtain* something of value through misrepresentation. Intent to

deceive, however, does not require that the accused physically obtain anything.¹¹ The misrepresentation or deceit inherent in the intent to deceive means only to *gain an advantage* for oneself, or a third party, or to put someone at a disadvantage.¹² For example, a soldier who gives a bad check to his roommate for payment of a debt gains no tangible item. He does, however, gain an advantage over his roommate through deceit by delaying actual payment of the debt. The roommate, in turn, suffers a resulting disadvantage by not having the debt actually paid.

The article 134 bad check offense differs substantially from the article 123a offenses.¹³ The gravamen of the article 123a offense lies in the accused's intent. Intent to defraud or deceive at the time of the making or uttering, or knowledge that insufficient funds will be available upon presentment of the check are immaterial under article 134.

To be guilty of an article 134 bad check offense, the accused's conduct must be dishonorable.¹⁴ When used in this context, dishonorable means grossly or culpably negligent.¹⁵ The mere neglect of one's account or a simple mathematical error will not suffice. The conduct of the accused in maintaining the proper balance in his checking account must instead amount to bad faith or gross indifference.¹⁶

Pleadings

Once the trial counsel has analyzed the evidence and determined which offenses to charge, the specifications should be drafted. "Paper hangers" rarely write only one bad check. Rather, they seem to write them in

- b. that the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;
- c. that the act was committed with intent to deceive; and
- d. that at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not nor would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

⁶ MCM, 1984, Part IV, para. 68. Check, Worthless, making and uttering—by dishonorably failing to maintain funds:

- a. that the accused made and uttered a certain check;
- b. that the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;
- c. that the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for the payment of the check in full upon its presentment;
- d. that this failure was dishonorable; and
- e. that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

⁷ For a general discussion on the development of the law regarding bad checks, see Simon, *A Survey of Worthless Check Offenses*, 14 Mil. L. Rev. 29 (1961); Anderson, *Article 123a: A Bad Check Offense for the Military*, 17 Mil. L. Rev. 145 (1962).

⁸ MCM, 1984, Part IV, para. 49b(1) (emphasis added).

⁹ *Id.*, Part IV, para. 49b(1) (emphasis added).

¹⁰ See *supra* note 5.

¹¹ See *United States v. Ambrose*, 7 M.J. 729 (A.C.M.R. 1979).

¹² For discussions on the differences between intent to defraud and intent to deceive, see *United States v. Green*, 36 C.M.R. 882 (A.F.B.R. 1966); *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964); and *United States v. Barnes*, 34 C.M.R. 347 (C.M.A. 1964).

¹³ See *supra* note 7.

¹⁴ See *infra* notes 38-47 and accompanying text.

¹⁵ See MCM, 1984, Part IV, para 68c.

¹⁶ *Id.*; see also *United States v. Berthea*, 3 M.J. 526 (A.F.C.M.R. 1977); *United States v. Gibson*, 1 M.J. 714 (A.F.C.M.R. 1975).

groups. Trial counsel's problem therefore becomes whether to draft one specification for each bad check, one "mega-specification" that includes all the checks, or some logically-based group of specifications.¹⁷

These options raise issues pertaining to multiplicity and duplicity. Multiplicity is a concept that has had a confused and often frustrating application. The rule of multiplicity for drafting charges and specifications is that "[w]hat is substantially one transaction should not be made the basis of an unreasonable multiplication of charges."¹⁸ As an exception to the rule, otherwise multiplicitous charging is permitted to meet exigencies of proof.¹⁹

The purpose of the rule prohibiting multiplicitous charging is to ensure the accused is not twice convicted for what is essentially a single crime. The usual remedy for multiplicitous charging is dismissal of multiplicitous charges and specifications. The prohibitions against multiplicity also apply to sentencing.²⁰ Charges that are multiplicitous only for sentencing will be merged for purposes of establishing a maximum punishment.

Duplicity is the opposite of multiplicity. The rule of duplicity is that each specification should state only one offense.²¹ The purpose of the rule is to prevent the government from alleging multiple charges against the accused in a single specification. In some circumstances, duplicitous charging could expose the accused to a greater maximum punishment, as when separate larcenies are combined to increase the total value of the property taken to over \$100.00. The remedy for duplicity is severance.

What if trial counsel is faced with an accused who has written eighty-seven bad checks? Trial counsel could elect to draft eighty-seven specifications and expose the accused to a potential maximum sentence of confinement

for over forty-three years.²² At some point, however, such charging yields diminishing returns. Rarely, if ever, will a bad check writer actually receive a sentence nearing forty-three years of confinement, and separate charging of all bad checks may tax the support staff who must prepare the charge sheets.

Another consideration for trial counsel is whether to charge separate specifications for making and uttering each check. The Army Court of Military Review has held that "making" specifications are multiplicitous for findings with "uttering" specifications for the same checks where no substantial time gap exists between the making and uttering.²³ Accordingly, unless trial counsel is concerned about exigencies of proof for either the making or uttering, there is little reason to separately charge both for each check.²⁴ In fact, the common practice is to charge both making and uttering in the same specification when the two events occur at about the same time.

For reasons of efficiency, trial counsel often charge check offenses by using "mega-specifications."²⁵ Mega-specifications are essentially duplicitous pleadings; they charge multiple violations in a single specification. The maximum punishment for each bad check mega-specification is limited, however, to the maximum punishment permitted for the largest check within the specification. For example, if one check in an article 123a (intent to defraud) mega-specification is for over \$100, the maximum sentence for the specification will include five years of confinement and a dishonorable discharge. If no check exceeds \$100.00, then the maximum punishment for the specification will be six months of confinement and a bad-conduct discharge, regardless of the total value of all the checks alleged.²⁶ Under the latter circumstances, trial counsel may want to consider drafting separate specifications. As a practical matter, however, trial counsel should also consider the administrative difficulties of multiple specifications and the

¹⁷ Whether to charge checks singly or in multiples (mega-specifications) depends largely on the amount of confinement to which trial counsel wants to expose the accused. The maximum punishments to confinement are as follows: 1) article 123a (intent to defraud) more than \$100: five years; 2) article 123a (intent to defraud) less than \$100: six months; 3) article 123a (intent to deceive): six months regardless of the amount of the check; 4) article 134: six months regardless of the amount. MCM, 1984, Part IV, paras. 49e and 68e.

¹⁸ Rule for Court-Martial, 307(c)(4) discussion [hereinafter R.C.M.].

¹⁹ R.C.M. 907(b)(3)(B).

²⁰ R.C.M. 1003(c)(1)(C).

²¹ R.C.M. 307(c)(4).

²² Eighty-seven separate and non-multiplicitous checks under either article 123a (intent to defraud-for under \$100.00 each or intent to deceive), or article 134 would carry a maximum confinement of 43 years, 6 months.

²³ *United States v. Holliday*, 24 M.J. 686 (A.C.M.R. 1987). Note that multiplicity for findings was not found where the making and uttering were done at different times and in different locations. See *United States v. Mora*, 22 M.J. 719 (A.C.M.R. 1986).

²⁴ The question arises of whether making and uttering can be charged in the same specification. The rule against duplicitous charging requires that each specification state only one offense. R.C.M. 307(c)(4). Because the remedy is severance, however, if the making and uttering are charged duplicitously, the defense may choose not to object.

²⁵ See *United States v. Poole*, 24 M.J. 539 (A.C.M.R. 1987), *aff'd*, 26 M.J. 272 (C.M.A. 1988).

²⁶ *Id.*

desirability of avoiding unwarranted multiplicity of specifications.²⁷

Another issue for trial counsel is whether to include a photocopy of the check as part of the specification in order to satisfy the requirement that the government properly allege all elements of the offense.²⁸ The original check, of course, should never be used as part of the charge sheet.²⁹ Before using photocopied checks in a single or mega-specification, trial counsel should consider *United States v. Carter*.³⁰ In *Carter* the trial counsel did not use photocopies of the bad checks and did not allege separate specifications for each check. Rather, he charged the accused with wrongfully uttering a number of checks between certain specified dates to a single source in an aggregate amount. The court found the specification legally sufficient, holding that the specification: 1) apprised the accused of what to defend against; 2) contained all the elements; and 3) prevented the possibility of some future trial for the same offenses considering the record as a whole. The traditional practice of using a photocopy of each check in numerous, separate specifications is still permitted. Alternatively, a simpler specification, which is clean, efficient, and does not burden the charge sheet with superfluous material, can also be employed. In this case, the key information that would be reflected on the photocopy would simply be included in the specification.

To summarize, preparing the pleading should not be a burdensome affair.³¹ Trial counsel can separately plead a small number of checks and add up the punishment for each specification to arrive at the total maximum punishment for the accused. Alternatively, trial counsel can logically group a large number of checks into a few specifications and rely on the largest check in each

specification to dictate the maximum punishment for that specification.

Proving the Prima Facie Case

For purposes of illustration, the following is a model for presenting a prima facie case for a specification alleging that the accused made and uttered a worthless check to the PX with intent to defraud in violation of article 123a. The elements are as follows:

1. That at the time and place alleged the accused made and uttered a check payable to the PX;
2. That the accused made and uttered the check for the purpose of obtaining something of value in return;
3. That the uttering was committed with the intent to defraud.
4. That the accused knew his account did not or would not have sufficient funds to cover the check upon presentment to the bank for payment.³²

Assuming the accused has not confessed, trial counsel needs three witnesses and two documents to present a prima facie case.³³

Witness 1: The PX Cashier

This witness can establish that the check was cashed at the PX on the date alleged for the procurement of something of value (elements one and two).³⁴ The witness should also be able to identify the accused, either directly or circumstantially, as the one who cashed the check and received value in return (elements one and

²⁷ For example, assume an accused has written 14 bad checks: 7 to the PX and 7 to Ralph's Pizza. The 7 to the PX were written in a one-week period. The 7 to Ralph's Pizza were written the following week. Traditional pleading would suggest 14 specifications of uttering and 14 specifications of making. By using mega-specifications in a logical grouping of checks, however, (one set for checks at the PX and the other for those at Ralph's) the specifications could be reduced to a maximum of 4, even if it were decided to charge multiplicatively. See *supra* note 19. Accordingly, the PX mega-specification, drafted without including a photo copy of each check (see *infra* notes 29-31 and accompanying text) would appear as follows:

In that the accused, did, at a certain place, at divers times from about A to B, with the intent to defraud and for the procurement of things of value, wrongfully and unlawfully utter to C checks for the payment of money in the amounts of D, E, F, G, H, I, J, more or less, drawn upon K, made payable to L and signed by M, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with said bank for the payment of said checks in full upon their presentation.

The other specifications would be drafted in a similar fashion.

²⁸ MCM, 1984, Part IV, para. 49f.

²⁹ Although R.C.M. 307(c)(3) provides no particular format for pleadings, no reason exists for stapling a piece of evidence that must be introduced onto a charge sheet. The discussion to R.C.M. 307 specifically provides for the use of photocopies in bad check cases.

³⁰ 21 M.J. 665 (A.C.M.R. 1985).

³¹ *Poole*, 24 M.J. 539 (A.C.M.R. 1987).

³² MCM, 1984, Part IV, para. 49b(1).

³³ A variety of ways exist to try any case. The model suggested here represents only one alternative. In preparing this article, I contacted the Trial Counsel Assistance Program (TCAP) and asked what was the most common question from the field regarding bad check cases. They responded that the most frequently asked question was how to lay the proper foundation and introduce the check. That topic will be discussed herein. Trial counsel should not be reticent to seek assistance from TCAP. TCAP phone numbers are AV: 289-1804 or CML: 703-756-1804. In the same manner, the Trial Defense Service (TDS) forwards guidance and assistance to defense counsel. TDS phone numbers are AV: 289-1390 or CML: 703-756-1390.

³⁴ MCM, 1984, Part IV, para. 49b(1)(a) and (b).

two).³⁵ Additionally, by identifying the check as having been cashed at the PX, the witness becomes an important part of the foundation for admitting the check into evidence.³⁶

Witness 2: The PX Custodian of Returned Checks

Although it is not a specific element of the offense, the government must prove that the check was returned dishonored in order to show the required intent and knowledge.³⁷ The PX custodian of returned checks should be able to testify that, in the ordinary course of business, checks payable to the PX are deposited in the PX account and subsequently returned to the PX if sufficient funds are not available in the maker's account to cover the check. The witness will also be able to identify the specific check as having been returned to the PX unpaid.

During the course of this witness's testimony, trial counsel is essentially laying two foundations regarding the check. First, trial counsel wants to show that this check was cashed by the accused, that the accused received something of value, and that the check was returned unpaid when presented for payment. Second, the trial counsel must account for notations made on the check after it was cashed, i.e., the bank stamp showing dishonor. Were it not for the provisions of the Military Rules of Evidence and the Uniform Commercial Code, those notations might be excluded as hearsay.³⁸ The first foundation is laid completely through the witness's

testimony. The second, accounting for bank notations on the check, requires additional evidence.³⁹

The evidence regarding bank notations can be handled by way of judicial notice. Specifically, trial counsel should ask the military judge to take judicial notice of the appropriate Uniform Commercial Code provision regarding admissibility of the check as altered by the bank notation of insufficient funds.⁴⁰ Trial counsel should then request that the check be admitted into evidence under the provisions of Military Rules of Evidence 803(6) and 902(9).⁴¹

At this point you have established the first and second elements of the offense, at least with regard to the uttering of the bad check. Intent and knowledge, the third and fourth elements, are more challenging to prove. This has been made easier in bad check cases, however, by the rule of evidence that creates a permissive inference of both knowledge and intent to defraud.⁴² After the check has been introduced into evidence, the witness will normally be able to testify that, when the PX received the check back from the bank unpaid, a notice of dishonor was sent to the accused. This notice advises the accused that he or she had five days to redeem the check. Testimony that the check was not redeemed within five days after receipt of the notice creates a permissive inference of intent to defraud and knowledge by the accused (elements three and four).⁴³ A warning, however, is in order. Not only must the government prove that the notice of dishonor was sent, but it must also show that the notice was

³⁵ *Id.* If the witness cannot specifically identify the accused as having cashed the check, trial counsel can circumstantially prove the same by inquiring into the ordinary course of conduct of the cashier. What routine does the cashier follow when cashing a check? Is the military identification card requested? Is the name on the ID card checked against the name on the check? Is the signature on the check compared with the signature on the ID card? Is the picture on the ID card compared with the person cashing the check? If an ID card was not requested, was the customer wearing a uniform? Does the cashier ordinarily compare the name tag on the uniform with that on the check? Is there any reason why, on the date in question, the cashier would have deviated from normal practice?

For defense counsel, the clerk's failure to identify the accused provides opportunity to find potential deviations from the routine. If the clerk does make an in-court identification of the accused, the defense counsel might inquire into prior identifications and the surrounding circumstances in the hope of inferring that the clerk might have made a mistaken identification. Inquiry about physical characteristics of the customer before and after the accused might also demonstrate that the clerk's memory is selective and perhaps has been influenced by inappropriate suggestions.

³⁶ Multiple means exist for introducing the check into evidence. The most common method involves calling the bank officer in addition to PX employees. This article suggests an alternative means which does not involve calling a bank employee. For an excellent discussion of the means of introducing checks in cases such as these, see Raezer, *Introducing Documentary Evidence*, *The Army Lawyer*, Aug. 1985, at 30.

³⁷ The fourth element of the offense is that at the time of the making or uttering, the accused knew that he did not or would not have sufficient funds in the bank to pay the check when presented. MCM, 1984, Part IV, para. 49b(1)(d). Implicit in this element is that the check was presented and returned unpaid. Note, however, that the required knowledge of dishonor or potential dishonor must relate back to the time the accused made or uttered the check. *Ambrose*, 7 M.J. 729 (A.C.M.R. 1974).

³⁸ Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 803(6) and 902(9) [hereinafter Mil. R. Evid. 803(6) and 902(9)]; Uniform Commercial Code 3-510(b) (1977) [hereinafter UCC]; see also Raezer, *supra* note 36.

³⁹ As suggested, through the cashier and custodian of returned checks, trial counsel should be able to prove that the accused cashed the check, that he received something of value, and that the check was returned dishonored.

⁴⁰ U.C.C. 3-510(b). This portion of the code provides that as a regular business practice, the stamp of the bank on the back of the check showing dishonor is admissible and creates a presumption of dishonor. The military judge may take judicial notice of domestic law under Military Rule of Evidence 201A. Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 201A [hereinafter Mil. R. Evid. 201A]. Note, however, that the military judge will only take notice of law applicable in the jurisdiction. Accordingly, trial counsel must provide the court the applicable portion of state law which mirrors the UCC. A photocopy will suffice.

⁴¹ See Raezer, *supra* note 36.

⁴² MCM, 1984, Part IV, para. 49c(17).

⁴³ See *id.*, Part IV, para. 49b(1)(c) and (d). This inference permits, but does not require, the finder of fact to infer both intent to defraud and knowledge.

actually received by the accused. Failure to do so will result in insufficient foundation to support the inference.⁴⁴

The method of proving actual notice of dishonor by the accused can vary. In many cases, the accused will visit the PX check custodian to discuss the notice of dishonor. Testimony by the custodian will show actual notice in these cases. In other instances, the PX will send the notice of dishonor by certified mail, return receipt requested. Actual notice may be proven here by laying the proper foundation regarding the return receipt request and by then having a questioned documents examiner identify the signature on the return receipt as being the accused's. Even when the notice is not sent to the accused by certified mail, the PX will usually send a notice of dishonor to the accused's commander. In this case, the commander can usually testify that the accused was counseled about the notice.

After demonstrating that the notice of dishonor was sent and actually received by the accused, trial counsel can move for introduction of the notice into evidence.⁴⁵ Assuming five days have passed without redemption, a prima facie case for elements three and four has been established.⁴⁶

Witness 3: The Questioned Documents Examiner

This witness will conclude the case-in-chief.⁴⁷ Recall that the charge against the accused was making as well as uttering the check. The evidence discussed so far has focused primarily on whether the accused uttered the check.

⁴⁴ United States v. Cauley, 12 M.J. 484 (C.M.A. 1982).

⁴⁵ Mil. R. Evid. 401.

⁴⁶ MCM, 1984, Part IV, para. 49b(1)(c) and (d). In the absence of evidence to rebut the inference, the statutory rule of evidence regarding intent and knowledge are compelling. United States v. Montara, 2 M.J. 381 (A.F.C.M.R. 1977). Still, trial counsel should avoid relying exclusively on the rule. If defense counsel is even moderately successful at raising a defense, the permissive inference can be persuasively disputed. Therefore, if independent evidence is available to prove knowledge and intent, trial counsel should hold it in reserve. If the defense appears to be having success, this independent evidence can be offered on rebuttal. R.C.M. 913(c)(1)(C).

⁴⁷ From the trial counsel's perspective, the role of the questioned documents examiner is to prove that the accused made (or wrote) the check. It is not absolutely necessary to call a questioned documents examiner as a witness to do this. The fact finder in a case may compare the handwriting on a check with the accused's and make its own conclusions without the assistance of an expert. Depending on the difficulty of obtaining an expert and how the expert is expected to testify, trial counsel may consider this approach. See United States v. Alfred, 10 M.J. 170 (C.M.A. 1981). If trial counsel is not calling a questioned documents examiner, this should alert defense counsel to a possible weakness in the government's case. Alternatively, the government may have decided to save the witness for rebuttal. Assuming that a handwriting analysis was done, the decision not to call an examiner could mean that the examiner has no information helpful to the government. Defense counsel should of course talk to the examiner.

⁴⁸ In preparation of this article, I spoke with a questioned documents examiner, Chief Warrant Officer (CW3) Larry Nelson, at the crime lab at Ft. Gillem, Georgia. From his perspective, the most frequent problem encountered in bad check cases is inexperience on the part of the trial counsel in two areas: 1) in dealing with questioned documents examiners, and 2) in introducing documentary evidence. Examiners see their role as technicians, not advocates, and find that trial counsel are dismayed when the examiners are willing to call it as they see it, regardless of which side benefits. The examiners are more than willing to assist either counsel in any way possible. They will prepare qualifying questions for counsel and enlarge photographs to aid in their testimony. These experts prefer early involvement in a case in order to maximize their contribution. In short, a great resource is available for counsel who are willing to learn. The phone number for the questioned documents section is AV: 797-7047. Before requesting the assistance of the questioned documents section, I recommend that counsel read CW3 Nelson's contribution to *The Army Lawyer*. Nelson, *Reader Note*, *The Army Lawyer*, August 1985, at 39. At appendix II are questions used by CW3 Nelson to assist trial counsel in preparing an expert to testify.

⁴⁹ See United States v. Harden, 18 M.J. 81 (C.M.A. 1984).

⁵⁰ In attacking unfavorable results, defense counsel should distinguish the admission of questioned documents reports and conclusions that involve substantially subjective analysis from analyses that are essentially objective, such as chemical analyses. United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987).

⁵¹ See generally *Handbook*, *supra* note 4, at chap. 2.

The questioned documents examiner will testify regarding the making of the check.⁴⁸ Those investigating the case will have taken handwriting exemplars from the accused.⁴⁹ The questioned documents examiner will compare the known samples with the writing on the check and will offer an opinion of whether the accused wrote the check.⁵⁰

For those trial counsel who have not worked with questioned documents examiners, a word of caution is in order. Rarely will questioned documents examiners opine that the accused, without any doubt, wrote the check. Do not be dismayed. Take the time to learn the terminology used by these witnesses. Trial counsel will find that an opinion that the accused "probably" wrote the check is more than sufficient. The questioned documents examiner's testimony will be even more effective if the examiner is allowed to explain to the panel what the terms mean. Trial counsel should have the examiner explain the terms before asking the examiner to express an opinion about who wrote the check.

There it is. By effectively presenting witnesses and documentary evidence to prove each element of the offense, trial counsel has put on a prima facie case. Sit down.

The Defense

Generally

Backward planning for a defense counsel is not usually as mechanical as it is for trial counsel. More often than not, it is an ongoing mental process rather than a pen to paper process. Even so, some elements of backward planning work equally well for defense counsel.⁵¹

The goal, of course, is a finding of not guilty. In that regard, it is often instructive for defense counsel to chart the elements of the offense against the available evidence to determine whether and how the government can put on a prima facie case. Defense counsel should then be able to understand what evidence the government will present, even before the defense receives a witness list. During trial, defense counsel should be attentive to the government's case in the hope that trial counsel will forget to address a required element of the offense. If this occurs, the defense counsel should make a motion for a finding of not guilty and hope the military judge will not allow the trial counsel to reopen the case to establish the missing element.

Assuming the government successfully presents a prima facie case, the defense counsel must try to do one of two things: 1) raise an affirmative defense; or 2) negate some element of the offense. The following discussion suggests several approaches for defense counsel to consider.

Mistake of Fact

The Manual and case law provide that a mistake of fact can constitute a defense to both article 123a and 134 check offenses.⁵² For example, if an accused mails a deposit before he writes and cashes a check, thinking the deposits will be credited to the account before the check is presented for payment, the accused has not committed an offense. Similarly, if an accused honestly but mistakenly believes she has overdraft protection, the accused may be entitled to a mistake of fact defense.⁵³

The mistake of fact defense can apply even when the permissive inference regarding knowledge and intent has been established. Remember, only a *permissive* inference of knowledge and intent is raised by the failure of the accused to redeem the check within five days of the receipt of notice of dishonor. Accordingly, although the inference may arise if the accused does not redeem the check, defense counsel can nonetheless show lack of knowledge and intent if the accused made an honest mistake regarding the status of the account. For example, assume an accused mistakenly thought she had direct deposit of her paycheck. Assume also that she wrote several bad checks and was thereafter prevented from redeeming them because of an error by the finance office or by a delay in receiving her pay. The defense would apply because her mistake was honest, regardless of her failure to redeem the checks.

Mistake of fact applies differently to article 123a and article 134 offenses. Article 123a requires an intent to deceive or defraud; that is, a specific intent. Accordingly, for the mistake of fact defense to apply to the charge, the mistake need only have honestly existed in the mind of the accused.⁵⁴ The article 134 check offense, however, is not a specific intent crime. Application of the mistake of fact defense to this crime requires a two-part inquiry. First, did the mistake exist in the mind of the accused? Second, was the mistake reasonable under all the circumstances?⁵⁵ There appears to be an additional step in the reasonableness inquiry. The accused's actions could be unreasonable (that is, simply negligent) and yet not be *so* unreasonable (that is, culpably negligent) as to amount to a *dishonorable* failure to maintain sufficient funds.⁵⁶ For example, suppose an accused charged with the article 134 offense thought he would have enough funds to pay the checks upon presentment. When the time came, however, he did not. Under the two-part inquiry, it would appear that the accused could be convicted if the mistake was unreasonable. If that unreasonable mistake was only the result of simple negligence, however, the case would merit acquittal because the mistake, although unreasonable, did not rise to the level of bad faith or gross indifference required by article 134.

In sum, while article 123a requires only a subjective mistake of fact, a successful defense to an article 134 bad check offense requires both a subjective and an objective mistake of fact.⁵⁷ In either case, mere negligence, inadvertence, or indifference in maintaining one's account does not constitute an offense under military law.⁵⁸ Further, when considering the mistake of fact defense for an article 134 charge, an additional step in the two-part inquiry focusing upon the degree of negligence is required.

Duress

The defense of duress can also apply to bad check cases. Thus, if an accused wrote bad checks because of a reasonable fear that death or bodily harm would befall him or another innocent person if he did not, the defense will apply.⁵⁹ This fear must continue throughout the commission of the offense, and there must be a nexus between the threatened harm and the offense.

Holding and Postdating Checks

The key issue regarding holding or postdating checks is the accused's state of mind as shown by the accused's

⁵² MCM, 1984, Part IV, para. 49c(18); *United States v. Remele*, 33 C.M.R. 149 (C.M.A. 1963).

⁵³ *Remele*, 33 C.M.R. 149; see also Memorandum for Trial Judiciary (Navy), dated 7 August 1987.

⁵⁴ R.C.M. 916(j).

⁵⁵ *Id.*

⁵⁶ Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 5-11(III) (1 May 1982) [hereinafter Military Judges' Benchbook].

⁵⁷ *United States v. Harville*, 7 M.J. 895 (A.F.C.M.R. 1979), suggests that something approaching specific intent is required in the article 134 offense.

⁵⁸ *United States v. Gibson*, 1 M.J. 714 (A.F.C.M.R. 1975).

⁵⁹ R.C.M. 916(h); *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982); *United States v. Margelony*, 33 C.M.R. 267 (C.M.A. 1963). For example, if the accused was forced to write a bad check and give the money to kidnappers so they would not kill his wife or children, the defense of duress could apply.

actions at the time he or she makes or delivers the check.⁶⁰ If, for example, an accused postdates a check and advises the holder of the check that it is postdated or asks the holder to delay presenting it for a period of time, this should not be the basis for an article 123a or 134 conviction. The accused would lack the requisite intent to commit the offense if she had or thought she would have sufficient funds in her account on the date that was placed on the check.

Mental Condition

Denial of requests for instructions on partial mental responsibility have been upheld in check cases.⁶¹ This suggests that inquiry into the accused's mental condition has no place in bad check cases. If, however, an accused's mental condition impacts on whether the accused can formulate the specific intent to defraud or deceive, such evidence appears to be admissible.⁶²

What is Dishonorable?

The article 134 bad check offense is a lesser included offense of the article 123a crime.⁶³ Therefore, assuming defense counsel can mount a successful defense to the article 123a charge, counsel must still confront the lesser included article 134 offense. Although the defenses discussed above would likewise apply to the article 134 offense,⁶⁴ this lesser offense often presents a special problem. Even though defense counsel do not have to be concerned with knowledge and intent,⁶⁵ they must confront the element that the failure to maintain sufficient funds in the account was dishonorable.⁶⁶

The focus here is not on the time of the making or the uttering. Rather, it may be upon the accused's conduct after the check is made or uttered. The accused must have maintained his checking account with bad faith or gross indifference to constitute the article 134 offense. Simple neglect or carelessness will not suffice. Thus, in one case, an accused's guilty plea to the article 134 offense was deemed improvident where he got "carried away" with writing checks and could not deposit enough money into the bank to cover them.⁶⁷

Special Problems: The Guilty Plea

The term "dishonorable," as used in the article 134 offense, is ill-defined and is often dealt with at the appellate level in the context of an improvident guilty plea. This suggests that defense counsel should take special care when advising their clients to plead guilty to the article 134 bad check offense. Although a panel may have no trouble finding that the accused's conduct was dishonorable, the accused may not share those views and, more importantly, may not be able to express them adequately during the providence inquiry.⁶⁸ Accordingly, if an accused chooses to plead guilty to the article 134 offense, defense counsel must properly prepare the accused for the providence inquiry and ensure that he or she can adequately explain that the conduct was dishonorable and why.⁶⁹

For trial counsel, the implication here should be clear: Be extremely reticent to bargain for a plea to the lesser included article 134 offense. Part of trial counsel's job is to protect the record. If the accused's guilty plea to the article 134 offense is improvident, trial counsel may bear part of the responsibility. Accordingly, trial counsel might better protect the record by not recommending a negotiated plea to an article 134 offense and by simply proving the case at trial.

Stipulations of fact are another problem connected with guilty pleas to bad check cases.⁷⁰ Two points are worth noting. If an accused has a stipulation of fact in front of him on the eve of trial and is told that the government may back out of the deal if he does not agree to its contents, the accused is generally going to sign. If it is inconsistent with his response in the providence inquiry,⁷¹ however, everybody has a problem.

The lessons should be obvious. If you are a trial counsel, do not unfairly characterize the accused's misconduct in the stipulation of fact in the hope of having him receive greater punishment. The likely result will be either a needless delay while you and defense counsel revise the stipulation or a rejected guilty plea. The other

⁶⁰ United States v. Hodges, 35 C.M.R. 867 (A.F.B.R. 1965).

⁶¹ United States v. Zajal, 15 M.J. 845 (A.F.C.M.R. 1983).

⁶² See Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

⁶³ MCM, 1984, Part IV, para. 49d.

⁶⁴ See *supra* notes 33-39.

⁶⁵ See *supra* note 5.

⁶⁶ See *supra* note 6.

⁶⁷ United States v. Bethea, 3 M.J. 526 (A.F.C.M.R. 1977).

⁶⁸ See R.C.M. 910e.

⁶⁹ After a defense counsel has had a few pleas rejected during providency, the counsel will normally spend considerable time with each client and the Military Judges' Benchbook to ensure that every phase of the plea is understood by the client and that the client can properly and truthfully admit each and every element of the offense.

