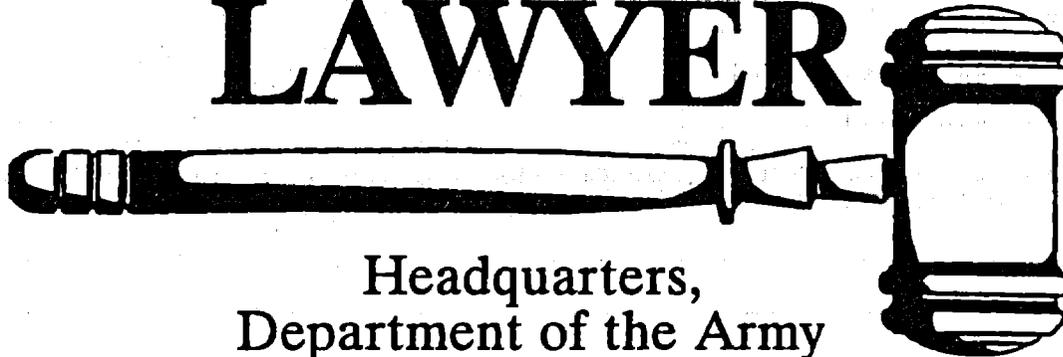


# THE ARMY LAWYER



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# The Tax Consequences of Renting and Then Selling a Residence

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"The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person." Adam Smith.<sup>2</sup>

"Whether or not property is used by the taxpayer . . . as his principal residence . . . depends upon all of the facts and circumstances in each individual case . . ." H.R. Rep. No. 586, 82d Cong., 1st Sess. (1951)<sup>3</sup>

## Introduction

Each year thousands of Americans move to new cities for reasons related to employment. Many must decide what to do with their old home—rent or sell. Some may intend to sell, but slow real estate markets may cause them to rent temporarily while they continue their attempts to sell. Eventually many will sell their homes at either a gain or loss. How will the sale be taxed? Can the taxpayer defer or exclude gain from the sale? Must the taxpayer recognize gain from the sale? Can the taxpayer take a loss deduction? The answers to these seemingly straightforward questions are far from certain.

The following five sections of the Internal Revenue Code (Code) potentially apply to these sales:

1. Section 121<sup>4</sup> allows taxpayers over the age of fifty-five to exclude up to \$125,000 from gross income on the sale of a principal residence;

2. Section 165<sup>5</sup> limits noncasualty loss deductions claimed by individuals to those incurred in a trade or business or in connection with a transaction entered into for profit;

3. Section 262<sup>6</sup> precludes most deductions for personal, living, and family expenses;

4. Section 1001<sup>7</sup> generally requires taxpayers to recognize gain when the amount realized from a sale of property exceeds the taxpayer's adjusted basis in the property; and

5. Section 1034<sup>8</sup> mandates deferral of recognition of gain on the sale of a principal residence unless the adjusted sales price of the old residence exceeds the cost of purchasing the new residence.

Whether these provisions apply to the sale of the old home depends primarily on whether the home is still the taxpayer's "principal residence." Even though the taxpayer may rent the old home, under some circumstances it may still constitute the taxpayer's principal residence and may not constitute property held for the production of income, trade or business property, or a transaction entered into for profit.<sup>9</sup> If it is still the taxpayer's principal residence, gain from the subsequent sale may either be excluded or have its recognition deferred until later. If it is not the taxpayer's principal residence, the taxpayer will include gain from

<sup>1</sup> I thank Dean Michael K. Friel of the University of Florida Graduate Tax Program for his critical review of a draft of this article and for the valuable suggestions he made to help me improve it.

<sup>2</sup> ADAM SMITH, THE WEALTH OF NATIONS 778 (Modern Library ed. 1937) (originally published in 1776).

<sup>3</sup> Reprinted in I J.S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME AND EXCESS PROFITS TAX LAWS 1953-1939, at 1605 (1954).

<sup>4</sup> I.R.C. § 121 (1988).

<sup>5</sup> I.R.C. § 165 (West Supp. 1995).

<sup>6</sup> I.R.C. § 262 (1988).

<sup>7</sup> I.R.C. § 1001 (1988 & Supp. V 1993).

<sup>8</sup> I.R.C. § 1034 (1988).

<sup>9</sup> To take most deductions related to rental of the residence, it must, at a minimum, constitute property held for the production of income. *Id.* § 212 (1988). See *infra* notes 177-189 and accompanying text. To take a loss on the subsequent sale, the residence must either be operated as a trade or business or constitute a transaction entered into for profit. I.R.C. § 165 (West Supp. 1995). See *infra* notes 25-31, 191-203 and accompanying text.

the subsequent sale in gross income for the year of the sale. If the taxpayer sells at a loss and it is still the principal residence, the loss will be nondeductible. If it is no longer considered a principal residence, the loss from the subsequent sale will be deductible.

Some cases are straightforward. For example:

- \* If a taxpayer sells a home he currently resides in and replaces it shortly thereafter with a more expensive home, he must defer the gain under section 1034;
- \* If a taxpayer, age fifty-five or older, sells a home she currently resides in, she may elect to exclude up to \$125,000 of gain under section 121; and
- \* If a taxpayer rents a home at a fair market rental (after vacating it with no intention of returning to it), he may treat it as property held for the production of income and deduct expenses related to its rental.<sup>10</sup>

Results are less certain when the taxpayer's intention changes or when the taxpayer engages in conduct that is incongruous with treating a home as a principal residence. For example:

- \* If a taxpayer rents her home while working temporarily in another city, always intending to return to it, but a change in circumstances causes her to sell it, she may or may not be able to defer gain, exclude gain, or deduct expenses connected with the property's rental;

\* If a taxpayer sells her home after temporarily renting it during a period of slow real estate sales, she may or may not be able to defer gain, exclude gain, or deduct expenses connected with the property's rental; and

\* If a taxpayer sells her home at a loss (after vacating it with the intention of renting it indefinitely), she may or may not be able to take a loss deduction.

These cases are unclear because, instead of writing a law that makes the tax consequences of such sales certain as Adam Smith implored,<sup>11</sup> Congress has required each case to turn on its facts and circumstances. Additionally, some tax consequences flow simply from the rental of the property. The Treasury Department has been equally nondirective in its regulations:

Whether or not property is used by the taxpayer as a residence, and whether or not property is used by the taxpayer as a principal residence (in the case of a taxpayer having more than one property as a residence) depends upon all the facts and circumstances in each case, including the good faith of the taxpayer.<sup>12</sup>

The Treasury Department also is unwilling to issue letter rulings on whether a residence is the taxpayer's principal residence for the purpose of either section 1034 or section 121.<sup>13</sup> This lack of direction from either Congress or the Treasury Department has left it to the courts to determine what constitutes a principal residence. Unfortunately, the courts have failed to provide clear guidelines and decide each case individually.<sup>14</sup> However, the courts

<sup>10</sup> *Robinson v. Commissioner*, 2 T.C. 305 (1943). In 1932, the taxpayer in *Robinson* abandoned her principal residence and moved to a property she had inherited. She attempted to rent or sell her former residence, but except for the small portion of the property that she rented in 1934 and in 1936-37, was unsuccessful. The Tax Court concluded that the "diligent" efforts to rent, when coupled with the abandonment as a principal residence, had converted the property to "property held for the production of income." *Id.* at 307. Consequently, the court allowed deductions for depreciation and maintenance expenses. *Id.* at 309. She could not, however, based on this small amount of rental activity, have taken a loss deduction if she sold the property at a loss. See *infra* note 176 and accompanying text.

<sup>11</sup> See *supra* note 2.

<sup>12</sup> Treas. Reg. § 1.1034-1(b)(3) (as amended in 1979). Courts also take a case-by-case approach in determining whether a taxpayer holds property for the production of income or uses a residence in connection with a transaction entered into for profit.

<sup>13</sup> Rev. Proc. 95-3, § 3.01(6), 1995-1 I.R.B. 85, 86. The Internal Revenue Service stopped issuing letter rulings in 1980 on whether property qualifies as a principal residence for the purpose of either sections 121 or 1034. Rev. Proc. 80-22, 1980-1 C.B. 654. A current issue frequently addressed in letter rulings is whether the residence is exempted from the special valuation rules of section 2702 for intrafamily transfers in trust when a family member retains an interest in the trust property. Under section 2702, the value placed on most such retained interests is zero. Thus, the initial transfer includes the full value of the property. Section 2702(a)(3)(ii) exempts from its coverage "a residence to be used as a personal residence by persons holding term interests in such trust." To determine whether the residence qualifies, one must determine whether it is "[t]he principal residence of the term holder (within the meaning of section 1034)" or is used as a personal residence more than 14 days or more than 10 percent of the number of days it is rented during the year (§ 280A). Treas. Reg. § 25.2702-5(c)(2).

<sup>14</sup> See *Trisco v. Commissioner*, 29 T.C. 515, 519 (1957) (citing the facts and circumstances language of the legislative history); *Stolk v. Commissioner*, 40 T.C. 345, 354 (1960) (citing the facts and circumstances language of the legislative history), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964); *Houlette v. Commissioner*, 48 T.C. 350, 354-55 (1960) (citing the facts and circumstances language of the legislative history and the treasury regulation); *Clapham v. Commissioner*, 63 T.C. 501, 509 (1975) ("*Stolk* and *Houlette* do not establish a rule of law, but merely identify facts and circumstances deemed relevant in those cases.>").

have at least indicated which facts and circumstances are relevant. From these indicators it is possible to build a framework for counselling clients on the likely tax consequences of their actions. Advance planning is important, because the taxpayer's actions after leaving a residence will in large part dictate the tax consequences. If challenged by the Internal Revenue Service, the burden of proof shifts to the taxpayer.<sup>15</sup>

The tax consequences to taxpayers who sell their former residences after a period of rental can be analyzed under three headings: (1) intent to return to the residence; (2) intent to temporarily rent pending sale; and (3) intent to rent for profit. The key element to determining the tax treatment of the subsequent sale is the taxpayer's intention. If the taxpayer intended to reoccupy the residence, the taxpayer can still claim it as a principal residence and use section 1034 to defer recognition of gain. The taxpayer also may use section 1034 to defer recognition of gain if slow real estate markets (or other factors) hamper selling efforts and temporarily rented the residence to prevent financial hardship. Less clear (because the Treasury Department promulgated a regulation that requires occupancy for three of the five years preceding the sale) is whether a taxpayer can, under these circumstances, take advantage of the "once-in-a-lifetime" exclusion under section 121.

If the taxpayer hopes to take a loss deduction on the sale, she must convert the home to trade or business property or enter into a transaction for profit. To establish either, the taxpayer must rent the home at market rates with the expectation of profitable operations. Additionally, to prove she really intended to rent to make a

profit and not just to claim a loss on the sale, she must rent for a substantial period of time or sell due to factors beyond her control.

The taxpayer's intention will be supported or refuted by the facts and circumstances surrounding the venture. Before discussing these facts and circumstances, however, consider the following brief review of the legislative history and mechanics of section 262 (no deduction for personal, living, or family expenses), section 165 (losses), section 121 (exclusion of gain on sale of principal residence); and section 1034 (rollover of gain on sale of principal residence).

## Internal Revenue Code Provisions

### Section 262

Like today's section 262, the Income Tax Act of August 27, 1894<sup>16</sup> precluded deductions for personal, living, and family expenses.<sup>17</sup> Treasury Regulation 4, Subdivision 2 (December 13, 1894) stated that such expenses were nondeductible because "the \$4000 exemption from the payment of income taxes should cover [them]."<sup>18</sup> The 1894 provision was codified at section IIB of the Internal Revenue Code of 1913,<sup>19</sup> at section 24(a)(1) of the 1939 Code,<sup>20</sup> and at section 262 in the 1954<sup>21</sup> and 1986<sup>22</sup> revisions to the Code. Today it provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."<sup>23</sup> The Treasury Regulation cites "losses . . . upon the sale . . . of property held for personal, living and family purposes" as an example of nondeductible expense.<sup>24</sup>

<sup>15</sup> *Welch v. Helvering*, 290 U.S. 111, 115 (1933) (courts presume the determinations of the Internal Revenue Service to be correct). *See also Helvering v. Taylor*, 293 U.S. 507 (1935) (burden is on the taxpayer to establish that the determination is incorrect).

<sup>16</sup> Act of August 27, 1894, ch. 349, 28 Stat. 509 (1893-1895). The provisions pertaining to the individual income tax are found at pages 553-60. The act afforded a deduction of \$4000 to each family. *Id.* at 553-54. Anyone earning over \$3500 was required to file a return. *Id.* at 554.

<sup>17</sup> THOMAS GOLD FROST, *A TREATISE ON THE FEDERAL INCOME TAX LAW OF 1913*, at 29-30 (1913).

<sup>18</sup> *Id.* at 30. *See also* GEORGE E. HOLMES, *FEDERAL INCOME TAX* 895 (6th ed. 1925); HENRY CAMPBELL BLACK, *A TREATISE ON THE LAW OF INCOME TAXATION* 178 (1913). Although the income tax exemption is now inadequate to cover most taxpayers' personal, living, and family expenses, that such expenses are nondeductible is too well settled for a taxpayer to use this as the sole basis for claiming a deduction.

<sup>19</sup> Act of October 3, 1913, 38 Stat. 114, 66 (1913). In particular, the Act allowed as a deduction "the necessary expenses actually paid in carrying on a business, not including personal, living, or family expenses." *Id.* at 167. A taxpayer challenged the constitutionality of this provision on the theory that denying the deduction for rent expense on a family home violated due process, because home owners were not required to include the imputed rental value of their homes in gross income. The Supreme Court rejected this challenge to the provision. *Brushaber v. Union Pacific R.R.*, 240 U.S. 1, 23-25 (1915).

<sup>20</sup> Internal Revenue Code, 53 Stat. (Part 1) 1, 16 (1939). In particular, it provided that "no deduction shall be allowed for . . . personal, living, or family expenses." *Id.*

<sup>21</sup> Internal Revenue Code of 1954, 68A Stat. 1, 76 (1954).

<sup>22</sup> Tax Reform Act of 1986, 100 Stat. 2085 (1986). Congress did not expressly restate section 262 in the Tax Reform Act of 1986. Instead, Congress merely redesignated it and many other provisions of the Internal Revenue Code of 1954 (as amended—if applicable) as part of the Internal Revenue Code of 1986.

<sup>23</sup> I.R.C. § 262(a) (1988).

<sup>24</sup> Treas. Reg. § 1.262-1(b)(4) (as amended in 1972).

Section 165

Like today's section 165, the Income Tax Act of August 18, 1894<sup>25</sup> precluded most deductions for losses not incurred in connection with a trade or business or not incurred in a transaction entered into for profit.<sup>26</sup> The 1894 provision was codified at section IIB of the Internal Revenue Act of 1913,<sup>27</sup> at section 23(e) of the Internal Revenue Act of 1939,<sup>28</sup> and at section 165(c) of the 1954<sup>29</sup> and 1986<sup>30</sup> revisions to the Code.

Today, section 165 generally limits losses of individuals to those "incurred in a trade or business" or to those "incurred in connection with any transaction entered into for profit."<sup>31</sup> The Treasury Regulation specifically disallows deductions for "[a] loss sustained on the sale of residential property . . . used [as a personal residence] up to the time of sale."<sup>32</sup>

The regulations, however, further provide that a taxpayer who converts a personal residence to a profit-oriented property and incurs a loss on its subsequent sale may deduct the loss.<sup>33</sup> In calculating loss, the taxpayer must use the lesser of the fair market value at the time of conversion or the selling price.<sup>34</sup>

<sup>25</sup> See *supra* note 16.

<sup>26</sup> FROST, *supra* note 17, at 32. Until 1916, individuals could deduct expenses incurred in connection with a trade or business, but could not deduct expenses incurred in connection with a transaction entered into for profit. HOLMES, *supra* note 18, at 968.

<sup>27</sup> Act of October 3, 1913, 38 Stat. 114, 66 (1913). In particular, the Act allowed deductions for "the necessary expenses actually paid in carrying on a business, not including personal, living, or family expenses." *Id.* at 167.

<sup>28</sup> Internal Revenue Code, 53 Stat. (Part 1) 1, 14 (1939). Like the current provision, it generally disallowed losses to individuals unless incurred in connection with a trade or business or in connection with a transaction entered into for profit. *Id.*

<sup>29</sup> Internal Revenue Code of 1954, 68A Stat. 1, 49 (1954).

<sup>30</sup> Tax Reform Act of 1986, 100 Stat. 2085 (1986).

<sup>31</sup> I.R.C. § 165(c) (West Supp. 1995).

<sup>32</sup> Treas. Reg. § 1.165-9(a) (as amended in 1964).

<sup>33</sup> *Id.* § 1.165-9(b). In *Heiner v. Tindle*, 276 U.S. 582 (1927), the Court allowed a taxpayer to deduct a loss on a sale of a personal residence that had been converted 13 years earlier to a rental property. The Commissioner argued that section 214 (the predecessor to section 165(c)) was inapplicable because the taxpayer did not acquire the property with a view toward making a profit. See I.R.C. § 165(c)(2) (provides that allowable losses include those connected with "any transaction entered into for profit"). The taxpayer prevailed, but his loss was limited to the difference between the fair market value at the time of conversion and the selling price. 276 U.S. at 587. Treasury Regulation § 1.165-9 contains a similar limitation. See *infra* note 34 and accompanying text.

<sup>34</sup> Treas. Reg. § 1.165-9(c) (as amended in 1964).

<sup>35</sup> I.R.C. § 469 (1988 & Supp. V 1993).

<sup>36</sup> *Id.* § 469(c)(2). Section 469(c)(7) excepts from its coverage rental activities where more than one-half of the work performed by the taxpayer during the year is in the real estate business and he performs more than 750 hours work in the business.