⁷⁰ See, e.g., United States v. Pollock, 2 M.J. 373 (A.F.C.M.R. 1977).

⁷¹ See R.C.M. 910(d) and (e).

lesson is for trial and defense counsel to agree before any negotiated plea is approved, with the advice and consent of the accused, to a proposed stipulation of fact.⁷²

Conclusion

While there is no one correct way to try or defend any given case, some generalizations with respect to bad check cases can be made. Trial counsel should attempt to keep the case as simple as possible. Backward plan the case. Determine which bad check offense the accused has committed. From pleading to witness selection, include only those matters that are necessary to obtain a conviction. Using superfluous material can lead to error, which sometimes results in reversal.

For the defense counsel, several alternative approaches have been suggested, some of which may apply in a particular case. Often times, however, the best defense is to allow trial counsel to over-try his case and confuse the issues. Many defense counsel believe that the shotgun approach to defending a bad check case is somehow required—for example, cross-examine every witness and object at every occasion. That is simply not the case. Defense counsel who pick a narrow theme and hammer it to death are generally the most successful. For example, if mistake of fact is the trial strategy, defense counsel should avoid cross-examining the cashier on the issue of identification.

It is said that advocacy is an art. As with any artistic endeavor, there are certain mechanics which must be mastered. While this article does not attempt to cover all the mechanics pertaining to bad check cases, it should serve as a useful framework to begin the mastery of this art.

Appendix 1

Qualification Questions Questioned Documents Examiner

1. State your name, rank, social security number, and branch of service.
2. What is your organization and station?
3. What is your job title?
4. What are your duties as an Examiner of Questioned Documents?
5. What training have you received to prepare you for this work?
6. Do you receive any continuing education in this field?
7. What is the extent of your non-technical education?
8. Are you affiliated with any professional organizations related to your work?
9. Have you done individual research pertaining to document analysis?

⁷² R.C.M. 705(c)(2)(A). Entering into a stipulation of fact before a plea bargain is accepted is not without danger. If an accused were to expressly agree to its contents, the stipulation *might* be construed as a confession if the trial ended up contested. Mil. R. Evid. 410, however, appears to make the stipulation inadmissible.

10. Have you written technical papers concerning your work for publication or presentation at professional conferences?

11. Have you taught classes or lectured pertaining to document analysis?

12. Have you testified as an expert witness in the field of document examination prior to today?

13. For approximately how many cases involving questioned documents have you conducted examinations in your laboratory?

14. Do you have special instruments to assist you in your work in the laboratory?

15. About what portion of your work involves the examination of handwriting?

Offer the witness to the court as an expert in the field of questioned document examination.

Appendix 2

Direct Examination Questions Questioned Documents Examiner

1. Mr. _____, would you explain to the court why handwriting is identifiable?

2. Are you always able to identify the author of a particular handwriting?

3. When you are unable to reach a positive conclusion, do you sometimes render a conclusion expressing a probability of authorship?

4. Mr. _____, I now show you documents marked Prosecution Exhibits _____ for identification. Have you seen these documents before?

5. Did you conduct examinations of these documents in your laboratory?

6. What conclusions did you reach as a result of your examinations in this case?

7. Have you prepared a chart using photographs of documents in this case?

8. Would your testimony be clearer and better understood through the use of this chart?

9. Is this the chart to which you have referred in your testimony?

Have the chart marked as a prosecution exhibit.

To court: Request the witness be allowed to leave the witness stand and approach the chart.

10. Mr. _____, using this chart, please explain to the court how you conduct a handwriting comparison and some of the reasons you arrived at your findings in this case.

Release the witness for cross-examination.

Be alert for explanatory testimony not allowed by the defense counsel. Bring the same line of questioning up again during redirect.

Appendix 3

Backward Planning Model

Article 123a: intent to defraud

Elements

1. That the accused made/uttered a check;

Use- Witness 2
Witness 3
Document 2

2. For the procurement of something of value;

Use- Witness 2

Potential Evidence

Witness 1
(friend of accused)

Witness 2
(cashier)

Witness 3
(document examiner)

Witness 4
(check custodian-PX)

Witness 5
(commander)

Elements

3. The act was committed with intent to defraud;

Use- Witness 4
Document 4

4. At the time of the act

the accused knew he did not have or would not have sufficient funds to cover the check.

Use- Witness 4
Witness 5
Document 4

Potential Evidence

Document 1
(LES)

Document 2
(check)

Document 3
(cert. mail receipt)

Document 4
(notice of dishonor)

Document 5
(prior bad check)

****Note—This assumes that Witness 4 can prove notice of dishonor. Otherwise, either Witness 5 or Document 3 may be required. Trial counsel should resist the temptation to use every piece of available evidence. As previously noted, not every piece of evidence in the CID file will be required to prove the case-in-chief.

Maximizing Survivor Benefits for Family Members

Major Thomas F. Dougall

Instructor, Administrative and Civil Law Division, TJAGSA

Introduction

Survivor benefits are often overlooked and misunderstood advantages of military service. Generally, the survivors of a soldier who dies on active duty are provided an annuity through Dependency and Indemnity Compensation (DIC).¹ Retired soldiers can provide an annuity for their survivors by participating in the Survivor Benefit Plan (SBP).² In addition to these basic annuities, survivors may be entitled to other benefits, including a death gratuity payment,³ social security

survivor's benefits,⁴ and the proceeds from Servicemen's Group Life Insurance.⁵

Judge advocates are often asked for advice concerning survivor benefits. This advice becomes most important when the judge advocate is advising a soldier who faces imminent death.⁶ Because the soldier's concern is to maximize benefits for his or her survivors, the critical issue is whether the soldier should die on active duty or retire.⁷ In order to arrive at the best solution, the judge advocate must do more than merely add numbers and

¹ 38 U.S.C. §§ 401-417 (1982). See generally Dep't of Army, Pam. 360-539, SBP Made Easy: The Survivor Benefit Plan, at 10 (Rev. 1987) [hereinafter DA Pam. 360-539]; Dep't of Army Pam. 608-33, Personal Affairs: Casualty Assistance Handbook, app. D (17 Nov. 1987) [hereinafter DA Pam. 608-33].

² 10 U.S.C. §§ 1447-1455 (1982 & Supp. V 1987). See generally DA Pam. 360-539; DA Pam. 608-33, app. H.

³ 10 U.S.C. §§ 1475-1480 (1982); DA Pam. 608-33, app. E.

⁴ 42 U.S.C. §§ 401-17 (1982).

⁵ 38 U.S.C. §§ 765-79 (1982).

⁶ David W. Meyers, *Medico-Legal Implications of Death and Dying* § 9.3 (1981) (citing Rabkin, Gillerman & Rice, *Orders Not to Resuscitate*, 295 *New Eng. J. Med.* 365 (1976)) (death is imminent where it is likely to occur within two weeks).

⁷ This article does not address the standards for determining whether to retain or retire a soldier for medical disability. The time at which a member should be processed for disability retirement or separation must be decided on an individual basis. Army policy is that a soldier will not be retained nor separated solely to increase retirement or separation benefits. See generally DOD Dir. 1332.18 (Feb. 25, 1986); Army Reg. 635-40, *Personnel Separations: Physical Evaluation for Retention, Retirement, or Separation* (13 Dec. 1985). See *infra* note 32.

Regulatory Law Office Note

Installation contract attorneys should be familiar with Department of the Army Pamphlet 27-153, Contract Law, chapter 17, section I (15 Aug. 1989), which provides some background to utilities and telecommunications acquisition. This section notes that, pursuant to Army Regulation 27-40, paragraph 2-3g, judge advocates and legal advisors have initial responsibility to report proposed rate increases and knowledge of the existence of any action or proceeding involving utilities and telecommunications services to the Regulatory Law Office (USALSA, ATTN: JALS-RL) Falls Church, VA 22041-5013; AV 289-2015, Coml (703) 756-2015. DA Pam 27-153 also has a general outline of a typical regulatory proceeding.

The Army Power Procurement Officer (the Chief of Engineers) is ultimately responsible for the administration of the purchase of utilities services and for policies, rates, and legal sufficiency in connection with all utilities services transactions and contracts for the Department of the Army. This authority has been delegated and is regulated by Army Regulation 420-41, Utilities Contracts (1 Oct. 82), and Armed Services Procurement Regulation Supplement No. 5, Procurement of Utility Services (ASPR Supp. No. 5). Utility Services include such services as electricity, gas, and water. ASPR Supp. No. 5, §101.1.

These services have historically been available only from a regulated utility operating in an exclusive service area that has been established by an appropriate regulatory scheme. The prices that a utility may charge for its services generally are controlled by a state regulatory commission. Unless an alternative supplier is available, utility services are obtained on a sole source basis. With increasing frequency, contracting officers have opportunities to competitively obtain such services on an unregulated basis.

Telecommunications services are not within the definition of utility services and are not obtained under ASPR Supp. No. 5. Army officials obtain pertinent authority and guidance from Army Regulation 105-23, Administrative Policies and Procedures for Base Telecommunications Services (16 Dec. 1985). Such services may also be available on an unregulated basis.

The Regulatory Law Office represents the consumer interests of the Department of the Army before regulatory tribunals for matters concerning the acquisition of utility and telecommunications services. Installation contract attorneys should be aware of the utility services contracts at their installations and should maintain close liaison with those personnel who administer utility and telecommunications services contracts to ensure that relevant information is made available to the Regulatory Law Office as soon as possible. Observant attorneys can also obtain such information from local newspapers or other sources.

Following receipt of an AR 27-40 report or other information about a pending proceeding, the Regulatory Law Office reviews the circumstances and decides whether or not to intervene in the proceeding. Upon a decision to intervene, a petition for leave to intervene is prepared for filing with the appropriate commission. The Regulatory Law Office files contain the rules of practice for all 50 states and examples of proper formats for filings.

The commission concerned typically issues an order granting the intervention of the Army and other interested parties and sets a date for a pre-hearing conference. This conference is used to set future procedural dates. Normally, the utility company seeking a rate increase has the burden of proof, and the commission sets a date at the pre-hearing conference for the utility to file its initial testimony. Dates are also set for the filing of interrogatories by the other parties, for utility responses to such interrogatories, and for cross-examination of utility witnesses.

The utility's direct case sets forth the basis for any rate increase and covers accounting, economic, financial, and technical matters. Most of the facts are derived from utility records and are sponsored by utility officers. On broader issues such as rate of return, the utility usually retains expert witnesses to provide their opinions on the cost of capital. The several methodologies used by such experts to recommend a proposed profit margin for the utility include comparable earnings, alternative investment opportunities, discounted cash flow, capital asset pricing, and risk-premium.

Intervening parties are allowed to cross-examine the utility's witnesses, pre-file testimony, and present their case in opposition. The Regulatory Law Office often sponsors expert rate of return and rate structure (how the rates are spread among the various customer categories) testimony. The office either uses experts employed by the General Services Administration or it retains outside experts to offer this testimony.

The utility is allowed to cross-examine the other parties' witnesses and to present their rebuttal. The record is then closed and a date for filing briefs is set. After reviewing the briefs of the parties, the Commission issues its decision, which may be appealed to the courts.

As this brief outline shows, the administrative hearing process is very similar to any other type of trial. As any attorney in the Regulatory Law Office can attest, however, these proceedings are rife with "traps for the unwary." Please continue to report notice of hearings to this office. Installation contract attorneys should request our assistance when contracting officers seek to acquire utility or telecommunications services where there are no regulatory controls.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Burglary and the Requirement for a Breaking

In the recent case of *United States v. Thompson*,¹ the Army Court of Military Review considered whether pushing aside closed venetian blinds and entering through an otherwise open window constituted a breaking for purposes of a burglary charge.² In doing so, the court provided guidance on an issue that, surprisingly, has received little attention by the military's appellate courts and boards. This guidance, however, appears contrary to prior military authority and is inconsistent with the gravamen of the breaking requirement for burglary under military law.

The accused in *Thompson* was convicted, inter alia, of two specifications of burglary in violation of article 129. In the initial instance, the accused went to a first floor window of a building, where he removed a screen, raised some venetian blinds, and entered through the now unobstructed window.³ Later, the accused went to a first floor window of another building that had no screen. There, he pushed aside some closed venetian blinds that were blocking the otherwise open window and entered the room.⁴

To be guilty of burglary under military law, the accused must unlawfully break and enter the dwelling house of another during the nighttime with the intent to commit certain offenses proscribed by the UCMJ.⁵ The element of "breaking" must be pleaded and proven beyond a reasonable doubt for the accused to be convicted of burglary.⁶

What constitutes a breaking? According to Colonel Winthrop, "[b]urglary being the violation of the security of the habitation, the breaking must be of some portion or fixture of the building relied upon for the protection

of the dwelling."⁷ The Manual provides the following guidance with respect to the meaning of the term "breaking."

Merely to enter through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a "breaking." Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking.⁸

Few military cases have addressed the issue of whether the accused's actions constitute a breaking within the meaning of article 129. In *United States v. Handzlik*,⁹ decided in 1962, the accused entered an apartment house and attempted to open the inner door of one of the residents. The resident, believing that one of her fellow tenants was seeking entry, opened the door. Upon seeing the accused, she attempted to close the door, but the accused pushed it open and entered the room.¹⁰

The board in *Handzlik* distinguished the facts of that case from the situation where someone gains access to a room by entering through a door that had been left open. The court found that, although entering through an open door would not constitute a breaking, the accused's act of forcefully overcoming pressure being used to try to close an open door constituted an actual breaking.¹¹ The court wrote in this regard that "the act of closing the door had for its purpose the protection of the room. The forceful pressure against the door by the accused overcame the corresponding pressure on the door which was relied upon for the protection of the room."¹²

¹ 29 M.J. 609 (A.C.M.R. 1989).

² A violation of Uniform Code of Military Justice art. 129, 10 U.S.C. § 929 (1982) [hereinafter UCMJ].

³ *Thompson*, 29 M.J. at 610.

⁴ *Id.*

⁵ UCMJ art. 129. The elements of burglary are as follows:

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That the breaking and entering was done in the nighttime; and

(3) That the breaking and entering was done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a.

Manual for Courts-Martial, United States, 1984, Part IV, para. 55b [hereinafter MCM, 1984].

⁶ *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983) ("burglariously" enter" does not allege, by fair implication, the element of breaking required for burglary).

⁷ W. Winthrop, *Military Law and Precedents* 682 (2d ed. 1920 Reprint).

⁸ MCM, 1984, Part IV, para. 55c(2).

⁹ 32 C.M.R. 573 (A.B.R. 1962), *pet. denied*, 32 C.M.R. 472 (C.M.A. 1963).

¹⁰ *Id.* at 574.

¹¹ *Id.* at 575.

¹² *Id.*

Thirteen years later, in *United States v. Hart*,¹³ the accused pleaded guilty to the burglary of a fellow soldier's barracks room. During the providence inquiry, the accused said that he pushed open a door to the room that had been left ajar about a quarter of an inch.¹⁴ The court concluded that "the accused's act consisted of pushing rather than opening, unlatching, or in any other manner breaking the closure of the room. Absent a breaking, a conviction for burglary cannot be sustained."¹⁵

Applying this authority and precedent to the facts of *Thompson*, the first charged incident clearly amounts to a breaking. The accused's act of removing a screen—a portion or fixture of a building relied upon for the protection of the dwelling—constitutes removing an obstruction to gain entry to a closed dwelling. Accordingly, the article 129 requirement for a breaking is established.

The second incident presents a closer question. Indeed, the court in *Thompson* acknowledged that "venetian blinds may not serve the same functional purpose as a closed window or door in restricting physical access."¹⁶ The court wrote, however, that this fact was not dispositive and found that the "victim's actions in closing the blinds in this case [were] sufficient to have closed the window to public intrusion."¹⁷ The court concluded:

To hold otherwise would lead to the illogical result that items such as screens, designed to provide protection from mosquitoes, would provide greater legal protections to a victim than deliberate steps to prevent intrusion into personal living areas by closing the blinds. With such a complete closing, it becomes difficult to hold a window which is closed for the purpose of viewing to be really open for the purpose of physical intrusion.¹⁸

The court's reasoning, however, says too much. By equating physical closure to obscuring from public view, the court has expanded the definition of breaking to the point that it is now inconsistent with that recognized by

the prior decisions and authority.¹⁹ A "Peeping Tom" or voyeur, for example, is not guilty of burglary, even though he may invade the privacy of a premises by looking through a closed window.²⁰ Likewise, although a partially open door may well obscure the inside of a residence from public view, pushing open the door and entering through the doorway would not constitute a breaking under an earlier military court decision. Similarly, while shrubbery in front of an open window might conceal the interior of a room from a passerby, a breaking would not be constituted if a person went behind the shrubs and entered the room through an open window.²¹ In each case, there is no breaking within the meaning of article 129 because the physical security of the dwelling was not breached by removing, damaging, or otherwise "breaking" a portion of the dwelling relied upon to provide physical security. Merely invading the privacy of the inhabitants by looking through a window or walking through an open doorway is not enough.

Applying traditional analysis to the facts in *Thompson*, the court should have first determined whether the venetian blinds at issue served the same purpose or function in restricting physical access as do doors, screens, and windows. This determination would depend, in part, on the specific characteristics and physical construction of the blinds involved; for example, whether they are built into the window frame or are merely hanging loosely from a curtain rod. Assuming that the court found that the blinds were the functional equivalent of a door or window, the court should then have made a factual determination of whether the blinds were "closed" or "opened" at the time that the accused entered the premises. If the court concluded that the accused breached a "closed" blind designed to restrict physical access to the interior of the dwelling, then the accused's conduct would amount to an actual breaking within the meaning of article 129.

This suggested methodology undeniably requires a more painstaking, fact-specific analysis than does the court's sweeping approach in *Thompson*. This alternative approach, however, is both consistent with past

¹³ 49 C.M.R. 693 (A.C.M.R. 1975).

¹⁴ *Id.* at 694.

¹⁵ *Id.* at 695. The court's opinion in *Hart* is apparently inconsistent with the provision in the Manual quoted earlier. MCM, 1984, Part IV, para. 55c(2).

¹⁶ *Thompson*, 29 M.J. at 610.

¹⁷ *Id.*

¹⁸ *Id.* at 610 n.1. The court's syllogism is flawed. Although steel bars spaced about one inch apart across an otherwise open window would be ineffective in stopping mosquitoes, their removal to gain entry through the window would clearly constitute a breaking. On the other hand, while an exterminator's fumes or a "bug-zapper" near an open window may serve to prevent mosquitoes from passing, circumventing these measures to enter through the window would not constitute a breaking.

¹⁹ This aspect of the court's approach seems akin to fourth amendment analysis pertaining to the reasonable expectation of privacy, if any, pertaining to property in public view. See generally *Katz v. United States*, 389 U.S. 347 (1967) (what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection).

²⁰ A violation of UCMJ art. 134; see generally *United States v. Foster*, 13 M.J. 789 (A.C.M.R. 1982); *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957); *United States v. Clark*, 22 C.M.R. 888 (A.F.B.R. 1956).

²¹ In fact, no breaking would occur, regardless of whether the bushes had been planted for the purpose of enhancing privacy within the dwelling. The gravamen of the breaking requirement for burglary is the breaching of physical security, not the invasion of privacy by being observed in a private location.

authority and more directly related to the gravamen of the breaking requirement for burglary under military law. MAJ Milhizer.

Legal Efficacy as a Relative Concept

*United States v. Hopwood*²² is the latest in a line of military cases addressing the issue of legal efficacy with respect to a forgery charge. The opinion, which seeks to clarify the concept of legal efficacy, is both scholarly and provocative. It also appears to be inconsistent with the recent landmark opinion by the Court of Military Appeals addressing legal efficacy, *United States v. Thomas*.²³

The accused in *Hopwood* presented a credit application that was apparently false or altered.²⁴ This application was one in a series of documents, each of which was required to obtain a loan. Thus, the issue presented to the court was whether a single document in a set of documents had legal efficacy, where all the documents in the set were necessary to change the legal relationship between the parties. To answer this question, the offense of forgery under military law must be defined and recent cases pertaining to legal efficacy, including *Thomas*, must be considered.

Forgery, as proscribed by article 123, UCMJ,²⁵ can be committed in two distinct ways: by making or altering, and by uttering.²⁶ Both types of forgery have, as an element of proof, the requirement that the writing or signature have legal efficacy.²⁷ The Manual defines legal efficacy in relation to the writing's or signature's effect: "The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt."²⁸ The requirement for legal efficacy has long been enforced by the military's appellate courts.²⁹

In *United States v. Thomas*³⁰ the Court of Military Appeals addressed the issue of legal efficacy in connection with a forgery charge. The court found that a false credit reference, commonly known as a "Commanding Officer's Letter," could not be the subject of a forgery.³¹ The court determined that the document lacked legal efficacy and therefore could not support a forgery charge, even though the accused intended to use it to obtain a loan.³² The court wrote:

The record before us leaves no doubt that the false document was intended to facilitate appellant's obtaining the loan and that, if genuine, it might have

²² 29 M.J. 530 (A.F.C.M.R. 1989).

²³ 25 M.J. 396 (C.M.A. 1988).

²⁴ See *id.* at 533. The opinion is not specific, however, as to the theory of forgery alleged or the precise manner in which the alleged forgery was committed.

²⁵ UCMJ art. 123.

²⁶ UCMJ art. 123 provides:

Any person subject to this chapter who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct.

²⁷ MCM, 1984, Part IV, para. 48b, sets forth the elements of both types of forgery. The second element of both types of forgery, as reflected below, impose the legal efficacy requirement.

(1) *Forgery—making or altering.*

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(c) That the false making or altering was with the intent to defraud.

(2) *Forgery—uttering.*

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with intent to defraud.

Id.

²⁸ *Id.*, Part IV, para. 48c(4).

²⁹ See, e.g., *United States v. Diggers*, 45 C.M.R. 147 (C.M.A. 1972) (forged military order to obtain approval of travel request had legal efficacy); *United States v. Phillips*, 34 C.M.R. 400 (C.M.A. 1964) (carbon copy of allotment authorization form lacked legal efficacy); *United States v. Farley*, 29 C.M.R. 546 (C.M.A. 1960) (false insurance applications lacked legal efficacy); *United States v. Noel*, 29 C.M.R. 324 (C.M.A. 1960) (form similar to a letter of credit had legal efficacy); *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957) ("Request for Partial Payment" letter had legal efficacy); *United States v. Strand*, 20 C.M.R. 13 (C.M.A. 1955) (letter lacked legal efficacy); *United States v. Jedeke*, 19 M.J. 1987 (A.F.C.M.R. 1985) (bankcard charge slip had legal efficacy); *United States v. Gilbertsen*, 11 M.J. 675 (N.M.C.M.R. 1981) (suspect's rights acknowledgement form lacked legal efficacy); *United States v. Schwarz*, 12 M.J. 650 (A.C.M.R. 1981), *aff'd*, 15 M.J. 109 (C.M.A. 1983) (allotment form had legal efficacy); *United States v. Benjamin*, 45 C.M.R. 799 (N.C.M.R. 1972) (prescription form had legal efficacy).

³⁰ 25 M.J. 396 (C.M.A. 1988).

³¹ *Id.* at 401-02.

³² *Id.*

had a decisive effect on the application. In that sense, the document could readily be seen "as a step in a series of acts which might perfect a legal right or liability." But, again, the test for forgery—and derivatively for uttering a forged writing—is not whether the writing was a cause in fact or a *sine qua non* but whether it "would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice."³³

In the aftermath of *Thomas*, several forgery convictions were reversed by the Army Court of Military Review because of the failure to establish legal efficacy.³⁴ In *United States v. Walker*,³⁵ for example, the Army court reversed the accused's forgery conviction because his "forgery of another soldier's signature on the latter's military identification card . . . did not impose a legal liability on the other soldier."³⁶ Similarly, in *United States v. Vogan*³⁷ the Army court reversed the accused's conviction of forgery because the anvil cards (ration control documents) that were the subject of the forgery charge lacked legal efficacy.³⁸ In each instance, the Army court treated legal efficacy as an absolute concept—either the writing in question had legal efficacy or it did not. This determination was based on the definition of the term provided by *Thomas*.

The approach taken by the Air Force Court of Military Review in *Hopwood* is markedly different. The majority in *Hopwood* considers legal efficacy to be a relative concept. Indeed, the court constructs a sort of legal-efficacy continuum, with commercial paper on one extreme (as clearly having legal efficacy) and a letter of introduction on the other (as clearly lacking legal efficacy).³⁹ The court ultimately concludes that the credit application at issue in *Hopwood* lies sufficiently close to the commercial-paper extreme to have legal efficacy within the meaning of article 123.⁴⁰

Regrettably, the court in *Hopwood* has apparently confused the relative difficulty in proving legal efficacy

in a particular case with defining legal efficacy in relative terms for all cases. The nature of the document at issue will, of course, affect the ease or difficulty of proving legal efficacy in a given case.

Where legal efficacy is clear on the document's face, such as [a] check, proving legal efficacy should not be particularly complicated. Counsel must nevertheless look behind the document to ensure that it imposes an actual or apparent liability on another. In other cases, counsel must allege and prove, or be prepared to dispute, extrinsic facts that establish legal efficacy.⁴¹

Nevertheless, legal efficacy remains an absolute concept. Either a document has legal efficacy or it does not. The court's characterization of this term in relative terms is therefore questionable.

In fact, the court in *Hopwood* recognizes that its analysis is problematic. The majority candidly acknowledges that *Thomas* "can be read as supporting a contrary position,"⁴² and the dissenting judge admits that he is "unable to reconcile the result reached [by the majority] with my understanding of *Thomas*."⁴³

Accordingly, trial and appellate practitioners should hesitate before rejecting the Army court's more traditional interpretation of legal efficacy and the *Thomas* decision as reflected in cases such as *Walker* and *Vogan*. Practitioners must remain alert to the need for a searching pretrial investigation regarding the legal effect of the document at issue and should consider alternative charging and the existence of lesser included offenses in a trial for forgery where legal efficacy is unclear.⁴⁴ The opinion in *Hopwood*, although scholarly and provocative, may not survive review by the Court of Military Appeals nor persuade an Army trial or appellate judge. MAJ Milhizer.

³³ *Id.* at 401 (citations omitted) (emphasis in original).

³⁴ Most of these cases are found in unpublished opinions. *E.g.*, *United States v. Ross*, 26 M.J. 933 (A.C.M.R. 1988) (prescription lacked legal efficacy); *United States v. Hart*, ACMR 8800211 (A.C.M.R. 9 Sept. 1988) (unpub.) (ration control anvil cards lacked legal efficacy); *United States v. Grayson*, ACMR 8702884 (A.C.M.R. 27 July 1988) (unpub.) (honorable discharge certificate, certificate of achievement, and certificate for participation in tank gunnery competition lacked legal efficacy); *United States v. Smith*, ACMR 8702513 (A.C.M.R. 29 June 1988) (unpub.) (application forms for Armed Forces Identification Cards lacked legal efficacy).

³⁵ 27 M.J. 878 (A.C.M.R. 1989).

³⁶ *Id.* at 879.

³⁷ 27 M.J. 883 (A.C.M.R. 1989).

³⁸ *Id.* at 884.

³⁹ *Hopwood*, 29 M.J. at 532.

⁴⁰ The court wrote:

We are convinced that the application was effectively an instrument which perfected the appellant's claim to benefits. It is immaterial that additional steps may have been needed before legal harm actually occurred. In sum, the evidence shows that the information contained in the application substantiated and generated the loan and materially helped put the appellant into the new automobile he desired.

Id. at 533 (citations omitted).

⁴¹ TJAGSA Practice Note, *Forgery and Legal Efficacy*, *The Army Lawyer*, June 1989, at 40-42.

⁴² *Id.*

⁴³ *Id.* at 534 (Lewis, J., concurring in part and dissenting in part).

⁴⁴ See generally TJAGSA Practice Note, *Forgery and Legal Efficacy*, *The Army Lawyer*, June 1989, at 41.

Using Circumstantial Evidence to Prove False Swearing

In *United States v. Veal*⁴⁵ the Army Court of Military Review addressed the general rule that the offense of false swearing⁴⁶ may not be proven by circumstantial evidence alone. The provision in the Manual for Courts-Martial imposing this requirement for false swearing⁴⁷ incorporates by reference the following language pertaining to proving falsity for perjury: "The falsity of the alleged perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof."⁴⁸

The statement in *Veal* alleged to be the false swearing was the accused's denial that she cut her fiancé with a knife.⁴⁹ An important issue on appeal was whether *direct evidence* was required to prove that the accused knew that she had cut the victim.⁵⁰ The court determined that such evidence was not required because "[d]irect proof that the [accused] did know she cut her friend was impossible."⁵¹

Direct proof of an accused's knowledge is, however, possible. For example, an accused could testify at a court-martial regarding his knowledge or lack of knowledge about a certain fact.⁵² Likewise, a pretrial statement or confession by the accused might be introduced on the issue of the accused's knowledge. The fact-finder, of course, may choose to believe such testimony or to give it no weight. In either case, the accused's testimony constitutes direct evidence as to his knowledge because it is "based on actual knowledge or observation."⁵³

Nevertheless, only the accused can present direct evidence of what he is or was thinking or intending. These matters include the special *mens rea* requirements for certain offenses—specific intent, premeditation, and

willfulness—as well as knowledge. For example, assume that the accused is being tried for false swearing for falsely denying that he premeditated before killing his victim.⁵⁴ The accused's trial testimony or pretrial statements could, of course, constitute direct evidence as to whether he premeditated. On the other hand, evidence presented from other sources regarding the accused's planning activity, motive, and the nature of the killing, although relevant to the issue of whether the accused premeditated,⁵⁵ is circumstantial in nature.⁵⁶

Later in the *Veal* opinion, the court more accurately characterizes the applicable legal standard when it writes that, "When only an accused can verify guilt, we conclude that the Manual permits proof of falsity by circumstantial evidence."⁵⁷ This statement recognizes that, regardless of the policy reasons advanced by the general rule requiring direct proof of falsity, these are outweighed or do not apply when the accused is the only potential source of such proof.⁵⁸ Counsel who prosecute or defend soldiers charged with falsification offenses should be alert to these special requirements of proof for such crimes. MAJ Milhizer.