<sup>37</sup> *Id.* § 469(i). This special allowance is phased out for taxpayers with adjusted gross income of over \$100,000. *Id.* § 469(i)(3)(A). To actively participate, a taxpayer must participate:

in making management decisions or arranging for others to provide services (such as repairs), in a significant and bona fide sense. Management decisions that are relevant in this context include approving new tenants, deciding on rental terms, approving capital or repair expenditures or other similar decisions. Thus, for example, a taxpayer who owns and rents out an apartment that formerly was his primary residence . . . may be treated as actively participating even if he hires a rental agent and others to provide services such as repairs. So long as the taxpayer participates in the manner described above, a lack of participation in operations does not lead to the denial of relief.

COMMITTEE REPORT ON P.L. 99-514 (TAX REFORM ACT OF 1986), reprinted in 7 CCH STANDARD FEDERAL TAX REPORTER 40,845, 40,854 (1995).

<sup>38</sup> I.R.C. § 469 (1988 & Supp. V 1993).

ket value at the time of conversion or the adjusted basis at the time of conversion (with any subsequent modifications required by Treasury Regulation section 1.1011-1).<sup>34</sup>

Section 165 is not the sole limitation on deductibility of losses connected with an income producing residence. Section 469<sup>35</sup> precludes most individuals from deducting losses incurred in connection with a passive activity. A passive activity generally includes "any rental activity."<sup>36</sup> However, the section allows taxpayers to take up to \$25,000 in losses for rental real estate, provided the taxpayer actively participates in the activity.<sup>37</sup> The limitation on deduction of losses imposed by section 469 disappears when the taxpayer disposes of the entire interest in a passive activity in a fully taxable transaction. Even if the taxpayer sells at a loss, the Code treats the loss "as a loss which is not from a passive activity."<sup>38</sup>

Additionally, a loss on a sale of a personal residence might be capital in nature. This, too, can limit its deductibility. Internal Revenue Code section 1221(2) provides that a "capital asset" means property held by the taxpayer . . . but does not include real

property used in a trade or business."<sup>39</sup> "Property held for the production of income, but not used in a trade or business . . . is not excluded from the term 'capital assets' even though depreciation may have been allowed with respect to such property . . ."<sup>40</sup> Whether converted real property is held for the production of income or is used in a trade or business is far from settled.

Although the Treasury Regulations promulgated under section 212 (pertaining to nontrade or nonbusiness expenses)<sup>41</sup> contain most of the Treasury Department's discussion of rental deductions relating to a residence (which would seem to indicate that renting a residence does not constitute a trade or business), the Tax Court has frequently ruled "that the rental of even a single piece of property for production of income constitutes a trade or business."<sup>42</sup> Nevertheless, whether rental activity constitutes a trade or business is a question "of fact in which the scope of the ownership and management activities may be an important consideration."<sup>43</sup> The Tax Court found that a taxpayer who moved to Pittsburgh, but rented his former residence in Kansas City for approximately three years, was engaged in a trade or business.<sup>44</sup> He listed the property for sale or for rent for the entire period. Conversely, the United States Court of Appeals for the Second Circuit (Second Circuit)<sup>45</sup> ruled that taxpayers who engaged in only minimal management activities in connection with their rented residences were not engaged in a trade or business. Accordingly, the Tax Court ruled that the losses were capital in nature.

The Tax Court must follow decisions of the circuit in which it sits. For example, in *Balsamo v. Commissioner*,<sup>46</sup> the Tax Court, in a case appealable to the United States Court of Appeals for the Second Circuit (Second Circuit), noted its numerous precedents, but was compelled to follow the decisions of the Second Circuit. In so doing, the Tax Court suggested that under appropriate facts and circumstances, the rental of a single residence could constitute a trade or business.<sup>47</sup> It was unwilling to rule that *Balsamo* presented such facts and circumstances.<sup>48</sup> This decision stands as a clarification of the court's previous rulings. One must construe the proposition that rental of a single residence constitutes a trade or business "as a general, not an absolute rule."<sup>49</sup>

If a court were to rule that the rental home constituted a capital asset, a loss on its sale would be capital in nature. The deduction therefore would be limited by the rule that individuals may deduct annually capital losses only in an amount equal to capital gains for the year, plus \$3000.<sup>50</sup>

### Section 1034

Congress enacted section 1034 in 1951 "to eliminate a hardship under existing law which provides that when a personal residence is sold at a gain the difference between its adjusted basis and the sale price is taxed as a capital gain."<sup>51</sup> In part, this was for equitable reasons—because losses were nondeductible, it seemed reasonable that taxpayers should at least be able to defer recogni-

<sup>39</sup> I.R.C. § 1221(2) (1988) (emphasis added).

<sup>40</sup> Treas. Reg. § 1.1221-1(b) (as amended in 1975).

<sup>41</sup> I.R.C. § 212 (1988). "[O]rdinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held by the taxpayer as rental property are deductible even though such property was formerly held by the taxpayer for use as a home." Treas. Reg. § 1.212-1(h) (as amended in 1975).

<sup>42</sup> *Curphey v. Commissioner*, 73 T.C. 766, 774 (1980) (involving a dermatologist who had six rental properties). See also *Leland Hazard*, 7 T.C. 372 (1946) (allowing a loss on the sale of a residence that had been converted to a rental property); *Fegan v. Commissioner*, 71 T.C. 791, 814 (1979) (involving a taxpayer who operated a motel), *aff'd*, 81-1 USTC 9436 (10th Cir. 1981).

<sup>43</sup> *Curphey*, 73 T.C. at 775. The claims court has also ruled that whether rental activity rises to the level of a trade or business is a question of fact. *Bauer v. United States*, 168 F. Supp. 539 (Cl. Ct. 1958).

<sup>44</sup> *Hazard v. Commissioner*, 7 T.C. 372 (1946).

<sup>45</sup> *Grier v. United States*, 120 F. Supp. 395 (D. Conn. 1954), *aff'd per curiam*, 218 F.2d 603 (2d Cir. 1955) (involving an inherited home rented to the same tenant both before and after the inheritance). The Fifth Circuit required a corporate taxpayer who purchased a home from an employee in accordance with the terms of an employee's employment contract to treat the loss as a capital loss. *Azar Nut Co. v. Commissioner*, 931 F.2d 314 (5th Cir. 1991). The Fifth Circuit held that the corporation failed to establish that acquisition of the home was connected with its trade or business.

<sup>46</sup> *Balsamo v. Commissioner*, 56 Tax Ct. Mem. Dec. (P-H) 2552 (1987). *Balsamo* involved a taxpayer who inherited a residence that had been rented during the administration of the decedent's estate. The petitioner sold the property within months of receiving title to it.

<sup>47</sup> *Id.* at 2556.

<sup>48</sup> *Id.* The court found the taxpayer's "activities with respect to the premises as rental property were almost nonexistent." *Id.*

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

<sup>50</sup> I.R.C. § 1211 (1988). Section 1212 generally allows taxpayers to carryover and use the disallowed amount in future years. I.R.C. § 1212 (1988 & Supp. V 1993).

<sup>51</sup> H.R. REP. NO. 586, 82d Cong., 1st Sess. (1951), *reprinted* in 1 SEIDMAN, *supra* note 3, at 1605. See also S. REP. NO. 781, 82d Cong., 1st Sess. (1951), *reprinted* in 2 SEIDMAN, *supra* note 3, at 1606.

As a relief provision, one could argue that it should be broadly construed. The dissenter in *Stolk* urged this point when he argued that the statute required only that the home have been used as a personal residence and not that it be the taxpayer's personal residence at the time of the sale. *Stolk v. Commissioner*, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964). A counter argument would be that the provision is analogous to a deduction, and that deductions are a matter of legislative grace and should be construed narrowly. See *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593, *reh'g denied*, 320 U.S. 809 (1943).

tion of capital gains on the sale of a residence.<sup>52</sup> Although the hardship was particularly acute due to mobilization in World War II, Congress did not limit the statute's application to cases of involuntary relocation.<sup>53</sup>

Section 1034 defers recognition of gain whenever a taxpayer sells property "used by him as a principal residence" and then "within a period beginning two years before the date of such sale and ending two years after such date" the taxpayer purchases property and uses it "as his principal residence."<sup>54</sup> Taxpayers must replace their former residences and occupy the new ones within the specified time frames; the Internal Revenue Service lacks authority to extend the time periods.<sup>55</sup> If the purchase price of the new residence exceeds the selling price of the old residence, deferral of gain recognition is mandatory.<sup>56</sup> The statute preserves future gain recognition by reducing the basis of the taxpayer's new principal residence in an amount equal to the gain not recognized.<sup>57</sup>

When married taxpayers sell their residence and acquire a new home, application of section 1034 is mandatory. However, a husband and wife may elect to have section 1034 apply to them even though the former residence was owned jointly and the new principal residence is owned separately (for example, as tenants in common).<sup>58</sup> Similarly, the taxpayers may hold their former residence separately and their new residence jointly if they consent to have the provision apply to them. Taxpayers who divorce, sell their former residence, and acquire separate residences must defer gain on their separate shares of the proceeds from selling the old residence.<sup>59</sup>

Special provisions apply to members of the United States Armed Forces. Members of the armed forces serving on active duty have up to four years to acquire a new principal residence after selling their former principal residence.(FMCRA)<sup>60</sup> Additionally, service members serving outside the United States have up to eight years to acquire a new residence.<sup>61</sup> Aside from these

<sup>52</sup> 97 CONG. REC. 6961 (1951) (statement of Mr. Forand).

<sup>53</sup> H.R. REP. NO. 586, 82d Cong., 1st Sess. (1951), reprinted in 1 SEIDMAN, *supra* note 3, at 1604. See also S. REP. NO. 781, 82d Cong., 1st Sess. (1951), reprinted in 2 SEIDMAN, *supra* note 3, at 1606.

<sup>54</sup> I.R.C. § 1034(a) (1988). As initially enacted, the period allowed for replacing the residence was only one year. Revenue Act of 1951, 65 Stat. 452, 494-97 (1951). The Tax Reduction Act of 1975 expanded the period for replacement to 18 months. Tax Reduction Act of 1975, 89 Stat. 26, 32 (1975). The legislative history of the Act does not discuss the reasons for the change. The Revenue Act of 1978 made another substantial change that benefitted taxpayers. Revenue Act of 1978, 92 Stat. 2763, 2870-71 (1978). Before the 1978 Amendment, taxpayers could not, even if required to relocate for reasons of employment, take advantage of the tax deferral provision if they had used it within the preceding 18-month period. Under the amended provision, taxpayers were required to defer gain recognition if the sale was in connection with "the commencement of work . . . at a new principal place of work." *Id.* Congress enacted the bill during a period of rapid increase in value of homes and considered it necessary to offset the hardship that taxation of such inflation-related growth would cause. S. REP. NO. 95-1263, 95th Cong., 2d Sess. 199 (1978), reprinted in 1978 U.S.C.C.A.N. 6761, 6962. The Economic Recovery Tax Act of 1981 expanded the period for replacing the former residence from 18 months to two years. Economic Recovery Tax Act of 1981, 95 Stat. 173, 197 (1981). The legislative history does not discuss the reasons for the change.

<sup>55</sup> Priv. Ltr. Rul. 88-23-005 (Feb. 25, 1988) (denying a request for an extension from a service member who had been stationed in Germany); *Bayley v. Commissioner*, 35 T.C. 288 (1960) (taxpayer must own and occupy the new residence within the statutory period). Actual occupancy of the new residence within the statutory time frames is an absolute requirement. The new residence, however, may be anywhere; it need not be in the United States. Rev. Rul. 71-495, 1971-2 C.B. 311; Priv. Ltr. Rul. 71-05-120560A (May 12, 1971).

<sup>56</sup> Treas. Reg. § 1.1034-1(a) (as amended in 1979). See also H.R. REP. NO. 586, 82d Cong., 1st Sess. (1951) reprinted in 1 SEIDMAN, *supra* note 3, at 1605. See also S. REP. NO. 781 (Supp.), 82d Cong., 1st Sess. (1951), reprinted in 1 SEIDMAN, *supra* note 3, at 1607.

The one exception to its mandatory use is when an eligible taxpayer elects to exclude gain under section 121. *Robarts v. Commissioner*, 103 T.C. 72 (1994). See also Treas. Reg. § 1.121-5(g) (as amended in 1979) (acknowledging that section 121 may be elected in lieu of or in addition to section 1034).

<sup>57</sup> I.R.C. § 1034(e) (1994).

<sup>58</sup> *Id.* § 1034(g); Treas. Reg. § 1.1034-1(f) (as amended in 1979).

<sup>59</sup> Rev. Rul. 74-250, 1974-1 C.B. 202; *George S. Hall*, 35 Tax Ct. Mem. Dec. (CCH) 1399, 1407 (1976), *rev'd on other grounds*, 595 F.2d 1059 (5th Cir. 1979). I.R.C. § 6013(d)(3) imposes joint and several liability on a husband and wife who file a joint return. Therefore, should one spouse fail to acquire a replacement home within the required period, the I.R.S. can hold the other spouse responsible for paying the tax in full (with interest and penalties). *Murphy v. Commissioner*, 103 T.C. 111 (1994). The taxpayers must file an amended joint return and may not file separate amended returns to correct an error of this nature. For the procedure to file a joint amended return when one spouse refuses to sign, see Rev. Rul. 80-5, 1980-1 C.B. 284. To defer gain, each must still consider the former home their principal residence. If one spouse has abandoned or is barred from using the marital home as a residence, that spouse will not be allowed to defer that spouse's share of the gain on the marital home. *Perry v. Commissioner*, 67 Tax Ct. Mem. Dec. (CCH) 3035 (1994).

<sup>60</sup> I.R.C. § 1034(h)(1) (1994). In effect, this provision suspends the period required to replace the principal residence while the member is on active duty, but only to a maximum of four years. For example, if the taxpayer both entered the military and sold a principal residence on January 1, 1996, and then was discharged on December 31, 1996, the taxpayer would have two years to purchase a new residence (until December 31, 1998). The running of the period for replacement was suspended for the 12 months on active duty, leaving the full two years to run. On the other hand, if the service member served for three years, he would only have 12 months left to reacquire a new residence. See Treas. Reg. § 1.1034-1(g)(1) (as amended in 1979).

Section 1034(h) was added in 1952 to benefit taxpayers serving on active duty during the Korean conflict. S. REP. NO. 1823, 82d Cong., 2d Sess. (1952); H.R. REP. NO. 2262, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S.C.C.A.N. 2298. The *Congressional Record* does not reflect that any substantive debate occurred in response to this initiative.

<sup>61</sup> I.R.C. § 1034(h)(2) (1988). The replacement home may be either within or without the United States. Rev. Rul. 71-495, 1971-2 C.B. 311; Priv. Ltr. Rul. 71-05-120560A (May 12, 1961).

special provisions, military status affords no other special considerations.<sup>62</sup>

### Section 121

The Revenue Act of 1964<sup>63</sup> added section 121. Congress enacted it to ameliorate "an undesirable burden on the elderly."<sup>64</sup> Congress perceived this burden to arise, in part, when an elderly taxpayer who no longer needed a large family home purchased a new residence for the sole purpose of deferring recognition of income from the sale of the former residence.<sup>65</sup> Additionally, Congress believed that many elderly taxpayers needed the income derived from the sale of the family home to assist them in meeting their financial obligations.<sup>66</sup> Congress has regularly increased the scope of section 121's coverage.<sup>67</sup>

Section 121 allows taxpayers who are fifty-five or older on the date they sell their principal residence to exclude up to \$125,000 of gain from their gross income.<sup>68</sup> To qualify for the

section 121 exclusion, the taxpayer must have owned and used the home as a principal residence for three of the five years preceding the sale.<sup>69</sup>

To determine whether the property qualifies for the exclusion, one looks to the definition of principal residence set out in section 1034.<sup>70</sup> The same case-by-case facts and circumstances analysis that applies to section 1034 also applies to section 121.<sup>71</sup> Unlike section 1034, however, the Treasury Regulation implementing section 121 requires the taxpayer to actually occupy the residence during the statutory period.<sup>72</sup> This requirement may cause the difficult cases that arise under section 1034 interpreting "principal residence" (such as where the taxpayer accepts employment in a different city, rents the old home, fully expects to reoccupy the old home, and therefore claims it as a principal residence when sold) not to arise under section 121.

This regulation, however, may not be valid.<sup>73</sup> Congress directed that the same test for principal residence that applies to

<sup>62</sup> *Houlette v. Commissioner*, 48 T.C. 350, 357 (1967). In *Houlette*, the taxpayer argued that his military status compelled him to leave his residence and that this involuntary absence did not cause him to abandon his residence. *Id.* The court rejected his argument, but noted that it would be more compelling if he had not repeatedly attempted to sell his house and if he had intended to return to it. *Id.* Military taxpayers who have not repeatedly attempted to sell their former residences and desire to defer gain under section 1034 might point to additional facts and circumstances to argue that they retain their old residence while away from it on military orders. For example, the Soldier's and Sailor's Civil Relief Act provides that military members retain their old tax home and do not acquire a new one when their presence in a new state is solely in accordance with military orders. 50 U.S.C. App. § 574 (1988). The Joint Federal Travel Regulations limit the entitlement of some service members for shipment of household goods on separation from the service to a point no further than their home of record when entering the service. 1 Joint Fed. Travel Regs. ¶ U5125 (1 Jan. 1987). This could serve as additional proof that service members retain their old home as their principal residence. See also 37 U.S.C. § 411G (West Supp. 1995) (pertaining to transportation allowances for one who voluntarily extends a tour of overseas service). See *infra* notes 96-128 and accompanying text.

<sup>63</sup> Revenue Act of 1964, 78 Stat. 19, 38 (1964).

<sup>64</sup> S. REP. NO. 830, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 1673, 1723.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> As originally enacted in 1964, section 121 applied only to taxpayers who had attained the age of 65, and it provided limited benefits to homes sold with an adjusted sales price of over \$20,000. Revenue Act of 1964, 78 Stat. 19, 38 (1964). It also required taxpayers to use the home as a principal residence in at least five of the preceding eight tax years. The Revenue Act of 1978 made taxpayers who had attained the age of 55 eligible to use the exclusion, and it decreased the required period for use as a personal residence to three of the preceding five years ending on the date of sale. Revenue Act of 1978, 92 Stat. 2763, 2869-70 (1978). The Act also allowed taxpayers to exclude up to \$100,000 of gain from the sale of a principal residence from income. Congress made the change because it considered "the current dollar limits and age restrictions [to be] unrealistic in view of increased housing costs and lower retirement ages." H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 134 (1978), reprinted in 1978 U.S.C.C.A.N. 7046, 7160. In 1981, the amount excludable was increased to \$125,000. Economic Recovery Tax Act of 1981, 95 Stat. 172, 197 (1981).

<sup>68</sup> I.R.C. § 121 (1988).

<sup>69</sup> *Id.* § 121(a)(2).

<sup>70</sup> "For purposes of the exclusion contained in the bill, the definition of a taxpayer's principal residence is that presently used for the rollover provision (sec. 1034)." H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 134 (1978), reprinted in 1978 U.S.C.C.A.N. 7046, 7160; S. REP. NO. 95-1263, 95th Cong., 2d Sess. 197 (1978), reprinted in 1978 U.S.C.C.A.N. 6761, 6960. Similarly, Treasury Regulation § 1.121-3 provides: "The term 'principal residence' has the same meaning as in section 1034 . . ." Treas. Reg. § 1.121-3(a) (as amended in 1979).

<sup>71</sup> S. REP. NO. 95-1263, 95th Cong., 2d Sess. 197 (1978), reprinted in 1978 U.S.C.C.A.N. 6761, 6960.

<sup>72</sup> Treas. Reg. § 1.121-1(c) (as amended in 1979). The regulation allows "short temporary absences such as for vacation or other seasonal absence (even though the property is rented)." Treas. Reg. § 1.121-1(c) (as amended in 1979). However, a "1-year sabbatical leave . . . may not be included in determining [whether] the home was used as a principal residence for the required period." *Id.*

<sup>73</sup> The regulation is an interpretive regulation. That is, the Treasury's authority for promulgating it comes from its general grant of authority to promulgate rules (I.R.C. § 7805 (1988 & Supp. V 1993)), rather than from a specific grant of authority from Congress. Courts are not bound by such interpretations, and will consider legislative history to determine whether the interpretation is reasonable. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

section 1034 will also apply to section 121.<sup>74</sup> Some of the important cases that defined principal residence for the purpose of section 1034 arose long before the Treasury Department promulgated the implementing regulation.<sup>75</sup> The language in section 1034 is virtually identical to the language in section 121.<sup>76</sup> Some legislative history, however, suggests that the Treasury Department's interpretation is consistent with congressional intent.<sup>77</sup>

No reported decision indicates that any taxpayer has ever challenged this regulation. One Tax Court decision acknowledged that it may be possible for a taxpayer to rent the home, yet still claim it as a residence.<sup>78</sup> That Tax Court did not rule on the issue because the taxpayer was not fifty-five when she vacated her residence.<sup>79</sup> Unless the taxpayer made a section 121 election on or before July 26, 1978, section 121 is available for use only once in a lifetime.<sup>80</sup> The taxpayer may, however, use it in addition to or in lieu of section 1034.<sup>81</sup>

### Section 1001

If a residence is sold at a gain and the deferral provisions of section 1034 and the nonrecognition provisions of section 121 do not apply, the gain will reflect gross income that is includable

under section 61(a)(3).<sup>82</sup> Section 1001 provides that gain from the sale of property is "the excess of the amount realized . . . over the adjusted basis."<sup>83</sup> Although a taxpayer's rental of the residence may constitute a trade or business and may allow the taxpayer to take an ordinary loss deduction should the property sell at a loss,<sup>84</sup> the converse is not necessarily true. Property used in a trade or business that is sold at a gain often generates capital gain, rather than ordinary gain. Under section 1231, when property used in a trade or business is sold at a gain, and the sum of trade or business property sold by the taxpayer at a gain during the year exceeds the sum of trade or business property sold by the taxpayer at a loss during the year, the gains will be treated as long-term capital gains.<sup>85</sup> Under section 1(h), the maximum tax imposed on capital gains is twenty-eight percent.<sup>86</sup>

### The Initial Search for a Workable Definition

To qualify for either the one-time exclusion of section 121 or the deferral treatment of section 1034, a taxpayer must use the property as his principal residence. Conversely, to take a loss deduction, should he sell at a loss, or to take most deductions for expenses related to the property, the taxpayer must not be using the property as his principal residence.

<sup>74</sup> See *supra* note 70.

<sup>75</sup> The Treasury Regulation was issued in 1965. *Trisko v. Commissioner*, which allowed a taxpayer to claim property as his personal residence even though he had rented it for over three years, was decided in 1957. *Trisko v. Commissioner*, 29 T.C. 515 (1957).

<sup>76</sup> Section 1034 applies when property "used by the taxpayer as his principal residence is sold by him." I.R.C. § 1034(a) (1988). Section 121 applies to property "owned and used by the taxpayer as his principal residence." I.R.C. § 121(a)(2) (1988).

<sup>77</sup> Mr. Kuchel stated that the bill applies to a taxpayer who "has lived in the home for at least 5 of the past 8 years." 109 CONG. REC. 14411 (1963). (Congress has since shortened the period to three of five years.) Mr. Hartke stated that the bill applies to taxpayers "who have owned and occupied their homes for a period of 5 years or more." 110 CONG. REC. 6506 (1964). The statute, however, does not contain either the words "lived in" or the word "occupied." Instead, it uses the same words found in section 1034: "used by the taxpayer as his principal residence."

<sup>78</sup> *Green v. Commissioner*, 64 Tax Ct. Mem. Dec. (CCH) 369 (1992).

<sup>79</sup> *Id.* at 373. The statute requires only that the taxpayer be fifty-five years old before the date of the sale. I.R.C. § 121(a)(1) (1988). One could argue that the taxpayer did not need to be fifty-five when she vacated the premises and that she should have received the benefit of this section. Nevertheless, the case was not appealed.

<sup>80</sup> I.R.C. § 121(b) (1988).

<sup>81</sup> A taxpayer election under section 121 is the one exception to the rule that application of section 1034 is mandatory to taxpayers who satisfy its requirements. *Roberts v. Commissioner*, 103 T.C. 72 (1994). See also *Treas. Reg. § 1.121-5(g)* (as amended in 1979) (acknowledging that section 121 may be elected in lieu of or in addition to section 1034).

<sup>82</sup> I.R.C. section 61 defines gross income. It provides that "gross income means all income from whatever source derived, including (but not limited to) the following items . . . [g]ains derived from dealings in property." I.R.C. 61(a)(3) (1988).

<sup>83</sup> I.R.C. § 1001(a) (1988 & Supp. V 1993).

<sup>84</sup> See *supra* notes 39-50 and accompanying text.

<sup>85</sup> I.R.C. § 1231 (1988).

<sup>86</sup> I.R.C. § 1(h) (Supp. V 1993).

Some of the early cases decided under section 1034 looked to common law definitions of principal residence.<sup>87</sup> A frequently cited case provided the following definition:

It does not mean . . . one's permanent place of abode, where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been established, but means . . . one's actual home in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite period of time.<sup>88</sup>

A similar definition was provided by the United States Court of Appeals for the Seventh Circuit:

Residence has been defined to be a place where a person's habitation is fixed, without any present intention of removing therefrom. It is lost by leaving the place where one has acquired a permanent home and removing to another place *animo non revertendi*, and is gained by remaining in such new place *animo manendi*.<sup>89</sup>

In other words, taxpayers need not intend to live somewhere forever for the property to be their principal residence. They need only intend to live there, and only there, for the present. They may be absent from their principal residence, but so long as they intend to return, it still remains their principal residence. And finally, they may abandon the property as their principal residence and acquire a new one.<sup>90</sup> Accordingly, taxpayers can have several residences, but only one principal residence at a given time.<sup>91</sup>

Although these generalizations are accurate, they do not describe the circumstances to which they apply. After struggling to

create a definition of principal residence, the Tax Court realized it was hopeless. In 1975, the Tax Court summarized earlier cases by declaring that "[they] do not establish a rule of law but merely identify facts and circumstances deemed relevant in those cases."<sup>92</sup> The Tax Court abandoned its quest for a workable definition and returned to the case-by-case approach dictated by the legislative history and by the Treasury Regulation. The remainder of this article analyzes the factors that are likely to lead a court to conclude that property is or is not a principal residence.

### Rental

The legislative history indicates that a taxpayer may temporarily rent an old residence and still use section 1034 to defer recognition of gain from the sale of that residence.<sup>93</sup> Similarly, the Treasury Regulation provides:

Whether or not property is used by the taxpayer as his [principal] residence . . . depends upon all the facts and circumstances . . . including the good faith of the taxpayer. The mere fact that property is, or has been, rented is not determinative that such property is not used by the taxpayer as his principal residence.<sup>94</sup>

Because use of section 1034 is mandatory when it is applicable,<sup>95</sup> whether one satisfies its requirements is critical. Courts have, under two circumstances, allowed taxpayers to claim property as their principal residence, even though they rented it for a period of time before they sold it: (1) the taxpayers rent temporarily with intent to return to the residence; and (2) the taxpayers rent temporarily because a slow real estate market made it impossible to sell the home. Each circumstance requires a case-by-case determination. Accordingly, understanding what facts and circumstances the courts have looked to is critical in advising a client.

<sup>87</sup> See *Stolk v. Commissioner*, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964); *Houlette v. Commissioner*, 48 T.C. 350, 356 (1967).

<sup>88</sup> *Shaeffer v. Gilbert*, 73 Md. 66, 71 (1890).

<sup>89</sup> *In re Gameau*, 127 F. 677, 679 (7th Cir. 1904), *cited with approval in Stolk v. Commissioner*, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964).

<sup>90</sup> One of the earliest cases deciding the question of principal residence for the purpose of section 1034 (then 112(n)(1)) involved such an abandonment. *Biltmore Homes, Inc. v. C.I.R.*, 288 F.2d 336 (4th Cir. 1961). In *Biltmore*, the taxpayer had lived with his mother in a home he owned until he married in 1949 and moved to a rented home. *Id.* at 342. His mother continued to live in his former home until he sold it in 1951. The Fourth Circuit determined that he had abandoned his former principal residence. Therefore, he could not defer recognition of gain. *Id.*

<sup>91</sup> *Petition of McLaughlin*, 1 F.2d 5, 7 (1st Cir. 1924).

<sup>92</sup> *Clapham v. Commissioner*, 63 T.C. 505, 509 (1975).

<sup>93</sup> H.R. REP. NO. 586, 82d Cong., 1st Sess. (1951), *reprinted in 1 SEIDMAN, supra note 3*, at 1605. See also S. REP. NO. 781 (Supp.), 82d Cong., 1st Sess. (1951), *reprinted in 1 SEIDMAN, supra note 3*, at 1607; Report—Staff on Joint Committee on Internal Revenue Taxation, 82d Cong., 1st Sess. (1951), *reprinted in 1 SEIDMAN, supra note 3*, at 1608.

<sup>94</sup> Treas. Reg. § 1.1034-1(c)(3) (as amended in 1979).

<sup>95</sup> See *supra* note 56 and accompanying text.

### Intent to Return to the Residence

If the taxpayer rents his old home, but intends eventually to return to it, the rental will not cause it to lose its character as a principal residence. In *Trisko v. Commissioner*,<sup>96</sup> the Tax Court ruled that a taxpayer who rented his home for over three years could, nevertheless, still claim it as his principal residence and use section 1034 to defer recognition of gain. The *Trisko* court focused on more than Trisko's statement that he always intended to return. It placed particular emphasis on his issuing leases for periods concurrent with his overseas employment contract, his renting at below market rates because he was more interested in having a responsible tenant than obtaining the highest income, and his inability to reoccupy being caused by rent control laws rather than his own action.<sup>97</sup> In view of these facts and circumstances, the court ruled "that the property sold by the taxpayer was used by him as a residence 'in contradistinction to property used in trade or business and property held for the production of income.'"<sup>98</sup> As is true of all of these cases, the decision was "limited strictly to the facts here present."<sup>99</sup>

Ten years later, in *Houlette v. Commissioner*,<sup>100</sup> the Tax Court reached a contrary conclusion in a case with slightly different facts. Houlette, a service member, initially attempted to sell his home (prior to his reassignment from Portland, Oregon, to Alaska) and, being unsuccessful, rented it on a two-year lease.<sup>101</sup> He extended the lease several times (for a total rental period of six years) and usually attempted to sell the property each time the lease expired.<sup>102</sup> Although he had purchase offers, he did not accept any because he would have incurred a loss.<sup>103</sup> Houlette claimed the

property was his personal residence when he sold it.<sup>104</sup> The Tax Court, however, ruled that he had abandoned his property as a personal residence no later than three years after he first rented it; this date coincided with his transfer from Alaska to Astoria, Oregon.<sup>105</sup> Unlike Trisko, Houlette produced no evidence showing he intended to reoccupy his former residence.<sup>106</sup> Additionally, the court further distinguished *Trisko* by emphasizing that Houlette consistently attempted to sell his former residence.<sup>107</sup>

These cases demonstrate that the taxpayers' good faith intent (bona fides) is critical. To establish good faith intent, a taxpayer must do more than contend that he planned to return to his former residence. The facts and circumstances must also support the contention. Although the taxpayers in *Trisko* and *Houlette* each stated they intended to return to their former residences, the decisive distinguishing features between them was that Houlette had continuously attempted to sell his residence whereas Trisko had not. Consequently, the *Trisko* court concluded that Trisko's home remained his principal residence and the *Houlette* court concluded that Houlette's home was no longer his principal residence. Although renting at below market rates was found to be a factor demonstrating intent to return in *Trisko*, it was not a critical factor.<sup>108</sup>

While intent to return is the critical feature in these cases, other cases have looked to additional factors to establish the taxpayer's intention. A series of memorandum decisions<sup>109</sup> illustrate factors courts have considered relevant. The first was *Demeter v. Commissioner*,<sup>110</sup> a 1971 ruling that section 1034 was not available to taxpayers who rented their home for over thirteen

<sup>96</sup> 29 T.C. 515 (1957).

<sup>97</sup> *Id.* at 516-17.

<sup>98</sup> *Id.* at 520.

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

<sup>100</sup> *Houlette v. Commissioner*, 48 T.C. 350 (1967).

<sup>101</sup> *Id.* at 351-52.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* For a discussion of whether such losses are deductible, see *infra* text accompanying notes 191-203.

<sup>104</sup> *Houlette*, 48 T.C. at 352-53.

<sup>105</sup> *Id.* at 357. The court did not discuss why the abandonment occurred then instead of when the taxpayer first vacated the residence three years earlier. The court may have given some deference to the fact that he left Portland pursuant to military orders. *But see supra* note 62 and accompanying text.

<sup>106</sup> *Id.* at 357-58.

<sup>107</sup> *Id.* at 355-58.

<sup>108</sup> Other cases have recognized that taxpayers may rent at regular market rates and that the home will not lose its character as a residence. See *infra* notes 144-52 and accompanying text.

<sup>109</sup> A memorandum opinion does not decide new issues of law. It reflects a purely factual determination or involves a settled question of law. COMMERCE CLEARING HOUSE, PROCEDURE AND PRACTICE BEFORE THE TAX COURT § 404 (1972).

<sup>110</sup> 30 Tax Ct. Mem. Dec. (CCH) 863 (1971).

years because they failed to demonstrate they ever intended to return to it.<sup>111</sup> The taxpayers in *Demeter* always lived in rental housing after vacating their former residence and had rejected fair market value purchase offers for their former residence.<sup>112</sup> They also were in the process of renovating the residence (they said for the purpose of returning to it) when they accepted an unsolicited purchase offer.<sup>113</sup> The court looked at their long absence from the property, their renting at fair market value, their voting in another jurisdiction, and their willingness to accept an unsolicited purchase offer as proof that they had abandoned it as their principal residence.<sup>114</sup> Considering these facts, the court viewed their statement they intended to return as "self-serving."<sup>115</sup>

The *Demeter* court noted that "the facts and circumstances must be exceptional and unusual to permit the conclusion that a principal residence is being used by the taxpayer at the time of sale if he is not in possession thereof and occupying same at the time." In view of the legislative history and the Treasury Regulation that allow temporary rental, this assertion is inaccurate. The exceptional case is the one that allows lengthy rental, followed by sale, to qualify for deferral of gain under section 1034.<sup>116</sup> *Trisko* was one such exceptional case;<sup>117</sup> another was *Barry v. Commissioner*.<sup>118</sup>

The taxpayer in *Barry* was a service member who was reassigned from Maryland to Germany.<sup>119</sup> He rented his Maryland

home (the only home he had ever retained after being reassigned), at apparently a fair market rental, and took depreciation deductions on it for over five years (he lived in United States government provided housing in Germany).<sup>120</sup> He had intended to return to Maryland, but on his retirement from the military he received a job offer as an Assistant Dean at the University of Denver College of Law.<sup>121</sup> The court found that "the facts and circumstances . . . including all the bona fides of the [taxpayer], [demonstrate that he] always considered the [Maryland] home to be his principal residence and at all times intended to occupy this home."<sup>122</sup>

Other taxpayers have, like the taxpayers in *Demeter*, failed to meet their burden of proof. In *Stucchi v. Commissioner*,<sup>123</sup> the taxpayers rented their Massachusetts home for more than three years while they lived in another state. When they returned to Massachusetts, they had a chance to reoccupy their former residence but instead leased it to another tenant.<sup>124</sup> When they later sold this residence, the Tax Court ruled that it did not qualify for deferral of gain under section 1034.<sup>125</sup>

In *Rogers v. Commissioner*,<sup>126</sup> a service member who rented his Virginia home for about seven years while assigned in Alabama was found to have abandoned his home as a principal residence. Rogers's own statement made this an easy case for the court to decide. He was on record as saying that he "had no inten-

<sup>111</sup> *Id.* at 865.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 864-65.

<sup>115</sup> *Id.* Other courts have made similar remarks. See *Houlette v. Commissioner*, 48 T.C. 350, 353 (1967).