The Unenforceable Waiver and the Enforceable Promise

An accused is entitled to appellate review at the Army Court of Military Review if the adjudged sentence includes a dismissal, a bad-conduct or dishonorable discharge, or a year or more of confinement.⁵⁹ Alternatively, if the conviction was by a general court-martial but does not qualify for review by the Army Court of Military Review, the accused is entitled to automatic review at the Office of The Judge Advocate General.⁶⁰ The exception to these automatic review provisions occurs when an accused waives or withdraws the case from appellate review.⁶¹

⁴⁵ 29 M.J. 600 (A.C.M.R. 1989).

⁴⁶ A violation of UCMJ art. 134. See MCM, 1984, Part IV, para. 79.

⁴⁷ MCM, 1984, Part IV, para. 79c(1).

⁴⁸ *Id.*, Part IV, para. 57c(2)(c).

⁴⁹ *Veal*, 29 M.J. at 601.

⁵⁰ Obviously, if the accused had cut the victim but did not know she had done so, her denial would not constitute a false swearing. See MCM, 1984, Part IV, para. 79b(6).

⁵¹ *Veal*, 29 M.J. at 601.

⁵² E.g., *United States v. Lucy*, 27 C.M.R. 238, 240 (C.M.A. 1959).

⁵³ Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 7-3 (1 May 1982) [hereinafter Benchbook].

⁵⁴ A violation of UCMJ art. 188(1). See MCM, 1984, Part IV, paras. 43b(1)(d) & 43c(2)(a).

⁵⁵ See *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988) (citing W. LaFave and A. Scott, *Criminal Law* § 73 (1972)).

⁵⁶ See Benchbook, para. 7-3; see also *id.*, para. 3-86b n.1.

⁵⁷ *Id.* (emphasis deleted).

⁵⁸ For a good discussion of the two-witness rule and the rule requiring direct proof of falsity, see Hall, *The Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone*, *The Army Lawyer*, May 1989, at 11.

⁵⁹ MCM, 1984, Rules for Courts-Martial 1201(a) and 1203(b) [hereinafter R.C.M.].

⁶⁰ R.C.M. 1201(b).

⁶¹ R.C.M. 1110 (Note, however, that in cases where death has been adjudged, the appellant cannot waive or withdraw from appellate review).

determine the current available benefits. Even though the family members face emotional trauma over the soldier's pending death, they must be prepared to ask and answer some tough questions in order to assure themselves a sound financial future. They must, however, first understand the basic benefits.

Dependency and Indemnity Compensation

Dependency and indemnity compensation is payable to the survivors of a soldier who dies from a service-connected or compensable disability,⁸ whether the death occurs while the soldier is on active duty or any time after the soldier's release from active duty.⁹ Dependency and indemnity compensation is paid monthly and is administered by the Department of Veterans' Affairs (VA).¹⁰ The amount of a surviving spouse's payment is determined by the soldier's pay grade as of the date of death,¹¹ with additional amounts payable for surviving children.¹² Dependency and indemnity compensation is tax-free compensation and is payable without regard to other sources of income.¹³ Dependency and indemnity compensation payments to a surviving spouse terminate upon remarriage.¹⁴ Current monthly rates for a surviving spouse are:¹⁵

0-10	1,381	W-4	773	E-9	735
0-9	1,259	W-3	730	E-8	704
0-8	1,174	W-2	709	E-7	667
0-7	1,071	W-1	682	E-6	636
0-6	991			E-5	622
0-5	879			E-4	606
0-4	797			E-3	570
0-3	754			E-2	555
0-2	704			E-1	539
0-1	682				

⁸ 38 U.S.C. § 410 (1982).

⁹ *Id.*

¹⁰ 38 U.S.C. § 411 (1982); the Veterans' Administration was redesignated the Department of Veterans' Affairs. See Department of Veterans' Affairs Act of 1988, Pub. L. No. 100-527, § 2, 102 Stat. 2635 (1988).

¹¹ 38 U.S.C. § 402 (1982). For those whose death is service-connected, but who are no longer on active duty, the monthly payment is based on the highest pay grade held on active duty.

¹² 38 U.S.C. §§ 411(b), 413, 414 (1982). As of 1 December 1988, supplemental payments for surviving children are \$62 per month for each child under the age of 18, \$138 per month for each child between 18 and 23 pursuing full-time education, and \$271 per month for children permanently incapable of self-support. If there is no surviving spouse, benefits are payable to surviving children. If there is neither a surviving spouse nor children, benefits may be payable to surviving parents. The children only benefit and parental benefit are paid at less than the full DIC rate.

¹³ I.R.C. § 122 (1986); see also 38 U.S.C. § 3101 (1982).

¹⁴ 38 U.S.C. § 101(3) (1982); DA Pam. 608-33, app. D-2. Benefits are reinstated upon dissolution of the subsequent remarriage.

¹⁵ Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, § 1102, 102 Stat. 4124 (1988). See *supra* note 12 for additional amounts for surviving children.

¹⁶ 10 U.S.C. § 1448 (1982).

¹⁷ 10 U.S.C. § 1448(a)(1)(A) (1982).

¹⁸ 10 U.S.C. § 1448(a)(3)(A) (1982).

¹⁹ *Id.*

²⁰ 10 U.S.C. § 1451(a)(1) (Supp. V 1987).

²¹ *Id.* See also 10 U.S.C. § 1451(e)(1)(c) (Supp. V 1987) (the annuity for children and persons with an insurable interest is not reduced).

²² See Tolleson, *SBP - The Social Security Offset, The Retired Officer*, at 49 (Mar. 1989).

²³ 10 U.S.C. § 1447 (1982).

²⁴ 10 U.S.C. § 1448(b)(1) (1982).

Survivor Benefit Plan

The SBP assures financial protection for the family of a retired soldier or an active duty soldier who is retirement eligible (over twenty years of active federal service).¹⁶ Retirement eligible soldiers on active duty who are married or have dependent children are automatically covered by the SBP and need not pay any premiums.¹⁷ All retirees are automatically enrolled in the SBP for the maximum amount of coverage unless the retiree affirmatively declines enrollment or opts for less than the maximum coverage.¹⁸ If the retiree decides to decline enrollment or opts for less than full coverage in the SBP, then the retiree's spouse must concur in that decision.¹⁹

Survivor Benefit Plan payments to spouses are based on a two-tier system.²⁰ Up to age sixty-two, the surviving spouse receives fifty-five percent of the base amount. At sixty-two, the surviving spouse receives thirty-five percent of the base amount.²¹ Retirees, survivors, or those retirement eligible on or before 1 October 1985, are covered under a different version of the SBP, which includes a social security offset provision.²² The maximum base amount is the gross monthly retired pay; a retiree may, however, choose a lower base amount.²³ Instead of spouse-only coverage, retirees may elect to provide spouse and children coverage, children-only coverage, or coverage for persons with an insurable interest in the retiree.²⁴ If there is a spouse, the retiree may not select other beneficiaries without spousal concurrence.

Retirees pay a premium, which is deducted from their retired pay, for participation in the SBP. The cost varies

according to the type of coverage and the base amount selected by the retiree.²⁵ There is an on-going debate concerning the cost effectiveness of the SBP. At first glance, SBP premiums appear expensive. A lieutenant colonel who retires after twenty years of active service and selects maximum coverage for a spouse would pay \$166.90 per month.²⁶ Because military personnel retire at a relatively young age, the retiree could conceivably pay the premium for a long time. Some argue that it would be better to invest the \$166.90 and opt out of the SBP. The SBP is not an investment; the retiree is buying protection much like term life insurance. Commercial insurance companies cannot provide similar protection, however, because the SBP is heavily subsidized by the Federal Government. Additionally, commercial insurance companies cannot afford to guarantee cost of living increases that are provided for in the SBP.²⁷ In cases of imminent death, however, cost effectiveness is a moot issue, because the soldier will not pay premiums for any significant length of time.

Survivor Benefit Plan payments, unlike DIC, are taxable.²⁸ Also, any SBP payment to a surviving spouse is reduced by the amount of any DIC payment to that spouse.²⁹ SBP payments terminate if the surviving spouse remarries before age fifty-five.³⁰

A Case Study

Lieutenant Colonels Jones and Smith were both commissioned in 1970 upon graduation from college. They have served continually on active duty since that time. Each receives \$3,732 per month in basic pay.³¹ Lieuten-

ant Colonel Smith was divorced in 1982. He has since remarried and has two children, ages one and three. His current spouse is twenty-five years old. Lieutenant Colonel Jones also has two children, ages thirteen and fifteen. His wife is thirty-eight. Medical authorities have determined that both officers are facing imminent death and are eligible for medical retirement.³² Their gross retired pay would be \$2,799 per month.³³ These officers want to maximize the potential survivor benefits for their families.³⁴ For the purposes of this article, assume that both spouses will live to age eighty and that each surviving child will attend four years of college. The children will not marry while in college. Both officers have three basic choices: 1) die on active duty; 2) retire and select SBP for the wife; or 3) retire and select SBP for the children while the spouse receives DIC benefits.

Dying on Active Duty

If the officers remain on active duty and die, the survivors are entitled to DIC.³⁵ Neither officer is eligible for automatic enrollment in the SBP, because neither one has twenty years of active duty.³⁶ The surviving spouses would each receive \$879 per month in DIC. Each family would receive an additional \$124 per month (\$62 per month, per child), reduced by \$62 per month when each child reaches age eighteen. Additionally, qualified surviving children are entitled to Survivors' and Dependents' Education benefits of \$376 monthly from the VA.³⁷ Assuming both surviving spouses live to age eighty, the DIC monthly payments would be:³⁸

²⁵ 10 U.S.C. § 1452 (1982). See *supra* note 17 (retirement eligible soldiers on active duty do not pay any premiums for SBP coverage).

²⁶ Current basic pay for a lieutenant colonel over 20 years is \$3,845.10. Retired pay at 20 years of service would be 50 percent of the basic pay or \$1,922. The SBP premium is calculated by adding 2½ percent of the first \$337 of coverage to 10 percent of the remainder. Assuming full SBP coverage, the premium is $(.025 \times \$337) + (.10 \times \$1,585)$ or $(\$8.40 + 158.50) = \166.90 .

²⁷ See Analysis of the Survivor Benefit Plan and Alternative Estate Building Options (Apr. 1, 1987) (available from DOD Office of the Actuary) (this study compares the cost and benefits of the SBP to the cost and benefits of term life insurance, investments, and universal life insurance); Shoemaker, *Survivor Benefit Plan: Arguing with Himself, Almost Winning*, Army Times, Jan. 30, 1989, at 8; Shoemaker, *Commercial Insurance Plans No Match for Government's SBP*, Air Force Times, Sept. 26, 1988, at 19.

²⁸ I.R.C. § 101, 134 (1986).

²⁹ 10 U.S.C. § 1451(c)(1)(B)(3) (1982).

³⁰ 10 U.S.C. § 1450(b) (Supp. V 1987).

³¹ National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 601, 102 Stat. 1976 (1988).

³² See Army Reg. 635-40, Personnel Separations: Physical Evaluation for Retention, Retirement, or Separation (13 Dec. 1985); Army Reg. 600-60, Personnel General: Physical Performance Evaluation System (31 Oct. 1985); Army Reg. 40-501, Medical Services: Standards of Medical Fitness (1 July 1987). For a discussion of the Army disability system, see Pardue, *Military Disability in a Nutshell*, 109 Mil. L. Rev. 149 (1985); Novak, *The Army Physical Disability System*, 112 Mil. L. Rev. 273 (1986).

³³ Seventy-five percent of the monthly basic pay. Both would be retired under the provisions of 10 U.S.C. § 1201 (1982). Retired pay is computed by taking the retired pay base computed under 10 U.S.C. § 140 (1982) and multiplying by the percentage of disability (100 percent in our hypothetical) not to exceed 75 percent. 10 U.S.C. § 1401 (1982).

³⁴ Counseling of the family members raises potential ethical problems. The spouses may not agree on the best course of action. As the surviving spouse can effectively veto the decisions affecting SBP benefits, it may be impossible for one attorney to advise the entire family. See *supra* note 19 and accompanying text.

³⁵ See *supra* notes 8-15 and accompanying text.

³⁶ *Id.*

³⁷ 38 U.S.C. § 1732 (Supp. V 1987).

³⁸ Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, § 1102, 102 Stat. 4124 (1988).

Mrs. Smith (25 at spouse's death)	
1989-2004	\$1,003
2004-2006	\$1,079
2006-2008	\$1,155
2008-2010	\$ 917
2010-2044	\$ 879

Mrs. Jones (38 at spouse's death)	
1989-1992	\$1,003
1992-1994	\$1,079
1994-1996	\$1,155
1996-1998	\$ 917
1998-2031	\$ 879

Future payments are expressed in current dollars. Lifetime payments in current dollars, would total \$614,796 for Mrs. Smith and \$459,816 for Mrs. Jones. Compared to other available options, death on active duty is probably the least favorable economically.

SBP—Spouse-Only Coverage

If Lieutenant Colonels Smith and Jones are retired for disability, they are automatically enrolled in the SBP with spouse-only coverage.³⁹ Each spouse would receive fifty-five percent of the gross monthly retired pay of \$2,647 until after age sixty-two and thirty-five percent thereafter. The percentage reduction is linked only to the age of the surviving spouse and not to the receipt of social security benefits for which the spouse may be eligible at age sixty-two.⁴⁰

Monthly payments for spouse-only coverage would be:

Mrs. Smith	
1989-2026	\$1,539
2026-2044	\$ 979

Mrs. Jones	
1989-2013	\$1,539
2013-2031	\$ 979

Lifetime payments in current dollars would be \$894,780 for Mrs. Smith and \$654,696 for Mrs. Jones. Because both officers are facing death as a result of service-connected illness, the surviving spouses would actually receive \$879 per month in DIC payments, with the remaining \$660 paid out as SBP benefits. DIC benefits are tax free; therefore, the spouses' gross monthly benefits would be higher than benefits received as SBP payments. Thus, it is apparent that spouse-only coverage is usually more economically beneficial than DIC. Payments to the surviving family, however, may be increased even more through another option.

Survivor Benefit Plan Children Only—Spousal DIC

Another possible variation is for Lieutenant Colonels Smith and Jones to retire and elect children-only coverage under the SBP. The children would receive fifty-five percent of gross retirement pay until age eighteen or up to age twenty-two if enrolled in college and unmarried.

Because there is no SBP offset for children receiving DIC, the family would receive both benefits in full until the children reach age eighteen or twenty-two.⁴¹

Because the deaths would be service connected, Mrs. Smith and Jones would receive spousal DIC benefits, even though the deaths of their spouses would have occurred after retirement.⁴² Total monthly payments would be:

Smith Family			
	DIC	SBP	Total
1989-2004	\$1,003	\$1,539	\$2,542
2004-2006	\$1,079	\$1,539	\$2,618
2006-2008	\$1,155	\$1,539	\$2,694
2008-2010	\$ 917	\$1,539	\$2,456
2010-2044	\$ 879	—	\$ 879

Jones Family			
	DIC	SBP	Total
1989-1992	\$1,003	\$1,539	\$2,542
1992-1994	\$1,079	\$1,539	\$2,618
1994-1996	\$1,155	\$1,539	\$2,694
1996-1998	\$ 917	\$1,539	\$2,456
1998-2031	\$ 879	—	\$ 879

Lifetime payments in current dollars would be \$1,002,624 for Mrs. Smith and \$626,028 for Mrs. Jones and their children. This option would significantly increase total benefits for the Smith family as compared to the option of retiring with spousal only SBP coverage. The Jones family, however, would experience a decrease in total benefits, even though initial benefits between the years 1989 and 1998 are substantially higher under this option than spouse-only coverage under the SBP. This presents a dilemma for Mrs. Jones. Does she need the additional benefits now, while her children are young and expenses are high, or does she need to live on less now and ensure financial security in later years? Additionally, under this option SBP payments are paid to the children or their guardian, and the spouse could not use the funds for her own benefit. This is not, however, the only additional factor to be considered.

Remarriage

A surviving spouse loses entitlement to SBP upon remarriage before age fifty-five and DIC upon remarriage at any age.⁴³ Remarriage after age fifty-five does not affect the surviving spouse's entitlement to SBP payments.⁴⁴ Entitlement to either benefit is reinstated

³⁹ See *supra* notes 16-28 and accompanying text.

⁴⁰ See Maze, *Reforming Survivor Benefits*, Army Times, Oct. 3, 1988, at 6.

⁴¹ See *supra* notes 12 and 27.

⁴² See *supra* note 9.

⁴³ 10 U.S.C. § 1450(b) (Supp. V 1987). Legislation before the current Congress would make the remarriage provisions for DIC identical to those for SBP. See S. 505, 101st Cong., 1st Sess. (1989).

⁴⁴ *Id.*

upon termination of the subsequent marriage.⁴⁵ Remarriage of the surviving spouse does not affect eligibility for children's benefits. Based on her age, the statistical probability that Mrs. Jones will remarry is quite low. On the other hand, Mrs. Smith would be more likely to remarry. If remarriage is likely, the best option would probably be that of SBP children-only coverage and spousal DIC. Remarriage is an important factor to consider when advising family members about future benefits.

Significant Health Problems

If a surviving spouse has serious medical problems that reduce life expectancy, concern about long-term benefits may be less important than the need to maximize current benefits. If the spouse is also facing imminent death or has a short life expectancy, the best option may be to elect children-only SBP coverage to ensure monthly payments for the children and to increase maximum survivor benefits.

If a surviving child suffers from a disability, payment schedules are drastically altered. A surviving child incapable of self-support because of a mental or physical incapacity existing before his or her eighteenth birthday is entitled to SBP payments as long as the incapacity exists.⁴⁶ Similarly, an incapacitated child is entitled to DIC payments for life.⁴⁷ The long-term needs of an incapacitated child may be a paramount consideration in the decisionmaking process.

Former Spouses

Former spouses are also eligible beneficiaries under the SBP.⁴⁸ A retiree may have elected to provide the SBP annuity to a former spouse, or a court may have ordered the soldier to provide an annuity to the former spouse.⁴⁹ A current spouse will be notified of an election to provide coverage for a former spouse, but the current spouse cannot veto that election.⁵⁰ When advising family members about survivor benefits, attorneys must ascertain whether the soldier has been ordered to provide SBP coverage for a former spouse. If the dying soldier is not sure, the U.S. Army Finance and Accounting Center at Fort Benjamin Harrison, Indiana, should have a copy

of any court orders or written agreements in the soldier's pay records.

Is the Spouse Already Covered?

Traditionally, a surviving spouse was entitled to either DIC or SBP, but not both, without applying the offset provisions.⁵¹ The prohibition against receipt of both annuities applied even when SBP and DIC entitlements were not based on the same marriage.⁵² This rule had been followed by the services since the SBP was established.

A recent decision⁵³ modified this longstanding approach by holding that a widow was entitled to both annuities because her entitlements were based on different marriages. The Comptroller General followed this holding in a subsequent case with similar facts.⁵⁴

A surviving spouse may not receive two SBP annuities or two DIC annuities, even if the annuities result from two marriages. If a spouse is entitled to DIC from a former marriage, she can now maximize her benefits by receiving both SBP and DIC.

Social Security Benefits

Both officers in our hypothetical cases are "fully insured" for social security survivor benefits because they have worked over ten full years.⁵⁵ The Social Security Administration will pay monthly benefits to the spouse of a deceased worker if she is raising children under the age of 16. Moreover, the surviving spouse would receive a monthly benefit at full retirement age (or a reduced benefit at age sixty). In addition, the children of a deceased worker will be entitled to social security survivor benefit payment up to age eighteen or nineteen if they attend college. Both families could initially receive more than \$4,000 per month with continued DIC payments for the surviving spouse, SBP payments for the children, and social security benefits. Mrs. Smith would receive this amount for approximately fifteen years. These amounts are approximations provided by the Social Security Administration. They are subject to fluctuations in actual earnings and future changes in the law. Mrs. Jones, however, would receive

⁴⁵ *Id.*

⁴⁶ 10 U.S.C. § 1447(5)(B)(iii) (1982).

⁴⁷ 38 U.S.C. § 411 (1982).

⁴⁸ 10 U.S.C. § 1448(b)(2) (Supp. V 1987).

⁴⁹ 10 U.S.C. § 1450(f) (Supp. V 1987).

⁵⁰ 10 U.S.C. § 1448(b)(2) (Supp. V 1987).

⁵¹ 10 U.S.C. § 1450(e) (1982). Remember that DIC is offset against any SBP payments.

⁵² Comp. Gen. B-190617 (16 Feb. 1978) (unpublished).

⁵³ See *Croteau v. United States*, 823 F.2d 539 (Fed. Cir. 1987).

⁵⁴ 67 Comp. Gen. _____ (1988).

⁵⁵ The social security benefits discussed herein are based on current projections provided by the Social Security Administration for an officer in pay grade O-5 with 18 years of continuous military service and no other earnings subject to social security taxes. Any individual may receive a projection of benefits by completing Form SSA-7004-PC-OPI(6/88).

this amount for three years. After five years, Mrs. Jones would not receive social security benefits until age sixty.

Once benefits are determined, the families should consider how future events can affect the receipt of those benefits.

Servicemen's Group Life Insurance

All soldiers on active duty are entitled to enroll in the Servicemen's Group Life Insurance (SGLI) program.⁵⁶ This low cost, level term, group policy provides up to \$50,000 of term life insurance. As it is almost always better to retire the soldier to maximize the survivor benefits, what happens to the SGLI coverage?

Coverage for all soldiers participating in SGLI is automatically extended for a 120-day period after separation or retirement at no cost to the insured.⁵⁷ A soldier who was totally disabled at the time of separation or retirement is eligible for a free extension of SGLI coverage for up to one year.⁵⁸ Additionally, during the SGLI extension period, SGLI participants may convert to the Veterans' Group Life Insurance program. In any event, soldiers who die shortly after retirement remain eligible for government insurance protection.

The SGLI proceeds can be important in determining which option is best for the surviving family members. If the family elects to provide SBP for children only, the surviving spouse will experience a significant decrease in income when the children reach majority or complete college. Moreover, the surviving spouse can invest SGLI proceeds to provide future income.

But I Am Already Covered!

Our case study of Lieutenant Colonels Smith and Jones was based on both officers having eighteen years of active service. Soldiers on active duty who are retirement eligible, that is, those with more than twenty years of active duty, are automatically enrolled in the SBP for spousal coverage.⁵⁹ These soldiers must retire to elect children-only SBP coverage. As discussed previously, this option can in some instances dramatically increase the amount of family survivor benefits. Therefore, a retirement eligible soldier facing imminent death should not automatically assume that, because SBP coverage is already in effect, he or she is providing maximum benefits to his family. If a retirement eligible soldier dies on active duty, the surviving spouse automatically receives DIC.⁶⁰ If the DIC payments are less than the amount the spouse would receive in SBP payments, the Secretary of the Army will pay to the surviving spouse the difference between full SBP coverage and DIC payments.⁶¹ In effect, the surviving spouse would receive fifty-five percent of what the soldier's retired pay would have been had the soldier retired.

Conclusion

The benefits available to surviving family members can vary greatly. Each case is different; there is no option that is correct for every family. The family members facing the imminent death of a soldier are under severe stress. Legal advisors must guide them through all the options so they are able to make the best choice. If the survivors can make informed, considered choices, the legal advisor can be confident that he or she helped the Army "take care of its own."

⁵⁶ 38 U.S.C. §§ 765-79 (1982).

⁵⁷ 38 U.S.C. § 768 (1982).

⁵⁸ *Id.*

⁵⁹ See *supra* notes 16-19 and accompanying text.

⁶⁰ See *supra* notes 8-14 and accompanying text.

⁶¹ 10 U.S.C. § 1448(d) (1982).

USALSA Report

United States Army Legal Services Agency
The Advocate for Military Defense Counsel

DAD Notes

COMA Issues Landmark AIDS Decisions

The Court of Military Appeals (COMA) recently issued two opinions that upheld the right of the military services to prevent the spread of the AIDS virus. The landmark rulings support the services' use of the "safe sex" order. This order is given by commanders to AIDS-infected service members and directs these service members to follow certain guidelines in their sexual practices. The rulings also indicate that deliberately engaging in conduct that can spread the AIDS virus may constitute the criminal offense of aggravated assault. These decisions by COMA are the first such rulings by any federal appeals court on the above-mentioned issues. This note will briefly discuss the cases and analyze their impact on the litigation of AIDS-related matters by defense counsel.

*United States v. Stewart*²

Pursuant to his pleas, the accused in *Stewart* was convicted, inter alia, of assault with a means likely to produce death or grievous bodily harm by exposing his sexual partner to the AIDS virus. During a detailed providence inquiry, the accused admitted he had tested positive for the human immunodeficiency virus (HIV). He also admitted that he had been counseled about the dangers of exposing others to the AIDS virus and that he had engaged in "unprotected sexual intercourse with" the victim, which "under the circumstances . . . was the means [he] used to expose her to the AIDS virus and that this was a wrongful and unlawful act on [his] part."³

The government offered testimony in aggravation that there was a thirty to fifty percent chance of death resulting from exposure to the AIDS virus. The military judge determined that this was sufficient to permit the inference that the accused's acts were a means likely to produce death or grievous bodily harm.

The issue raised on appeal was whether the plea of guilty was provident, where evidence by the government in aggravation established that the "means" alleged was not a means "likely" to produce death or grievous bodily harm.

The Court of Military Appeals ruled that "the pleas were not rendered improvident since even a 30 to 50% chance of death resulting from the battery inflicted is sufficient to fall within 'the natural and probable consequence' definition."⁴ The court stated that in order for a plea to be improvident the record must contain some evidence in "substantial conflict with" the pleas of guilty.⁵ The court opined that the testimony given was merely a summary of the recent AIDS research and that such research is far from complete. In addition, they found that there was no conflict in the record that the accused's conduct exposed his female partner to a substantial risk of developing the deadly AIDS disease. In fact, his partner subsequently tested positive for the AIDS virus.

*United States v. Womack*⁶

The second significant case pertaining to AIDS-related issues is *United States v. Womack*.⁷ In this case COMA scrutinized a "safe sex" order that required the accused to inform all present and future sexual partners of the infection; to avoid transmitting the infection to other persons by taking affirmative steps during any sexual activities to protect the sexual partner from coming into contact with blood, semen, urine, feces, or saliva; and to refrain from any acts of sodomy or homosexuality as proscribed by the Uniform Code of Military Justice, regardless of whether or not the partner consents to such acts.⁸ COMA determined that this "safe sex" order was not overbroad or overly intrusive and that it did not exceed military necessity.

At trial the accused entered a conditional plea of guilty to willful disobedience of a superior commissioned officer.⁹ The order given was the requirement to comply

¹ AIDS is the acronym for acquired immunodeficiency syndrome. A person with AIDS has the human immunodeficiency virus (HIV), which damages the body's immune system. See generally TJAGSA Practice Note, *AIDS Update*, *The Army Lawyer*, Mar. 1989, at 29.

² 29 M.J. 92 (C.M.A. 1989). The Army Court of Military Review had previously affirmed Stewart's conviction in an unpublished opinion. ACMR 8702932 (A.C.M.R. 9 Sept. 1988) (unpub.).

³ *Id.* at 93.

⁴ *Id.*

⁵ *Id.*

⁶ 29 M.J. 88 (C.M.A. 1989).

⁷ *Id.*

⁸ *Id.* at 89.

⁹ *Id.*

with "safe sex" practices. The accused had been charged with violation of the three specific practices stated above. The charges arose when the accused performed fellatio on an airman who had fallen asleep in the accused's room. Womack had been diagnosed as being infected with the AIDS virus and had been ordered several weeks earlier to engage only in "safe sex" practices.

The United States Air Force Court of Military Review, in an en banc decision, determined that the order was not overly broad or intrusive and that it served a valid military purpose.¹⁰ The court deleted that portion of Charge I alleging a violation of the order to refrain from acts of sodomy or homosexuality on the ground that such language was "fairly embraced" or multiplicitous with the sodomy specifications.¹¹ The remaining portions of the specification of Charge I was deemed lawful. Accordingly, the court affirmed the findings of guilty, as modified.¹² The Court of Military Appeals affirmed the Air Force Court of Military Review's decision. The court compared the transmission of AIDS to the public health threat caused by the transmission of other sexually transmitted infections and diseases. The military's use of "safe sex" orders was held to be similar to state statutes making it a criminal offense to expose an individual to a sexually transmitted disease. The court opined that a "safe sex" order was a less restrictive means to limit the spread of disease.

The court further opined that a plain reading of this order demonstrates that it was specific, definite, and certain. The court stated that it was obvious the accused had actual knowledge of its nature and terms and that he was on fair notice as to the particular conduct that was prohibited. Accordingly, the order as applied to appellant's conduct was not vague.

The court also rejected appellant's assertion that the order was illegal because it failed to relate to a valid military purpose and that it interfered with his private rights and personal affairs. The court held that the order's stated purpose was "to safeguard" the overall health of members of a military organization and to ensure unit readiness and the ability of the unit to accomplish its mission. Accordingly, such an order had a valid military purpose.¹³

The court found no infringement on the constitutionally protected right of privacy and noted that the armed

forces may constitutionally prohibit or regulate conduct that may be permissible elsewhere. The court likened this type of restriction to other requirements that are legally imposed on service members.¹⁴

Stewart and Womack indicate that the Court of Military Appeals agrees with tactics used by the Army and Air Force in their battle against the spread of the AIDS virus. Defense counsel must look for other routes or theories of attack in cases involving AIDS-related orders and aggravated assault offenses relating to the unwarned spread of the AIDS virus. Defense counsel should closely analyze each case to determine if procedural flaws exist. A good example of this would be a lack of proof by the government that the accused ever received the order or proof that the contents of the order were conveyed verbally and were unclear. Barring a strong attack on the particular facts, it appears that the government will prevail in any challenge to the legality of "safe sex" orders. Likewise, any unwarned sexual contact will most likely be upheld as a basis for an aggravated assault charge. Ultimately, a defense counsel's best approach may be to encourage a client to plead guilty and to negotiate the most favorable pretrial agreement possible. In any event, it certainly appears that these landmark decisions will have a profound effect on the defense of AIDS cases. Captain Deborah C. Olgin.

Multiplicity Update—1989

Multiplicity continues to be an active area of appellate litigation. If trial counsel and defense counsel had read previous commentaries¹⁵ and court decisions on this issue,¹⁶ two things should have happened to reduce litigation in the subject area:

1) trial counsel should have stopped charging obviously multiplicitous offenses, and, in the rare case of exigencies of proof, trial judges should have forced an election after findings; and,

2) trial defense counsel should have made motions to dismiss or, if the specifications were not clearly multiplicitous, trial defense counsel should have made either a motion to have the pleadings made more definite and certain or a motion for a bill of particulars.