<sup>116</sup> For example, the Tax Court had no difficulty in applying section 1034 to a taxpayer who attempted to rent his former home in Washington D.C. for nearly six months before he sold it. *Andrews v. Commissioner*, 41 Tax Ct. Mem. Dec. (CCH) 1533 (1981). The taxpayers in *Andrews* were uncertain whether they would be returning to D.C. and "it was certainly appropriate for them to retain ownership of the [home], and so long as they owned it, it was reasonable to attempt to derive some income from the rental of it." *Id.* at 1545. Thus, it is well settled (since this appears in a memorandum decision, see *supra* note 109) that taxpayers will qualify for section 1034 treatment, even though they have rented their residences at market rates, provided they had intended to return. What is more difficult for taxpayers to establish is that they intended to return when their absence is prolonged.

<sup>117</sup> See *supra* notes 96-99 and accompanying text.

<sup>118</sup> 30 Tax Ct. Mem. Dec. (CCH) 757 (1971).

<sup>119</sup> *Id.* at 758.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 760.

<sup>123</sup> 35 Tax Ct. Mem. Dec. (CCH) 1052 (1976).

<sup>124</sup> *Id.* at 1053.

<sup>125</sup> *Id.*

<sup>126</sup> 45 Tax Ct. Mem. Dec. (CCH) 318 (1982).

tion of ever returning to [he] indeed [he] hoped he would never be stationed in the Washington, D.C. area again."<sup>127</sup>

The more factors a taxpayer can use to corroborate an expression of intention, the stronger the case will be. Where the taxpayer votes, pays taxes, registers vehicles, has a drivers license, maintains bank accounts, maintains church membership, and many other factors will all be relevant to verify an intention to return to the former residence.<sup>128</sup>

Few taxpayers are likely to consider these factors until they actually sell their home. An attorney, aware that a client is moving away temporarily, should ask about the client's intentions concerning the residence. If the client has planned for this in advance, the client will be better prepared to defend their position if the former residence is sold without reoccupying it.

#### *Intent to Rent Temporarily Pending Sale*

Sometimes a taxpayer may want to sell his home, but a slow real estate market precludes him from doing so. As a consequence, he moves out and begins to rent the residence to preclude financial ruin caused by paying the mortgage on the former residence until he eventually sells it. The rental is a stopgap measure until the real estate market improves and the taxpayer is able to sell the former residence. In these cases, the taxpayer never intends to return to his former residence and, it would seem, has abandoned it as his principal residence. Nevertheless, Congress provided

that a taxpayer may, under appropriate facts and circumstances, rent his residence temporarily and still treat the residence as his principal residence when he eventually sells it.<sup>129</sup>

The term residence is used in contradistinction to property used in a trade or business and property held for the production of income. Nevertheless, the mere fact that the taxpayer temporarily rents out either the old or the new residence may not, in the light of all of the facts and circumstances in the case, prevent the gain from being recognized.<sup>130</sup>

Congress did not, however, indicate what constitutes a temporary rental or what facts and circumstances cause the rented residence to retain its character as a principal residence.<sup>131</sup> A period of temporary rental may extend beyond the statutory period for replacing the former residence because the "replacement period is measured from the date of sale of the old residence (not the date it is vacated) to the purchase of a new one."<sup>132</sup>

*Aagaard v. Commissioner*<sup>133</sup> was the first case to address the question of temporary rental of a residence. Without discussing the facts and circumstances of the rental,<sup>134</sup> the Tax Court concluded that the taxpayer's claiming his home remained his principal residence, despite his temporary rental of it, was clearly within the intent of Congress and allowed deferral of gain recognition.<sup>135</sup>

<sup>127</sup> *Id.* at 321. Another reason was that neither financial circumstances nor a slow real estate market compelled him to rent. See *infra* notes 129-165 and accompanying text. The taxpayer in *Ross v. Commissioner* went even further in assisting the Court to determine that the home was no longer his principal residence. Ross stipulated that the old residence he had rented for over eight years was not his principal residence at the time of its sale. *Ross v. Commissioner*, 56 Tax Ct. Mem. Dec. (P-H) 2698 (1987). The taxpayer in *Ross* was seeking to avoid imposition of the alternative minimum tax. At the time, capital gains deductions, other than sale of a principal residence determined under section 1034, were tax preference items. I.R.C. § 57(b)(9) (superseded).

<sup>128</sup> See *Thomas v. Commissioner*, 92 T.C. 206, 245 (1989).

<sup>129</sup> Indeed, this is consistent with the intent of section 1034. It provides tax deferral when an old residence is sold and a new residence acquired. This typical case involves an abandoning of the former residence, and the intention to abandon is formed when the property is listed for sale. See *Clapham v. Commissioner*, 63 T.C. 505, 510 n.6 (1975).

<sup>130</sup> S. REP. NO. 781 (Supp.), 82d Cong., 1st Sess. (1951), reprinted in 1 SEIDMAN, *supra* note 3, at 1607. See also H.R. REP. NO. 586, 82d Cong., 1st Sess. (1951) (containing the same language), reprinted in 1 SEIDMAN, *supra* note 3, at 1605; Report—Staff on Joint Committee on Internal Revenue Taxation, 82d Cong., 1st Sess. (1951) ("The Taxpayer is not required to have been actually occupying his old residence on the date of its sale. Relief is to be available even though the taxpayer moved into his new residence and rented the old one temporarily before its sale."), reprinted in 1 SEIDMAN, *supra* note 3, at 1608 (1954); S. REP. NO. 781, 82d Cong., 1st Sess. (1951) (containing the same language as the Joint Committee), reprinted in 1 SEIDMAN, *supra* note 3, at 1606.

<sup>131</sup> The case of *Green v. Commissioner* presented an unusual fact and circumstance that allowed a rented residence to retain its status as a residence. *Green v. Commissioner*, 64 Tax Ct. Mem. Dec. (CCH) 369 (1992). The taxpayer in *Green* owned property jointly with her boyfriend. When their relationship became strained, she moved out and a court directed her boyfriend (after he refused to sell the property) to pay her rent. Despite taking depreciation deductions, the Tax Court ruled "that her predominate motive was to sell that property at the earliest possible date rather than hold it for rental income." *Id.* at 373.

<sup>132</sup> *Clapham v. Commissioner*, 63 T.C. 505, 511 n.11 (1975). Once a taxpayer purchases a new residence, the statutory time afforded for selling the old one starts to run. Therefore, in the usual case, where a taxpayer buys a new principal residence and is required to rent the old one, he would have only two years to replace it.

<sup>133</sup> 56 T.C. 191 (1971).

<sup>134</sup> *But See Clapham v. Commissioner*, 63 T.C. 505, 510 (1975) (which indicates that *Aagaard* rented his residence "briefly prior to sale with no intention of returning to it).

<sup>135</sup> *Aagaard*, 56 T.C. at 202-03.

*Clapham v. Commissioner*<sup>136</sup> was the first case to provide an analysis of this issue. The taxpayer in *Clapham* was transferred from San Francisco to Los Angeles.<sup>137</sup> In the months preceding his transfer, he and his wife attempted to sell their residence.<sup>138</sup> When their sales efforts proved unsuccessful, they leased the property to prevent financial hardship.<sup>139</sup> Some three years later they sold their former residence (accepting the first offer they received), and purchased a new home (they had been living in a rental home during this period).<sup>140</sup> The court concluded that under all the facts and circumstances the home was still their principal residence.<sup>141</sup> The court stressed that their "dominant motive was to sell the property at the earliest possible date rather than to hold the property for the realization of rental income."<sup>142</sup> This conclusion was supported by their receiving no purchase offers for the property and their renting only to preclude financial hardship.<sup>143</sup>

*Bolaris v. Commissioner*<sup>144</sup> presented facts similar to *Clapham*.<sup>145</sup> The Bolarises built a new residence, and about three months before occupying it they listed their current residence for sale.<sup>146</sup> They received no purchase offers before they took occupancy of their new residence, and decided to rent their former

residence (at a fair-market rate, on a month-to-month lease) to be able to continue paying their mortgage.<sup>147</sup> The Bolarises always intended to sell the home and "had no expectation or intention of making a profit from the rental."<sup>148</sup> They sold the home approximately one year after they entered into their first rental contract.<sup>149</sup> The Tax Court had little difficulty in determining that section 1034 applied to the transaction.<sup>150</sup> However, because the Tax Court determined the rental was merely temporary, it also ruled that the property was not held for the production of income and that the taxpayer could not take depreciation deductions or miscellaneous deductions for insurance and maintenance under section 212 ("Expenses for the Production of Income") (FMCRA).<sup>151</sup> The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed and held that taxpayers could hold a residence for the production of income and still have it retain its character as a principal residence.<sup>152</sup>

*Bolaris* presented a difficult question. On the one hand, section 1034 was meant to be a relief provision.<sup>153</sup> On the other hand, it was only to be available when a principal residence was replaced by another principal residence. The legislative history

<sup>136</sup> 63 T.C. 505 (1975).

<sup>137</sup> *Id.* at 506.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 507.

<sup>141</sup> *Id.* at 512.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Contrast this with *Houlette v. Commissioner*. See *supra* notes 100-107 and accompanying text. Although a key fact in *Houlette* was the taxpayers' determination not to return, they also had offers for their property but rejected them to avoid selling at a loss. Their decision to rent was driven more by business considerations than by other factors, and this business purpose was sufficient to deprive their former residence of its character as a principal residence. The case of *Rogers v. Commissioner* reached a result similar to that obtained in *Houlette*. *Rogers v. Commissioner*, 45 Tax Ct. Mem. Dec. (CCH) 318 (1982). In *Rogers*, the taxpayers rented their former residence for more than six years. They first attempted to sell, and being unsuccessful, they decided to lease. *Id.* at 319. Each time the lease was about to expire, they placed the home on the market for several months. They "presented no evidence that financial circumstances forced them to rent . . . or that the real estate market was depressed." *Id.* at 321. "In fact, it was evidently booming . . ." *Id.* An additional basis for the *Rogers* decision was lack of intent to return. See *supra* notes 126-127 and accompanying text.

<sup>144</sup> 81 T.C. 840 (1983), *aff'd in part and rev'd in part*, 776 F.2d 1428 (9th Cir. 1985).

<sup>145</sup> See *supra* notes 136-143 and accompanying text.

<sup>146</sup> *Bolaris*, 81 T.C. at 842.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 843.

<sup>150</sup> *Id.* at 840.

<sup>151</sup> *Id.* at 850.

<sup>152</sup> *Bolaris v. Commissioner*, 776 F.2d 1428 (9th Cir. 1985).

<sup>153</sup> See *supra* note 51 and accompanying text.

distinguished a residence from "property used in a trade or business and property held for the production of income."<sup>154</sup> Nevertheless, the Ninth Circuit reasoned that because Congress stated that section 1034 could apply even though the taxpayer had temporarily rented his residence and because Congress enacted section 1034 after the *Robinson*<sup>155</sup> decision, "a former residence could qualify for nonrecognition of gain even if the residence was temporarily rented and also qualified as being held for the production of income."<sup>156</sup>

This result was consistent with earlier cases,<sup>157</sup> although neither the Tax Court nor the Ninth Circuit noted this consistency. The *Bolaris* court did comment, however, that their "interpretation [that property could satisfy section 1034 and also be held for the production of income] has never been questioned until this lawsuit."<sup>158</sup> In *Barry v. Commissioner*,<sup>159</sup> a 1971 case, the Commissioner argued that a taxpayer who took depreciation and expense deductions could not also claim that the property remained his principal residence. In *Bolaris*, the Commissioner advanced a related argument—that is, one who asserts that property is his principal residence cannot also claim that the property is held for the production of income.

To satisfy section 1034, a home that is held for the production of income still must be the taxpayers principal residence. Like the taxpayers in *Clapham*,<sup>160</sup> the taxpayers in *Bolaris* rented only because they could not find a buyer for their home and they accepted the first offer they received. Had the Bolarises rented for some other reason (other than temporary absence with the intent to return),<sup>161</sup> a different result would have occurred. Additionally,

to take deductions for depreciation and maintenance expenses, the property must actually be held for the production of income. To be held for the production of income, the taxpayer's "predominant purpose [must be] making a profit."<sup>162</sup> In *Bolaris*, the Ninth Circuit focused on three factors to support the Bolarises' profit motive: "[they] rented their old home at fair market rental, [they] permanently abandoned [their] old home," and "[their] old home offered no elements of personal recreation."<sup>163</sup>

A taxpayer who hopes to take advantage of both section 1034 and section 212 must walk a narrow path. A taxpayer who strays too far toward making a profit may convert the residence from a personal residence (temporarily held for the production of income) to one that is simply property held for the production of income. It must be a personal residence to qualify for treatment under section 1034. If it is not a personal residence and is sold at a gain, the gain will generally be capital in nature. Conversely, a taxpayer must establish that he intended to make a profit to take most deductions related to rented real estate. If the taxpayer does not intend to make a profit, section 183<sup>164</sup> limits deductions to those he could otherwise take (for example, mortgage interest and real estate taxes) and deductions equal to the gross income derived from the property. Consequently, had the Bolarises rented at something less than fair market value (like the taxpayers in *Trisko v. Commissioner*,<sup>165</sup> who rented with the expectation of returning), they would have qualified for section 1034, but section 183 would have restricted the deductions they could have taken related to the rental of their residence. Sometimes, however, the taxpayer may want his residence to lose its character as a principal residence.

<sup>154</sup> See *supra* note 130 and accompanying text.

<sup>155</sup> *Robinson v. Commissioner*, 2 T.C. 305 (1943) (where the Tax Court ruled that a taxpayer could convert her principal residence to property held for the production of income and could deduct expenses incurred in connection with the rental activity).

<sup>156</sup> *Bolaris v. Commissioner*, 776 F.2d 1428, 1432 (9th Cir. 1985).

<sup>157</sup> See *Trisko v. Commissioner*, 29 T.C. 515 (1957).

<sup>158</sup> *Bolaris*, 776 F.2d at 1432. The Commissioner had issued private letter rulings indicating that section 183 limits deductions when the home qualifies for deferral of recognition of gain under section 1034. Priv. Ltr. Rul. 81-32-017 (April 30, 1981).

<sup>159</sup> *Barry v. Commissioner*, 30 Tax Ct. Mem. Dec. (CCH) 757 (1971). See *supra* notes 118-122 and accompanying text.

<sup>160</sup> See *supra* notes 136-143.

<sup>161</sup> See *supra* notes 96-128 and accompanying text.

<sup>162</sup> *Bolaris*, 776 F.2d at 1432. See also *Allen v. Commissioner*, 72 T.C. 28, 33 (1979); *Johnson v. Commissioner*, 59 T.C. 791, 813-24 (1973); *Jasionowski v. Commissioner*, 66 T.C. 312, 19 (1976) (cases involve rental homes). "Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity with the expectation of making a profit." Treas. Reg. § 1.183-2(a) (1972).

<sup>163</sup> *Bolaris*, 776 F.2d at 1433. Renting at a fair market rental is critical to taking deductions under section 212. "[R]enting the residence at its fair market value would normally suggest that the taxpayer had the requisite profit motive." *Bolaris v. Commissioner*, 81 T.C. 840, 849 (1983), *rev'd on other grounds*, 776 F.2d 1428 (1985). Compare *Jasionowski*, *supra* note 162, at 322 ("[V]oluntary acceptance of rent at an amount substantially below fair market rental is a clear indication [that the taxpayers predominant purpose was not to make a profit].").

<sup>164</sup> I.R.C. § 183 (1988 & Supp. V 1993).

<sup>165</sup> See *supra* notes 96-99 and accompanying text.

A taxpayer may convert his personal residence to one held for the production of income and still qualify for deferral of gain under section 1034. However, if it is still his personal residence and he sells it at a loss, he will not be able to take a loss deduction. Sections 165<sup>166</sup> and 262<sup>167</sup> do not allow taxpayers to deduct most expenses related to personal residences. To take a loss deduction and deduct most expenses incurred in operating the former residence, both Treasury Regulation 1.165-9<sup>168</sup> and Treasury Regulation 1.212-1<sup>169</sup> generally require the taxpayer to abandon use of the property as a personal residence.

Some taxpayers may have purchased their homes when values were high and then, due to a declining market, were faced with the prospect of selling at a loss. These taxpayers may want to first convert their personal residence to an income-producing property and sell at a later time. To take a loss deduction, the property must be, at the time of the sale, used in a trade or business or be held in connection with a transaction entered into for profit.<sup>170</sup> Converting a principal residence to trade or business property or to property held in connection with a transaction entered into for profit is complicated by the *Bolaris*<sup>171</sup> decision.

*Bolaris* recognized that a taxpayer can hold a residence for the production of income and still claim it as a principal residence.<sup>172</sup> Nevertheless, as early as 1927, the Supreme Court recognized that taxpayers could convert their residences to property that qualified for profit related deductions.<sup>173</sup>

In determining deductibility, one must distinguish between section 212 and section 165. To satisfy section 212, the taxpayer must incur expenses "for the production of income" or "for the management, conservation, or maintenance of property."<sup>174</sup> To satisfy section 165, the taxpayer must suffer the loss in connection with "a trade or business" or in connection with a "transaction entered into for profit."<sup>175</sup> At first glance, it appears that if property was held for the production of income, it would necessarily entail, at a minimum, a transaction entered into for profit. However, various courts draw distinctions between these two sections of the Internal Revenue Code.<sup>176</sup> Section 212 is easier to satisfy than is section 165.

*Newcombe v. Commissioner* establishes that to satisfy section 212, "[t]he key question . . . is the purpose or intention of the taxpayer in light of all the facts and circumstances."<sup>177</sup> Thus, in determining whether a taxpayer holds property for the production

<sup>166</sup> See *supra* notes 25-34 and accompanying text.

<sup>167</sup> Section 262 disallows deductions for personal, living, and family expenses. I.R.C. § 262 (1988). See also *supra* notes 16-24 and accompanying text. In 1967, the instructions for completing Form 1040 incorrectly allowed taxpayers to deduct losses incurred in selling their house. A taxpayer argued that the I.R.S. was equitably estopped from denying the loss he claimed in accordance with these instructions; he lost. Equitable estoppel does not prevent the Commissioner from correcting mistakes of law. *Elliot v. Commissioner*, 30 Tax Ct. Mem. Dec. (CCH) 1030 (1971).