This, however, has not been the case.¹⁷ The appellate courts are still considering numerous cases each year on

¹⁰ *United States v. Womack*, 27 M.J. 630, 634-35 (A.F.C.M.R. 1987).

¹¹ *Id.* at 635.

¹² *Id.*

¹³ *Womack*, 29 M.J. at 90. See generally Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, *The Army Lawyer*, Dec. 1988, at 4.

¹⁴ *Womack*, 29 M.J. at 91.

¹⁵ Ryan, *Multiplicity Update*, *The Army Lawyer*, July 1987, at 29; Raezer, *Trial Counsel's Guide to Multiplicity*, *The Army Lawyer*, Apr. 1985, at 21.

¹⁶ See Appendix, *infra*.

¹⁷ Actually, confusion in this area is not surprising. The author argued *United States v. Guerro*, 28 M.J. 223 (C.M.A. 1989), before the U.S. Court of Military Appeals. From the questions and discussion during the oral argument it became clear that even the court does not agree upon a single multiplicity theory/analysis; and, as a result, conducts a case-by-case analysis.

the issue of multiplicity, whether it be for findings or for sentencing. In many cases, the issue was raised at trial, but the military judge ruled that the offenses were multiplicitous for sentencing only.¹⁸ Thus, in those cases, any relief gained on appeal is "paper relief"—the findings of guilty as to one or more specifications are set aside and the specifications concerned are dismissed, but the sentence is unchanged.¹⁹

Trial defense counsel must continue to be alert to possible multiplicity issues and must raise them at trial. If these issues are not raised at trial and if the specifications are not clearly multiplicitous on their face, then the courts will not allow the accused to challenge the findings for the first time on appeal.²⁰ The courts of review disagree as to whether or not multiplicity for sentencing can be raised for the first time on appeal, but the Army Court of Military Review seems to allow it.²¹

With these thoughts in mind, the attached Appendix is provided. It covers volumes 23, 24, 25, 26, 27, and 28 of the West Military Justice Reporters, in their entirety, and also as much of volume 29 as was published by 3 October 1989.²² Counsel should also read the two previously cited multiplicity articles.²³ Captain Thomas A. Sieg.

Appendix

Adultery

1. Offenses of carnal knowledge and adultery based on same act of sexual intercourse were multiplicitous for findings. *United States v. Lavalla*, 24 M.J. 543 (A.F.C.M.R. 1987).

2. Adultery specifications were not multiplicitous for findings purposes with specifications of indecent acts and sodomy, although all specifications involved the same co-participant with the accused. *United States v. Rivera*, 26 M.J. 638 (A.C.M.R. 1988).

AIDS

1. Offense of attempted anal sodomy was multiplicitous for findings with offense of aggravated assault by means of "AIDS" virus. *United States v. Johnson*, 27 M.J. 798 (A.F.C.M.R. 1988).

2. Two specifications of willful disobedience of "Safe Sex" order were not multiplicitous for findings with each other or with specification of adultery. *United States v. Negron*, 28 M.J. 775 (A.C.M.R.), *aff'd*, _____ M.J. _____ (C.M.A. 29 Sept. 1989).

3. Offense of disobeying "Safe Sex" order is not multiplicitous for findings with aggravated assault by

means of "AIDS" virus. *United States v. Demford*, 28 M.J. 836 (A.F.C.M.R. 1989).

Assaults

Offenses of assault with intent to commit rape and assault with intent to commit sodomy were not multiplicitous for findings. *United States v. Flynn*, 28 M.J. 218 (C.M.A. 1989).

Absent Without Leave

Specification alleging absence without leave from October 24 until October 25 was multiplicitous for findings with specification alleging escape from custody on 24 October. *United States v. Shears*, 27 M.J. 509 (A.C.M.R. 1988).

Checks

Making false checks multiplicitous for findings with uttering same checks. *United States v. Holliday*, 24 M.J. 686 (A.C.M.R. 1987).

Cruelty and Maltreatment

1. Accused was assigned to the cadre at a CCF. Assault and battery specifications were not multiplicitous for findings with cruelty and maltreatment specifications. The cruelty and maltreatment specification focused on mistreatment of a group of correctees causing them to assault and batter one or two other correctees, but the assault and battery specifications focused on the batteries delivered by the maltreated groups of correctees. Dereliction of duty specification not multiplicitous with cruelty and maltreatment specifications because accused's dereliction went beyond the facts supporting the cruelty and maltreatment specification. *United States v. Lee*, 25 M.J. 703 (A.C.M.R. 1987).

2. Charge of violating general regulation prohibiting maltreatment of subordinates (UCMJ art. 92) is multiplicitous for findings with charge of maltreating subordinate (UCMJ art. 93). *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989).

Drugs

1. If the accused possesses a substantial quantity of a drug and only consumes a small portion, he can be charged with both use and possession. *United States v. Nixon*, 29 M.J. 505 (A.C.M.R. 1989); *United States v. Johnson*, 26 M.J. 415 (C.M.A. 1988).

2. It is multiplicitous for findings to charge an accused with possession with intent to distribute and the actual distribution of the same drug in type and quantity. *United States v. Hilts*, 23 M.J. 105 (C.M.A. 1982).

¹⁸ See *Guerrero*, 28 M.J. 223.

¹⁹ *Id.*

²⁰ *United States v. Jones*, 23 M.J. 301 (C.M.A. 1987).

²¹ *United States v. Newman*, 25 M.J. 604, 606 n.4 (A.C.M.R. 1987), *pet. denied*, 27 M.J. 9 (C.M.A. 1988); *but see United States v. Everstone*, 26 M.J. 795 (A.F.C.M.R. 1988).

²² Each case discussed in the Appendix is mentioned under only one offense.

²³ *Supra* notes 13 and 15.

3. Use of marijuana and use of cocaine multiplicitous for findings where both substances were contained within same cigarette. *United States v. White*, 28 M.J. 530 (A.F.C.M.R. 1989).

4. Distribution of cocaine and marijuana to same undercover police officer were not multiplicitous for findings when separated by four minutes and second distribution was instigated by accused after completion of the first illicit agreement. They were, however, multiplicitous for sentencing. *United States v. Harper*, 28 M.J. 526 (A.C.M.R. 1989).

5. It is multiplicitous for findings to have five specifications that charge possession of a drug on five separate occasions and a single specification of possession that alleges a time period that covers the dates and types of drugs in the five specifications. *United States v. Stephenson*, 25 M.J. 816 (A.F.C.M.R. 1988).

6. Accused was charged with three separate distributions to three different soldiers at the same time, but when accused offers at the same time, arranges three separate lines on same mirror at same time, and provides them with a single rolled-up dollar bill to use, the distributions are multiplicitous for findings as a single indivisible transaction. *United States v. Johnson*, 26 M.J. 686 (A.C.M.R. 1988).

7. Attempt to use marijuana was multiplicitous for findings with wrongful possession of marijuana and both were multiplicitous for sentencing for possession of drug paraphernalia. *United States v. Derksen*, 26 M.J. 818 (A.F.C.M.R. 1987).

8. Possession of cocaine was not multiplicitous for findings with distribution of cocaine or use of cocaine (although contemporaneous, the amounts were very different), but all offenses were multiplicitous for sentencing. *United States v. Jordan*, 24 M.J. 573 (N.M.C.M.R. 1987).

9. Introduction of cocaine into installation with intent to distribute and actual distribution of some amount of cocaine multiplicitous for findings. Under the facts, wrongful possession of cocaine and marijuana multiplicitous for sentencing. *United States v. Wheatcraft*, 24 M.J. 687 (A.F.C.M.R. 1986).

Drunk Driving

1. Specifications of drunk driving and involuntary manslaughter were not multiplicitous where the manslaughter specification did not allege intoxication as the act of negligence. *United States v. Zayos*, 24 M.J. 132 (C.M.A. 1987).

2. Negligent homicide and driving while intoxicated resulting in personal injuries were not multiplicitous for either findings or sentencing. *United States v. Long*, 23 M.J. 856 (A.F.C.M.R. 1987) (different victims).

3. Specification alleging negligent homicide based on drunken and reckless driving was not multiplicitous with specification alleging drunken and reckless driving resulting in personal injuries to other passenger. *United States v. Brett*, 25 M.J. 720 (A.C.M.R. 1987).

Duty Free Goods

Specifications that allege purchase with intent to illegally transfer or enter into the blackmarket duty or tax free goods are multiplicitous for findings with specifications that allege actual illegal transfer or entry into the blackmarket of the same goods. *United States v. Smith*, 27 M.J. 914 (A.C.M.R. 1989); *United States v. Barber*, 27 M.J. 885 (A.C.M.R. 1989); *United States v. Foster*, 27 M.J. 852 (A.C.M.R. 1988); *United States v. Phillips*, 26 M.J. 463 (A.C.M.R. 1988); *United States v. Bianchi*, 25 M.J. 557 (A.C.M.R. 1987).

Entry

Charges of throwing rock through window and damaging government property in order to gain illegal entry were multiplicitous for findings with charge of attempted illegal entry. *United States v. Demper*, 24 M.J. 731 (A.C.M.R. 1987).

Fraternization

1. Fraternalization specifications and adultery specifications were not multiplicitous for findings where fraternization specification had no language indicating or implying the sexual intercourse was adulterous. *United States v. Coldwell*, 23 M.J. 748 (A.F.C.M.R. 1987).

2. Offense of dereliction of duty by permitting female to enter accused's stateroom was fairly included in allegations of fraternization offense and was multiplicitous for findings. *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986).

Indecent Liberties

Two specifications of attempted indecent liberties arising out of the same transaction were not multiplicitous for findings because there were two separate victims. *United States v. Le Prowse*, 26 M.J. 652 (A.C.M.R. 1988).

Larceny/Wrongful Appropriation

1. Accused cannot be convicted of wrongful appropriation of rental car and dishonorable failure to pay just debt that was incurred after deadline for returning car, but if indebtedness incurred before contract day to return car and car not returned on time, two separate crimes. *United States v. Hale*, 28 M.J. 310 (C.M.A. 1989).

2. Charges of false official statement, fraudulent claim, and larceny are multiplicitous for findings when based on single set of factual circumstances. *United States v. Spellman*, 28 M.J. 683 (A.C.M.R. 1989); *United States v. Thompson*, 28 M.J. 769 (A.C.M.R. 1989); *United States v. Donegan*, 27 M.J. 576 (A.F.C.M.R. 1988); *United States v. Gans*, 23 M.J. 540 (A.C.M.R. 1986); but see *United States v. Turner*, 28 M.J. 556 (C.G.C.M.R. 1989).

3. Larceny is multiplicitous for findings with forging of check when that is how the larceny is effected. *United States v. Jones*, 24 M.J. 827 (A.C.M.R. 1987); *United States v. Johnson*, 24 M.J. 796 (A.C.M.R. 1987); but different result if accused uses innocent third party to cash forged checks. *United States v. Barnum*, 24 M.J. 729 (A.C.M.R. 1987).

4. Larceny of targets and M-16 magazines alleged to have been stolen at same time, from same victim and location, not multiplicitous for findings when factually proven at trial to have occurred at different times. *United States v. Wixon*, 23 M.J. 570 (A.C.M.R. 1986).

5. Failure to pay just debt and attempted larceny not multiplicitous for findings or sentencing in that debt offense arose at the moment debt became due and accused intended not to honor it and accused's subsequent mailing of falsified receipt indicating the debt had been paid was the basis of the attempted larceny charge. *United States v. Mervine*, 23 M.J. 801 (N.M.C.M.R. 1986).

6. Conspiring to commit larceny and conspiring to receive the same stolen property were not multiplicitous when accused enters two different conspiracies with different individuals and the third party involved in the receipt offense is not associated with the theft offense. *United States v. Hiatt*, 27 M.J. 818 (A.C.M.R. 1988).

7. Charges of conspiring to commit larceny of government funds and attempted larceny of those same funds were not multiplicitous for findings even though the alleged act to complete the conspiracy was the same act that was the attempt. The court looked to the "Blockburger Rule" as a guide for legislative intent. *United States v. Stottlemire*, 28 M.J. 477 (C.M.A. 1989).

Murder

1. The same homicide cannot support convictions of unpremeditated murder and felony murder, *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989); or of premeditated murder and felony murder. *United States v. Mobley*, 28 M.J. 1024 (A.F.C.M.R. 1989).

2. Negligent discharge of firearm is multiplicitous for findings with negligent homicide when the negligent discharge of firearm is alleged as the basis of culpable negligent causing victim's death. *United States v. Conforti*, 26 M.J. 852 (A.C.M.R. 1988).

Obstruction of Justice

Single act of simultaneously soliciting false testimony from more than one potential witness is one violation of obstructing justice. *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989).

Officers

1. The actual acts/underlying offenses are multiplicitous for findings with charge of conduct unbecoming an officer. *United States v. Court*, 24 M.J. 11 (C.M.A. 1987); *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987).

2. Conducting unbecoming an officer by wrongfully catheterizing self to conceal use of marijuana was not multiplicitous with conduct unbecoming an officer by communicating to enlisted person how to do this and then admitting to using such a procedure. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

Rape

Offenses of rape and extortion were not multiplicitous under the facts of this case when extortion offense was complete upon the communication of threat in order to receive sexual favors and rape was subsequently accomplished by means of placing victim in fear of bodily harm. *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987).

Sodomy

Disobeying superior's order to refrain from any acts of homosexuality or sodomy is multiplicitous for findings with specification charging an act of sodomy. *United States v. Womack*, 27 M.J. 630 (A.F.C.M.R. 1988).

Solicitation

Solicitation to enter a conspiracy is multiplicitous for findings with the conspiracy offense. *United States v. Jaks*, 28 M.J. 908 (A.C.M.R. 1989).

Government Appellate Division Note

Sentence Credit Revisited at the Appellate Level

Captain Timothy J. Saviano
Government Appellate Division

Introduction

Administrative sentence credit pursuant to Rule for Courts-Martial 305(k)¹ has been the subject of frequent appellate litigation. The activity at the appellate level is a direct result of the Army Court of Military Review's

decision in *United States v. Hill*.² The alleged error being repeatedly raised by appellate defense counsel is that the military judge failed to determine whether appellant's pretrial confinement was properly reviewed pursuant to R.C.M. 305(i).³ This article will examine

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(k) [hereinafter MCM, 1984, and R.C.M.].

² *United States v. Hill*, 26 M.J. 836 (A.C.M.R. 1988).

³ R.C.M. 305(i)(1) provides that "[a] review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement."

the development of sentence credit through case law, the development of administrative credit pursuant to R.C.M. 305(k), and the related error currently raised at the appellate level. Furthermore, it will discuss the reasons that *Hill* does not require the military judge to *sua sponte* examine the magistrate's review.

Case Law Development of Sentence Credit— *Allen and Mason Credit*

Pretrial confinement is physical restraint, imposed by order of competent authority, that deprives a person of freedom pending disposition of charges.⁴ R.C.M. 305 clarifies the bases for pretrial confinement and establishes procedures for its imposition and review.⁵ It is well established that when an accused is held in pretrial confinement pursuant to this rule, he or she shall receive day-for-day sentence credit against the approved sentence.⁶

In *United States v. Allen* the appellant was legally confined for eighty-one days prior to his general court-martial.⁷ The court held that, pursuant to Department of Defense (DOD) Instruction 1325.4, appellant was entitled to day-for-day sentence credit for the pretrial confinement period.⁸ The DOD instruction required that procedures employed by military services for computation of sentence be in conformity with those published by the Department of Justice.⁹ The court interpreted the DOD Instruction "as voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts."¹⁰ Accordingly, appellant was entitled to

eighty-one days of sentence credit for the time spent in pretrial confinement.¹¹

In *United States v. Mason*¹² the Court of Military Appeals expanded the concept of granting sentence credit for pretrial confinement to situations of severe restriction that were tantamount to confinement. In *Mason* the appellant was restricted to the dayroom and could go, under escort, to only the latrine, chapel, and mess hall. He was required to sign in hourly and was prohibited from participating in training.¹³ The court granted day-for-day sentence credit for the period of restriction.¹⁴ Now, in all cases where restriction is determined to be tantamount to confinement, an accused will be entitled to day-for-day sentence credit against the approved sentence.¹⁵ *Mason* credit,¹⁶ therefore, is identical in form to *Allen* credit, except in the manner in which the accused was "confined."

Case Law Development of Administrative Credit— R.C.M. 305(k)

R.C.M. 305 establishes a number of procedural requirements to properly place an individual in pretrial confinement.¹⁷ It also requires a magistrate's review of the need for continued pretrial confinement within seven days of the imposition of confinement.¹⁸ The remedy for noncompliance with the procedural requirements of R.C.M. 305 is administrative credit against the sentence adjudged.¹⁹ This credit is computed at the rate of one day of credit for each day of confinement served as a result of the noncompliance with the rule.²⁰ The one

⁴ R.C.M. 305(a).

⁵ R.C.M. 305 analysis, app. 21, at A21-14.2 [hereinafter R.C.M. 305 analysis].

⁶ *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

⁷ *Id.*

⁸ *Id.* at 129.

⁹ *Id.* at 126.

¹⁰ *Id.* at 128. The Department of Justice follows the mandate of 18 U.S.C. § 3568 (1982), which requires the Attorney General to give any person sentenced to imprisonment credit toward service of his sentence for any days spent in custody in connection with the offenses for which the sentence was imposed.

¹¹ R.C.M. 305, itself, does not require administrative credit for lawful pretrial confinement. In fact, the Manual for Courts-Martial does not discuss administrative credit for lawful pretrial confinement at all. This sentence credit comes solely from the Court of Military Appeals' decision in *United States v. Allen*. See *United States v. Belmont*, 27 M.J. 516, 517 (N.M.C.M.R. 1988).

¹² *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition).

¹³ The Army Court of Military Review in *United States v. Smith*, 20 M.J. 528, 531 n.1 (A.C.M.R. 1985), took judicial notice of the record of trial in *Mason* in order to discern the facts upon which the Court of Military Appeals' decision was premised.

¹⁴ *Mason*, 19 M.J. 274.

¹⁵ *Id.* See also *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985) (appellant entitled to 56 days of sentence credit for period of pretrial restriction tantamount to confinement).

¹⁶ In situations involving restriction tantamount to confinement, the sentence credit will be referred to as *Mason* credit, while *Allen* credit refers to situations involving actual pretrial confinement. See *United States v. Gregory*, 21 M.J. 952, 953 n.2, 958 n.14 (A.C.M.R. 1986).

¹⁷ See R.C.M. 305(f) (entitlement to military counsel); (h) (notification of confinement to commander and commander's memorandum); (i) (magisterial review of confinement); (j) (review by military judge upon motion for appropriate relief).

¹⁸ R.C.M. 305(i)(1).

¹⁹ R.C.M. 305(k) provides in part that "[t]he remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as a result of such noncompliance."

²⁰ R.C.M. 305(k).

day administrative credit is in addition to the day-for-day sentence credit provided by *Allen*.²¹

On its face, R.C.M. 305 applies only to situations involving actual pretrial confinement. In *United States v. Gregory*,²² however, the Army Court of Military Review expanded R.C.M. 305 to include situations where an accused is ordered into pretrial restriction tantamount to confinement.²³ In *Gregory* the military judge found appellant's pretrial restriction to be tantamount to confinement and awarded appellant thirty-one days of sentence credit.²⁴ The military judge denied the timely motion of defense counsel for administrative credit pursuant to R.C.M. 305(k) for procedural violations of the rule.²⁵ The Army Court of Military Review analyzed the scope of R.C.M. 305 and concluded that "restriction tantamount to confinement is a form of pretrial confinement, and that the provisions of R.C.M. 305 apply equally thereto."²⁶ Accordingly, because the provisions of R.C.M. 305(h) and (i) were violated in the case, the court held that the appellant was also entitled to administrative credit under the provisions of R.C.M. 305(k).²⁷

The Court of Military Appeals, in affirming *Gregory*, stated that "the Court of Military Review correctly concluded that restriction tantamount to confinement is a form of confinement to which R.C.M. 305, Manual for Courts-Martial, United States, 1984, applies."²⁸ Accordingly, an accused is entitled both to *Mason* credit for restriction tantamount to confinement and to administrative credit pursuant to R.C.M. 305(k) if procedural violations have occurred. Given the decision in *Gregory*, the Court of Military Appeals and the Army Court of Military Review have made it clear that situations of actual pretrial confinement and those of restriction tantamount to confinement will be given *equal* treatment in their entitlement to administrative credit pursuant to R.C.M. 305(k).

Errors Raised at the Appellate Level

As a result of the Army Court of Military Review's decision in *Hill*,²⁹ a new twist to R.C.M. 305(k) credit has emerged at the appellate level. In *Hill* the accused was confined at Fort Meade, Maryland, on March 11, 1988.³⁰ He subsequently was transported to the confinement facility at Fort Hood, Texas, on March 17, 1988.³¹ A military magistrate reviewed his confinement on 21 March 1988.³² At trial, the military judge credited the accused with seventeen days of pretrial confinement.³³ Despite the fact that the magistrate's review occurred four days late, no administrative credit was requested by trial defense counsel.³⁴ On appeal, the appellant contended that he was entitled to administrative credit for the untimely magisterial review of his pretrial confinement. The government asserted that the issue was waived because administrative credit was not requested at trial. The court declined to apply waiver "where the facts regarding both the pretrial confinement and magistrate's review are present in the case documents."³⁵ Accordingly, the court granted appellant four additional days of administrative credit for the late magistrate review.³⁶

In *Hill* the Army Court of Military Review stated:

The government must ensure compliance with R.C.M. 305(i). Thus, when pretrial confinement is announced in the sentencing proceeding or an Article 39(a) session, trial counsel *should* inform the military judge whether a military magistrate has reviewed pretrial confinement within seven days of its imposition. *Cf. United States v. Harris*, 26 M.J. 729, 733-34 (A.C.M.R. 1988). Next, the military judge with the assistance of both counsel, *should* determine any issue regarding the magistrate's review, and, if it was not conducted in a timely or correct manner, fashion the correct remedy as set forth in R.C.M. 305(k). This practice will avoid a needless appellate issue and reduce the number of

²¹ R.C.M. 305 analysis at A21-18.

²² *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition).

²³ *Id.* at 956.

²⁴ *Id.* at 953.

²⁵ *Id.* at 954. The procedural violations dealt with R.C.M. 305(h) and (i).

²⁶ *Id.* at 955-56 (footnotes omitted).

²⁷ *Id.* at 958.

²⁸ *Gregory*, 23 M.J. 246.

²⁹ *Hill*, 26 M.J. 836.

³⁰ *Id.* at 837.

³¹ *Id.*

³² *Id.*

³³ *Id.* This was pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), for the period of March 11-28, 1988.

³⁴ *Id.*

³⁵ *Id.* at 838.

³⁶ *Id.*

cases in which the appellant cannot receive meaningful benefit from credit delayed until appellate review.³⁷

Relying on this language, appellate defense counsel contend that the *Hill* decision requires the trial counsel and the military judge (but not the trial defense counsel) to determine on the record whether a military magistrate has reviewed pretrial confinement within seven days of its imposition. In cases where the record is silent as to the magistrate's review, an alleged error has been raised on appeal that the military judge failed to determine that the appellant's pretrial confinement was properly reviewed pursuant to R.C.M. 305(i), and, therefore, administrative credit is due pursuant to R.C.M. 305(k).³⁸

The typical case scenario on appeal is as follows. The accused is properly placed into pretrial confinement. At trial, the military judge grants *Allen* credit for the period of time the accused was held in pretrial confinement. In each of these cases, there is no motion before the court requesting administrative credit for technical violations of R.C.M. 305. On appeal, appellant never contends that his confinement had not been reviewed by a magistrate in a timely manner. Rather, appellant simply relies on the *Hill* decision to allege that the record should contain these facts, and because the record is silent, appellant argues that he is due administrative credit.

In response to this allegation of error, the government has proceeded on a twofold basis. First, the government has argued that the military judge has no sua sponte duty to determine whether the magistrate's review was timely.³⁹ In fact, pursuant to R.C.M. 305(j), the government has contended that once the charges for which the

accused has been confined are referred to trial, "the military judge shall review the propriety of pretrial confinement [only] upon motion for appropriate relief."⁴⁰ R.C.M. 305 does not mandate that the military judge determine in each case whether the magistrate's review is timely. The military judge's obligation for such a review arises only upon an appropriate motion.⁴¹

Second, the government has argued that defense counsel's failure to request R.C.M. 305(k) administrative credit at trial waives the issue presented for purposes of appeal. The Rules for Courts-Martial clearly place the burden on the defense to raise these matters at trial.⁴² Failure to raise objections or requests for appropriate relief before the court-martial is finally adjourned constitutes waiver.⁴³ Additionally, R.C.M. 1001(b)(1) provides, in pertinent part, that:

Trial counsel shall inform the court-martial of the data on the charge sheet relating to . . . the duration and nature of any pretrial restraint. . . . *If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are waived.*⁴⁴

These provisions notwithstanding, appellate defense counsel, relying upon *United States v. Shelton*,⁴⁵ have continued to assert that waiver should not be applied. In *Shelton* the magisterial review occurred thirteen days after appellant had been placed in pretrial confinement.⁴⁶ At trial, the defense counsel raised the issue of untimely magisterial review; however, the military judge concluded that "because the review could occur as late

³⁷ *Id.* (emphasis added).

³⁸ Currently, there are 35 cases pending review before ACMR raising this error. A collateral issue also being raised on appeal is whether the record of trial must contain evidence that appellant was properly ordered into pretrial confinement by his commander. This issue really deals with whether the pretrial confinement packet must be included with the allied documents of the record.

³⁹ See *United States v. Bryant*, 27 M.J. 811, 812 (A.C.M.R. 1988) (the military judge has no sua sponte duty to grant administrative credit pursuant to R.C.M. 305(k) for noncompliance with the Rule).

⁴⁰ R.C.M. 305(j) (emphasis added).

⁴¹ The Army Court of Military Review's choice of language in the *Hill* decision clearly does not require that the military judge determine in every case whether the magistrate conducted a timely review. This is evident by the court's use of the permissive word "should," rather than the prescriptive word "shall." In fact, in *United States v. Mathieu*, ACMR 8802947, slip op. at 2 (A.C.M.R. 20 Nov. 1989), the court noted that the language used in *Hill* was only precatory. They noted that the court was not requiring the military judge in each case to determine whether a timely magisterial review occurred. The court was merely suggesting a procedure that would possibly avoid needless appellate issues. Nevertheless, following this dicta in *Hill*, more appellate litigation has been generated.

⁴² R.C.M. 906(b)(8) provides that [r]elief from pretrial confinement in violation of R.C.M. 305 "may be requested by motion for appropriate relief"; R.C.M. 905(c)(2)(A) provides that "[e]xcept as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party"; R.C.M. 905(b) provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial."

⁴³ R.C.M. 905(e) provides that [f]ailure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

⁴⁴ R.C.M. 1001(b)(1) (emphasis added). See also Army Reg. 27-10, Legal Services: Military Justice, para. 5-22.1 (16 Jan. 1989).

⁴⁵ *United States v. Shelton*, 27 M.J. 540 (A.C.M.R. 1988).

⁴⁶ *Id.* at 542.

as the tenth day,⁴⁷ only three days were due as the result of noncompliance with the Rules.”⁴⁸ Concluding that appellant was entitled to an additional three days of credit from the seventh day of pretrial confinement to the tenth day, the Army Court of Military Review declined to apply waiver because the issue of untimely review of pretrial confinement was raised at trial.⁴⁹ Nevertheless, in the cases where the issue of untimely magisterial review is currently being raised at the appellate level, trial defense counsel have not alleged technical violations of R.C.M. 305 at trial.

Case law supports waiver in these instances. In *United States v. Ecoffey*⁵⁰ the Army Court of Military Review has determined “that military courts have faithfully applied the waiver doctrine to matters pertaining to pretrial punishment and illegal pretrial confinement.”⁵¹ The *Ecoffey* court announced that

in cases tried ninety days or more from the date of this decision, failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial concerning the nature of such restraint will waive consideration of the credit issue on appeal.⁵²

Although *Ecoffey* dealt with restriction tantamount to confinement rather than actual pretrial confinement, the same result should occur given the case law development of sentence credit as previously discussed. Indeed, recent

Army Court of Military Review decisions have supported this view. In *United States v. Snoberger*,⁵³ which was decided after *Hill*, the appellant complained that the military judge erred by failing to grant administrative sentence credit for pretrial confinement because the record failed to establish that the government complied with the procedural requirements of R.C.M. 305(h) and (i).⁵⁴ The *Snoberger* court held that this issue was waived by the defense’s failure to raise it at trial.⁵⁵

Additionally, the Army Court of Military Review recently held in *United States v. Kuczaj*⁵⁶ that “an affirmative showing of compliance with Rule 305(i) is not required of the Government in the absence of challenge by an accused.”⁵⁷ There, the appellant also contended that he was entitled to administrative credit because there was a lack of evidence in the record of trial that a magistrate reviewed his pretrial confinement as required by R.C.M. 305(i).⁵⁸ The court further stated that “[i]t is incumbent upon an accused to affirmatively assert government noncompliance with Rule 305” and “[f]ailure to assert the issue at trial waives the issue on appeal.”⁵⁹ Accordingly, the court held that appellant’s assignment of error was without merit.⁶⁰

In light of *Kuczaj*, Army government appellate attorneys had hoped that this issue would finally be put to rest.⁶¹ Nevertheless, defense appellate briefs filed after the decision in *Kuczaj* continue to raise the same issue and rely upon the *Hill* decision. Although a reference to *Kuczaj* is made in these briefs, appellate defense counsel

⁴⁷ R.C.M. 305(i)(4) allows, for good cause, the extension of the time limit for completion of the initial review to ten days rather than seven days after the imposition of pretrial confinement.

⁴⁸ *Shelton*, 27 M.J. at 542.

⁴⁹ *Id.* at 543.

⁵⁰ *United States v. Ecoffey*, 23 M.J. 629 (A.C.M.R. 1986).

⁵¹ *Id.* at 631. See also *United States v. Howard*, 25 M.J. 533 (A.C.M.R. 1987) (the court cautioned that “when restriction tantamount to confinement of more than seven days is raised at trial, the issue of *Gregory* is normally present as well and should be raised by counsel as soon as possible at the trial level. If this issue is not promptly raised, waiver may be considered appropriate.”) (footnote and citations omitted); *United States v. Bryant*, 27 M.J. 811, 812 (A.C.M.R. 1988) (trial defense counsel’s failure to request R.C.M. 305(k) administrative credit at trial constitutes waiver).

⁵² *Ecoffey*, 23 M.J. at 631 (footnotes omitted).

⁵³ *United States v. Snoberger*, 26 M.J. 818 (A.C.M.R. 1988).

⁵⁴ *Id.* at 821.

⁵⁵ *Id.*

⁵⁶ *United States v. Kuczaj*, ACMR 8802249, slip op. at 1-2 (A.C.M.R. 22 Sept. 1989) (unpub.).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (citations omitted).

⁶⁰ *Id.*

⁶¹ Since the decision in *Kuczaj*, the Army Court of Military Review has affirmed the findings and sentences in 14 cases where this exact issue was raised on appeal for the first time and there was absolutely no evidence indicating failure to comply with the provisions of R.C.M. 305(i). See *United States v. Bell*, ACMR 8902087 (A.C.M.R. 8 Nov. 1989) (unpub.); *United States v. Gaddis*, ACMR 8901680 (A.C.M.R. 6 Nov. 1989) (unpub.); *United States v. Goguen*, ACMR 8900730 (A.C.M.R. 6 Nov. 1989) (unpub.); *United States v. Jacobs*, ACMR 8901010 (A.C.M.R. 6 Nov. 1989) (unpub.); *United States v. Hawkins*, ACMR 8900982 (A.C.M.R. 3 Nov. 1989) (unpub.); *United States v. Kuehn*, ACMR 8901697 (A.C.M.R. 3 Nov. 1989) (unpub.); *United States v. Pasca*, ACMR 8901788 (A.C.M.R. 30 Oct. 1989) (unpub.); *United States v. Carr*, ACMR 8901821 (A.C.M.R. 30 Oct. 1989) (unpub.); *United States v. James*, ACMR 8900979 (A.C.M.R. 30 Oct. 1989) (unpub.); *United States v. Black*, ACMR 8901040 (A.C.M.R. 19 Oct. 1989) (unpub.); *United States v. Cunningham*, ACMR 8901384 (A.C.M.R. 19 Oct. 1989) (unpub.); *United States v. Adams*, ACMR 8901382 (A.C.M.R. 12 Oct. 1989) (unpub.); *United States v. Young*, ACMR 8900073 (A.C.M.R. 27 Sept. 1989) (unpub.); *United States v. Pearce*, ACMR 8901398 (A.C.M.R. 27 Sept. 1989) (unpub.).

dismiss it and claim that it is merely inconsistent with *Hill* and *Shelton*.⁶² Despite the continued emphasis being placed on this issue by appellate defense counsel, it is clear that the Army Court of Military Review does not require the military judge, *sua sponte*, to determine whether the magistrate's review occurred in a timely manner. Therefore, unless technical violations of R.C.M. 305 are raised at trial, waiver should be applied on appeal.⁶³

Conclusion

Relying on dicta from *Hill*, appellate defense counsel have sought to obtain administrative sentence credit on behalf of their clients merely because the record was silent as to the magistrate's review. While this argument was unique, it went against prior precedent and the

Rules for Courts-Martial. The military judge, absent a motion for appropriate relief raised by the defense, has no *sua sponte* duty to determine whether the magistrate's review was conducted in a timely manner.

The Army Court of Military Review has made it clear in its decision in *Kuczaj* that, despite the gratuitous language in *Hill*, an accused must affirmatively assert government noncompliance with R.C.M. 305. Otherwise, the issue will be found to have been waived on appeal. Although this issue remains active at the appellate level, it is unlikely that attempts to obtain administrative credit on appeal will be successful. There is no legal requirement for trial counsel or the military judge to state anything on the record regarding compliance with R.C.M. 305 in the absence of the issue first being raised by trial defense counsel.⁶⁴

⁶² A Petition for Grant of Review to the Court of Military Appeals was recently filed in *United States v. Cannon*, ACMR 8802720, Docket #63,305/AR (filed 18 Oct. 1989) with the issue presented as follows:

WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED BY FAILING TO GRANT RELIEF WHERE THE RECORD OF TRIAL AND ITS ALLIED PAPERS FAIL TO ESTABLISH THAT APPELLANT'S PRETRIAL CONFINEMENT WAS PROPERLY REVIEWED BY A MILITARY MAGISTRATE UNDER MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984, RULE FOR COURTS-MARTIAL 305(i).

The appellate defense counsel contends that the Army Court of Military Review has rendered inconsistent opinions in this area and calls upon the Court of Military Appeals to resolve this conflict.

⁶³ See also *United States v. Mathieu*, ACMR 8802947, slip op. at 1-2 (A.C.M.R. 20 Nov. 1989) (waiver will result on appeal unless alleged technical violations of R.C.M. 305 are raised at trial).

⁶⁴ While it is true that there is no requirement for trial counsel to state anything on the record regarding compliance with R.C.M. 305, in *Mathieu* the Army Court of Military Review noted the wisdom of having the trial counsel do just that. The court explained that this information will avoid improper deprivations of liberty, reduce the number of appellate issues, and allow the military judge to determine the correct amount of sentence credit due the appellant. In the opinion of the author, the practice would be unwise for the following reasons: 1) there is no legal requirement that trial counsel announce this information; 2) this information is uniquely in the possession of the defense counsel, not the trial counsel, because the defense counsel receives notice of the magistrate hearing and, along with the accused, has a right to be present; 3) this information pertains to a relatively unimportant issue that is seldom in dispute; 4) this proposed practice would shift the burden from the defense to the government to raise this issue, thereby imposing an additional unnecessary task on trial counsel and military judges, cluttering records of trial with unnecessary paperwork, and creating the possibility for error whenever the task is performed incorrectly or is omitted; 5) proper mechanisms already exist that inform the military judge of the period of pretrial confinement; and 6) more appellate litigation would result if waiver is not applied because the issue was raised at trial, albeit, by trial counsel.

Trial Defense Service Note

Using Experts to Prepare for Courts-Martial

Lieutenant Colonel Larry E. Kinder
Regional Defense Counsel, Region VI

Introduction

Military defense counsel are expected to provide competent representation and effective assistance in every court-martial to which they are detailed.¹ Thoroughly preparing for trial is one of the most important things defense counsel can do to ensure competent representation and effective assistance.

The time and effort required to adequately prepare for a court-martial varies substantially from case to case and

from counsel to counsel. For any particular court-martial, the time and effort necessary to prepare will be determined by a number of variables. These include the stakes, the experience of counsel, and the complexity of the court-martial.² This article proposes using an expert during the preparation phase of trial as part of the "defense team" to assist defense counsel who are attempting to litigate a highly technical issue involving a subject about which they have little or no knowledge.

¹ Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 1.1 (31 Dec. 1989) [hereinafter DA Pam. 27-26].

² *Id.* Comment.

The Problem

Before a complex issue can be litigated and ultimately resolved, it first has to be identified. "Spotting" the issues that are involved with a highly technical aspect of a court-martial can be a formidable task and often requires substantial time and effort during the preparation phase. Frequently, such an issue will involve new and developing scientific principles.

The use of the DNA "fingerprint" test as a forensic identification tool is one example of developing scientific technology that may significantly change the way military defense counsel prepare for trial.³ This testing procedure can ascertain with great certainty whether human body tissue recovered from the scene of a crime was left there by a particular person. Defense counsel confronted with the attempted use of such evidence at trial must be familiar with the underlying principles of genetic science, the strengths and weaknesses of the DNA testing procedures, and the standards for admissibility of such evidence at a court-martial.

The Law

The United States Constitution guarantees each accused due process of law⁴ and the right to effective assistance of counsel.⁵ These same guarantees exist within the military for members of the Armed Forces. Military due process⁶ permits the consultation with and employment of such experts if such consultation or employment is "necessary" for an adequate defense and if it is required to ensure that the accused has "meaningful access to justice."⁷ Additionally, the Army rules that govern the professional conduct of lawyers require adequate preparation by counsel in every case to ensure that effective assistance is rendered.⁸

Little statutory authority exists for the employment and use of experts to assist defense counsel to prepare for a court-martial. The Criminal Justice Act of 1964⁹ provides that, in a criminal case, if investigative, expert,

or other services are necessary and the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services. This act, however, has been held to be inapplicable to courts-martial.¹⁰ In *Hutson v. United States*, the Court of Military Appeals stated:

We are not without sympathy for defense counsel who finds his client faced with the most serious charges and lacks the resources and facilities available to the Government to perfect its case. The situation, however, is one which exists in many jurisdictions in this country when charges are brought against an indigent defendant. In the Federal courts, relief has been provided by Congress under 18 USC 3006A, supra. In the military system, it has been so far provided by Congress only in the form of the usual Article 32 pretrial investigation, and, if further relief is to come to an accused, it, too, must emanate from the National Legislature.¹¹

Further, as a practical matter, counsel may not be able to wait until charges have been referred to trial and a court-martial has been convened before requesting pretrial assistance, because much of the investigation and preparation will have to be accomplished before the article 32¹² investigation or the first article 39a¹³ session.

While not specifically addressing the employment and use of experts, the Uniform Code of Military Justice requires that the trial counsel, the defense counsel, and the court-martial have equal access to witnesses and other evidence in accordance with such regulations as the President may prescribe.¹⁴ This provision contemplates that witnesses and evidence are to be equally available to all parties at trial, but it does not specifically provide for their use and employment during the preparation phase. Similarly, the 1984 Manual for Courts-Martial provides for the use and employment of experts as witnesses, but does not specifically address their use to assist counsel prepare for court-martial.¹⁵

³ For a general discussion of the use of DNA as an aid in forensic identification, see Long, *The DNA "Fingerprint": A Guide to Admissibility*, *The Army Lawyer*, Oct. 1988, at 36.

⁴ U.S. Const. amend. V, XIV.

⁵ U.S. Const. amend. VI.

⁶ See *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986).

⁷ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

⁸ DA Pam. 27-26, Rule 1.1.

⁹ 18 U.S.C. § 3006A (1982).

¹⁰ 42 C.M.R. 39, 40 (C.M.A. 1970).

¹¹ *Id.*

¹² Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

¹³ UCMJ art. 39.

¹⁴ UCMJ art. 46.

¹⁵ Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 706 [hereinafter MCM, 1984, and Mil. R. Evid. 706]; MCM, 1984, Rule for Courts-Martial 703(d) [hereinafter R.C.M. 703(d)]. R.C.M. 703(d) authorizes the employment of experts as witnesses, when necessary, but adds that expert witness fees will not be paid unless the convening authority has previously authorized the employment and fixed the fees. This expresses a policy that it is the convening authority who determines which witnesses will be employed. Nevertheless, if the military judge rules that an expert or acceptable substitute must be made available, the proceedings shall be abated if the convening authority fails to comply with the order.

Chapter 5 of Army Regulation 27-10¹⁶ provides guidance concerning the procedures applicable to trials by court-martial, although the employment and use of experts necessary to prepare for the court-martial is not mentioned. Paragraph 6-5b(6) of Army Regulation 27-10 may offer some assistance.¹⁷ It allocates responsibility between the United States Army Trial Defense Service and convening authorities for funding various defense functions and provides that the convening authority has responsibility for funding investigative expenses that have been properly authorized by a convening authority or military judge. It is unclear whether the employment of an expert to assist defense counsel prepare for trial is the type of expense contemplated by this provision, but there is strong support for an argument that it is.

The Supreme Court has considered requiring a state to appoint an expert to assist an indigent defendant prepare for trial. In *Ake v. Oklahoma*¹⁸ the Court concluded that the risk of an inaccurate resolution of sanity issues was extremely high without the assistance of a psychiatrist to perform the following functions: 1) to conduct a professional examination on issues relevant to the defense; 2) to help determine whether the insanity defense was feasible; 3) to present testimony; 4) and to assist the defense in preparing the cross-examination of a state's psychiatric witness.¹⁹ The Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must, at a minimum, assure that the defendant has access to a competent psychiatrist who can conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.²⁰ The Court further provided that, so long as the state granted access to a competent expert, the state was free to implement this right as it saw best. The Court noted that indigent defendants did not have a Constitutional right to choose an expert of their personal liking or to receive funds to hire their own.²¹

Within the military, the law continues to develop with regard to an accused's right to expert assistance in order

to prepare for a court-martial. In *Hutson*²² the Court of Military Appeals concluded that there was no right for an accused to have United States Army Criminal Investigation Command (CID) agents detailed to help his defense counsel investigate and prepare the case, nor did an accused have a right to any funds with which to hire private investigators. Nevertheless, the court stated that there was nothing that precluded "the government from voluntarily furnishing to the defense such expert assistance as it may desire in order to assure a fair opportunity to prepare for any trial which may ultimately be ordered."²³

Shortly thereafter, the Court of Military Appeals denied a petition to review an Army Court of Military Review decision that held that there was no obligation for the CID to conduct an investigation for the defense when the defense requested investigative assistance.²⁴

Later, in *United States v. Johnson*,²⁵ the court, relying upon paragraph 116 of the 1969 Manual for Courts-Martial,²⁶ held that military law provides for the employment of experts by either side when "necessary" for the preparation of its case.

More recently, the Court of Military Appeals recognized the accused's right to expert assistance—including investigative assistance—in order to prepare for trial. In *United States v. Garries*²⁷ the court found that, as a matter of military due process, soldiers are entitled to investigative and other expert assistance when "necessary" for an adequate defense.²⁸ The court again concluded that the Criminal Justice Act of 1964 is concerned with the representation of indigent defendants in federal courts and is inapplicable to the military, adding that the investigative, medical, and other expert services available within the military are usually sufficient to permit the defense to adequately prepare for trial.²⁹ The court cited *Ake*³⁰ and R.C.M. 703(d), asserting that the defense must demonstrate the "necessity" for the services of an expert when requesting

¹⁶ Army Reg. 27-10, Legal Services: Military Justice (16 Jan. 1989).

¹⁷ *Id.*

¹⁸ 470 U.S. at 77.

¹⁹ *Id.* at 82.

²⁰ *Id.* at 83.

²¹ *Id.*

²² 42 C.M.R. 39 (C.M.A. 1970).

²³ *Id.* at 40.

²⁴ *United States v. Simmons*, 44 C.M.R. 804 (A.C.M.R. 1971), *pet. denied*, 44 C.M.R. 940 (C.M.A. 1972).

²⁵ 47 C.M.R. 402 (C.M.A. 1973).

²⁶ Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 116.

²⁷ 22 M.J. 288 (C.M.A. 1986).

²⁸ *Id.* at 290.

²⁹ *Id.* at 290, 291.

³⁰ 470 U.S. 68 (1985).

such pretrial employment.³¹ Although defense counsel's use of expert services to prepare for trial is not discussed in R.C.M. 703(d), the court did not limit the application of that rule to the use of experts only as witnesses at trial, but interpreted it to include the employment and use of experts to assist in the preparation for a court-martial as well.

A Methodology

Expert witnesses are most frequently used at a court-martial when their scientific, technical, or other specialized knowledge will help the fact-finder understand the evidence or determine a fact in issue.³² When the inquiry concerns the use of an expert during the preparation phase of trial, the test to determine whether an expert is "necessary" is a balancing of the three factors identified in *Ake*:³³ the soldier's interest in having the expert services provided; the government's interest in not providing the services; and the probable value of the services versus the risk of error if the services are not provided.³⁴ When the technical issues are significant factors to be resolved at trial, the complexity of the scientific principles involved, coupled with their new and novel nature within the scientific community, contributes to the risk of erroneous resolution of these issues and tends to make the expert services "necessary."

Defense counsel may experience resistance to this expanded use of experts for preparation, particularly in remote locations where experts will have to be brought in. A clear and concise rationale will have to be presented to the convening authority and, if the request is denied, to the military judge as to why the employment and use of an expert is "necessary."

If the convening authority or military judge determines that the employment and use of an expert is "necessary" for the defense to prepare adequately, the government will likely offer a qualified and acceptable expert from within the military community. Defense counsel must further request from the convening authority or military judge that any detailed government expert be designated as a "lawyer's representative"³⁵ and made a part of the defense team.³⁶ This procedure will ensure that all confidential communications between the accused and the defense expert are governed by the lawyer-client privilege³⁷ and that the results of the expert's efforts will be considered as defense counsel's work product and will not be subject to disclosure or discovery.³⁸

The expert ultimately employed and used by the defense may understand that certain communications are frequently considered to be confidential and that work should not be discussed with people who do not have a need to know about that work. This same expert, however, may not appreciate the fact that defense-related activities cannot be discussed with supervisors, criminal investigators (CID agents), the trial counsel, or anyone else who is not part of the defense team. The expert may have openly discussed work with some or all of these people in the past and may not realize that it would be improper to do so with regard to defense-related matters. Consequently, defense counsel should explain to the expert, in writing, the concept of a defense counsel's work product being protected and the extent of the lawyer-client privilege with regard to confidential communications.

Conclusion

Military defense counsel detailed to a court-martial that involves highly technical scientific principles and the novel legal issues associated with them cannot decline representation and refer the soldier elsewhere. Using experts during the preparation phase will help military defense counsel understand the scientific principles associated with the case, recognize any deficiencies in the testing procedures that may have been used, and prepare to examine and cross-examine the experts with specialized training and experience who will necessarily testify at the court-martial.

Not every case in which military defense counsel might need to use an expert in order to adequately prepare for trial will involve a developing field of forensic science. Defense counsel may need to use an expert to prepare for an examination of a witness who will present evidence concerning a complex set of technical business records. Perhaps defense counsel will need to gain a working knowledge and understanding of a unique aspect of a business or profession in order to provide a defense. The applicability of a recognized form of insanity could be the significant factor to be resolved at trial. The possibilities are endless.

Regardless of the complexity of the court-martial, thorough preparation, to include the use of experts when "necessary," will enhance the quality of litigation rendered by defense counsel and will help ensure that the accused has the type of representation and assistance necessary to ensure that the court-martial is fair and just.

³¹ *Garries*, 22 M.J. at 291.

³² Mil. R. Evid. 702.

³³ 470 U.S. at 77.

³⁴ A complete discussion of the necessity standard is beyond the scope of this article. For a complete discussion, see Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 Mil. L. Rev. 77 (1984); A. Moenssens, F. Inbau & J. Starrs, *Scientific Evidence in Criminal Cases* (3d ed. 1986); P. Gianelli and E. Imwinkelried, *Scientific Evidence* (1986).

³⁵ Mil. R. Evid. 502(b)(3) provides: A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

³⁶ See *United States v. Toledo*, 25 M.J. 270, 275 (C.M.A. 1987).

³⁷ Mil. R. Evid. 502(a).

³⁸ See generally R.C.M. 701.

savings bonds is due in large part to their safety, relatively low cost, and tax deferral advantages. Beginning in 1990, the bonds will have an added feature that will allow owners to entirely exclude interest accrued on the bonds if used to pay for qualified educational expenses.

Series EE Savings Bonds are sold for half of their face value. When held for five years or more, the interest on EE bonds becomes market based, retroactive to the first day of purchase. The bonds currently receive interest at either 85% of the average return during that time on marketable Treasury securities with five years remaining to their maturity or a guaranteed minimum of six percent.¹¹⁵

Some investors purchase Series EE Savings Bonds for their favored tax treatment under the Internal Revenue Code, which gives owners a choice in reporting interest. Taxpayers may pay tax on interest as it accrues or defer paying tax on the interest until the bond is redeemed.¹¹⁶ Interest on Series EE Bonds escapes state and local taxes altogether.

The tax treatment of Series EE bonds makes them an attractive investment for saving for children's college educations. If the bonds are purchased in the child's name, the accrued interest is taxable to the child when the bonds are redeemed, usually at a time when the child will be in a lower tax bracket than his or her parents. Alternatively, a child owner may elect to report the interest as it accrues and use the annual \$500 standard deduction¹¹⁷ to reduce or eliminate tax altogether. Children who elect this method of reporting interest should file a 1040EZ tax return for the first year in which bonds are owned, even if no tax is due.

The election to use one method of reporting is not irrevocable; the IRS will allow bond owners to switch the method of reporting interest.¹¹⁸ Thus, bond owners have the flexibility of reporting bond interest as current income for a few years, then switching over to postpone the tax, and then changing back to the accrual method. Taxpayers can make the switch only once every five years and, when a switch is made, it applies to all bonds owned by the taxpayer. To change methods of reporting, taxpayers must complete IRS Form 3115 and attach it to the federal income tax return for the year concerned.

Beginning in 1990, there will be an alternative method for using Series EE bonds for college savings plans. The interest on qualified U.S. savings bonds issued after 1989 is entirely free from federal tax if used to pay for higher education costs.

¹¹⁵ The guaranteed minimum rate has been 6% since November 1, 1986. If held less than 5 years, EE Bonds earn interest on a fixed, graduated scale beginning at 4.16% for bonds held six months and gradually rising to the minimum 6%. Yields on EE Bonds are published in Department Circular, Public Debt Series 1-80.

¹¹⁶ I.R.C. § 454(a) (West Supp. 1989); Treas. Reg. § 1.454-1.

¹¹⁷ I.R.C. § 63(c)(5) (West Supp. 1989). The dependent's standard deduction is limited to the greater of \$500 or the dependent's earned income up to his or her basic standard deduction.

¹¹⁸ Rev. Proc. 89-46, 1989.

¹¹⁹ The amount excludable is reduced proportionately up to \$55,000 for single filers and \$90,000 for joint filers.

¹²⁰ More information on redeeming Series E or EE Savings Bonds in exchange for HH Bonds may be found in Department of the Treasury Circular, Public Debt Series 2-80.

There are four basic restrictions to the qualified savings bond exclusion program. First, the exclusion is available only for bonds purchased on or after January 1, 1990. Bonds purchased before this date will not qualify. Second, the bond must be issued to an individual who is at least twenty-four years old. Thus, a parent or grandparent must own the bond; if it later turns out that the bonds will not be used for college expenses, the accrued interest will be taxed to that individual. Third, the exclusion is phased out as the adjusted gross income of the taxpayer rises above \$40,000 for single filers and \$60,000 for joint filers.¹¹⁹ While these levels will be adjusted for inflation after 1990, it is important to note that the AGI levels are for the year the bond is redeemed, not the year it is purchased. The final requirement is that the amount of the interest on the redeemed bonds must be lower than qualified higher educational expenses of the child, the taxpayer, or a spouse. Educational costs are broadly defined as including tuition and fees, but the term does not include room and board. Thus, it is possible that the exclusion will not be available if the child receives a scholarship or attends a military service academy.

Taxpayers must distinguish the tax reporting rules for Series EE savings bonds from those that apply to HH bonds. Series HH bonds are current income securities that are available only in exchange for eligible Series EE or E Savings bonds with total redemption values of \$500 or more.¹²⁰ Interest on Series HH bonds is paid semiannually and must be reported for the year in which it is paid. The interest is not subject to state or local income tax. MAJ Ingold.

IRS Announces 1989 Mileage Rates

The optional mileage rate for business travel will be 25 1/2 cents per mile for the first 15,000 miles of business use for the year. The rate for business mileage above 15,000 miles is 11 cents per mile. This rate also applies for all business use of an automobile that is fully depreciated.

A taxpayer may elect to keep a record of all actual expenses for business travel in lieu of the mileage allowance. Taxpayers using this method must, however, prove actual expenditures for gas, oil, repairs, and maintenance.

The 1989 mileage rates for charitable activities remains at 12 cents per mile. The mileage rate for medical and moving expense deductions also remains unchanged at 9 cents per mile.

Property Settlement Agreement and Will Held Not Effective To Change IRA Beneficiary Designation

Separated and divorced clients can easily be misled into believing that a divorce decree or a will can legally change life insurance or Individual Retirement Account (IRA) beneficiaries. According to *Graves v. Summit Bank*,¹²¹ neither instrument is effective to change the beneficiary designation on a Pay On Death (P.O.D.) IRA under Indiana law.

The facts in *Graves* are as follows. Richard Lockhart opened an IRA in 1981 and listed his wife as the beneficiary in the event of his death. Two years later, Lockhart received a divorce from his wife. The dissolution decree awarded the IRA to Lockhart. After the dissolution, Lockhart changed his will and listed his children as the beneficiaries of his entire estate. Lockhart did not, however, change his IRA beneficiary form before his death in 1987. Consequently, Lockhart's wife sued the estate and the bank holding the IRA for recovery of the funds that had been deposited.

The court first held that the dissolution decree had no effect on the designation of a beneficiary on a non-probate transfer. The court analogized the situation to the rule governing life insurance beneficiary designations, which provides that a divorce will not result in a change in beneficiary named in the insurance policy.¹²² The court rejected the executor's argument that a distinction should be made between insurance and pensions having cash value and policies having no present cash value, such as term insurance.

The court also held that, under Indiana law,¹²³ a will cannot control the disposition of nonprobate assets, such as a pay on death IRA account. A party may not defeat a P.O.D. beneficiary designation merely by arguing that a subsequently executed will evinced an intent to change the original payee. According to the court, the only avenue available to change such a designation by operation of law would be to show fraud, undue influence, duress or coercion by clear and convincing evidence.¹²⁴

Legal assistance attorneys should advise clients owning nonprobate assets such as IRAs, P.O.D. accounts, and life insurance contracts that they cannot rely on wills or divorce decrees to modify beneficiary designations. As *Graves* illustrates, these clients must take the extra step and change the beneficiary listed on the underlying policy or bank agreement. MAJ Ingold.

Many family members of deceased soldiers are aware of the Department of Veterans' Affairs (VA) program for providing financial assistance to survivors of deceased soldiers and veterans.¹²⁵ Post-secondary education students can receive up to \$376 per month under this program, and the nearest VA office can provide additional information.

The "Restored Entitlement Program for Survivors" (REPS)¹²⁶ is another, lesser known, educational assistance program available for some surviving children of deceased soldiers and veterans. These children lose social security benefits when they reach age eighteen, even if they are enrolled in a post-secondary education program. REPS replaces some of the lost social security benefits for qualifying students. The Army and Air Force Mutual Aid Association states that beneficiaries can receive as much as \$500 per month.

In order to qualify for REPS, the child must meet the following requirements:

—A survivor of: a soldier who died on active duty before August 13, 1981; or a veteran who died of service-connected causes before August 13, 1981; or a soldier or veteran who died at any time of a service-connected cause that was diagnosed before August 13, 1981.

—Full-time student.

—Unmarried and under age 22.

—Employment income of less than \$6,480 per year.

Mr. Doug Davis of the Army and Air Force Mutual Aid Association can assist those who may be entitled to REPS benefits. He can be reached at 1-800-336-4538 or (703) 522-3060. MAJ Guilford.

Family Law Note

Mansell v. Mansell

State court interpretations of *Mansell v. Mansell*¹²⁷ have begun to be reported. Although *Mansell* restricts application of state property division laws in divorce matters,¹²⁸ these initial opinions suggest that judges are applying the new rule in a reasonable manner. So far, there have been no strained interpretations of statutory language, case law, or facts to circumvent the U.S. Supreme Court's pronouncement. While one can argue

¹²¹ 541 N.E.2d 974 (Ind. Ct. App. 1989).

¹²² *Id.* at 977.

¹²³ Ind. Code §32-4-1.5-4 (1988).

¹²⁴ *Id.* at 978.

¹²⁵ See 38 U.S.C. §§ 1700-1763 (1982 & Supp. V 1987).

¹²⁶ The program is created by § 156, Pub. L. 97-377, 96 Stat. 1920 (1982).

¹²⁷ 109 S. Ct. 2023 (1989).

¹²⁸ See TJAGSA Practice Note, *McCarty and Preemption Revived: Mansell v. Mansell*, *The Army Lawyer*, Sept. 1989, at 30-34.

that this is only as it should be, remember that just such linguistic games triggered the *Mansell* case.¹²⁹

Three reported cases have applied *Mansell* to conclude that disability benefits paid by the Department of Veterans' Affairs (VA) cannot be treated as marital property.¹³⁰ This result, of course, is virtually mandated by the *Mansell* holding. Courts have gone beyond a strict interpretation and application of *Mansell*, however, to apply its logic in resolving related issues as well.

For example, in addition to acknowledging that VA disability payments cannot be treated as marital property, the Idaho Court of Appeals also ruled that offset awards cannot be used to avoid the resulting distortion in dividing community property.¹³¹ An "offset award" in this situation means awarding the civilian spouse a disproportionate share of other community assets to compensate for the community interest in the waived retired pay. The Hawaii Intermediate Court of Appeals has reached the same conclusion on this issue.¹³²

Both courts rested their offset award decisions on *Hisquierdo v. Hisquierdo*.¹³³ There, a wife sought to have a Railroad Retirement Act pension divided as community property. In the alternative, she asked for offsetting property equal to her community interest in the pension. Using a rationale similar to that later voiced in *McCarty v. McCarty*,¹³⁴ the United States Supreme Court first ruled that states are preempted from interfering with the federal benefit scheme for railroad workers. The Court went on to hold that an offset award would "upset the statutory balance and impair [the husband's] economic security just as surely as would a regular deduction from his benefit check."¹³⁵ The Idaho and Hawaii courts recognized that logic requires application of the *Hisquierdo* rule to *Mansell*-type cases to prohibit offset awards.

On the other hand, these state courts also took pains to clarify that *Hisquierdo* does not require an equal division of non-pension property. State laws typically enumerate a variety of factors to guide courts in deciding how to divide property, and it is not uncom-

mon for these to result in one spouse receiving more than half the community assets. Despite *Hisquierdo*, courts generally remain free to apply such laws, even when federal pensions and disability benefits are involved. The Supreme Court decision, however, does prohibit an unequal apportionment scheme when it is used for the purpose of circumventing federal limitations on dividing benefits.

The Hawaii case also addresses another issue raised by *Mansell*. Technically, *Mansell* decided only the narrow issue of division of waived retired pay when a member elects to receive VA benefits. The Court's rationale could have broader application, however, including cases where the member receives military disability retired pay instead of a longevity pension.¹³⁶ In *Jones*¹³⁷ the Hawaiian court agreed with this expansive analysis. It ruled that *Mansell*, in conjunction with the Uniformed Services Former Spouses' Protection Act,¹³⁸ extends to all military disability benefits. Thus, Hawaiian courts can divide only the "disposable retired pay" portion of a military disability pension.¹³⁹

Jones addressed a final, and interesting, issue that can arise in other cases. The parties' separation agreement required the husband to continue his enrollment in the Survivor Benefit Plan (SBP),¹⁴⁰ with his soon-to-be former spouse remaining as the beneficiary. The agreement was incorporated in the divorce decree. After *Mansell*, the husband unilaterally terminated his SBP participation, and Mrs. Jones asked the court to review this action.