<sup>168</sup> *Treas. Reg.* § 1.165-9(b) (as amended in 1964) ("If property purchased or constructed by the taxpayer for use as his personal residence is prior to its sale, rented or otherwise appropriated to income-producing purposes, and is used for such purposes up to the time of sale, a loss sustained on the sale of such property shall be allowed as a deduction under section 165(a).").

<sup>169</sup> *Id.* § 1-212-1(h) (as amended in 1975) ("[O]rdinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held by the taxpayer as rental property are deductible even though such property was formerly held by the taxpayer as a home.").

The regulation allows deductions "even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto." *Id.* § 1-212-1(h). Nevertheless, the taxpayer must do more than merely hold property in a declining market to take a deduction. See *Newcombe v. Commissioner*, 54 T.C. 1298, 1302 (1970). "A decline in value during a period while the owner is merely trying to enter into a profit-inspired transaction with the property is regarded as part of the loss incidental to personal use, without which the loss would not have occurred." *Leslie v. Commissioner*, 6 T.C. 488, 493 (1946).

<sup>170</sup> I.R.C. § 165(c) (West Supp. 1995).

<sup>171</sup> *Bolaris v. Commissioner*, 81 T.C. 840 (1983), *aff'd in part and rev'd in part*, 776 F.2d 1428 (9th Cir. 1985). See *supra* notes 144-156 and accompanying text.

<sup>172</sup> Although section 1034 is mandatory, it would not apply when a taxpayer sells at a loss. Section 1034 serves to defer gain, not loss.

<sup>173</sup> See *supra* note 33.

<sup>174</sup> I.R.C. § 212 (1988).

<sup>175</sup> I.R.C. § 165(c)(1)-(2) (West Supp. 1995).

<sup>176</sup> *Warner v. Commissioner*, 167 F.2d 633 (2d Cir. 1948). This was a per curiam affirmance of a Tax Court memorandum decision that allowed depreciation and maintenance deductions on property that was listed for rental but never rented for nearly four years, but which disallowed a loss deduction. To the same effect, see *Hormann v. Commissioner*, 17 T.C. 903 (1951) (taxpayer's unsuccessful efforts to rent his property over a three year period allowed him to deduct expenses, but not to take a loss deduction on the sale of the property); *Johnson v. Commissioner*, 19 T.C. 93, 98 (1952) (taxpayer's renting a small portion of her former residence over a five year period did not constitute a trade or business or a transaction entered into for profit, but did constitute property held for the production of income).

<sup>177</sup> 54 T.C. 1298, 1303 (1970).

of income, the courts consider the same factors they use in determining whether property is, under sections 121 and 1034, the taxpayer's principal residence. The taxpayer's intent in using the property is of greatest significance.<sup>178</sup> The taxpayer must reasonably expect to earn a profit,<sup>179</sup> and this profit making motive must be the taxpayer's primary objective.<sup>180</sup> Generally, renting at a fair market rate will demonstrate the taxpayer's profit making motive.<sup>181</sup> Like the sections 121/1034 test, this intent is discerned by examining all the facts and circumstances.<sup>182</sup> The taxpayer has the burden of proof in establishing that his residence has been converted to property held for the production of income.

The Tax Court looks at five factors in determining whether a taxpayer intended to hold his residence for the production of income:

1. The length of time the house was occupied by the individual as his residence before placing it on the market for sale;
2. Whether the individual permanently abandoned all further personal use of the house;
3. The character of the property (recreational or otherwise);

4. Offers to rent; and

5. Offers to sell.<sup>183</sup>

All factors are equally important.<sup>184</sup> If the taxpayer has owned and occupied the residence for a long period of time, it will be more difficult to establish that the subsequent expenses were not personal in nature.<sup>185</sup> Conversely, if the taxpayer lived only briefly in the property or never lived in it at all (for example, property received by gift or bequest) and engages in rental activity, it will be easier to establish that the subsequent expenses were not personal in nature.<sup>186</sup>

Whether the taxpayer has abandoned personal use of the property and whether it still presents recreational opportunities also can be relevant. For example, most rented residences lack recreational characteristics and their rental precludes personal use.<sup>187</sup> Their rental usually converts them to property held for the production of income, and may constitute either a trade or business or a transaction entered into for profit.<sup>188</sup> Vacation homes rented only temporarily, however, offer opportunities both for recreation and for personal use.<sup>189</sup> Their rental usually does not result in their conversion to property held for the production of income.<sup>190</sup>

To satisfy section 165 and to take a deduction for a loss on the sale of the property, a taxpayer must do more than simply hold it

<sup>178</sup> *Johnson v. Commissioner*, 59 T.C. 791 (1973) (finding that an oceanside cottage that the taxpayers never advertised for rent was not held by them for the purpose of producing income—they did not intend to profit from it). Compare this with the requirement to examine the good faith and bona fides of the taxpayer in section 1034 cases. See *supra* text following note 107.

<sup>179</sup> *Carkuff v. Commissioner*, 425 F.2d 1400 (6th Cir. 1970).

<sup>180</sup> *Austin v. Commissioner*, 298 F.2d 583, 584 (2d Cir. 1962).

<sup>181</sup> *Eisenstein v. Commissioner*, 47 Tax Ct. Mem. Dec. 441, 442 (1978). In *Bolaris*, the Ninth Circuit relied on this rule and the five factor test discussed *infra* at notes 183-193 in determining that the Bolarises had the requisite profit motive. The Ninth Circuit did not discuss the Tax Court's finding that the Bolarises "had no expectation or intention of making a profit from the rental of their old residence, but instead rented it simply to lessen the burden of carrying the property." *Bolaris v. Commissioner*, 81 T.C. 840 (1983). In *Bolaris*, the rent received by the Bolarises was not sufficient to cover their mortgage payment. *Id.* at 841. Nevertheless, because the rent charged was all the market would bear, the Ninth Circuit's conclusion that the Bolarises held it for the production of income seems reasonable—no taxpayer could be expected to rent for more than the market is willing to pay. Since the Code otherwise allows deductions for taxpayers involved in rental activities, it would be unreasonable to deny such deductions to taxpayers who are forced to rent a residence that they have vacated but are unable to sell.

<sup>182</sup> *Johnson*, 59 T.C. at 815.

<sup>183</sup> *Grant v. Commissioner*, 84 T.C. 809, 825 (1985), *aff'd per curiam*, 800 F.2d 260 (4th Cir. 1986) (finding a taxpayer's maintenance expenses were incurred to preserve his home pending a divorce and not for the purpose of realizing appreciation). This decision reflects an amplification of the factors considered in *Newcombe v. Commissioner*, 54 T.C. 1298, 1300-01 (1970).

<sup>184</sup> *Bolaris v. Commissioner*, 776 F.2d 1428, 1433 (9th Cir. 1985).

<sup>185</sup> *Newcombe*, 54 T.C. 1298, 1300 (1970).

<sup>186</sup> *Id.*

<sup>187</sup> See *Bolaris*, 776 F.2d at 1433. Treasury Regulation § 1.183-2 provides: "a profit motivation may be indicated where an activity lacks any appeal other than profit." Treas. Reg. § 1.183-2(b)(9).

<sup>188</sup> See *infra* notes 191-203 and accompanying text.

<sup>189</sup> Treasury Regulation 1.183-2 provides: "The presence of personal motives in carrying on an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved." Treas. Reg. § 1.183-2(b)(9) (1972).

<sup>190</sup> I.R.C. § 280A (1988) is also relevant to the rental of vacation homes. It disallows most deductions when the taxpayer also uses the vacation home for personal purposes.

for the production of income. The taxpayer must either incur the loss in connection with a trade or business or in connection with a transaction entered into for profit.<sup>191</sup> Simply listing the property for sale is insufficient to convert it to trade or business property or into a transaction entered into for profit and thereby satisfy section 165.<sup>192</sup> On the other hand, a taxpayer need not necessarily rent the property to hold it for the production of income and thereby satisfy section 212.<sup>193</sup>

Some taxpayers have argued that they acquired their residence with the intention of making a profit. Therefore, they assert, they should be able to deduct their subsequent, unexpected loss when they sell their property. This has not been a successful approach.<sup>194</sup> Taxpayers who want to deduct a loss on the sale of their former residence must first convert it to trade or business property or enter into a transaction for profit. Should they make the conversion, their adjusted basis will be the lower of their adjusted basis in the property or the property's fair market value at the time of conversion.<sup>195</sup>

Unlike deductions for expenses related to the production of income, taxpayers must actually rent the former residence to claim a loss on the property's subsequent sale.<sup>196</sup> Simply listing the property for rent is insufficient to constitute a trade or business or a transaction entered into for profit.<sup>197</sup> Additionally, the taxpayer must intend to profit from the rental. Merely renting for a brief period with the intention of subsequently selling at a loss is not sufficient to support a loss deduction on the sale of the property.<sup>198</sup> Similarly, simply renting incident to sale also is insufficient.<sup>199</sup> Although some courts have allowed loss deductions after the property was rented only briefly, the courts determined that each transaction was profit inspired.<sup>200</sup> In response to these cases, taxpayers have asserted that a straight sale transaction could also be profit inspired,<sup>201</sup> but they have not been successful. The distinguishing feature is that a rental precludes the taxpayer from reoccupying the residence. The taxpayer could still reoccupy when the property is merely listed for sale or rent. This ability to reoccupy demonstrates that the property has not been converted from

<sup>191</sup> I.R.C. § 165 (West Supp. 1995).

<sup>192</sup> *Leslie v. Commissioner*, 6 T.C. 493 (1946). See also *Morgan v. Commissioner*, 76 F.2d 390 (5th Cir.), cert. denied, 296 U.S. 601 (1935) (denying a loss deduction to a taxpayer who had placed his home with an agent to rent or sell but failed to show he could not reoccupy it).

<sup>193</sup> Holding property (in some capacity other than as a personal residence) that the taxpayer anticipates will increase in value is holding it for the production of income. *Newcombe v. Commissioner*, 54 T.C. 1298, 1302-03 (1970). Listing the property for sale shortly after abandoning it as a personal residence would be strong proof that the taxpayer was not holding the property for the production of income. *Id.* at 1302; *Murphy v. Commissioner*, 64 Tax Ct. Mem. Dec. (RIA) 1460 (1993). Holding property the taxpayer anticipates will decrease in value is not for the production of income. See *supra* note 169; *Murphy v. Commissioner*, 64 Tax Ct. Mem. Dec. (RIA) 1460 (1993) (finding no profit motive where the taxpayer listed his residence for sale for an amount less than he paid for it).

<sup>194</sup> *Austin v. Commissioner*, 35 T.C. 211 (1960), *aff'd*, 298 F.2d 583 (2d Cir. 1962). To satisfy section 165, taxpayers must do more than expect to make a profit when they acquire the property; their profit motivation must be their primary purpose. See *Meyer v. Commissioner*, 34 T.C. 528 (1960). *Meyer* denied a loss deduction to a taxpayer who bought a home to live in temporarily while he had another home under construction. Even though he acquired the home with the expectation of making a profit, the court denied the deduction because it found he acquired the home primarily to have a place to live while his other home was under construction. On the other hand, in the case of *Henry J. Gordon*, *Gordon*, a taxpayer, was allowed to take a loss deduction on property that he acquired primarily for the purpose of making a profit, even though he lived in it as a residence for sixteen years. He had not intended to reside in it when he constructed it, and he tried to sell it for many years after taking occupancy of it. *Henry J. Gordon*, 12 B.T.A. 1191 (1928).

<sup>195</sup> Treas. Reg. § 1.165-9(b)(2) (as amended in 1964).

<sup>196</sup> *Grammer v. Commissioner*, 12 T.C. 34 (1949). A narrow exception to this requirement arises when a taxpayer alters the structure so that it is suitable only for business purposes. Under these circumstances, the taxpayer's efforts would constitute a transaction entered into for profit, and actual rental would not be necessary to claim a loss when the property is sold. *Rumsey v. Commissioner*, 82 F.2d 158 (2d Cir. 1935). When the taxpayer has never used the property as a residence, such as if he acquires it by gift or bequest, listing the property for sale or rental may be enough to claim a loss on the property's subsequent sale. In these cases, the taxpayers' profit-motivated intentions are clear from the very beginning. See *Campbell v. Commissioner*, 5 T.C. 272 (1945).

<sup>197</sup> *Id.*

<sup>198</sup> Whether a brief rental is inspired by a profit making motive will also require a case-by-case determination. Courts will usually allow loss deductions when the property is rented in an amount equal to the monthly mortgage and when the sale transpires in a manner that the taxpayer did not control. *Edward L. Parker*, 19 B.T.A. 171 (1930) (allowing a loss deduction on a summer home, which the taxpayer, who had moved to another city, never intended to use again, which was rented for about six months and sold when the taxpayer urgently needed money); *Ginsburg v. Campbell*, 16 AFTR2d (P-H) 5770 (N.D. Tex. 1965) (denying a loss deduction on property rented for 11 days—at a rate that would only equal 66% of their monthly mortgage obligation—while still listed for sale); *Rechnitzer v. Commissioner*, 26 Tax Ct. Mem. Dec. (P-H) 298 (1967) (allowing a loss deduction on property rented for four months in an amount equal to the taxpayers' monthly mortgage obligation and the renter exercised an option to buy the property).

<sup>199</sup> *Dawson v. Commissioner*, 31 Tax Ct. Mem. Dec. (CCH) 5 (1972) (a taxpayer who rented his home to the purchaser while the purchaser arranged financing had not converted his residence to rental property—loss deduction denied).

<sup>200</sup> See *supra* note 198.

<sup>201</sup> *McAuley v. Commissioner*, 45 Tax Ct. Mem. Dec. (P-H) 1214 (1976).

property held for personal use.<sup>202</sup> Thus, to have much chance of success at taking a loss deduction, taxpayers must rent their property, and the rent must be equal to or exceed the monthly mortgage payment.<sup>203</sup>

### Conclusion

A taxpayer who rents a home and then sells it presents the tax attorney with an interesting challenge. Numerous sections of the Internal Revenue Code are potentially applicable to the sale. The applicability of each section hinges on whether the property has retained its character as the taxpayer's principal residence or has been converted into a profit-oriented enterprise. The *Bolaris* decision, which held that taxpayers may vacate their residence, hold it for the production of income, and still claim it as their principal residence further clouds the determination of the appropriate tax treatment.

The key element to determining the tax treatment of the subsequent sale is the taxpayer's intention. If the taxpayer actually intended to reoccupy the residence, then the taxpayer can still claim it as a principal residence and use section 1034 to defer recognition of gain. Should the taxpayer abandon an intent to reoccupy the residence, then the taxpayer will be unable to use section 1034 to defer recognition of gain. The Taxpayer may also use section 1034 to defer recognition of gain if a slow real estate market (or other factors) hampered selling efforts and temporarily rented it to prevent financial hardship.

Less clear is whether the taxpayer can, under these circumstances, take advantage of the once-in-a-lifetime exclusion pro-

vided by section 121. Congress intended that the same test used to determine principal residence under section 1034 should apply to section 121. Nevertheless, the Treasury Department promulgated a regulation that requires taxpayers to occupy the residence for three of the five years preceding the sale to claim the exclusion. No reported decisions have challenged this, but one Tax Court case suggested that the constructive occupancy test that developed under section 1034 may also apply to section 121. This may present the practitioner with an opportunity for advocacy.

If the taxpayer hopes to take a loss deduction on the sale, the taxpayer must enter into a transaction for profit. To accomplish this, the taxpayer must rent the home, at market rates, with the expectation of profitable operations. Additionally, to prove intent to rent to make a profit and not just to claim a loss on the sale, the taxpayer must rent the former home for a substantial period or sell due to factors beyond the taxpayer's control.

All the facts and circumstances surrounding the venture will be examined to measure the taxpayer's intention. Unfortunately, few taxpayers discuss the potential tax consequences of a future sale with an attorney before they move out and begin to rent. To the extent they do, the attorney can assist them to develop a record that will prove their intention if they should later sell. Unfortunately, in the typical case, the home will have been rented for substantial periods or perhaps listed for sale or even sold when the client first visits the attorney. It will then fall to the attorney to sort matters out. Understanding the facts and circumstances that the courts have examined to determine the taxpayer's intention will be of greatest importance to this sorting.

<sup>202</sup> *McAuley v. Commissioner*, 45 Tax Ct. Mem. Dec. (P-H) 1214, 1217, n.4 (1976); *Rechnitzer v. Commissioner*, 26 Tax Ct. Mem. Dec. (CCH) 298, 302 (1967); *Morgan v. Commissioner*, 76 F.2d 390 (5th Cir. 1935), cert. denied, 296 U.S. 601 (moving out, listing for sale or rent, combined with rental of garage does not constitute a transaction entered into for profit); *Foehl v. Commissioner*, 39 Tax Ct. Mem. Dec. (P-H) 465 (1961) (listing for rent or sale, initial rental of 2-3 months, followed by three years of vacancy, does not constitute a transaction entered into for profit).

<sup>203</sup> *McAuley v. Commissioner*, 45 Tax Ct. Mem. Dec. (P-H) 1214 (1976). Taxpayers who unsuccessfully attempted to rent their former home for about ten months could deduct expenses under section 212 but could not take a loss deduction under section 165—it had not become an income producing property. Although the taxpayers expended about \$2100 in making improvements to the home to make it more attractive to renters, this did not change the property's status as a personal residence. Compare this to *Grammer v. Commissioner*, 12 T.C. 34 (1949), remarking that converting a residence to property suited only for business use is sufficient. Of course, this would require substantial expense and, in a declining real estate market, would be strong proof that the taxpayer's motivation was profit inspired.

# USALSA Report

United States Army Legal Services Agency

## Clerk of Court Notes

### Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial whose records of trial were received by the Army Judiciary during the third quarter of Fiscal Year 1995 (FY 1995) are shown below. For comparison, the previous two quarters and Fiscal Year 1994 (FY 1994) processing times are also shown.

#### General Courts-Martial

	FY 1994	1Q, FY 1995	2Q, FY 1995	3Q, FY 1995
Records received by Clerk of Court	789	187	208	211
Days from charges or restraint to sentence	53	55	56	58
Days from sentence to action	70	83	80	71
Days from action to dispatch	8	10	10	6
Days en route to Clerk of Court	9	9	8	8

#### BCD Special Courts-Martial

	FY 1994	1Q, FY 1995	2Q, FY 1995	3Q, FY 1995
Records received by Clerk of Court	150	53	36	35
Days from charges or restraint to sentence	37	34	33	32
Days from sentence to action	58	60	71	56
Days from action to dispatch	7	4	6	6
Days en route to Clerk of Court	9	9	8	7

*Non BCD Special Courts-Martial*

	FY 1991	FY 1992	FY 1993	FY 1994
Records reviewed by SJA	174	104	65	53
Days from charges or restraint to sentence	35	42	35	33
Days from sentence to action	43	40	25	28

*Summary Courts-Martial*

	FY 1991	FY 1992	FY 1993	FY 1994
Records reviewed by SJA	903	739	353	335
Days from charges of restraint to sentence	12	15	14	14
Days from sentence to action	8	8	8	8

***Litigation Division Notes***

**Army Medical Doctors as Expert Witnesses in Federal Medical Care Recovery Act Cases**

A recurring question in Federal Medical Care Recovery Act (FMCRA)<sup>1</sup> cases is whether civilian attorneys representing the interests of the United States under the FMCRA may use Army medical doctors (AMEDDD) as expert witnesses? The answer, in most cases, is yes.

Sections III and IV of Chapter 7, *Army Regulation 27-40, Litigation*,<sup>2</sup> address the appearance of Department of the Army (DA) personnel as expert witnesses in litigation. Section III deals with witnesses in private litigation and Section IV deals with litigation in which the United States has an interest.<sup>3</sup> This distinction is important because the general rules stated in Section III often are mistakenly applied to litigation in which the United States has an interest. The rules set out in *Army Regulation 27-40, Section III, paragraph 7-10*, are not applicable to litigation in which the United States has an interest, such as FMCRA cases.

*Army Regulation 27-40, Section IV, paragraph 7-13*, allows the use of DA personnel as expert witnesses for the United States in litigation in which the United States has an interest. There is no restriction on AMEDDD personnel. Paragraph 7-13 applies to requests for expert testimony made by both Department of Justice attorneys and other attorneys representing the interests of the United States. For example, civilian attorneys representing the government's interests under the FMCRA. Requests for expert witnesses must be referred to the Litigation Division, Office of the Judge Advocate General,<sup>4</sup> and are subject to command approval and the witness's willingness to testify.

The rationale behind allowing AMEDDD personnel to testify in FMCRA cases is compelling. Providing AMEDDD personnel as expert witnesses is one of the few incentives which can be offered to entice an injured party and their counsel to enter into FMCRA representation agreements for the benefit of the government. Through these representation agreements, the injured party's attorney asserts the government's medical care recovery claim along with the injured party's claim for damages, which saves the United States the time and expense of bringing an independent

<sup>1</sup> 42 U.S.C.A. § 2651 (West 1994).

<sup>2</sup> DEP'T OF ARMY, REG. 27-40, LITIGATION, chapter 7, secs. III, IV (19 Sept. 1994) [hereinafter AR 27-40].

<sup>3</sup> *Id.* Glossary, sec. II, terms. Litigation in which the United States has an interest includes "[a] suit in which the United States has a financial interest in the plaintiff's recovery," and private litigation is "[l]itigation other than that in which the United States has an interest." *Id.*

<sup>4</sup> Requests for expert witnesses do not have to be referred to the Litigation Division, Office of the Judge Advocate General, where the matter has been delegated to a staff judge advocate or legal advisor. If the matter has not been delegated, coordinate with the Tort Branch, Litigation Division, Office of the Staff Judge Advocate.

action or intervening in an ongoing action. Unfortunately, few incentives exist for civilian attorneys to enter into representation agreements.<sup>5</sup> One substantial benefit the government can offer in return for representation in a significant case is the potential use and cooperation of DA personnel as witnesses.<sup>6</sup>

Many physicians may be reluctant to provide expert testimony, and many hospital commanders may be reluctant to make their doctors available for such testimony. Commander and physicians should be advised that monies recovered under the FMCRA are returned to the military medical treatment facility providing the treatment, and their cooperation can greatly enhance such recoveries. Commanders and physicians should also be assured that requests for expert testimony are always subject to regulatory and mission requirements. All requests for AMEDD personnel are closely coordinated with the servicing staff judge advocate or the medical center judge advocate and the Litigation Division, Office of the Staff Judge Advocate. Moreover, presenting expert testimony may be a way for physicians to enhance their position in professional and academic communities. Testifying will also provide them with valuable courtroom experience and a better understanding of the litigation process.

The value of a potential recovery will not always justify the impact on the medical mission that results for AMEDD personnel testifying as experts. In many cases, a treating physician already appearing as a fact witness may properly provide expert testimony. In other cases, the potential value of the recovery may justify providing an expert in addition to a treating physician's testimony. Captain Sausville.

## ***Environmental Law Division Notes***

### **Recent Environmental Law Developments**

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board Service, Environmental Law Conference,

while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below:

### **Federal District Court Denies State's Attempt to Impose Fines Under the Clean Air Act**

A federal district court recently held that the Clean Air Act (CAA) does not waive United States sovereign immunity for state civil fines.<sup>7</sup> In 1994, the State of Georgia's Department of Natural Resources (DNR) attempted to impose civil penalties on Fort Benning and the United States Penitentiary in Atlanta for violating the Georgia Air Quality Act. These two federal agencies allegedly modified boiler systems without obtaining permits or amending existing permits and failed to maintain fuel consumption records as required by existing permits. An administrative law judge entered final judgment against the United States and assessed a civil penalty of \$20,000.00 for both installations. Upon appeal, the United States, citing *Department of Energy (DOE) v. Ohio*,<sup>8</sup> argued that there was no waiver of sovereign immunity in the CAA enabling states to impose civil fines against the United States. The Supreme Court held in *DOE v. Ohio* that similar sovereign immunity provisions contained in the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA) did not contain a civil fine waiver.

The *Georgia DNR* court agreed with the United States and held that the CAA did not contain a waiver of sovereign immunity for civil fines. The opinion also contains several observations of interest to installation environmental law specialists (ELs). First, the court stated that several pre-*DOE v. Ohio* decisions,<sup>9</sup> which had allowed states to impose civil penalties on federal facilities under the CAA, were no longer viable given the Supreme Court's strict interpretation of similar federal facilities provisions in RCRA<sup>10</sup> and CWA<sup>11</sup>. Second, the court rejected consideration of legislative history in analyzing waivers of sovereign immunity by stating that "If legislative history is needed to determine the extent or existence of a waiver of sovereign immunity, the statutory text necessarily is ambiguous and the waiver of sovereign immunity has not been unequivocally expressed."<sup>12</sup> Finally, the court refused to consider historical instances where the United States had paid state punitive civil fines, because Georgia raised them for the first time in reply briefs.

<sup>5</sup> 5 U.S.C. § 3106 (West 1994) precludes the payment of fees for recovery of government claims under the FMCRA.

<sup>6</sup> In the absence of a representation agreement, requests for expert testimony from plaintiff's counsel will be denied. *Army Regulation 27-40*, paragraph 7-13, limits requests for expert testimony to those made by "[Department of Justice] or other attorneys representing the United States." AR 27-40, supra note 2.

<sup>7</sup> *United States v. Georgia Department of Natural Resources*, No. 1: 94-CV-2993-JOF (N.D. Ga. filed Aug. 2, 1995) [hereinafter *Georgia DNR*].

<sup>8</sup> 112 S. Ct. 1627 (1992).

<sup>9</sup> *United States v. South Coast Air Quality Management District*, 748 F. Supp. 732 (C.D. Cal. 1990); *State of Ohio ex rel. Celebrezze v. Department of the Air Force*, 1987 WL 110399 (S.D. Ohio 1987); *State of Alabama ex rel. Graddick v. Veteran's Administration*, 648 F. Supp. 1208 (M.D. Fla. 1986).

<sup>10</sup> 42 U.S.C. § 6961 (1983). The court limited its analysis to the prior provisions of Federal Facilities Compliance Act by noting that the 1992 federal facility compliance agreement amendment to § 6961, which broadened The Resource Conservation Recovery Act waiver of sovereign immunity to include "any such substantive or procedural requirements," took effect after the alleged CAA violations occurred.

<sup>11</sup> 33 U.S.C. § 1323(a) (1986).

<sup>12</sup> See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35 (1992).

The *Georgia DNR* case illustrates that post-*DOE v. Ohio* federal courts are less likely to find a waiver of United States sovereign immunity in environmental statutes for the payment of civil fines unless they contain unequivocal waiver language. It is important to note, however, that while not necessarily determinative to this case's outcome, acquiescence to the payment of such fines raises regulator expectations and makes resolution of future cases more difficult. Environmental law specialists should coordinate closely with the ELD to avoid unnecessary payment of fines under any environmental statute. Mr. Kohns.

### **Native American Graves Protection and Repatriation Act Compliance Deadline**

Section 5 of the Native American Graves Protection and Repatriation Act requires federal agencies to complete an item-by-item inventory of human remains and associated funerary objects by 16 November 1995. The inventory must be completed in consultation with Native American leaders. The appropriate Native American tribe must be notified and consulted if any cultural affiliation of any particular human remains or funerary objects is determined. In addition, the notification to the tribe must be published in the Federal Register.

Each installation's environmental law specialists should coordinate with their installation's department of public works (DPWs) to determine the status of their installation's inventory. All DPWs should be nearing completion of their installation's inventory. The DPWs must coordinate their efforts with the Mandatory Center of Expertise in Curation and Management of Archeological Collections, Corps of Engineers, St. Louis District.

Each ELS should also ensure the Native American consultation and Federal Register publication requirements are met. Native American leaders generally view consultation as a formal process, to include written communication with tribal leaders. Upon notification, Native American tribes may request further documentation or repatriation of the remains or funerary objects. Requests for repatriation should be handled expeditiously and coordinated with the Office of the Director of Environmental Programs and the Environmental Law Division. Major Ayres.

### **Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health) Guidance Issued on DERA Devolvement**

On 20 June 1995, Mr. Lewis D. Walker, then the Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health) (DASA (ESOH)), issued new guidance to the Services in anticipation of the devolvement of the Defense Environment Restoration Account (DERA). Although devolvement cannot be fully implemented until enabling legislation is passed, the new guidance states that the Army should assume that the DERA will be devolved, and plan accordingly. The enabling legislation is expected to be contained in the Fiscal Year 1996 Defense Authorization Act.

The new guidance states that all new cleanup agreements or revisions to existing agreements must employ flexible schedules

based upon relative risk to human health and the environment. Additionally, all new or revised Federal Facility Agreements (FFAs) for National Priority List installations must include an estimate of the cost of the agreement, which must be forwarded with the FFA for signature by the DASA (ESOH).

The new guidance also incorporates the expectation that, within the enabling legislation, Congress will repeal language from the governing statute that prevents the account from being used for non-environmental restoration purposes. As a result, it will be necessary for all projects to have additional justification concerning the legal requirements for the project to survive competition from other sources in the budget. The projects should state, where appropriate, the consequences to human health and the environment if the project does not receive its requested funding.

In addition, the Department of Defense has tasked the Services with classifying all response sites into a high, medium, or low relative risk classification system. This classification system is to be used to program funding for remedial systems. These remedial systems are to be in place by 2002, 2008, and 2015, respectively. Ms. Fedel.

### **Environmental Justice**

In mid August, the Center for Environmental Quality (CEQ) issued guidance on the use of the National Environmental Policy Act (NEPA) to achieve environmental justice (EJ) goals. This guidance may have a direct impact on the Army EJ, NEPA, and Base Realignment and Closure/NEPA processes. Also, the CEQ has directed federal agencies to submit to the President by March, 1996 "a limited set of discrete, concrete agency actions—apart from outreach, data collection, and process reforms" that the agencies have taken to implement Executive Order 12898. Major Corbin.

### **Fiscal Year 1994 Environmental Compliance Assessment System Findings—Results**

The Environmental Compliance Assessment System Findings—Results for the Fiscal Year 1994 Environmental Compliance Assessment System are being tabulated and some familiar trends are reappearing. A large proportion of the findings are in the Clean Water Act (CWA) and The Resource Conservation and Recovery Act hazardous waste areas (RCRA - C). The breakdown is as follows:

#### **Active Installations:**

RCRA - C	629 of 1729 = 37 %
CWA	487 of 1729 = 28 %

#### **Reserve Installations:**

RCRA - C	246 of 1056 = 23 %
CWA	299 of 1056 = 28 %

#### **National Guard Installations:**

RCRA - C	755 of 2220 = 34 %
CWA	799 of 2220 = 36 %

Mr. Nixon.

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Criminal Law Notes

### New Military Rules of Evidence 413 and 414

On 10 July 1995, the Federal Rules of Evidence were amended with the addition of rules 413, 414, and 415. On 6 January 1996, by operation of Military Rule of Evidence 1102, these new federal rules will take effect in the military criminal justice system as Military Rules of Evidence 413, 414, and 415.<sup>1</sup>

#### *Military Rule of Evidence 413 Will Read:*

##### Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of the body of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraph (1)-(5).

#### *Military Rule of Evidence 414 Will Read:*

##### Rule 414. Evidence of Similar Crimes in Child Molestation Cases.

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by Chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

<sup>1</sup> Although technically Military Rule of Evidence 415 (Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation) also will become a part of the Military Rules of Evidence on 6 January 1996, its applicability to civil proceedings makes it irrelevant to military practice.

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraph (1)-(5).

Editorial comment to Federal Rules of Evidence 413 and 414 states that the new rules are "intended to provide for more liberal admissibility" in criminal cases of sexual assault and child molestation "where the defendant has committed a prior act or acts of sexual assault or child molestation."<sup>2</sup>

These new rules will be a radical departure from the usual treatment of uncharged misconduct evidence governed by Military Rules of Evidence 404(b) and 405. No longer will there be a requirement to show a non-character purpose such as motive, absence of mistake or accident, opportunity, intent, preparation, plan, knowledge, or identity, as a prerequisite to admissibility. The new rules plainly state that evidence of sexual misconduct evidence "is admissible." Most commentators, however, agree that Military Rule Evidence 403 balancing applies to Military Rules of Evidence 413-414. Consequently, except for Military Rule of Evidence 403 as a barrier to admissibility, *prior acts for which the accused has not previously been prosecuted can be admitted explicitly to prove the propensity of the accused to commit an act of sexual assault or child molestation.*

The Joint Service Committee (JSC) on Military Justice is studying the impact of Military Rules of Evidence 413-415. The JSC will shortly recommend to the President that changes be made to the new rules for military practice. Consequently, the JSC invites readers of *The Army Lawyer* to suggest possible amendments to these soon to be effective Military Rules of Evidence. Lieutenant Colonel Borch, Criminal Law Division, Office of The Judge Advocate General, JSC Working Group.

### **Legal Assistance Items**

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program poli-

cies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADALA, Charlottesville, VA 22903-1781.

### **Office Management Note**

#### **TJAGSA Legal Assistance Course**

The 38th Legal Assistance Course has been scheduled for the week of 26 February to 1 March 1996. Interested personnel should refer to the Continuing Legal Education News section of this issue of *The Army Lawyer* for information on obtaining a quota. Major Block.

### **Preventive Law Note**

#### **Innovation—Creating Interest and Enthusiasm in Your Preventive Law Program**

Preventive Law continues to be an integral part of all services' legal assistance programs. In the Army Legal Assistance Program (ALAP), "[c]ommanders are responsible for ensuring that preventive law services are provided within their commands."<sup>3</sup> Critical to the commanders' success, however, is the responsibility of supervising attorneys to "ensure that preventive law services are provided by attorneys performing legal assistance duties, as well as by others under their supervision."<sup>4</sup> Attorneys providing preventive law services are expressly advised to be "aggressive and innovative in disseminating information to service members and their families,"<sup>5</sup> and to "[s]hare innovative measures with other attorneys providing legal assistance."<sup>6</sup>

The *Legal Assistance Items* section of *The Army Lawyer* has previously been, and continues to be, a resource for sharing preventive law success stories.<sup>7</sup> For example, the November 1994 issue of *The Army Lawyer* reviewed the Fort Riley Preventive Law Program.<sup>8</sup> A specific innovation, in Fort Riley's program, was the development and use of a Preventive Law Card.<sup>9</sup>

Innovative approaches to preventive law frequently involve radio and television. The Fort Benning Preventive Law Program

<sup>2</sup> See STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, AND DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL, Rules 413 and 414, Editorial Explanatory Comment, pp. 576-78, 581 (6th ed. 1994).

<sup>3</sup> DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-3a [hereinafter AR 27-3].

<sup>4</sup> *Id.* para. 3-3b (emphasis added).

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *Id.* para. 3-4a(5) (emphasis added).

<sup>7</sup> Other vehicles for sharing information include the Legal Automated Army-Wide System electronic bulletin board service and the Office of The Judge Advocate General Legal Assistance Quarterly Teleconferences.

<sup>8</sup> ARMY LAW., Nov. 1994, at 39.

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

developed a series of "infomercials" for airing on the installation television station or at preventive law briefings. Each infomercial addresses a local preventive law concern. For example, one infomercial emphasizes the importance of shopping around and even obtaining legal assistance before signing contracts for significant purchases.<sup>10</sup>

Fort Leonard Wood's Legal Assistance Program uses a videotape format to contribute to its preventive law program and to streamline its legal assistance operations. Clients at Fort Leonard Wood's Legal Assistance Office can view a locally-produced full-length video presentation of family law and the divorce process. The presentation, received extensive studio support from the installation, was locally scripted, and used local actors. The video focuses on sensitive issues of interest to many clients. The presentation fully addresses specific considerations of Missouri law and practice. Clients review the video at their own pace and frequently will receive answers to simple questions without having to wait for, or use, a legal assistance attorney.<sup>11</sup>

Innovative approaches to preventive law are not unique to the Army. In the face of opposition from local landlords, Marine Corps practitioners at Camp Lejeune, North Carolina, successfully created and have mandated use of a military lease for military personnel. Navy practitioners are experimenting with recycling older computers by putting them in waiting areas with databases of fact sheets that clients can directly search and access by subject.