The husband argued that because the court cannot divide his disability pension, neither can it order payment of SBP premiums. He reasoned that the annuity premiums are deducted from his pension, which he claimed was his only source of income, and that a court order to pay SBP premiums would be tantamount to a court-ordered "division" in his former wife's favor.

The court disagreed. It noted that the husband had financial resources other than his pension, and these were sufficient to cover the amount of the monthly SBP

¹²⁹ See, e.g., *Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, cert. denied, 479 U.S. 1012 (1986) (state court refused to apply the plain language of 10 U.S.C. § 1408(c)(1) concerning "disposable retired pay"). The United States Supreme Court discusses, and implicitly criticizes, this case in *Mansell*.

¹³⁰ *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989); *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989); *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989).

¹³¹ *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989).

¹³² *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989).

¹³³ 439 U.S. 572 (1979).

¹³⁴ 453 U.S. 210 (1981).

¹³⁵ *Hisquierdo*, 439 U.S. at 588.

¹³⁶ For a discussion of this issue, see TJAGSA Practice Notes, *McCarty and Preemption Revived: Mansell v. Mansell*, The Army Lawyer, Sept. 1989, at 32-33.

¹³⁷ *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989).

¹³⁸ The operative section of the Act for purposes of this note is 10 U.S.C. § 1408 (1982 & Supp. V 1987).

¹³⁹ 10 U.S.C. § 1408(a)(4)(E) (1982 & Supp. V 1987).

¹⁴⁰ 10 U.S.C. § 1447-1455 (1982 & Supp. V 1987).

premium. Thus, the court dismissed his argument as being founded upon inaccurate facts. The court's ruling also impliedly holds that the statutorily-prescribed method of paying SBP premiums¹⁴¹ is not controlling for divisibility issues when non-pension assets exist that are sufficient to pay the SBP premiums and the court could order that these assets be used to pay financial obligations such as an SBP annuity.

Although the court did not analyze the legal consequences of its ruling, this is a reverse of the offset award situation. Normally, an offset results in the civilian spouse receiving a disproportionate share of non-pension property, because the pension is not divisible.¹⁴² Here, however, the member is required to share his *nondivisible* pension with a former spouse in lieu of giving her other, non-pension property. The court impliedly justifies this action on the basis that the retiree owns non-pension property that could be used to pay the annuity cost, but for the statutory payment scheme.

Theoretically, the court had an alternative that would have avoided raising the issue of limitations on dividing disability pensions. It could have ordered the retiree to buy a civilian annuity plan that matches the benefits under SBP, using the non-pension to fund the purchase. As a practical matter, however, it is difficult to find commercial annuities with SBP's inflation protection, and any annuity probably would be very costly in this case because of the husband's disability.¹⁴³

Despite the retiree's interesting, if technical, point about the SBP order constituting a division of the disability pension, the court's rejection of his argument does not violate the spirit of *Hisquierdo*. In ordering continued SBP participation, the court had no intent to evade federal limitations on its power. Indeed, it was exercising a power that Congress expressly provided. The SBP statute was amended in 1986 to authorize divorce courts to order participation in the SBP program.¹⁴⁴

Moreover, the ruling did not reduce the member's income below that prescribed by federal benefit plans. The retiree had other assets, and the court stated that they were more than sufficient to offset the deductions from the disability pension. It implied that the result might have been different if no other assets were available.

It might have been preferable if the court had given the retiree a choice between continuing SBP participation and procuring a comparable civilian annuity. This approach would have foreclosed the argument of a forced division of a nondivisible disability pension. Moreover,

the result almost certainly would have been the same because SBP likely would be the most cost-effective protection the retiree could buy. Still, the court's SBP ruling seems to be a reasonable exercise of judicial power in this case. It may serve as a pattern for other courts when disabled retirees challenge orders requiring continued SBP participation. MAJ Guilford.

Administrative and Civil Law Notes

Reports of Survey

Army Regulation 735-5 has been revised and republished in Unit Supply UPDATE #12 (9 Oct. 1989). This revision significantly alters some procedures under the Army's report of survey system, especially the individual rights of soldiers and civilian employees found to be financially liable for the loss, damage, or destruction of government property.

Previously, soldiers and civilian employees had two years to appeal the approving authority's determination that they were financially liable for a loss of government property. Those persons now have thirty days to submit a request for reconsideration to the approving authority. Additionally, the request for reconsideration is a prerequisite for enlisted soldiers seeking remission or cancellation of the debt under AR 600-4.

Submission of a request for reconsideration or a request to remit the debt suspends collection action by the servicing Finance and Accounting Office (FAO). It is crucial that collection action be suspended because only uncollected debts may be remitted or cancelled. AR 37-1 requires that soldiers receive a demand letter prior to the initiation of involuntary collection action on a report of survey. Legal assistance attorneys should ensure that their clients respond to the demand letter and inform the local FAO that a request for reconsideration or remission has been submitted.

There is still some confusion concerning involuntary collection of amounts due under the report of survey system. Amounts due by members of the Army and Air Force may be involuntarily collected from current pay.¹⁴⁵ Amounts due by members of the Navy, Marine Corps, and civilian employees of all services may be collected from current pay only after the collecting agency complies with the requirements of the Debt Collection Act.¹⁴⁶ Appendix F, AR 37-1 provides a good summary of the procedural requirements for collection under either of these statutes. Additionally, civilian employees held financially liable may file a grievance if

¹⁴¹ SBP premiums are paid by a reduction in military retired pay; no other payment method is authorized. 10 U.S.C. § 1452 (1982).

¹⁴² Of course, there are other reasons for an offset award. For example, an offset is used when the parties or the court cash-out a pension at the time of divorce by awarding the spouse other assets worth one-half the pension's present value. The member then receives an interest in the entire pension as his or her separate property, free of any interest or claim by the former spouse.

¹⁴³ He had suffered a heart attack. This originally resulted in his being placed on the Navy's temporary disability retired list. Subsequently, he was placed on the permanent disability retired list with a 40% disability.

¹⁴⁴ See 10 U.S.C. § 1450(f) (Supp. V 1987).

¹⁴⁵ 37 U.S.C. § 1007(c) (Supp. V 1987).

¹⁴⁶ 5 U.S.C. § 5514 (1982).

they are members of a bargaining unit,¹⁴⁷ although a civilian employee must seek reconsideration under AR 735-5 and demand a hearing under the Debt Collection Act before invoking the negotiated grievance procedure.¹⁴⁸

Digest of Opinion of The Judge Advocate General

Nonappropriated Fund Instrumentalities/ Private Organizations—Museum Fund Drive. DAJA-AL 1989/2565 (27-1a), 16 Oct. 1989

Military installations around the world contain a variety of activities organized and operated under various authorities. The participation of military personnel in these activities and the support authorized from appropriated or nonappropriated funds depends on the type of organization. In a recent review of a letter encouraging enlisted personnel to support the US Army Noncommissioned Officer museum located at Fort Bliss, OTJAG outlined the restrictions on membership drives for nonappropriated fund instrumentalities (NAFIs) and private organizations (POs), the support authorized for POs, and the ways of obtaining authorized support for the museum.

The support activity for the museum could be a NAFI, a formally organized PO, or an informal association. Regardless, membership must be voluntary. This does not bar reasonable efforts by the command to inform personnel of the existence and worthiness of an organization and to encourage participation.

POs are not official organizations, and DA officials may not use their names or official titles to aid POs with fundraising or membership drives. It is particularly important for senior NCOs and officers to avoid any activity in their official capacity that might appear to endorse or sponsor a PO. In addition, any practice by DA personnel in support of a PO that involves or implies compulsion, coercion, or reprisal is prohibited. This does not prohibit DA personnel from voluntarily supporting POs in their personal, individual capacity. Finally, DA personnel must ensure that their activities do not create the appearance of DA sponsorship of a PO. For example, PO business may not be prepared on paper with a DOD or DA letterhead.

There are permissible ways to get additional support for a museum. Museums are authorized some appropriated fund support that could be increased in accordance with AR 870-20, para. 3-10. Nonappropriated fund support may be available depending on the mission of the activity. Category D, Supplemental Mission Funds, such as a Military Historical Museum NAFI, can provide a supplemental source of funding to an APF museum. A

private organization may be established to raise funds and support the museum. The PO may then make gifts or donations to the museum as authorized by AR 215-1, para. 3-13k, or AR 1-100. Gifts or donations also may be made by other organizations or individuals. Finally, a special bill could be introduced in Congress, although Congress has become increasingly reluctant to approve bills funding museum projects.

An additional issue raised by OTJAG concerned the proposal for a commercial insurance company to award "objective recognition" to units with high membership in the museum support activity. Although AR 600-29, para. 51(4), authorizes awards for achievements in a fund drive by groups outside the Army, there are many fundraising restrictions that must be observed, e.g., standards of conduct guidelines, publicity, publishing statistics, and the assignment of goals. MAJ McCallum.

Contract Law Note

Congress Changes, Then Suspends, Procurement Integrity Provisions

Congress has again been active in the area of procurement integrity. In November 1989 House and Senate conferees concluded two months of negotiations over the National Defense Authorization Act for Fiscal Years 1990 and 1991 [hereinafter the Authorization Act].¹⁴⁹ One of the key issues of these negotiations was how to clear up the problems of interpretation that arose from the original procurement integrity provisions that were passed last year as part of the Office of Federal Procurement Policy Act Amendments of 1988.¹⁵⁰ For reasons that will be explained later, however, Congress then suspended the procurement integrity provisions for one year, effective the day after the President signed into law the Government Ethics Reform Act of 1989.¹⁵¹

The Authorization Act, as passed and signed into law,¹⁵² changes the original procurement integrity provisions in five main areas. First, Congress attempted to clarify the definition of "procurement official." Section 814(b) of the Authorization Act provides a list of specific activities that an individual must "participate personally and substantially" in with respect to a particular procurement before he or she will be deemed to be a procurement official. These activities are: 1) drafting a specification; 2) reviewing and approving a specification; 3) preparing or issuing a procurement solicitation; 4) evaluating bids or proposals; 5) selecting a source; 6) conducting negotiations; 7) reviewing and approving the award, modification, or extension of a contract; and 8) any other specific procurement action set forth in

¹⁴⁷ National Fed'n of Fed. Employees v. U.S. Army Corps of Engineers, 32 F.L.R.A. No. 105 (1988).

¹⁴⁸ *Id.*

¹⁴⁹ H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 150 (1988).

¹⁵⁰ Pub. L. No. 100-679, 102 Stat. 4055, amending 41 U.S.C. § 423 (1989).

¹⁵¹ Pub. L. No. 101-165 (1989).

¹⁵² Pub. L. No. 101-189 (1989).

implementing regulations.¹⁵³ While helpful, the list still leaves a great deal of room for interpretation. For example, what constitutes "conducting negotiations"? Mere presence in the room? Discussions only with other government officials to help formulate the government's negotiating position? Perhaps the implementing regulations will help clarify these terms.

The second area of change concerns recusals of procurement officials in order to be able to discuss future employment with a competing contractor. The original provisions did not address recusals, so no procedure existed for obtaining a recusal on a particular procurement by a procurement official. Section 814(a) of the DOD Authorization Act now permits contacts by competing contractors with procurement officials for the limited purpose of determining whether the individual is interested in discussing employment or business opportunities. Once contacted, the procurement official must notify both his or her supervisor and the agency's ethics advisor, and must request recusal and receive approval of the request, before engaging in any discussions. Once granted, the procurement official is disqualified from participating personally and substantially on any contract with the contractor. Agencies are also required to develop specific criteria for review of recusal requests, including the timing of the request and the degree of the individual's involvement in key procurement decisions. Finally, no recusal is permitted during the period beginning with the issuance of the solicitation and ending with the award of a contract.

A third change in section 814(a) of the Authorization Act adopts a "knowing" standard for violations of the provisions' post-employment restrictions. Under the original provisions, a procurement official could unknowingly or unintentionally violate these restrictions and end up being subject to a civil fine of up to \$100,000.

The fourth change in section 814(a) of the Authorization Act added coverage for post-employment with subcontractors. Specifically, a procurement official who participates personally and substantially in a prime contract is now prohibited from working for a subcontractor if any of the following apply: 1) the subcontract is a first or second tier subcontract with a price over \$100,000; 2) the subcontractor "significantly assisted" in the negotiation of the prime contract; 3) the procurement official personally directed or recommended the subcontractor as a source on the prime contract; or 4) the procurement official personally reviewed and ap-

proved the award of the subcontract. This change essentially limits the broad statutory definition of "competing contractor" in the original provisions¹⁵⁴ so that not every minor subcontractor is covered by the post-employment restrictions.

The last change in section 814(a) of the DOD Authorization Act requires agencies to designate an "ethics official," whose responsibilities will include reviewing requests for, and issuing opinions on, whether an individual who is or was a government procurement official may work for a particular contractor or subcontractor. These opinions must be issued within thirty days after receiving both the request and all relevant information reasonably available to the requestor. The Justice Department is expected to enter into a Memorandum of Understanding that it will not penalize individuals who reasonably rely on a written opinion after a complete disclosure.¹⁵⁵

On November 17, 1989, shortly after the Conference Committee agreed to the above changes, Congress agreed to suspend the application of these changes and the original procurement integrity provisions for a period of one year.¹⁵⁶ This action resulted from a compromise between the President, who wanted the provisions repealed because of the perceived difficulty in attracting and retaining qualified personnel due to the post-employment restrictions, and the Senate, which was seeking to avoid a total repeal of the provisions that the House of Representatives had passed a day earlier.¹⁵⁷ Agreeing to the suspension may have saved Congressmen from a Presidential veto of their pay raise, which was included in the Government Ethics Reform Act of 1989,¹⁵⁸ but it created a strange situation with respect to the applicability of the provisions. The effective date of the suspension was the day after the President signed the bill into law, and not July 16, 1989, the day the procurement integrity provisions took effect. Therefore, the provisions *apply* between July 16 and the date of the suspension, a roughly four and one-half month period. Such an anomalous result can only be explained by Congress's desire to ensure that the President did not get the suspension unless Congress got its pay raise.

Whatever the merits of Congress attempting to legislate procurement integrity, the above-described congressional actions are a fine example of how the jumble of laws that now govern federal procurement were created. What we can expect from Congress in the future in this area is anybody's guess. MAJ McCann.

¹⁵³ Section 814(e) of the Authorization Act requires the Office of Federal Procurement Policy to issue regulations to implement these changes no later than 90 days after the enactment of the Act, which was on November 29, 1989.

¹⁵⁴ Subsection 6(n) of the Office of Federal Procurement Policy Act Amendments of 1988, *supra* note 150, defined "competing contractor" as "any entity that is, or is reasonably likely to become, a contractor for or recipient of a contract or subcontract . . ."

¹⁵⁵ 52 Fed. Cont. Rep. (BNA) 747 (6 Nov. 1989).

¹⁵⁶ The "Government Ethics Reform Act of 1989," Pub. L. No. 101-165, also suspended the application of 10 U.S.C. § 2397a, which required reports of certain contacts between contractors and government officials who had participated in the performance of a procurement function in connection with contracts awarded to that contractor, and 10 U.S.C. § 2397b, which barred certain Department of Defense civilian employees who had spent more than half of the previous two years working with a specific contractor from accepting employment from that contractor.

¹⁵⁷ 52 Fed. Cont. Rep. (BNA) 951 (27 Nov. 1989).

¹⁵⁸ Pub. L. No. 101-165 (1989).

Claims Report

United States Army Claims Service

A Brief History of Claims Automation

*Colonel Adrian J. Gravelle
Chief, Personnel Claims and Recovery Division*

Introduction

The automation of the U.S. Army Claims Service has been a difficult process, but the transition has largely been completed. This two-part article is intended to describe the history of the automation effort, including the victories, setbacks, and lessons learned. The lessons learned are applicable to any office, military or civilian, that is beginning the automation process. This article concentrates primarily on the automation of the personnel claims system and looks at the whole process from a manager's perspective.

Part I—History of the Automation Effort

Prior to 1988, the U.S. Army Claims Service (USARCS) used an automated data processing system known colloquially as the "DA Form 3" system, which was named after the primary document used to record claims data. The system, in effect since 1970, was state of the art when it was instituted. By the mid-1980s, however, it had become an antiquated and inefficient system. Every field claims office worldwide would submit data on each new claim as it was opened. Thereafter, the office would submit a new copy of this multi-leaved form at every significant point in the claims process. The form itself had to be filled out by neatly printing or typing in small blocks the claimant's name; social security number; type of claim; and data as to filing date, date of incident, and date and amount paid. The process was tedious for claims clerks. In order for USARCS to monitor the number and progress of claims through the claims system, the field claims offices around the world were required to send USARCS a copy of the DA Form 3 each time new information was entered. Once USARCS received the many DA Form 3s generated by claims offices, the data was recorded on thousands of computer punch cards by three data entry clerks. Large trays of computer punch cards were sent on a regular schedule to the Fort Meade Director of Information Management (DOIM) for processing on a main frame computer. After processing the data, the DOIM would provide USARCS with a series of reports generated by the computer. These reports were often late, inaccurate, and largely worthless for use in management decisions. This time-consuming process resulted in a blizzard of DA Form 3s at USARCS. Additionally, this system had built-in time lags and depended on overworked USARCS data entry clerks, an overworked DOIM, and a computer that was not under USARCS's control. By the mid-1980s, the system began to fall apart.

By the mid-1980s, several new developments made change inevitable. Powerful new and relatively inexpensive technology became available, including high-speed

microcomputers and minicomputers, networking of low cost computers for internal data sharing, modems, laser printers, and better lower cost methods for storing and long-distance transmission of data. Moreover, the cost of specific hardware and software fell dramatically. Other advancements and policy decisions added impetus to the claims system automation effort: the trend toward standardization of computer software and hardware interfaces within the computer industry, the decision to centralize selection, funding and procurement of basic hardware and software needs in the Judge Advocate General's Corps, the policy of The Judge Advocate General that every Army legal office would automate, and the decision that USARCS would lead the way in the automation effort. This latter decision was based on the nature of the USARCS mission: the supervision of a worldwide claims system, consisting of almost 150 claims offices, that processes almost 100,000 claims per year and involves the payment of and accountability for millions of dollars.

At the same time that automation became available to solve worldwide claims accountability problems, it also became available to improve internal work and communications efficiency. USARCS was a natural for automation.

Several studies had been done regarding automation of USARCS. One study proposed retaining the DA Form 3, but recommended the use of an optical character scanner to "read" the data and thereby enter it into the computer. This proved not to be feasible because the differences in handwriting and typewriter styles made the optical character reader unworkable. Also, this idea did not take full advantage of the advancements in technology, but merely continued an antiquated and inefficient system.

In 1986 USARCS decided to create a whole new system rather than try to update the DA Form 3 system. USARCS was fortunate to have a project manager who understood the organization's functional needs, technical requirements, and costs associated with using automated systems to satisfy the functional needs. The USARCS project manager wrote the three claims management computer programs and documentation used by the field claims offices worldwide. These included programs for torts, personnel claims, and affirmative claims. The program manager taught classes for claims personnel at installations across the country. He worked with the Army Software Development Command programmers in Atlanta who wrote the software needed to run the minicomputer at USARCS. The project manager had to ensure that the various hardware and software components were compatible. He spent many hours on the telephone and in meetings with the Fort Meade contract-

ing officers and others to push through the contract for installation of the wiring needed for computer networking and to monitor a myriad of other contracts for hardware, software, and maintenance support.

The system consisted of three parts. First, there was a field claims program written for use in each of the Army's approximately 150 claims offices. With this program, the data for each claim is entered into the field office's computer. The data includes much of the same data that was collected in the DA Form 3, with some additional data elements and with a built-in capability to keep running totals of claims funds expended, number of claims on hand, etc. The program also had the capability to search and find individual claims and to generate management reports for the claims officer and staff judge advocate.

Second, there was a program written for the USARCS minicomputer that permitted USARCS to receive, accept, and manipulate the electronic data provided by the field claims offices. This program also generates management reports for the commander and the division chiefs at USARCS. The claims data from the field claims offices is entered into the USARCS minicomputer on a periodic basis, usually monthly. Most field claims offices send the claims data once a month by mail on floppy diskettes. In the case of U.S. Army Claims Service, Europe, the data is sent by mail on a hard disk for all claims offices in Europe. While this method of transmitting data is not particularly efficient, it serves the purpose until such time as transmission of data by telephone line is available on a routine basis to most or all offices. In the meantime, only a few claims offices with modem capability and good quality phone lines are transmitting data on a regular basis by wire to USARCS. The number is growing, as more and more offices acquire the skills and equipment to transfer data by phone. Eventually, data will be transmitted routinely by phone line, possibly on a weekly or more frequent basis. It may be feasible to transmit data automatically in the middle of the night, when phone lines are more available and cheaper to use.

Third, the internal USARCS system consists of computer terminals installed at each employee's work station. These are linked together into a network by computer cable running to the USARCS minicomputer. With this system, we send electronic mail to any and all employees; we have a word processing system with the ability to move legal memoranda and letters around USARCS electronically; and we have electronic scheduling, telephone memos, graphics, and spreadsheets. With this same system, USARCS employees can enter data on individual claims directly into the minicomputer, search through the 189,000 personnel claims files and 7000 tort claims files on the system (as of October 1, 1989), and generate claims reports on USARCS or field office (individually or collectively) processing of claims.

In the early fall of 1987, with the key elements of these three components in place or well along in development, USARCS sent each field office the first two of the three field programs: personnel claims and tort claims. The third program, affirmative claims, had never been part of the DA Form 3 system and was fielded in

January 1989. On October 1, 1987, the DA Form 3 system officially ceased to exist and the computerized system became operational for recording all personnel and tort claims in the Army. All personnel and tort claims filed on or after that date were required to be entered into the system. Additionally, any unsettled claims from earlier fiscal years had to be converted to automation by entering them into the computer. The personnel claims management program and the tort claims management program became the only claims reporting system in the Army. With no backup, everything depended on the new system working. It was akin to jumping out of an airplane without a reserve parachute. Fortunately, because of the hard work of a lot of personnel in the field claims offices and at USARCS, the system worked and did not suffer a single "show stopper" crisis. This is not to say that there were no problems. There were problems, although none were serious enough to cause a major disruption of the overall automation effort or to require a significant design change.

In November 1987 the first diskettes of data began arriving at USARCS. Unfortunately, we did not have the capability to enter the data into the USARCS minicomputer, as the computer program for the USARCS minicomputer was still being written at Atlanta by the Computer Software Development Command. Because of the complexity of the personnel claims program and because of the critical need to evaluate the sheer numbers of personnel claims, the Commander, USARCS, decided to give priority in development of the minicomputer program to the personnel claims and recovery program. Still, it was not until late August 1988 that the personnel claims program was ready for installation and testing. After the minicomputer program was installed and tested and a number of minor adjustments were made, we loaded all of those monthly claims data diskettes from field offices into the USARCS minicomputer.

Once the data was loaded into the minicomputer, we discovered that the quality and completeness of the data being sent from most field claims offices was very poor. This was not surprising and not entirely unexpected with such a new system. In order to correct errors and omissions, we did two things: First, we issued several Claims Automation Bulletins (beginning in December 1987 and ending in 1989) as part of the USARCS Claims Manual. These bulletins clarified our previous guidance and promulgated new guidance to change existing procedures or to correct patterns of errors. Second—and more important—the Computer Software Development Command, working closely with the USARCS Automation Management Officer (AMO), developed an error-checking program whereby the minicomputer inspected the data in each and every claims file prior to the data being accepted into the minicomputer. If the data was incomplete or erroneous in certain critical data elements, the minicomputer rejected that particular claim record. At the same time, the minicomputer generated a list of claims that had been rejected or that contained certain other errors. The minicomputer produced an "error report" for each claims office, giving a specific description of the errors by individual claims number that

needed to be corrected prior to submission of the next monthly report. After the field claims offices corrected the errors, the minicomputer would accept those particular claims at the time of the next routine monthly upload of data. If the errors on the error report were not corrected, the minicomputer would continue to reject those claims and they would again show up on the next month's error report. These error reports became a source of much frustration for some field claims offices. As USARCS discovered new widespread errors, we added the errors to the minicomputer's error checking program in a piecemeal fashion. As a result, some offices with good error reports were unpleasantly surprised when the reports unaccountably became more lengthy as more error checks were added to the program and more errors were reported in records that had not been listed earlier.

When USARCS sent out the first error reports in the late summer of 1988, many claims offices really did not know what to do with them. Unfortunately, we had not done a good job of telling field offices what they were and what needed to be done with them. Other offices were simply overwhelmed with the sheer number of errors that needed to be corrected. Because of the long time that transpired prior to fielding the personnel claims program and because of USARCS' inability to effectively process the data on the minicomputer, almost a year's worth of errors had built up in field offices' data. Many offices had ten to twenty pages of errors. A few had as many as fifty to seventy pages of errors to correct. As each page contained about twenty-five claims, some offices had over a thousand errors to correct. During the fall and winter of 1988-89, many offices spent long hours in the evening and on weekends correcting the errors.

By May 1989, the error reports were much improved. The vast majority of offices had error reports of under two pages, our unofficial standard. By July, the quality and completeness of the personnel claims data were very good. Most offices had error reports of less than a page. This dramatic improvement came as the result of hard work by field claims office personnel and by the personal involvement and interest by claims officers and staff judge advocates.

We have not yet completed the programming needed to enter carrier offset payments into the computer database for the personnel claims data system. Until it is added, offset data is being kept manually with notations entered into the individual paper claims files. The offset data is also being retained in paper form for reporting purposes and for future entry into the database.

The final component yet to be added to the minicomputer for both personnel claims and tort claims will allow accountability and retrieval of retired records. This final component will meet two critical needs: access to file retrieval data and reduction in size of the permanent data base. Efficient retrieval of paper claims files is

essential. When all steps in processing personnel and tort claims are accomplished, the paper files are retired in cardboard boxes to the Federal Records Center at Suitland, MD. We retire between 900 and 1,200 boxes containing more than 80,000 personnel and tort claims files per year. Because of the need to retrieve individual claims files from time to time, it is essential that the shipment number and box number for each claim file be quickly and accurately identified. The final component of the system will provide this information for each retired file. In the meantime, this retirement data is being recorded into a locally-produced separate data base. Once the programming is completed for the minicomputer, the data will be batch loaded into that database.

At the present time, there are almost 200,000 personnel and tort claims in the USARCS claims database, with between 80,000 and 90,000 more expected to be added each year. Even with the great speed of the minicomputer—it can search over 800 claims records per second—it now takes over three-and-a-half minutes to do a simple personnel claims search and many hours to do a complex search. In order to reduce the size of the data base, USARCS will reduce the information for each retired file to the bare essentials. Each retired file will contain retrieval data and a bare minimum of claimant and claim information.

The Computer Software Development Command completed the tort claim software program for the minicomputer in the summer of 1989. The program was installed in late August. Uploading of tort claims data from the monthly field claims office submissions was accomplished in October. Until installation of the minicomputer's software, Tort Claims Division had been using a locally-written program to consolidate and access data sent monthly from field claims offices.

The automation project officer completed the affirmative claims program for use by field claims offices in late 1988. After testing it at USARCS, it was distributed to field claims offices as part of the Legal Automation Armywide System (LAAWS) update in January 1989. Field claims offices began reporting affirmative claims data to USARCS in March 1989. In July, because of suggestions from the field for improvements in the affirmative claims program, USARCS brought a number of experienced affirmative claims personnel from several of the better field offices to advise on modifications. These modifications will be incorporated into the next version of the software. The affirmative claims program for the minicomputer is yet to be developed at Atlanta. It is expected to be completed and installed in late 1990. In the meantime, a locally written program permits the Affirmative Claims Branch to consolidate and review affirmative claims data from field claims offices.

(Part II will be published in a future issue and will look at the lessons learned during the automation effort)

Claims Notes

Personnel Claims Recovery Note

Maximum Carrier Liability on Basic Increased Released Valuation Shipments To and From Alaska

A GBL carrier's maximum liability for loss and damage to basic Increased Released Valuation (IRV) shipments to or from Alaska is \$1.25 times the net weight of the shipment, rather than \$2.50 times the net weight. The reference in paragraph 1, Household Goods Recovery Bulletin 6 (Claims Manual, 2 June 1987) to a released valuation of \$2.50 times the net weight of Alaskan shipment is incorrect and should be deleted.

Although the government pays an additional transportation charge on an Alaskan IRV shipment, the carrier's maximum liability for loss and damage is the same as any other CONUS Code 1 or 2 shipment. Ms. Schultz.

Personnel Claims Note

Substantiating the Loss of Original Stereo and Video Tapes

Both commercially recorded video or stereo tapes and self-recorded tapes are often stolen from shipments. In adjudicating claims under the Personnel Claims Act, a claimant who cannot establish that he or she in fact lost original, commercially-recorded tapes would only be entitled to the depreciated value of a blank tape. As the statute only contemplates compensating claimants for actual loss, such claimants would not be entitled to any additional compensation for the time and trouble involved in copying such tapes, or for the cost of renting a tape to copy.

The substantiation required to establish that missing tapes were original would depend on the circumstances. The basis for a decision should be recorded on the

chronology sheet. A soldier claiming the loss of two commercial cassette tapes and forty-five copies would not be expected to provide substantiation; on the other hand, a soldier claiming the loss of fifty commercial tapes would be expected to provide purchase receipts or other evidence.

Similarly, a soldier claiming the loss of expensive computer software would only be entitled to the depreciated value of blank floppy disks unless he or she could establish that the missing software was original by producing evidence such as the original software documentation, registration information, purchase receipts, or other information. Mr. Frezza.

Affirmative Claims Note

The Federal Medical Care Recovery Act Relating to the U.S. Coast Guard

The U.S. Coast Guard centralized its management of Federal Medical Care Recovery Act Claims in 1988. They request that all reports of possible third party care seen through U.S. Army medical facilities be sent to Commandant (G-K-2), the U.S. Coast Guard Headquarters. They have recently reorganized their office under a different staff symbol and moved to a new location.

They now request that you send your reports of third party care involving all Coast Guard beneficiaries to:

Commandant (G-KRM-1)
U.S. Coast Guard
ATTN: FMCRA Section
2100 Second St., SW
Washington, DC 20593-0001
Telephone: (202) 267-2667

MAJ Morgan.