While Preventive Law Programs can make a significant difference in the morale and readiness of a command, they can also cause a significant drain on already limited resources. Offices successfully implementing programs that have readily adaptable elements are encouraged to talk about them at teleconferences,

put them on the bulletin board system, and share them with TJAGSA's Legal Assistance Branch. Major Block.

## Family Law Notes

### Texas Amends Law to Permit Alimony<sup>12</sup> . . . Sometimes!

Military legal assistance practitioners frequently come into contact with Texas domiciliaries as part of their assistance practice.<sup>13</sup> Almost all military practitioners are familiar with the longstanding bar on post-divorce alimony in Texas. However, as a result of legislation passed by the Texas legislature in 1995, this bar will end effective 1 September 1995.<sup>14</sup> While the absolute bar to alimony will end, practitioners must understand that the law provides prerequisites on eligibility for alimony as well as limits on the duration and amount of alimony a court can award.

Under the new law, two major prerequisites to the award of alimony exist. One prerequisite is the documented commission of an act of family violence by the payor spouse.<sup>15</sup> The alternative prerequisite is that the marriage lasted ten years or longer.<sup>16</sup> Eligibility under the ten-year durational prerequisite is further limited by several additional prerequisites. These include either incapacity of the spouse or a child requiring care of the spouse in the home or inability of the spouse to be self-supporting.<sup>17</sup> In the latter case, the spouse must overcome a presumption that alimony is not warranted.<sup>18</sup> One of these two prerequisites must be met before a court is authorized to order alimony.

Should a spouse actually meet all the prerequisites, two additional limitations apply. First, the court cannot order alimony for more than three years unless the spouse requesting support is incapacitated.<sup>19</sup> Second, alimony awards in excess of the lesser of \$2500 or twenty percent of gross income are not permitted.<sup>20</sup>

<sup>10</sup> Other infomercial topics addressed by the Fort Benning Preventive Law Program include: car leasing versus car buying; shopping for automobile financing; paternity; child support; landlord-tenant issues; pawning your property; and automobile repossessions. For further information, or for copies of infomercial scripts, contact Mrs. Jane Winand, Chief of Legal Assistance at the Fort Benning Office of the Staff Judge Advocate, at (706) 545-3281/1714 or DSN 835-3281/1714.

<sup>11</sup> For further information, or for a copy of the script of the videotape, contact Mr. C. Jarvis, Chief of Legal Assistance at the Fort Leonard Wood Office of the Staff Judge Advocate, at (314) 596-0626 or DSN 581-0626.

<sup>12</sup> The term "alimony" is used for ease of recognition by practitioners throughout this note. Texas law addresses this topic through use of the term "maintenance." See TEX. FAMILY CODE ANN § 3.9601 (West 1995) (effective September 1, 1995) for definition.

<sup>13</sup> Many soldiers are recruited directly into the Army from Texas. Many become domiciliaries of Texas during training or assignments to Texas at least in part to take advantage of the favorable tax treatment of military pay by the State of Texas.

<sup>14</sup> TEX. FAMILY CODE ANN §§ 3.9601—3.9611 (West 1995) (effective 1 September 1995).

<sup>15</sup> *Id.* § 3.9602(1). The offense must result in a conviction or a deferred adjudication.

<sup>16</sup> *Id.* § 3.602(2).

<sup>17</sup> *Id.* § 3.9602(2)(A)-(C).

<sup>18</sup> *Id.* § 3.9604.

<sup>19</sup> *Id.* § 3.9605.

<sup>20</sup> *Id.* § 3.9606.

Military payers will appreciate that Veterans Administration service-connected disability payments are excluded from alimony.<sup>21</sup>

A superficial review of the changing law on alimony in Texas is misleading. The ban on award of alimony has been removed, but significant barriers stand in its place.<sup>22</sup> Military practitioners should be prepared to incorporate a clear understanding of the new law and its impact into their legal assistance practice. Major Block.

### Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce?

In *Torwich v. Torwich*, a New Jersey appellate court recently held that a retired member's waiver of retired pay in order to receive Veterans Administration (VA) disability benefits justifies reopening a property division.<sup>23</sup> Citing cases in both Alaska and Florida,<sup>24</sup> the court's majority acknowledged the limitations of the United States Supreme Court's decision in *Mansell v. Mansell*,<sup>25</sup> while recognizing its own authority to equitably divide marital property including retired pay.<sup>26</sup>

Under the terms of the Uniformed Services Former Spouses' Protection Act (USFSPA), states were expressly authorized to divide "disposable retired pay" as "marital property in divorce."<sup>27</sup> "Disposable retired pay" equals gross retired pay minus specific deductions. One deduction is retired pay waived in order to receive VA disability benefits.<sup>28</sup> When a former spouse's share of retired pay is stated in terms of a percentage, waivers of retired pay can significantly reduce the "disposable retired pay" and the former spouse's share.

In cases where divorce occurs well after retirement, the impact of the definition will likely be fully known, and distributions made by a court or agreement will be unaffected. When divorce

occurs before retirement, however, the likelihood of future waivers is largely unknown. In cases where an entitlement to VA benefits is subsequently found, or even more significant, military disability retirement or Dual Compensation Act waivers, the impact on disposable retired pay can be dramatic.

To some extent, the impact of retired pay waivers can be addressed by inserting insulating provisions into an agreement or order. For example, the parties might agree to valuation of military retired pay based on no waivers and consent to continuing jurisdiction for a court to revisit the issue of property in the event of waiver. In the alternative, the parties may agree to a savings provision that adjusts the former spouse's share to prewaiver levels by increasing his or her share of retired pay or requiring payments from other sources. Another possibility is complete waiver in exchange for other assets of mutually agreed upon value.

The outcome in *Torwich* was clearly favorable to the former spouse. Despite this outcome, former spouses should not count on finding a court so favorably inclined in all jurisdictions. Particularly, given the potential for retired members to argue that the impact of the definition of "disposable retired pay" is foreseeable, practitioners must take additional steps to insulate former spouses.<sup>29</sup> Major Block.

## Tax and Estate Planning Notes

### Internal Revenue Service Issues Final Regulations on Moving Expenses

Internal Revenue Service regulations now provide that certain allowances received by members of the armed services in connection with a move are not includable in gross income.<sup>30</sup> These allowances include the dislocation allowance (DLA), temporary lodging expense (TLE), temporary lodging allowance (TLA), and the move in housing allowance (MIHA).

<sup>21</sup> *Id.*

<sup>22</sup> Some of these barriers (e.g., a ten-year test or family violence victim status) may seem familiar from experience with the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451. Despite their seeming similarity, they are entirely independent and should not be confused.

<sup>23</sup> *Torwich (Abrom) v. Torwich*, 21 Fam. Law Rept. (BNA) 1453 (N.J. Super. Ct. App. Div. July 3, 1995).

<sup>24</sup> *Id.* at 1454 (citing *Clausen v. Clausen*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So.2d 976 (Fla. Dist. Ct. App. 1990)).

<sup>25</sup> 490 U.S. 581 (1989). In *Mansell*, the Supreme Court held that states have no authority to divide deductions from gross retired pay found in the statutory definition of "disposable retired pay."

<sup>26</sup> *Torwich*, 21 Fam. Law Rept., at 1455.

<sup>27</sup> Pub. L. No. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451.

<sup>28</sup> *Id.* 10 U.S.C. § 1408(a)(4)(B). It is not unusual for service members to retire based on longevity and later qualify for disability payments from the VA. Receipt of VA disability benefits, which are not taxed, is conditioned on waiver of an equivalent amount of military retired pay.

<sup>29</sup> The judge who denied the original motion to reopen reversed on appeal in *Torwich* relied in part on this perspective. See *Torwich*, 21 Fam. Law Rept., at 1454.

<sup>30</sup> T.D. 8607, 60 Fed. Reg. 40075 (1995).

Prior to 1994, moving expenses were an itemized deduction, and both direct and indirect moving expenses were deductible. Direct moving expenses include the cost of moving the taxpayer, family members, and their household goods to their new location. Indirect moving expenses include, but are not limited to, the cost of house hunting trip(s) made prior to your move, the cost of settling an old lease and signing a new lease, and the cost of living temporarily in the new area.

The Omnibus Budget and Reconciliation Act of 1993<sup>31</sup> contained both good and bad news for taxpayers. The good news was that moving expenses were directly deductible from gross income and no longer an itemized deduction. The bad news was that moving expenses were narrowly defined to include only direct moving expenses. Thus, indirect moving expenses no longer are deductible.

As a result of these changes, there was considerable concern that certain military allowances, which were intended to reimburse military personnel for their indirect moving expenses, would be taxable.<sup>32</sup> Again, these allowances include DLA, TLE, TLA, and the MIHA.

The result of the final Treasury decision is that DLA, TLE, TLA, and MIHA are excluded from the definition of gross income. The final Treasury decision also clarifies that a service member must incur direct moving expenses that exceed the total reimbursement received for the move to deduct moving expenses. Therefore, a service member's total direct moving expenses must exceed all reimbursements received, to include DLA, TLE, TLA, and MIHA. Thus, service members are unlikely to be able to deduct any moving expenses because they receive these tax-free allowances, have their household goods shipped at government expense, and receive a per diem allowance to move themselves and family to their new duty station. Major Henderson.

### Taxation of the Survivor Benefit Plan

Attorneys may not be aware that the Survivor Benefit Plan is included in the gross estate of a deceased service member.<sup>33</sup> Further, all soldiers who are on active duty and have over twenty

years of active duty service are covered by the Survivor Benefit Plan.<sup>34</sup> The value of this plan should be considered in determining whether a service member's estate will potentially exceed \$600,000 and thus require a more thorough estate plan.

According to one private letter ruling, the value of the plan is determined by reference to the standard rules for valuing annuities and life estates, which are found in Treasury Regulation § 20.2031-7.<sup>35</sup> Using this approach, the Internal Revenue Service determined that a Survivor Benefit Plan paying \$1876 a month to a sixty-one-year-old widow had a value of \$172,361.<sup>36</sup>

The approach taken in the private letter ruling ignores that the Survivor Benefit Plan is adjusted for inflation each year. Additionally, private letter rulings are valid only for the taxpayer to whom they are issued and cannot be used as precedent by other taxpayers.<sup>37</sup> If a Survivor Benefit Plan were valued with an annual cost of living adjustment taken into account, the value of the plan could be over \$400,000 under the above facts.

Regardless of the value placed on the Survivor Benefit Plan, it presents no real problem if the beneficiary is a surviving spouse who is a United States citizen. The surviving spouse simply claims a marital deduction on the deceased service member's estate tax return, and the deceased service member's estate will not be subject to estate taxes. Upon the death of the surviving spouse, the Survivor Benefit Plan will have no value and will not be included in the gross estate of the surviving spouse. As a result, no estate taxes will be owed.

There are two situations in which the Survivor Benefit Plan could result in estate taxes being owed. First, if the surviving spouse is not a United States citizen, the marital deduction is not available, and the estate of the deceased service member could be subject to estate taxes.<sup>38</sup> Second, if a child is a beneficiary of the Survivor Benefit Plan on the death of the service member, the marital deduction will not be available. Additionally, the marital deduction will not be available if a child is a beneficiary following the death of the "surviving spouse." Thus, the estate that passes the Survivor Benefit Plan on to a child could be subject to estate taxes. The value of a Survivor Benefit Plan for a child

<sup>31</sup> Pub. L. No. 103-66 (1993).

<sup>32</sup> See TJAGSA Practice Notes, *Taxation of Moving Expense Allowances*, ARMY LAW., June 1994, at 59.

<sup>33</sup> I.R.C. § 2039 (RIA 1995).

<sup>34</sup> 10 U.S.C. § 1448(a)(1)(B) (1988).

<sup>35</sup> Priv. Ltr. Rul. 90-22-004 (June 1, 1990).

<sup>36</sup> *Id.*

<sup>37</sup> I.R.C. § 6110(j)(3) (RIA 1995).

<sup>38</sup> *Id.* § 2056(d).

would not be very large, unless the child is disabled. In such a case, the disabled child would be eligible to receive payments for his or her entire life, and the value of the Survivor Benefit Plan could be quite large. Major Henderson.

### Contract Law Notes

#### **Torncello<sup>39</sup> and Terminations for Convenience: the Government's Broad Rights Just Got Broader**

The government enjoys a broad right to terminate its contracts for convenience.<sup>40</sup> Historically, courts and boards have sustained the government's termination of contracts for a variety of reasons, recognizing the contracting officer's broad discretion in making the termination decision.<sup>41</sup> Courts and boards generally have refused to overturn a convenience termination absent a showing of bad faith or "clear abuse" of discretion.<sup>42</sup> Indeed, commentators have stated that "[i]n no other area of contract law has one party been given such complete authority to escape from contractual obligations."<sup>43</sup>

In 1982, the Court of Claims sought to rein in the government's overly broad use of the termination for convenience clause. In *Torncello v. United States*, the Navy awarded a requirements contract for grounds maintenance and refuse removal. The contract included a requirement for "plant disease, insect and rodent control" for which the contractor bid \$500 per call. At the time of the

award of the contract, the Navy knew that the contractor's price for these services was significantly higher than that of its competitors. Consequently, rather than giving its pest control requirements to the contractor, the Navy ordered these services from the Department of Navy Public Works.

In *Torncello*, the Court of Claims concluded that the Navy's failure to order its pest control requirements from the contractor was a breach of contract rather than a "constructive termination for convenience."<sup>44</sup> However, a plurality of the court was not content to stop there. Seeking to allocate the risks of a termination in an equitable manner, the plurality opinion asserted that the government's right to terminate for convenience was limited to situations where there has been "some kind of change from the circumstances of the bargain or in the expectation of the parties."<sup>45</sup>

For eight years, the Claims Court<sup>46</sup> and the contract boards of appeal grappled with the meaning of this "change in circumstances" rule.<sup>47</sup> Finally, in 1990, the Court of Appeals for the Federal Circuit divined the true meaning of *Torncello*. In *Salsbury Industries v. United States*,<sup>48</sup> the Postal Service terminated for convenience Salsbury's contract for lockboxes after a federal district court issued an injunction ordering it to suspend the performance of existing lockbox contracts. The federal district court issued the injunction because the Postal Service unlawfully determined that a competing contractor, Doninger Metal Products Corporation, was not responsible.

<sup>39</sup> *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982).

<sup>40</sup> See, e.g., GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.249-2, Termination for Convenience of the Government (Fixed Price) (allowing termination for convenience if a contracting officer determines that a termination is in the government's interest) [hereinafter FAR].

<sup>41</sup> See, e.g., "Quazar," ASBCA No. 23504, 79-1 BCA ¶ 13,828 (termination of band contract due to poor reception at engagement); *G.C. Casebolt Co. v. United States*, 421 F.2d 710 (1970) (bid irregularities); *Nolan Bros. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969) (defective specifications).

<sup>42</sup> *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964) (in absence of bad faith or clear abuse of discretion, decision to terminate is "conclusive"). To show bad faith, a contractor must demonstrate "well nigh irrefragable proof" that government officials had a specific, malicious intent to harm the contractor. See, e.g., *Apex Int'l Mgmt. Servs., Inc.*, ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff'd on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by "declaring war" against the contractor; board overturned default termination and awarded contractor breach damages). To show an abuse of discretion, the contractor must demonstrate that the government's actions were arbitrary and capricious. *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 672 (Ct. Cl. 1982).

<sup>43</sup> JOHN CIBINIC, JR. & RALPH NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS, 1073 (3d ed. 1995).

<sup>44</sup> *Torncello v. United States*, 681 F.2d at 772. The Navy did not actually terminate this contract for convenience, but let it run to completion without ordering any pest control services from the contractor. The Navy argued, however, that it "constructively" terminated the contract for convenience because it had the legal right to do so even though it failed to exercise that right. See *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925) (actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it).

<sup>45</sup> *Torncello*, 681 F.2d at 772.

<sup>46</sup> In 1982, Congress abolished the Court of Claims and created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. In 1992, Congress changed the name of the United States Claims Court to the United States Court of Federal Claims. See Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4516.

<sup>47</sup> See, e.g., *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43 (1984); *Special Waste, Inc.*, ASBCA No. 36775, 90-2 BCA ¶ 22,935; Karl M. Ellcessor, *Torncello and the Changed Circumstances Rule: "A Sheep in Wolf's Clothing,"* ARMY LAW., Nov. 1991, at 18.

<sup>48</sup> 905 F.2d 1518 (Fed. Cir. 1990).

On appeal to the Federal Circuit, Salsbury argued that, under *Torncello*, the termination for convenience was improper because the Postal Service knew of its misconduct in disqualifying Doninger before awarding the contract to Salsbury. Because the injunction was foreseeable, Salsbury reasoned, the government could not rely on it as a basis for terminating its contract for convenience. The Federal Circuit rejected Salsbury's argument, finding that the injunction was a proper and sufficient basis for termination of the contract. Moreover, the Federal Circuit specifically noted that *Torncello* had "nothing to do with this case," but merely "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by advert[ing] to the convenience clause."<sup>49</sup> Because the Postal Service had every intention of honoring its contract with Salsbury at the time of award, the termination was proper.

In spite of its direct assault on the broader implications of *Torncello*, the Federal Circuit in *Salsbury* nevertheless took pains to note, *ala Torncello*, that the district court's injunction was an "unanticipated change in circumstances, not merely justifying but compelling termination of the contract," because neither party expected that an injunction would be issued requiring termination.<sup>50</sup> Thus, while seeming to limit the *Torncello* doctrine to situations where the government awards a contract intending to terminate, the Federal Circuit went out of its way to say that the facts requiring the Postal Service to terminate were unexpected.

Left unanswered by the Federal Circuit's decision in *Salsbury* is the extent to which precontractual knowledge, without an actual intent to terminate, may limit the termination for convenience decision. Clearly, if the facts necessitating termination are completely unexpected, as in *Salsbury*, the government may properly terminate the contract. But what if the government knows the facts? What if the government enters a contract fully intending to honor it, but has knowledge of facts that would lead a reasonable person to conclude that termination will be necessary? For example, in *Salsbury*, what if the Postal Service knew that an injunction was forthcoming, but awarded the contract anyway on the mistaken belief that it could disregard the injunction, or that the injunction would be successfully appealed? Can the government properly terminate for convenience in these circumstances?

In the recent case of *Caldwell & Santmyer, Inc. v. Glickman*,<sup>51</sup> the Federal Circuit squarely addressed this question. In this case, the Department of Agriculture solicited bids for construction of a plant laboratory in Beltsville, Maryland. The equipment schedule in the solicitation included a requirement for "vendor furnished/vendor installed" equipment. The government interpreted this provision as requiring the contractor to furnish and install these items. Concerned about a possible mistake in Caldwell's bid, an agency employee asked Caldwell to submit the cost summary sheets used to determine its bid price. These sheets showed that Caldwell had not included in its bid price any costs for the "vendor furnished/vendor installed" equipment. Although the agency employee brought this to the contracting officer's attention, the contracting officer awarded the contract to Caldwell at its bid price because, in his opinion, there was "no reason to believe Caldwell's bid contained an error."<sup>52</sup>

After award, the contracting officer learned that Caldwell interpreted the requirement for "vendor furnished/vendor installed" equipment to mean government furnished, rather than contractor furnished, equipment. The contracting officer reviewed the specifications and drawings, then decided that the term "vendor furnished/vendor installed" was not precisely defined by the contract. Because the cost of supplying and installing this equipment was as much as \$300,000, the contracting officer determined that modification of the contract would be too costly and unfair to other bidders. The contracting officer then decided to terminate Caldwell's contract for convenience.

Caldwell submitted a claim to the government for lost profits in the amount of \$148,132, asserting that the government breached its contract by improperly terminating for convenience. After losing at the United States Department of Agriculture Board of Contract Appeals,<sup>53</sup> Caldwell appealed to the Federal Circuit, arguing that the government could not terminate for convenience "simply to get out of a bad deal that it was aware of, or should have been aware of, at the time of contract award."<sup>54</sup> Specifically, Caldwell asserted that the government had actual knowledge, prior to awarding the contract, that Caldwell's bid did not include the cost of equipment designated as "vendor furnished/vendor installed," but improperly chose to contract anyway.

<sup>49</sup> *Id.* at 1521. Considering the large number of opinions that have struggled with *Torncello*'s "change in circumstances" requirement, the Federal Circuit's declaration that *Torncello*'s holding is "unremarkable" is, to say the least, quite remarkable. *Salsbury* substantially reinterpreted the majority holding in *Torncello* in a much more restrictive fashion than written. *Torncello* did not find that the termination breached the contract due to a preexisting intent to terminate, but simply because the termination was based on precontractual knowledge that the government could obtain the items at lower cost. In so holding, the Federal Circuit expressly overruled precedent to the contrary. See *Colonial Metals Co. v. United States*, 495 F.2d 1355 (Ct. Cl. 1974).

<sup>50</sup> *Salsbury*, 905 F.2d at 1522.

<sup>51</sup> 55 F.3d 1578 (Fed. Cir. 1995).

<sup>52</sup> *Id.* at 1579. The contracting officer's opinion was based on architectural/engineering estimates and on the amounts of the next three lowest bids.

<sup>53</sup> *Caldwell & Santmyer, Inc.*, AGBCA No. 93-191-1, 94-2 BCA ¶ 26,854.

<sup>54</sup> *Caldwell*, 55 F.3d at 1580.

The Court rejected Caldwell's appeal, expressly refusing to apply *Torncello* to situations where the government contracts in good faith but knows of facts putting it on notice that it may have to terminate for convenience "at some future date."<sup>55</sup> Moreover, the Court declined Caldwell's invitation to put an "additional limitation on the government's use of the termination for convenience clause."<sup>56</sup> Citing *Salsbury*, the Court held that bad faith is required for a successful *Torncello* claim. In other words, the government must have a preexisting intent to terminate at the time of award to establish a valid *Torncello* claim.

The *Caldwell* decision should slam the door on nearly all contractor assertions that the government improperly terminated a contract for convenience.<sup>57</sup> Precontractual knowledge of facts

that ultimately necessitate a termination for convenience will not suffice to demonstrate a breach of contract. Absent egregious facts showing bad faith or clear abuse of discretion, the courts and boards will uphold a termination for convenience.

Nevertheless, legal advisors should continue to caution contracting officers that the courts and boards will find bad faith or abuse of discretion where the government awards a contract intending to terminate for convenience.<sup>58</sup> An improper termination for convenience can be a costly lesson, as the contractor will be entitled to damages, including lost profits.<sup>59</sup> Legal advisors should also review convenience terminations from a "business judgment" perspective, to assist the contracting officer in making decisions which are truly in the "government's interest."<sup>60</sup> Major Causey.

<sup>55</sup> *Id.* at 1582.

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

<sup>57</sup> Indeed, *Caldwell* may be viewed as a restoration of the law prior to *Torncello*. See *supra* notes 3, 4; *Colonial Metals Co. v. United States*, 495 F.2d 1355 (Ct. Cl. 1974), *overruled by Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (government properly terminated contract for convenience to obtain a cheaper price even though the contracting officer knew of the better price at the time of award; termination for convenience is "as available for contracts improvident in their origin as for contracts which supervening events show to be onerous or unprofitable for the Government.").

<sup>58</sup> See *Operational Service Corp.*, ASBCA No. 37059, 93-3 BCA ¶ 26,190 (government was aware at time of exercising option that either a commercial activity or the government would take over the work; termination for convenience an abuse of discretion).

<sup>59</sup> See *id.* at 130,374.

<sup>60</sup> See DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 1.602-2(c)(i)(A) (Department of Army policy requires legal counsel participation in the "entire acquisition process including acquisition planning thru contract completion or termination and closeout"). *Id.*

## Claims Report

### United States Army Claims Service

#### Claims Note

##### Revision of DA Pam 27-162<sup>1</sup>

The United States Army Claims Service (USARCS) is revising *Department of the Army Pamphlet 27-162, Legal Services: Claims (DA Pam 27-162)*, last published on 15 December 1989.<sup>2</sup> This complete update of *DA Pam 27-162* will mirror the format of *Army Regulation 27-20, Legal Services: Claims (AR 27-20)*.<sup>3</sup> Chapters, headings, and paragraph numbers will correspond as much as possible. For example, to find a discussion of how to implement a specific Army policy set forth in *AR 27-20*, the reader

will be able to refer to the corresponding paragraph in *DA Pam 27-162*.

A complete revision of *DA Pam 27-162* will make the pamphlet even more helpful for claims personnel in the field. Explanatory language in *AR 27-20* will be moved to *DA Pam 27-162*. Ultimately, a new streamlined *AR 27-20* will be limited to prescribing Army-wide policies and assigning missions and responsibilities, leaving information and procedures needed to carry out the claims mission to *DA Pam 27-162*.

Publication of the new *DA Pam 27-162* is expected by summer 1996. This is an important project and will greatly help the

<sup>1</sup> DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989) [hereinafter *DA Pam 27-162*].

<sup>2</sup> *Id.*

<sup>3</sup> DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (1 Aug. 1995) [hereinafter *AR 27-20*].

claims community. Specific suggestions for improvement of *DA Pam 27-162* should be sent to the USARCS Executive. Lieutenant Colonel Millard.

### ***Tort Claims Note***

#### **Special Delegation, Chief Counsel, United States Army Corps of Engineers**

The provisions of the Army Maritime Claims Settlement Act (AMCSA)<sup>4</sup> authorizes the Secretary of the Army to re-delegate claims settlement authority up to \$100,000. Under AR 27-20, paragraphs 8-9 and 8-13,<sup>5</sup> the Secretary of the Army has re-delegated settlement authority to The Judge Advocate General (TJAG), The Assistant Judge Advocate General, and the Commander, USARCS or his designee.

At the request of Chief Counsel, Army Corps of Engineers, TJAG has delegated his maximum authority to settle under the AMCSA to the Chief Counsel. This includes authority to re-delegate. Settlement authority includes authority to deny or approve payment in full or in part. It also includes authority to accept, settle, compromise, or receive payment on claims in favor of the United States. Claims in excess of \$100,000 will be processed in accordance with AR 27-20, Chapter 8, Maritime Claims. Claims under the Federal Torts Claims Act will continue to be processed in accordance with AR 27-20, Chapter 4, Claims Cognizable Under the Federal Tort Claims Act.<sup>6</sup> Currently, settlement authority is limited to \$25,000. However, in view of the stability and experience of the Corps of Engineers (COE) claims attorneys in many COE districts, increased settlement authority may be granted on a case-by-case basis. This will be facilitated, without processing through the COE channels, by strict compliance with the mirror file requirements of AR 27-20, paragraphs 2-9c and 4-9d, and direct discussion of the claim between the district claim attorney and the USARCS area action officer. Army policy is to settle claims at the lowest level possible.<sup>7</sup> Mr. Rouse.

### ***Personnel Claims Note***

#### **Adjudication Guidance on Potential Carrier Recovery Issues**

#### ***Potential Carrier Recovery Deductions on Code 4, 5, 6, 7, 8, J, T and Direct Procurement Method Shipments***

When a claimant fails to timely report a loss or damage on a Department of Defense (DD) Form 1840 or 1840R, it may be

appropriate to deduct lost potential carrier recovery (PCR) from the adjudicated amount for that particular line item.<sup>8</sup> However, a deduction for PCR should only be made if actual carrier recovery is lost.<sup>9</sup> For example, when a three-piece schrank is claimed as having damage to all three pieces, but there is only timely notice of damage to two of the pieces, the total carrier liability for the schrank (if size unknown) would be 250 pounds x \$1.80 = \$450. Accordingly, the Army can pursue up to the full \$450, whether one or more portions of the schrank was damaged in shipment. The fact that the damage to one of the portions of the schrank was not listed on the DD Form 1840 or 1840R would not prohibit the Army from pursuing the full carrier liability for the damage to the other portions, where timely notice was provided and the repair cost exceeds that amount.

For example, if the repair cost for the two pieces with timely notice is \$250 and \$350 and the repair cost for the one piece with no timely notice is \$150, the Army could pursue \$450 based on the repair cost of the first two pieces. In this case, it would not be necessary to penalize the claimant for PCR because none was lost. However, before paying the claimant for that third piece of the schrank, the claims judge advocate may need to consider whether there is enough evidence to substantiate that the claimed damage occurred in shipment. Regardless, it would not effect PCR.

#### ***PCR Deductions Shown on the DD Form 1844***

The "Amount Allowed" block for each line item should show the amount adjudicated and awarded on a particular claim. PCR line items are done differently from maximum allowable deductions in that the deduction is made on a line by line basis, rather than at the end.

For example, on a Code 4 shipment, with a love seat adjudicated at \$450, and the lost carrier liability is 80 pounds x \$1.80 = \$144, then an "RC \$450 @ 10%D = \$405 less \$144 PCR" should be placed in the "Remarks" block and "\$261" in the "Amount Allowed" block (i.e., \$405 - \$144 = \$261). The number "80" would go in the "Item Weight" block, to show the weight used to determine the carrier's liability, and a dash (-) or a zero (0) would go in the "Carrier Liability" block to indicate that no carrier liability is to be pursued for that line item. On a Code 1 shipment, place "RC \$450 @ 10%D = \$405, less PCR" in the "Remarks" block and a "0" in the "Amount Allowed" and "Carrier Liability" blocks. Ms. Marie Holderness.

<sup>4</sup> 10 U.S.C. 4802 (1988).

<sup>5</sup> AR 27-20, *supra* note 3.

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

<sup>7</sup> *Id.* para. 1-19.

<sup>8</sup> DA PAM 27-162, *supra* note 1, para. 2-52; AR 27-20, *supra* note 2, para. 11-21a.

<sup>9</sup> DA PAM 27-162, *supra* note 1, para. 2-52b.

**Management Note**

**Erroneous Commitment of Claims Open Allotment**

The USARCS Budget Office continues to experience problems with erroneous commitments of the Claims Open Allotment (COA) account. The COA is the appropriated funds account to pay claims. Frequently, however, finance offices commit COA funds for other unauthorized charges to include temporary duty settlements. Staff and claims judge advocates need to ensure that their claims offices are only committing COA funds for authorized claims. To do this, claims offices should examine the COA commitments each month to ensure they only reflect authorized use. Additionally, staff and claims judge advocates should review the COA commitments periodically.

Claims offices and their supervisors can review commitments of the COA using their copy of the 302 Expenditure Report. That document usually can be obtained from the servicing finance office's internal control and analysis branch. A review of the 302 Expenditure Report will show the element of resource (EOR) related to each charge against the COA. If the 302 Expenditure Report reflects an EOR other than that for an authorized claim commitment, the claims office should initiate action to correct the mistake. The USARCS Budget Office is available to help correct mistakes. Questions regarding the COA can be directed to Ms. Roe at DSN 923-7009, extension 332. Lieutenant Colonel Bowman.

**Guard and Reserve Affairs Items**

*Guard and Reserve Affairs Division, OTJAG*

**The Judge Advocate General's Continuing Legal Education (On-Site) Schedule**

Army Regulation 27-1, Judge Advocate Legal Services, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend each year the On-Site training within their geographic area. All other USAR and Army National Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates,

judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *The Army Lawyer* will contain a monthly update to the On-Site schedule. If you have any questions about this year's continuing legal education program please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380. Major Storey.

**THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
27-29 Oct Note: 2.5 days	Dallas, TX 90th RSC Souffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	MAJ Barry Woolfer 90th RSC 8000 Camp Robinson Rd. N Little Rock, AR 72118 (501) 771-790
18-19 Nov	NYC 77th RSC/4th LSO Fordham University School of Law 160 West 62d Street New York, NY 10023	LTC Myron J. Berman 77th RSC Bldg. 637 Fort Totten, NY 11359 (718) 352-5703

**THE JUDGE ADVOCATE GENERAL'S SCHOOL  
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
06-07 Jan 96	Long Beach, CA 78th LSO	LTC Andrew Bettwy 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (702) 876-7107
20-21 Jan	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 782205	LTC Matthew L. Vadnal 6th LSO, Bldg. 572 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002
24-25 Feb	Denver, CO 87th LSO Doubletree Inn 13696 East Iliff Pl. Aurora, CO 80014	MAJ Kevin G. Maccary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt Lake City, UT HQ, UTARNG National Guard Armory 12953 South Minuteman Dr. Draper, UT 84020	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
02-03 Mar	Columbia, SC 12th LSO/120th RSG	LTC Robert H. Uehling 12th LSO 5116 Forest Drive Columbia, SC 29206-4998 (803) 790-6104
09-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858

# THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 96

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
26-28 Apr Note: 2.5 days	St. Louis, MO 89th ARCOM/MO ARNG	LTC John O'Mally 8th LSO ATTN: AFRC-AMO-LSO 11101 Independence Ave. Independence, MO 64054
04-05 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 BPN: (305) 357-7600

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through

their unit training offices or, if they are non-unit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 5F-F1

Class Number—133d Contract Attorneys' Course 5F-F10

To verify you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

## 2. TJAGSA CLE Course Schedule

### 1995

13-16 November: 19th Criminal Law New Developments Course (5F-F35).

13-17 November: 61st Law of War Workshop (5F-F42).

4-8 December: USAREUR Operational Law CLE (5F-F47E).

4-8 December: 133d Senior Officers' Legal Orientation Course (5F-F1).

### 1996

8-12 January: 1996 Government Contract Law Symposium (5F-F11).

9-12 January: USAREUR Tax CLE (5F-F28E).

22-26 January: 48th Federal Labor Relations Course (5F-F22).

22-26 January: 23d Operational Law Seminar (5F-F47).

31 January-2 February: 2d RC Senior Officers Legal Orientation Course (5F-F3).

5-9 February: 134th Senior Officers' Legal Orientation Course (5F-F1).

5 February-12 April: 139th Basic Course (5-27-C20).

12-16 February: PACOM Tax CLE (5F-F28P).

12-16 February: 62d Law of War Workshop (5F-F42).

12-16 February: USAREUR Contract Law CLE (5F-F18E).

26 February-1 March: 38th Legal Assistance Course (5F-F23).

4-15 March: 136th Contract Attorneys' Course (5F-F10).

18-22 March: 20th Administrative Law for Military Installations Course (5F-F24).

25-29 March: 1st Contract Litigation Course (5F-F102).

1-5 April: 135th Senior Officers' Legal Orientation Course (5F-F1).

15-19 April: 1996 Reserve Component Judge Advocate Workshop (5F-F56).

15-26 April: 5th Criminal Law Advocacy Course (5F-F34).

22-26 April: 24th Operational Law Seminar (5F-F47).

29 April-3 May: 44th Fiscal Law Course (5F-F12).

29 April-3 May: 7th Law for Legal NCOs' Course (512-71D/20/30).

13-17 May: 45th Fiscal Law Course (5F-F12).

13-31 May: 39th Military Judge Course (5F-F33).

20-24 May: 49th Federal Labor Relations Course (5F-F22).

3-7 June: 2d Intelligence Law Workshop (5F-F41).

3-7 June: 136th Senior Officers' Legal Orientation Course (5F-F1).

3 June-12 July: 3d JA Warrant Officer Basic Course (7A-550A0).

10-14 June: 26th Staff Judge Advocate Course (5F-F52).

17-28 June: JATT Team Training (5F-F57).

17-28 June: JAOAC (Phase II) (5F-F55).

1-3 July: Professional Recruiting Training Seminar

1-3 July: 27th Methods of Instruction Course (5F-F70).

8-12 July: 7th Legal Administrators' Course (7A-550A1).

8 July-13 September: 140th Basic Course (5-27-C20).

22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).

24-26 July: Career Services Directors Conference.

29 July-9 August: 137th Contract Attorneys' Course (5F-F10).

29 July-8 May 1997: 45th Graduate Course (5-27-C22).

30 July-2 August: 2d Military Justice Management Course (5F-F31).

12-16 August: 14th Federal Litigation Course (5F-F29).

12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).

19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).

19-23 August: 63d Law of War Workshop (5F-F42).

26-30 August: 25th Operational Law Seminar (5