Labor and Employment Law Notes

*Labor and Employment Law Office, OTJAG,
Office of the Staff Judge Advocate, FORSCOM,
and Administrative and Civil Law Division, TJAGSA*

Labor Law Developments

Mandatory Performance Awards Are Nonnegotiable

In *Department of the Air Force, Langley Air Force Base, VA v. FLRA*, 878 F.2d 1430 (4th Cir. 1989), the court held that a union proposal to mandate performance awards based upon employees' summary rating levels was nonnegotiable. In reversing the FLRA decision, the court found that the proposal directly interfered with management's right to determine its budget (5 U.S.C. § 7106). The court also held that the proposal

conflicted with 5 U.S.C. § 4302 and 5 C.F.R. Part 430 and therefore was nonnegotiable under 5 U.S.C. § 7117(a)(1).

FLSA Claims

Most nonsupervisory federal employees are covered by the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* Section 216(b) of the FLSA gives employees the right to sue the government for violation of the minimum wage or overtime provisions. *Carter v. Gibbs*, 883 F.2d 1563

(Fed Cir. 1989), now holds that federal employees covered by a negotiated grievance procedure that does not exclude overtime claims may sue the government under the FLSA. The court held that 5 U.S.C. § 7121(a)(1), which states that the negotiated grievance procedure is the exclusive procedure for resolving grievances that fall within its coverage, does not prevent suits under the FLSA. The court held that there is nothing in the legislative history of 5 U.S.C. § 7121 to indicate a congressional intent to curtail employee rights under the FLSA, nor is there any irreconcilable conflict between the two provisions. A grievance could not provide the full scope of relief (liquidated damages and attorney fees) available under the FLSA, and employees cannot control whether grievances are submitted to arbitration.

Contracting Out

The United States Supreme Court has granted certiorari to decide whether federal agencies must bargain over a union proposal that would permit arbitral review of agency compliance with OMB contracting out guidelines. *Department of Treasury, Internal Revenue Service v. FLRA*, 110 S. Ct. 47 (1989). The D.C. Circuit Court of Appeals had upheld an FLRA decision that the IRS violated Title VII of the Civil Service Reform Act of 1978 by refusing to negotiate. The Fourth and Ninth Circuit Courts of Appeal had ruled in similar cases that the decision to contract out is a retained management right not subject to mandatory bargaining.

Profit Sharing Plans

A key component of the Army's civilian modernization program is giving Army leaders greater discretion to manage the civilian work force within the constraints of command operating budgets. A related initiative is the distribution among the work force of savings realized by increased employee productivity. "Gain sharing," discussed in greater detail in a DOD publication entitled "Guide for the Design and Implementation of Productivity Gain Sharing Programs" (DOD 5010.31-G, Mar. 1985), is being tested at a number of locations within DOD. Among the several issues being addressed that involve gain sharing plans has been the question concerning the extent to which unions can negotiate such plans. In a case of first impression, the court in *Charleston Naval Shipyard v. FLRA*, 885 F.2d 185 (4th Cir. 1989), declined to enforce an FLRA decision that management must negotiate over such an employee bonus incentive program proposal.

The shipyard was an industrially funded activity that submitted bids in competition with private contractors for maintenance of Navy ships. A significant portion of the shipyard's operating costs comes from proceeds of contracts awarded to it. As an incentive, the shipyard paid a portion of its "profits" to employees. The union proposal would have dictated the percentage of profits that would be paid to employees. The FLRA held that the proposal did not interfere with management's budgetary prerogative because it did not require the activity to pay a specific amount of money, but rather only required a percentage of profits (whatever amount that may be) to be shared with employees. The court disagreed.

The fact that the profits were uncertain until completion of the project did not mitigate the proposal's impact on management's retained right to determine its budget. Once the profits became certain, the proposal would require payment of a specific dollar amount. Such a proposal would prescribe the use of agency funds in the future. The proposal would divest managers of discretion and control over the allocation of profits.

Equal Employment Opportunity

Past Drug Use

The court in *Nisperos v. Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989), held that a rehabilitated drug abuser was a handicapped person protected by the Rehabilitation Act, 29 U.S.C. § 791, *et seq.* The Immigration and Naturalization Service (INS) removed Nisperos from his attorney position on the basis that his past illegal drug use barred him from employment because freedom from past drug use was a mandatory qualification requirement for occupying a sensitive position. INS argued that the drug-free workplace regulations supported its position. The court disagreed, finding that nothing in the general regulations precluded employment of rehabilitated drug abusers. Because Nisperos was not disqualified from holding his position and he was able to perform his duties satisfactorily, the agency acted improperly by removing him from the federal service. The court noted that current alcoholics or drug addicts whose substance abuse endangers the property or safety of others or prevents satisfactory performance of their duties are not protected by the Rehabilitation Act.

Last Chance Agreements

In *Ayers v. Frank*, 90 FEOR 3014 (1989), the EEOC held that the Postal Service discriminated against Ayers by failing to accommodate his alcoholism. The agency entered into a last chance agreement with Ayers' union representative to hold in abeyance a fourteen-day suspension and a proposed removal for repeated AWOLs, provided Ayers received regular counseling for alcoholism and did not have any subsequent misconduct for one year. Ayers was absent from work at the time of the agreement based upon his belief that removal was imminent. Neither the agency nor the union representative advised Ayers of the agreement. Due to his continuing absence after the agreement, the agency notified Ayers that his removal would be effected. Ayers entered a treatment program and asked the agency to hold his removal in abeyance, but the agency refused.

The EEOC found that the agency did not meet its responsibility to accommodate the alcoholism. The agency had a responsibility to notify the employee of the last chance agreement and allow him to demonstrate rehabilitation. Its failure to do so constituted handicap discrimination. Recognizing that many alcoholics relapse after treatment, the EEOC ordered the employee to undergo a fitness-for-duty examination to determine if reinstatement with back pay should be granted as relief for the discrimination. If Ayers was not fit for duty, the agency was directed to allow him to seek disability benefits as of the date of the examination.

Not considered in *Ayers* is the enforceability of a last chance agreement in which an employee agrees to waive EEO complaint rights related to the misconduct which prompted the negotiation of the agreement. The Labor and Employment Law Office consider this question still open, and we recommend that agreements provide for such waivers notwithstanding some authority to the contrary.

Tolling of Time Limit to File Administrative Complaint

According to 29 C.F.R. § 1613.214, an EEO complaint must be initiated within thirty days of the alleged act of discrimination. The time limit may be extended if the complainant was not notified of the time limits or was otherwise unaware of them. In *Ployman v. Cheney*, 714 F. Supp. 196 (M.D. Tenn. 1989), a NAF employee in Korea claimed that he was forced to resign in September 1986, when he tested positive for Human-Immunodeficiency Virus. In April 1987 he filed a pro se lawsuit alleging handicap discrimination. In October 1987 an attorney undertook his representation in the suit and advised Ployman of the thirty-day time limit for initiating an administrative complaint. His attorney advised him to continue with the suit, rather than to file an administrative complaint. The court found that the thirty-day time limit was tolled until October 1987, when his attorney advised him of the time limit. There was no evidence that he was advised or otherwise aware of the time limit before that time.

Even though Ployman was fortunate up to that point, the time limit was no longer tolled once he was represented by counsel who could advise him of the regulatory requirements. Hence, even if his attorney had not advised him of the time limit, the clock started to run in October 1987.

Because Ployman continued to pursue his suit rather than filing a complaint, the court held that he had failed to exhaust his administrative remedy in a timely manner after learning of the time limit. Accordingly, the court granted summary judgment for the agency.

The facts in *Ployman* emphasize the importance of well-publicized EEO programs that provide employees with notice of their rights.

Foreign Accent May Be Nondiscriminatory Reason for Employment Action

The Ninth Circuit held in *Fragante v. City and County of Honolulu*, 888 F.2d 591 (D. Haw. 1989), that refusing to hire a Filipino whose heavy accent would have made it difficult to communicate with motor vehicle bureau customers was not prohibited by Title VII. Having decided in an earlier opinion that oral communication skill was a bona fide occupational qualification, the court's amended opinion concludes that the employer had simply articulated a legitimate nondiscriminatory reason for nonselection.

EEOC Proposed Rules

EEOC has published its proposed restructuring of the Federal Sector EEO complaint process. 54 Fed. Reg. 45747 (Oct. 31, 1989). The proposed rules would require agencies to issue final decisions within 180 days (or up to

270 days if the complainant agreed to extensions) of the filing of the formal complaint. If no decision is made within the time limits, the employee could treat the lack of a decision as a denial and appeal to the EEOC or file a civil action.

EEOC would become an appellate agency. As part of the appeal process, the EEOC would review the file to ensure completeness. If further investigation was necessary, the EEOC could remand the case to the agency for supplemental investigation or the EEOC could investigate the complaint. If an agency failed to provide the supplemental investigation within the specified time limit, EEOC could make an adverse inference against the agency. When EEOC determined that the investigative file was complete, the complainant could request a decision on the record or a hearing. The administrative judge would issue recommended findings and conclusions to the EEOC Office of Review and Appeals (ORA). Either party could submit statements to ORA. ORA would issue a decision and either party could then request reopening and reconsideration of the decision.

The proposed regulations would encompass Equal Pay Act complaints. Such complaints would be processed in the same manner as other complaints.

This is the latest iteration of the long-running attempt by EEOC to streamline the complaint process. These regulations follow the last set of proposed regulations that were rejected by the full commission last year.

Interest on EEO Awards

On 18 September 1989, the Department of Justice opined that federal agencies may not pay interest on awards of back pay made pursuant to EEO complaints under Title VII or the Age Discrimination in Employment Act. EEOC has adopted this position in its proposed regulations that restructure the EEO complaint process.

Equitable Waiver of Time Limits for Civil Actions

In *Johnson v. Burnley*, 887 F.2d 471 (4th Cir. 1989), the court held that the thirty-day time limit under 5 U.S.C. § 7703(b)(2) for filing a civil action is subject to equitable waiver. In order to justify an extension, a plaintiff would have to meet a heavy burden of showing affirmative misconduct by the government. The court did not rule whether Johnson met this burden because it found that she had insufficient evidence to prove a prima facie case that would allow the case to go forward. Johnson initially filed suit within the thirty-day time limit, but did not name the proper defendant. In a similar action, *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st Cir. 1989), the court found an insufficient basis to grant an equitable exception to the filing time limits. Rys failed to name the proper defendant. He did not prove that his mistake was caused by active deception of the government or that he had exercised diligence in pursuing his own interests.

Bumping as EEO Remedy

In March 1989 we reported on the unpublished case of *Lander v. Hodel*, 1988 WL 122580 (D.D.C. 1988), in which a district court held that bumping an innocent

incumbent is an appropriate, albeit extraordinary, remedy to make a victim of discrimination whole. The district court's decision and rationale have now been affirmed in *Lander v. Lujan*, 888 F.2d 153 (D.C. Cir. 1989).

Personnel Law

Security Clearance

Revocation of a security clearance does not implicate a constitutionally protected property or liberty interest, according to *Doe v. Cheney*, 885 F.2d 898 (D.C. Cir. 1989). Thus, although courts can review constitutional claims of former employees incident to the revocation, alleging a property or liberty interest did not help Doe obtain review of his removal from his National Security Agency job after revocation of his security clearance.

MSPB Mitigates Shoplifting Removal

In deciding to reduce a removal to a 60-day suspension in *Thurmond v. USPS*, 41 M.S.P.R. 227 (1989), the board provided further guidance on the relevance of the de minimis value of stolen goods to penalty selection. The board distinguished *Mojica-Otero v. Department of the Treasury*, 30 M.S.P.R. 46 (1989), relied on by the administrative judge to sustain the removal, by noting that the appellant in that case was a law enforcement officer with a prior disciplinary record, whereas Thurmond was not a law enforcement officer and had a satisfactory work history reflecting no prior disciplinary actions. Thurmond did not steal the item in issue in connection with her duties, and there was no evidence that the offense would have a lasting effect on her ability to perform. Mitigation was appropriate, even though she showed no remorse and was in uniform at the time of the offense.

Denial of Leave Without Pay Improper

MSPB affirmed the reversal of a removal for 69 hours of AWOL in *Murray v. Navy*, 41 M.S.P.R. 260 (1989). The Navy notified the employee it would no longer grant leave without pay (LWOP) for absences not covered by accrued leave. The administrative judge concluded that the LWOP was for treatment for an on-the-job injury, and, because the Navy knew of appellant's medical situation, denial of LWOP was an abuse of discretion. The board agreed and noted that the Navy failed to show that the intermittent absences were an undue burden or that they would likely continue without a foreseeable end.

Board Rejects Disparate Treatment Claim

Removal followed appellant's conviction for shoplifting a \$3.59 kitchen knife. The initial decision rejected the appellant's argument that he had been discriminated against because a white employee had not been disciplined after his conviction for a more serious offense.

The board affirmed. While the white employee's crime had not been common knowledge, this conviction was in the local paper, and it had a direct impact on the employee's duties. In addition, the deciding official in appellant's removal was not at the facility at the time of the white employee's conviction. The penalty was, however, mitigated to a 30-day suspension based on the knife's value, the appellant's eight years of good service, and the fact that the knife was not taken on the job. *Mallery v. USPS*, 41 M.S.P.R. 288 (1989).

MSPB Rules Navy Petition Untimely

MSPB decided the Navy did not show good cause for a waiver of the filing time for review of an initial attorney fee decision in *Bivens v. Navy*, 41 M.S.P.R. 295 (1989). Although the evidence showed that the petition reached the military postal facility on the date of the filing deadline, it arrived with a postmark seven days later than the deadline. The board ruled that timely delivery to the agency's mail room is not equivalent to depositing pleadings with the U.S. Postal Service.

Board Lacks Jurisdiction Over Probationer Appeal

In *Awa v. Navy*, 41 M.S.P.R. 318 (1989), the Navy had removed a probationer for disruptive behavior. The employee claimed that the real reason was her inability to work overtime. She contended that she was entitled to the procedural protections of 5 C.F.R. § 315.805 because the removal was for a preappointment reason—her inability to work overtime resulting from her child care responsibilities. She cited this same argument to support her claim of marital status discrimination. The board determined that, even if the employee had been removed because of her refusal to work overtime, her refusal occurred after her appointment, thus making it a post-appointment reason. The board also ruled that a claim of marital status discrimination must involve allegations "which go to the essence of the appellant's marital status." Child care responsibilities were not so related to marital status and were not the grounds for removal.

Office of Special Counsel

OSC has published interim regulations implementing the Whistleblower Protection Act. 54 Fed. Reg. 47341-47345 (Nov. 14, 1989). These largely housekeeping regulations do not significantly change OSC practice. The Labor and Employment Law Office continues to await the final MSPB rules, which will principally implement the new act that became effective in July.

Drug-Free Workplace

OPM has published FPM Letter 792-19 (Establishing a Drug-Free Federal Workplace) in 54 Fed. Reg. 47324-47337 (Nov. 13, 1989). The new letter, effective 13 December 1989, consolidates and updates FPM Letters 792-16, 792-17, and 792-18.

Procurement Fraud Division Note

Procurement Fraud Division, OTJAG

New Developments in Fighting Individual Surety Bond Fraud

Recent experience has shown that bonds submitted by individual sureties are often unenforceable. This has been a serious problem for the government and suppliers under government contracts. Fortunately, new procedures for evaluating the net worth of individual sureties are in the process of being implemented. The Miller Act, 40 U.S.C. §§ 270a-270f (1982), requires that, prior to the award of any federal construction contract in excess of \$25,000, the contractor furnish to the contracting officer a performance bond for the protection of the United States and a payment bond for the protection of subcontractors and suppliers furnishing labor and materials. The requirements of the Miller Act are implemented in Federal Acquisition Regulation (FAR) Parts 28.1 and 28.2, with additional guidance in Army Federal Acquisition Regulation Supplement (AFARS) Subpart 28.1.

The FAR requires contracting officers to obtain adequate security for bonds and permits use of both corporate and individual sureties in support of those bonds. To be acceptable, corporate sureties must appear on the list contained in the Department of Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies," which is available from the Treasury Department.

The FAR also provides guidance to contracting officers in determining the acceptability of individual sureties. Individual sureties, frequently represented by a broker, pledge availability of their personal assets to satisfy their legal liabilities in the event of a default. In return, they receive payment of up to seven percent of the amount of the bond. Bond fraud normally involves false representations by a broker or individual surety regarding the existence and availability of the pledged assets supporting the bond.

In support of each bond, the FAR requires an individual surety to submit an Affidavit of Individual Surety, Standard Form (SF) 28, including, among other things, a listing of the individual surety's assets, liabilities, and net worth. The financial information contained on the SF 28 must be certified for sufficiency by an officer of a bank or trust company, a judge or a clerk of a court of record, a United States attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. FAR 53.301-28. The contracting officer must evaluate the information and determine the acceptability of the individuals proposed as sureties. FAR 28.202-2(a). In today's climate, a careful evaluation of the information provided by the prospective surety is essential. The contracting officer should independently confirm the validity of information provided by the prospective surety. The contracting officer is then required to

forward most surety bonds for further review to the Chief Trial Attorney, Office of The Judge Advocate General, Department of the Army, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041. AFARS 28.106-90.

AFARS 28.106-90 requires The Judge Advocate General to examine each bond for legal sufficiency. This review must include an examination of the bond's form and execution, the authority of the corporate officials who executed the bond on behalf of corporate sureties, and compliance by individual sureties with the requirements of FAR 28.202.2. This task has been delegated to the Chief Trial Attorney, Contract Appeals Division, where a "bonds team" reviews approximately 10,000 bonds per year. Ms. Leigh Stroud is chief of the bonds team. She may be reached at Autovon 289-1352 or Commercial (202) 756-1352. The bonds team should be able to provide helpful information about the acceptability of corporate and individual sureties and about whether problems with prospective sureties have been reported in other locations.

In 1988 the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council established an interagency task force to review the adequacy of the FAR regulations regarding procedures for approval of individual sureties. The task force was established because of congressional concern that serious abuses existed with the use of individual sureties that resulted in a failure to provide adequate payment protection for small business subcontractors. The task force found that information and documentation provided by individual sureties under current regulatory requirements provided inadequate protection to the government and to subcontractors, many of whom were small and minority subcontractors.

The task force found widespread evidence of systematic problems with the current method of handling individual sureties. The findings of the task force are supported by the fact that there are over forty investigations ongoing in a DOD-wide attack on surety bond fraud. One of these investigations culminated in the September 1989 conviction of an individual surety broker, Gwendolyn Joseph, in the United States District Court in Arizona (CR 88-332-PHX-RCB). Ms. Joseph was convicted of multiple federal charges involving a scheme to defraud the Corps of Engineers, other government agencies, and small and minority contractors by providing them with \$12 million in worthless bonds. Among other illegal acts, Ms. Joseph inflated the assets of various sureties. The U.S. District Court imposed the following sentence in that case: incarceration for nine years; five years of probation; \$1,345,917 in restitution; and a \$250,000 fine. The Procurement Fraud Division assisted in the prosecution of this case through the Army's Special Assistant U.S. Attorney Program. Further prosecutions are anticipated in this area.

The task force concluded that FAR regulations should be strengthened with respect to procedures governing individual sureties. A proposed rule was published on November 3, 1988. 53 Fed. Reg. 44,564 (1988). Public comments were solicited and considered in response to the proposed rule, and a final rule was published on November 28, 1989. 54 Fed. Reg. 48,978 (1989). The final rule is effective on February 26, 1990. FAC 84-53, Item 5. The final rule provides that individual sureties must pledge specific assets to support a bond, and it identifies specific types of acceptable assets. The rule requires evidence of ownership and unencumbered value for each asset. It requires the individual surety to furnish to the government a security interest in the pledged assets by means of a lien or by the establishment of an escrow account. Finally, it provides for the government-wide suspension and debarment of sureties for serious improprieties. The new provisions of the rule are likely to assist in decreasing the incidence of surety bond fraud.

Under the old rules as well as the new, the contracting officer is the key player in determining the acceptability of an individual surety. It is his or her responsibility to evaluate carefully all of the information provided by the prospective surety. For this reason, the Comptroller General has afforded contracting officers wide, although not unfettered, discretion in determining what specific financial qualifications and information should be considered in determining the individual surety's responsibility. *Consolidated Industrial Skills Corp.*, B-236239.2 (6 Oct. 1989), 89-2 CPD ¶ _____. For example, in *Consolidated* the contracting officer included a provision in a Navy solicitation that required offerors providing individual sureties to submit a certified public accountant's

certified balance sheet and income statement with a signed opinion of each surety's net worth. The protestor contended that the requirement effectively eliminated individual sureties as a viable means of obtaining bonding and was therefore unduly restrictive of competition. The Comptroller General denied the protest, finding that the Navy's requirement of a CPA-audited financial statement was not unduly restrictive. The Comptroller General held that it was therefore not unreasonable for the contracting officer to require an independent verification of the net worth claimed by the surety. This case emphasizes the important role of the contracting officer in protecting the interests of the government.

Contracting officers who need to report suspected worthless bonds should contact their local procurement fraud advisor or CID agent. Contracting officers should routinely check the GSA "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to ensure that prospective sureties are not on the list and therefore excluded from participating as sureties. Attorneys and contracting officers requiring information on the status of current investigations may contact CPT Malinda Dunn at the Procurement Fraud Division at (202) 504-4278.

In summary, the incidence of individual surety bond fraud is likely to decrease when SF 28s submitted by potential sureties contain the information and documentation required by the new rule. This information should help contracting officers perform a careful and thorough review. Investigators and prosecutors are continuing to do their part in bringing individual offenders to justice, and the regulations have been revised to make it more difficult for potential offenders to escape detection. Ms. Christine S. McCommas.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

February 5-9: 24th Criminal Trial Advocacy Course (5F-F32).

February 12-16: 3d Program Managers Attorneys Course (5F-F19).

February 26-March 9: 120th Contract Attorneys Course (5F-F10).

March 12-16: 14th Administrative Law for Military Installations Course (5F-F24).

March 19-23: 44th Law of War Workshop (5F-F42).

March 26-30: 1st Law for Legal NCO's Course (51D-71D/E/20/30).

March 26-30: 26th Legal Assistance Course (5F-F23).

April 2-6: 5th Government Materiel Acquisition Course (5F-F17).

April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).

April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).

April 16-20: 8th Federal Litigation Course (5F-F29).

April 18-20: 1st Center for Law & Military Operations Symposium (5F-F48).

April 24-27: JA Reserve Component Workshop.

April 30-May 11: 121st Contract Attorneys Course (5F-F10).

May 14-18: 37th Federal Labor Relations Course (5F-F22).

May 21-25: 30th Fiscal Law Course (5F-F12).

May 21-June 8: 33d Military Judge Course (5F-F33).

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

April 1990

5: ALIABA, Pension Law and Practice Update (Satellite) 50 cities USA.

5-6: ABA, Product Liability, Paris, France.

5-6: PLI, Current Developments in Bankruptcy and Reorganization, New York, NY.

6-7: ALIABA, Airline Labor and Employment Law, Washington, DC.

7-14: NELI, Employment Law Briefing, San Diego, CA.

8-12: NCDA, Office Administration, San Francisco, CA.

8-12: NCDA, Prosecution of Violent Crime, Chicago, IL.

16-18: GCP, Source Selection Workshop, Washington, DC.

16-20: ESI, Federal Contracting Basics, Washington, DC.

19-20: PLI, Cable Television Law, San Francisco, CA.

19-20: PLI, Financial Services Institute, New York, NY.

19-20: ALIABA, Criminal Enforcement of Environmental Laws, Washington, DC.

19-21: ABA, Appellate Advocacy, New Orleans, LA.

19-21: ALIABA, Banking and Commercial Lending Law-1990, San Francisco, CA.

19-21: ALIABA, Fundamentals of Bankruptcy Law, Boston, MA.

19-21: ALIABA, Litigating Medical Malpractice Claims, Kansas City, MO.

19-21: NJC, Employment Discrimination, Washington, DC.

20-21: ALIABA, International Tax Policy: Agenda for the '90s, Washington, DC.

22-May 4: NJC, General Jurisdiction: Section I, Reno, NV.

22-26: NCDA, Representing State and Local Government, Las Vegas, NV.

23: ESI, Truth in Negotiations Act Compliance, Washington, DC.

23-27: ALIABA, Planning Techniques for Large Estates, New York, NY.

23: PLI, Management: Counseling Clients in the Entertainment Industry-Music, Los Angeles, CA.

24: PLI, Management: Counseling Clients in the Entertainment Industry, Los Angeles, CA.

24-27: ESI, Operating Practices in Contract Administration, Washington, DC.

25: PLI, Counseling Clients: Film and Television Industry, Los Angeles, CA.

26-27: ABA, ERISA Basics: A Primer on ERISA Issues, New York, NY.

26-27: PLI, Construction Contracts and Litigation, New York, NY.

26-27: PLI, Hazardous Waste Litigation: Advanced Tactics and Practice, Chicago, IL.

26-27: ALIABA, Minimizing Liability for Hazardous Waste Management, Boston, MA.

26-27: PLI, Negotiation Workshop for Lawyers, New York, NY.

26-27: PLI, Real Estate and the Bankruptcy Code, New York, NY.

26-28: PLI, Workshop on Direct and Cross Examination, San Francisco, CA.

27: NKU, Representing the Elderly Client, Covington, KY.

27-28: PLI, Deposition Skills Training Program, New York, NY.

28: USCLC, Entertainment Law Institute, Los Angeles, CA.

29-May 25: SLF, International Program in Oil and Gas Financial Management, Dallas, TX.

30-May 4: SLF, Short Course on Business Planning, Dallas, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1989 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Requirement

Thirty-three states currently have a mandatory continuing legal education (CLE) requirement. In these

MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11a (Oct. 1989) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel

vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

<u>State</u>	<u>Local Official</u>	<u>Program Description</u>
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt but must declare exemption annually. -Reporting date: on or before 31 January annually.
*Arkansas	Office of Professional Programs Supreme Court of Arkansas 311 Prospect Building 1501 N. University Little Rock, AR 72207	-MCLE implemented 1 March 1989. -12 hours of CLE each fiscal year. -Reporting period ends 30 June 1990 the first year.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 (303) 893-8094	-Active attorneys must complete 45 hours of approved continuing legal education, including 2 hours of legal ethics during 3-year period. -Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3 years. -Reporting date: 31 January annually.
*Delaware	Commission of Continuing Legal Education 831 Tatnall Street Wilmington, DE 19801 (302) 658-5856	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: on or before 31 July every other year.
*Florida	Commission on Continuing Legal Education The Florida Bar 600 Apalachee Parkway Tallahassee, FL 32301 (904) 222-5286 (800) 874-0005 out-of-state	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period, including 2 hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: 10 hours every year.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Active attorneys must complete 12 hours of approved continuing legal education per year, including 2 hours of legal ethics. Modification effective 1 January 1990. -Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period. -Reporting date: 1 March every third anniversary following admission to practice.

<u>State</u>	<u>Local Official</u>	<u>Program Description</u>
*Indiana	Indiana Commission for CLE Program State of Indiana 1800 N. Meridian Room 511 Indianapolis, IN 46202 (317) 232-1943	-Attorneys must complete 36 hours of approved continuing legal education within a 3-year period. -At least 6 hours must be completed each year. -Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 218-3718	-Active attorneys must complete 15 hours of approved continuing legal education each year, including 2 hours of ethics during 2-year period. -Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 (913) 357-6510	-Active attorneys must complete 12 hours of approved continuing legal education each year, and 36 hours during 3-year period. -Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3793	-Active attorneys must complete 15 hours of approved continuing legal education each year. -Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566-1600	-Active attorneys must complete 15 hours of approved continuing legal education every year, including 1 hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January annually.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 S. Robert Street Suite 310 St. Paul, MN 55107 (612) 297-1800	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 30 June every 3d year.
*Mississippi	Commission of CLE Mississippi State Bar P.O. Box 2168 Jackson, MS 39225-2168 (601) 948-4471	-Attorneys must complete 12 hours of approved continuing legal education each calendar year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December annually.
*Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635-4128	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 30 June annually.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442-7660	-Active attorneys must complete 15 hours of approved continuing legal education each year. -Reporting date: 1 April annually.

R.C.M. 1110 allows an accused to waive or withdraw from appellate review. Prior to making this important decision, the accused has the right to consult with counsel.⁶² If the accused waives or withdraws from appellate review "in substantial compliance" with R.C.M. 1110, that waiver or withdrawal is irrevocable.⁶³ One caveat is that the government may not compel, induce, or coerce an accused into waiving or withdrawing from appellate review.⁶⁴

*Clay v. Woodmansee*⁶⁵

Private Clay lost his speedy trial motion. As a result, he pleaded guilty to absence without leave, assault with intent to commit rape, breaking restriction, and forgery. An officer and enlisted panel sentenced Private Clay to a bad-conduct discharge, confinement for forty-four months, forfeiture of \$340 pay per month for six months, a fine of \$673, and reduction to Private E-1.⁶⁶

The convening authority delayed taking action in the case for almost five months so that Private Clay could testify as a government witness in the courts-martial of two soldiers from his unit who were distributing heroin.⁶⁷ Fearing an appellate loss on a speedy trial motion, the chief of criminal law approached Private Clay's defense counsel and informed him that if Private Clay "did a good job as a witness, and if he would waive his right to appeal," the convening authority might reduce the accused's sentence to "about two years."⁶⁸

The accused's primary concern was being released from confinement as soon as possible. The chief of criminal law *erroneously* pointed out that, based on an approved sentence of only twenty-four months and considering pre-trial confinement credit, post-trial time served, and accumulated good time (improperly computed based upon the sentence adjudged as opposed to the sentence approved), the accused would be in confinement only until June of 1989. Based upon these representations, the accused accepted the "post-trial agreement."⁶⁹ The accused waived his appellate rights when the convening authority approved only twenty-two months of confinement.⁷⁰

You can guess what happened next. After signing this normally irrevocable waiver of appellate rights, the accused discovered that the chief of criminal law was incorrect in his calculation of good time. The accused was actually entitled to only six days of credit per month for twenty-two months, for a total of 132 days (as opposed to the earlier estimate of seven days of credit per month for forty-four months, for a total of 308 days). At that point, it appeared as if the government would benefit from the bargain, while the accused would not.

Because his waiver removed his case from appellate channels, Private Clay filed an extraordinary writ. He sought the following remedies:

1. Revocation of his waiver of appellate rights, which had been obtained as a result of an improper promise of clemency (so that the appellate court could review his lost speedy trial motion); and

2. Immediate release from confinement in accordance with his "post-trial agreement."⁷¹

The Army Court of Military Review agreed with the petitioner on both issues. The court held that the chief of criminal law violated R.C.M. 1110(c) when he promised the accused clemency for his waiver of appellate review. Because R.C.M. 1110(c) had been violated, the court held that the waiver was not in "substantial compliance" with the waiver requirements and therefore had no effect.⁷² As a result, the court vacated the waiver and ordered that the record of trial be referred to the court for appellate review.⁷³

Concerning Private Clay's petition for immediate release from confinement, the court found that "fair play" required that the government be bound by the chief of criminal law's informal post-trial agreement. The court abated Private Clay's confinement beyond June 1989 and ordered his immediate release.

Conclusion

There are several valuable lessons to be learned from *Clay*.

⁶² R.C.M. 1110(b).

⁶³ R.C.M. 1110(g)(4).

⁶⁴ R.C.M. 1110(c).

⁶⁵ 29 M.J. 663 (A.C.M.R. 1989).

⁶⁶ *Id.* at 664.

⁶⁷ *Id.* (The accused had worked as a registered source for the United States Army Criminal Investigation Command. The two courts-martial resulted in sentences of 15 and 20 years of confinement.)

⁶⁸ *Id.* at 664-65.

⁶⁹ *Id.* at 665 (The chief of criminal law was incorrect in determining Private Clay's good-time credit. Good time accumulates based upon the approved sentence, not the sentence adjudged.)

⁷⁰ *Id.*

⁷¹ *Id.* at 666.

⁷² *Id.*

⁷³ *Id.*

1. Good time credit is always computed based upon the approved sentence.⁷⁴

2. The government may never "compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review."⁷⁵

3. If the government does attempt to compel, coerce, or induce an accused into waiving appellate review, the appellate court will vacate the waiver/withdrawal as not being in "substantial compliance" with the requirements of R.C.M. 1110.⁷⁶

4. Lastly, even though the waiver/withdrawal is vacated, the appellate court will allow the accused the benefits of the improper agreement in the interest of fair play. The result will be an unenforceable waiver with enforceable government promises. CPT Cuculic.

The Air Force Faces Coy

Sergeant (SGT) John A. Thompson, U.S. Air Force, was charged with three specifications of sodomy with his two stepsons and one specification of assaulting his wife.⁷⁷ The stepsons, who were ten years old and twelve years old at the time of the court-martial, were allowed to testify at the court-martial facing the military judge with their backs to SGT Thompson. Defense counsel sat near the military judge's bench so that he could see each child's face as he testified. The Air Force Court of Military Review noted that this case "represents one attempt to respect the special concerns of dealing with child witnesses while providing a criminal accused with all required protections."⁷⁸

Considering *Coy v. Iowa*,⁷⁹ was SGT Thompson provided with all required protections under the confrontation clause of the sixth amendment? The Air Force Court of Military Review decided that *Thompson* differed from *Coy* in two important ways.

First, there is no statute or regulation mandating a particular courtroom arrangement for child witnesses or child victims. Second, the military trial judge made an extensive inquiry into the need for special protections before he approved the plans for

allowing the children to testify with their backs to the appellant.⁸⁰

When Coy was tried in Iowa for sexually assaulting two thirteen-year-old girls, there was a statute that addressed the child witness situation. The trial judge could require an accused to be in an adjacent room or behind a screen or mirror when a child victim testified so that the accused could see and hear the child, but the child could not see or hear the accused.⁸¹ This special arrangement was within the trial judge's discretion and was not mandated.⁸² The judge was not required to specifically find that such an arrangement was necessary because of potential trauma to the child victim.

In the majority opinion of *Coy*, which was written by Justice Scalia, the Supreme Court held: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."⁸³ The Court continued by stating: "We leave for another day, however, the question whether any exceptions exist . . ." Furthermore, "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception."⁸⁴

In her concurring opinion, Justice O'Connor, joined by Justice Stevens, discussed the possible exceptions to face-to-face confrontation: "I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."⁸⁵

As discussed, the court in *Thompson* was not faced with a statute or regulation similar to the statute in *Coy*. Instead, the court was concerned with whether the military judge made sufficient inquiries and reached specific findings that it was necessary to allow the children to testify with their backs to the accused in order to further an important public policy (protection of the children).

⁷⁴ See Dep't of Defense Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities (May 19, 1988).

⁷⁵ R.C.M. 1110(c).

⁷⁶ R.C.M. 1110(g)(4).

⁷⁷ United States v. Thompson, 29 M.J. 541 (A.F.C.M.R. 1989). SGT Thompson was convicted and sentenced to a dishonorable discharge, confinement for 30 years, total forfeitures, and reduction to airman basic.

⁷⁸ 29 M.J. at 542.

⁷⁹ 108 S. Ct. 2798 (1988). *Coy* was decided by the Supreme Court while SGT Thompson's case was pending on appeal.

⁸⁰ 29 M.J. at 543.

⁸¹ 108 S. Ct. at 2799 n.1.

⁸² The court in *Thompson* was incorrect in referring to the Iowa statute as "mandating" a particular courtroom arrangement. 29 M.J. at 543. The statute stated that a court "may require" a particular arrangement. *Coy*, 108 S. Ct. at 2799 n.1.

⁸³ 108 S. Ct. at 2800.

⁸⁴ *Id.* at 2803.

⁸⁵ *Id.* at 2803.

The military judge conducted an extensive discussion with counsel and then heard a psychologist's testimony. The psychologist had counselled the children every two weeks for approximately eight months before the court-martial. She stated that the victims were experiencing a great deal of anxiety, shame, and even fear that the accused would attack them in the courtroom. One child stuttered when he was nervous, and the psychologist testified that both children would have difficulties testifying if they were forced to face the accused.⁸⁶ Furthermore, she testified that their fear was not general stage fright, but was a very real fear of the accused based on past experiences.

On cross-examination, the psychologist testified that she was not convinced that the children would refuse to participate in the court-martial if they had to face the accused. "She concluded by admitting that, 'in general,' she would prefer any of her child clients to be allowed to testify without having to face the accused."⁸⁷

The military judge reached the following findings: 1) the children "would have their ability to think and testify accurately impaired" if they had to face the accused; 2) the arrangement (backs to the accused) would not affect the presumption of innocence; 3) the arrangement was not obtrusive and did not compare to *Coy*; 4) the accused's confrontation rights were not violated; and 5) the arrangement would not prejudice the accused's rights, but would ensure that the victims would testify.⁸⁸

The Court of Military Review said that "the military judge's inquiry was adequate to satisfy *Coy* and to justify the particular steps taken to accommodate the fears of the child witnesses in this case."⁸⁹ The court, however, was not giving its blanket approval for all such arrangements in the future, even when a specific inquiry is conducted. The court seemed particularly impressed by the fact that the children's fears were apparently based on actual beatings and were not a "general" fear of the accused that would prevent the children from testifying accurately or honestly. Also, the court was concerned that the children might lie in order to expedite the

stressful situation of confronting their step-father. The court affirmed the findings and the sentence.⁹⁰

In a strong dissent, Senior Judge Lewis emphasized that "[t]he majority have premised the decision today on their best estimate of what some future majority of the Supreme Court might recognize as the proper balance between the emotional interests of child sexual abuse victims at trial and the Sixth Amendment right of criminal accuseds to confront their accusers."⁹¹ The dissent continued: "When the majority affirm the military judge's action in this case they announce that the 'exception' to *Coy* has virtually engulfed the constitutional rule stated therein insofar as Air Force practice is concerned."⁹² The dissent recognized the protection of children as an honorable goal, but one which can lead to "very bad constitutional law,"⁹³ particularly when that goal overshadows the accused's confrontation rights.

The dissenting judge was not satisfied by the findings of the military judge. In particular, the psychologist did not testify about actual physical violence by the accused, although the military judge appeared to rely on exhibits or information about beatings. Also, the psychologist's concern about the children was based on her general preference that child victims not be forced to testify and was not an opinion tailored to this case. Finally, the dissent poses the question: What if this was a trial before court members—would the presumption of innocence still survive?⁹⁴

Coy issues are of primary concern to the state and military courts as they wrestle with the age-old question of how to protect children without violating the confrontation rights of the accused. *Thompson* was one court's answer to that question. The Court of Military Appeals has not yet reviewed a *Coy* case. The court mentioned *Coy* in *United States v. Hubbard*⁹⁵ and discussed the "possible value of such confrontation." In *Thompson* the court distinguished *Hubbard* and dismissed the relevance of the reference to *Coy*.⁹⁶ Nevertheless, the *Thompson* majority cannot ignore the following quotation from *Hubbard*: "The Sixth Amendment demands that an accused be allowed an opportunity for face-to-face confrontation."⁹⁷ Such a "demand" was not met

⁸⁶ 29 M.J. at 545.

⁸⁷ *Id.* at 544.

⁸⁸ *Id.* at 544-45.

⁸⁹ *Id.* at 545. In a recent decision by the Maryland Court of Appeals, *Craig v. Maryland*, 560 A.2d 1120 (Md. 1989), the court would not rely on the testimony of a psychologist, but required the child victim to attempt to testify facing the accused before the child could be considered "unavailable" and before any special protection could be used.

⁹⁰ *Id.* at 546.

⁹¹ *Id.*

⁹² *Id.* at 547.

⁹³ *Id.*

⁹⁴ *Id.* at 548.

⁹⁵ 28 M.J. 27, 33 n.4 (C.M.A. 1989).

⁹⁶ 29 M.J. at 546.

⁹⁷ 28 M.J. at 32.

in *Thompson* when the accused faced the backs of the victims.⁹⁸ MAJ Merck.

Evidence Pamphlet

DA Pam 27-22, Military Criminal Law Evidence (15 July 1987), will not be revised. Instead, Army counsel and military judges should use Saltzburg, Schinasi, and Schlueter, *Military Rules of Evidence Manual* (2d ed. 1986), as the basic reference tool for researching evidentiary issues. Staff judge advocate offices that do not have a copy of this evidence manual may request it by letter signed by the staff judge advocate. The request should be mailed to The Judge Advocate General's School, ATTN: JAGS-DDS, Charlottesville, Virginia 22903-1781. To assist practitioners, every few months the Criminal Law Division, TJAGSA, will publish a list of significant cases involving the Military Rules of Evidence. The first such update appears below.

Military Rules of Evidence Update

Character Evidence

A nexus between the military and the offense is required, even if only slight or strained, for good military character evidence of the accused to be admissible on the merits. The focus need not be on "military" versus "civilian" crimes; the victims (spouses of soldiers) may provide the nexus. In fact, good military character may lead to an inference that the accused was too professional to have committed an offense that would have adverse military consequences, thus providing the required nexus. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). This minimal nexus is arguably present when a service member commits any crime. In fact, Judge Cox feels good military character evidence is always relevant. *United States v. Court*, 24 M.J. 11 (C.M.A. 1987). In *United States v. Pershing*, 28 M.J. 668 (A.F.C.M.R. 1989), the Air Force court recognized that the admissibility of character evidence should not hinge on whether the crime charged is a purely military crime. The *Pershing* court cited the position of Judge Cox in *Court*, did not point to any nexus between the military and the offense, and found error in the trial judge's refusal to admit an accused's good military character evidence on the merits.

Uncharged Misconduct

To distinguish between permissible and prohibited uses of extrinsic acts evidence under MRE 404(b), the reasoning process used to connect the uncharged misconduct to the charged misconduct must be examined. Does the inference connecting the extrinsic act and the charged misconduct require an inference about the individual's character? Must an inference be made from a person's character to how the person probably acted on another occasion? Is the sole connection a belief that a certain type of person would act in the same way? If yes, the evidence is offered for the prohibited purpose of proving

criminal propensity. *United States v. Duncan*, 28 M.J. 946 (N.M.C.M.R. 1989).

The relevance of *modus operandi* evidence is to show the perpetrator's identity. If identity is not in issue, uncharged misconduct showing *modus operandi* is irrelevant and inadmissible. *United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989).

Urinalysis

The government's failure to view the urine sample exiting the body, as required by regulation, does not vitiate urinalysis results. Minor deviations from regular procedures do not render urinalysis results inadmissible per se. *United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989).

Scientific Evidence

Scientific acceptability (the *Frye* standard) is only one factor to consider in determining whether scientific evidence is sufficiently probative to be admissible in a court-martial. The accused must be allowed to attempt to lay a foundation for favorable polygraph evidence. *United States v. Berg*, 28 M.J. 567 (N.M.C.M.R. 1989).

Hearsay

Statements made for the purpose of medical diagnosis or treatment fall within the hearsay exception (MRE 803(4)) only if made with some expectation of receiving sought-after medical benefits. *United States v. Dean*, 28 M.J. 741 (A.F.C.M.R. 1989). A statement made without knowledge of being treated or diagnosed, even if made to a medical specialist, is inadmissible under this exception. *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988).

To show an accused had insufficient funds in his account to cover a check, an accused's check stamped with "Insufficient Funds" falls within the business records exception (MRE 803(6)). The stamp is a report of the condition of an account, made at the time the condition existed, in the regular course of business, by a person knowing the condition of the account. *United States v. Dababneh*, 28 M.J. 929 (N.M.C.M.R. 1989).

A CID report concluding that the accused committed a prior indecent assault is not admissible under the public records and reports exception (MRE 803(8)(B)) where the report is made by those acting in a law enforcement capacity. *United States v. Williams*, 28 M.J. 911 (A.C.M.R. 1989).

Article 32 testimony was admissible under the former testimony exception (MRE 804(b)(1)) where the witness was

a) unavailable after the government's good faith effort to obtain his presence. *United States v. Spindle*, 28 M.J. 35 (C.M.A. 1989).

(b) AWOL, without any indication of when, if ever, he may return. *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989).

⁹⁸ One method of protecting the children that would be less likely to violate the defendant's confrontation rights would be two-way closed circuit television; the children would testify from another room, but could see and be seen by the accused. See *Coy v. Iowa*, 108 S. Ct. 2798 (1988); *Craig v. Maryland*, 360 A.2d 1120 (Md. 1989).

A hearsay statement does not fit within the declaration against penal interest exception (MRE 804(b)(3)) when the declarant does not implicate himself until later. *United States v. Fisher*, 28 M.J. 544 (A.F.C.M.R. 1989).

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys 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*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Notes

Tax Refund Anticipation Loans

As tax season nears, soldiers and family members may be tempted to accept offers from commercial tax return preparation companies that provide "instant tax refunds." These tax preparation companies usually provide the consumer a loan based on the value of the anticipated tax refund. In exchange, the consumer assigns rights in the refund to the company. Obviously, the service is not free and, in many cases, can be unreasonably expensive for the consumer.

A recent tax article⁹⁹ highlights the hidden costs of these services. As the article explains, the average refund for an electronically filed return¹⁰⁰ is about \$1,100. It takes approximately eighteen days to receive the refund from an electronically filed return, whereas it takes about four days for consumers to get money through the refund anticipation loan process. As a practical matter, the consumer is borrowing the amount of the refund for approximately fourteen days. If the company charges a \$35 fee to process and carry such a loan for just fourteen days, the annual percentage rate on the loan is actually 82.85 percent. Waiting an additional fourteen days to receive the refund is clearly the preferred course of action, particularly when many SJA offices in CONUS, Hawaii, and Alaska now offer electronic filing—for free.

What should the judge advocate do when a client has entered such a loan agreement and now is being sued for

the amount of the loan? This situation typically occurs when the government exercises tax refund offset to satisfy a pre-existing debt that the individual owes to the federal government. Often, nothing is left for the tax refund company. Although the debt to the company will remain valid, the client may be able to negotiate repayment of a lesser amount. This is particularly true if the debtor has not made the disclosures that are required by the Truth in Lending Act.¹⁰¹

Few, if any, tax refund companies will disclose an annual percentage rate in excess of 80 percent. According to authorities at the National Consumer Law Center,¹⁰² most companies will attempt to characterize these loans as demand notes.¹⁰³ Truth in Lending regulations allow annual percentage rate disclosures for demand notes to be based on an assumed maturity of one year.¹⁰⁴ This would lower the annual percentage rate to 3.29 percent. Legal assistance attorneys should attack this description of the loan. They could argue that it is actually a loan whose payment is contingent on a future event (IRS issuance of a refund). In that case, disclosures must be based on the actual fourteen day repayment period, thereby requiring that the consumer be notified of the 82.85 percent annual percentage rate.¹⁰⁵

If unsuccessful with a Truth in Lending argument, attorneys should check state laws on unfair and deceptive acts and practices. These may be sufficiently broad to cover the tax refund loan situation. Additionally, the refund fees may violate state usury laws. Even if the companies do meet Truth in Lending disclosure requirements, the fee schemes may still exceed allowable interest rates under state law.

As a practical matter, in the tax refund setting, an ounce of prevention is worth a pound of cure. This is an area in which the installation preventive law program can be especially helpful to soldiers and family members. Legal assistance offices should combine an effective tax preparation program with an aggressive command information program that advertises the availability of free tax assistance. Such an approach will help reduce the problems associated with dealing with commercial tax preparation organizations. MAJ Pottorff.

Fair Credit Billing and Braniff Ticket Sales

With Braniff once again cancelling flights in the midst of financial woes, soldiers and family members may find

⁹⁹ Hill, *Electronic Filing: Does the New Wave Conceal a Dangerous Undertow?*, 43 Tax Notes 217 (April 10, 1989) (quoted in *Consumer Credit & Usury Edition*, 7 NCLC Reports 21 (1989)).

¹⁰⁰ The Internal Revenue Service will accept electronic returns filed directly from CONUS SJA offices, as well as from those in Hawaii and Alaska. The limiting factors in this program include availability of adequate commercial software and compatible hardware, specifically modems.

¹⁰¹ 15 U.S.C. §§ 1601-1667 (1982 & Supp. V 1987).

¹⁰² *Consumer Credit & Usury Edition*, 7 NCLC Reports 21 (1989).

¹⁰³ Tax return preparation companies are characterizing these transactions as loans in attempts to satisfy 31 U.S.C. § 3727 (1982), which limits assignments of claims against the government.

¹⁰⁴ 12 C.F.R. § 226.18(c)(5) (1988).

¹⁰⁵ Official Staff Interpretations, 12 C.F.R. Part 226.17(c)(5)2 (1988) (disclosures should be based on the creditor's estimate of the time at which the specified event will occur). For tax refund loans, the refund loan company should base the period of time on when the refund should arrive, which is approximately 14 days.

themselves holding tickets they cannot use. In a recent press release,¹⁰⁶ the Federal Trade Commission (FTC) outlined steps consumers may take to avoid financial losses if they paid for their Braniff tickets with credit cards. These steps are based on the provisions of the Fair Credit Billing Act¹⁰⁷ (FCBA).

The FCBA contains a provision that allows credit card holders relief when a card issuer makes an error in billing a consumer. The FTC release recommended that consumers take the following steps if they paid for their Braniff tickets by credit card:

- (1) Send written notice to their card issuer at the address listed for billing inquiries;
- (2) Include in the notice their name and account number, a statement that they are withholding payment because the bill contains a billing error, and a description of the error with dollar amount and reference number of the ticket transaction;
- (3) Keep a photocopy of the notice and send the notice by certified mail, return receipt requested;
- (4) Mail the notice within 60 days after the first bill containing the error was mailed to them; and
- (5) Keep the ticket in a safe place.

If the card issuer does not resolve the dispute within thirty days, the issuer must acknowledge the dispute in writing to the consumer within thirty days. The card issuer has a maximum of two billing cycles or ninety days, whichever is less, to ultimately resolve the dispute. When goods are not delivered to the consumer, the card issuer cannot conclude that the billing amount is correct unless the issuer determines that the goods actually were delivered. Therefore, based on the FTC release, consumers should argue that, even though the bill correctly reflects the amount of the Braniff ticket, a billing error still exists. The underlying purchase, the air flight, was never delivered. MAJ Pottorff.

Professional Responsibility Note

JAG Attorneys Following Military Ethics Rules Will Not Be Subject To Discipline For Violating Oregon Rules

The Oregon bar has issued an informal ethics opinion¹⁰⁸ that concludes that military attorneys following military ethics rules will not be subject to discipline

in Oregon. Thus, Army attorneys licensed in Oregon who follow the Army Rules of Professional Conduct¹⁰⁹ will not be subject to discipline in Oregon, even if the conduct is inconsistent with Oregon ethical standards.

The Oregon bar observed that this issue has never been addressed in a published opinion in any jurisdiction. The organization noted, however, that an ABA informal opinion¹¹⁰ concluded that some flexibility is required in applying ethical rules to military law offices. The Oregon bar believed that this opinion implied that military lawyers must be allowed to deviate from state ethical standards to meet the exigencies of military law practice.

The Oregon bar also found support for its conclusion in a Maryland ethics opinion. This opinion considered the controlling ethical standards for Maryland attorneys involved in proceedings in Washington, D.C. The Maryland bar concluded that an attorney's conduct in a foreign jurisdiction is ethical per se if it complies with that jurisdiction's code of ethics. This rule stands even if the Maryland standard is different.

The Oregon bar also suggested that the federal Supremacy Clause¹¹¹ may prohibit a state bar from enforcing code provisions that conflict with federal standards.

The ABA Model Rules,¹¹² which have not been adopted in Oregon, provide that a lawyer licensed in the state remains subject to the disciplinary authority of the state even though engaged in the practice of law elsewhere. A comment¹¹³ qualifies this absolute standard by stating that when the issue involves practice before a federal tribunal, the authority of the state may have to be reconciled with federal authority.

The well-reasoned Oregon opinion should serve as precedent for other states to follow. Before other jurisdictions specifically approve this approach, however, military attorneys should strive to comply with both the ethical standard of their licensing states and the military ethical standards.¹¹⁴ MAJ Ingold.

Tax Notes

U. S. Savings Bonds: An Old Reliable, Now Even More Attractive

More and more taxpayers are including U. S. Savings Bonds in their investment portfolios. The popularity of

¹⁰⁶ *Consumer Credit Report 562*, CCH Installment Credit Guide I, 2 (Nov. 15, 1989) (quoting Federal Trade Commission press release).

¹⁰⁷ 15 U.S.C. §§ 1666 - 1666j (1982).

¹⁰⁸ Informal Ethics Opinion 88-19. This ethics opinion was forwarded by CPT Daniel Hill, Fort Bliss, Texas.

¹⁰⁹ Dep't of Army, Pam. 27-26, Army Rules of Professional Conduct for Lawyers (31 Dec. 1987).

¹¹⁰ ABA Informal Opinion No. 1474 (1982).

¹¹¹ U.S. Const. art. 6.

¹¹² Model Rules of Professional Conduct, Rule 8.5.

¹¹³ ABA Model Rules of Professional Conduct, comment to Rule 8.5.

¹¹⁴ The comments to Army Rule 8.5 indicate that Army attorneys remain subject to state ethical standards as long as they are not inconsistent with the Army Rules.

<u>State</u>	<u>Local Official</u>	<u>Program Description</u>
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada 295 Holcomb Avenue Suite 5-A Reno, NV 89502 (702) 329-4443	-Active attorneys must complete 10 hours of approved continuing legal education each year. -Reporting date: 15 January annually.
New Jersey	New Jersey Bar Association 172 W. State Street Trenton, NJ 08608 (609) 394-1101	-1st year, "core" program consisting of 5 subjects must be completed within 2 Skills Course administration cycles following passage of bar exam; 2d year (12-month period commencing on 1st anniversary of bar exam), trial course and administrative law; 3d year (beginning on 2d anniversary of bar exam), 2 comparative basic courses from curriculum of New Jersey Institute for CLE.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., NE Albuquerque, NM 87125	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. -Reporting date: 1 January 1988 or first full report year after date of admission to Bar. -Reporting requirement temporarily suspended for 1989. Compliance fees and penalties for 1988 shall be paid.
*North Carolina	The North Carolina Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733-0123	-12 hours per year including 2 hours of legal ethics. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 31 January annually.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255-1404	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 1 February submitted in 3-year intervals.
*Ohio	Supreme Court of Ohio Office of Continuing Legal Education 30 East Broad Street Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Active attorneys must complete 24 credit hours in a 2-year period, 2 of which must be in legal ethics. -Active duty military are exempt, but pay a filing fee. -Reporting date: Beginning 31 December 1989 every 2 years.
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Active attorneys must complete 12 hours of approved legal education per year, including 1 hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: On or before 15 February annually.
*Oregon	Oregon State Bar MCLE Administrator CLE Commission 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 (503) 620-0222 1-800-452-8260	-Must complete 45 hours during 3-year period, including 6 hours of legal ethics. -Starting 1 January 1988.

<u>State</u>	<u>Local Official</u>	<u>Program Description</u>
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee Washington Square Bldg. 214 Second Avenue N. Suite 104 Nashville, TN 37201 (615) 242-6442	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt. -Reporting date: 31 January.
*Texas	Texas State Bar Attn: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463-1382	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. -Reporting date: Depends on birth month.
Utah	Utah State Bar Association 645 S. 200 E. Salt Lake City, UT 84111 (801) 531-9077 (800) 662-9054	-27 hours during 2-year period, including 3 hours of legal ethics. -Reporting date: effective 31 December 1989.
*Vermont	Vermont Supreme Court Mandatory Continuing Legal Education Board 111 State Street Montpelier, VT 05602 (802) 828-3281	-Active attorneys must complete 20 hours of approved legal education during 2-year period, including 2 hours of legal ethics. -Reporting date: 30 days following completion of course. -Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786-2061	-Active attorneys must complete 8 hours of approved continuing legal education per year. -Reporting date: 30 June annually.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121-2599 (206) 448-0433	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E-400 State Capitol Charleston, WV 25305 (304) 346-8414	-Attorneys must complete 24 hours of approved continuing legal education every 2 years, at least 3 hours must be in legal ethics or office management. -Reporting date: 30 June annually.
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703-3355 (608) 266-9760	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: 31 December of even or odd years depending on the year of admission.

State Local Official
 *Wyoming Wyoming State Bar
 P.O. Box 109
 Cheyenne, WY 82003
 (307) 632-9061

Program Description

-Active attorneys must complete 15 hours of approved continuing legal education per year.
 -Reporting date: 1 March annually.

5. Army Sponsored Continuing Legal Education Calendar

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Duncan, Heidelberg Military 8459). This schedule will be updated in The Army Lawyer on a periodic basis. Coordinator: CPT Cuculic, TJAGSA, (804) 972-6342.

<u>Training</u>	<u>Location</u>	<u>Dates</u>
3d & 4th Judicial Circuit Conference	Colorado Springs, CO	6 - 7 Feb 90
TJAGSA On-Site	Orlando, FL	10 - 11 Feb 90
USAREUR Administrative LAW CLE	Heidelberg, FRG	12 - 16 Feb 90
TCAP Seminar	Atlanta, GA	15 - 16 Feb 90
TJAGSA On-Site	Austin, TX	16 - 18 Feb 90
TJAGSA On-Site	Salt Lake City, UT	24 - 25 Feb 90
TJAGSA On-Site	Nashville, TN	3 - 4 Mar 90
TCAP Seminar	Kansas City, KS	8 - 9 Mar 90
TJAGSA On-Site	Columbia, SC	10 - 11 Mar 90
USAREUR Contract Law CLE	Heidelberg, FRG	12 - 16 Mar 90
TJAGSA On-Site	Washington, DC	17 - 18 Mar 90
TJAGSA On-Site	San Francisco, CA	17 - 18 Mar 90

<u>Training</u>	<u>Location</u>	<u>Dates</u>
ABA Lamp Committee CLE	Ft Belvoir, VA	29 Mar 90
TJAGSA On-Site	El Paso, TX	30 Mar - 1 Apr 90
TCAP Seminar	San Diego, CA	2 - 3 Apr 90
TJAGSA On-Site	Chicago, IL	7 - 8 Apr 90
USAREUR Annual TDS Workshop	To Be Determined	8 - 11 Apr 90
TCAP Seminars	USAREUR	30 Apr - 11 May 90
TJAGSA On-Site	Columbus, OH	5 - 6 May 90
TJAGSA On-Site	Jackson, MS	5 - 6 May 90
USAREUR International Law Trial Observer CLE	Heidelberg, FRG	10 - 11 May 90
USAREUR SJA CLE	Heidelberg, FRG	17 - 18 May 90
USAREUR Op Law CLE	Heidelberg, FRG	22 - 25 May 90
TCAP Seminar	Ft Hood, TX	21 - 22 Jun 90
TCAP Seminar	Norfolk, VA	12 - 13 Jul 90
TCAP Seminar	Ft Bragg, NC	2 - 3 Aug 90
USAREUR Branch Office CLE	Heidelberg, FRG	10 Aug 90
USAREUR Contract Law - Procurement Fraud Advisor CLE	Heidelberg, FRG	17 Aug 90
USAREUR SJA CLE	Heidelberg, FRG	23 - 24 Aug 90
5th Judicial Circuit Conference	Garmisch, FRG	Sep 90
USAREUR Legal Assistance CLE	Heidelberg, FRG	4 - 7 Sep 90
TCAP Seminar	Colorado Springs, CO	17 - 18 Sep 90

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 not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. 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, AUTOVON 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 B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
*AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

AD A174511	Legal Assistance Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law/JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
*AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property/JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B094235	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
AD B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).
------------	---

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
AD B100235	Government Information Practices/JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B108016	Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).

- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

- AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).

Reserve Affairs

- *AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC 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

Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 1-75	Administrative and Logistical Support of Overseas Security Assistance Organizations	10 Oct 89
AR 11-33	Army Lessons Learned Program System Development and Application	10 Oct 89
AR 25-9	Army Data Management and Standards Program	13 Sep 89
AR 37-1	Army Accounting and Fund Control	1 Oct 89
AR 40-501	Standards of Medical Fitness—Interim Change 101	2 Oct 89
AR 56-3	Management of Army Rail Equipment	30 Sep 89
AR 600-20	Personnel—General Army Command Policy—Interim Change 101	13 Sep 89
CIR 25-89-3	1989 Contemporary Military Reading List	15 Sep 89
Pam 351-4	Army Formal Schools Catalog	1 Oct 89
Pam 600-8-21	Soldier Applications Program	20 Oct 89
UPDATE 12	Unit Supply Update	9 Oct 89

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

WILLIAM J. MEEHAN II
Brigadier General, United States Army
The Adjutant General

Distribution. Special.

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL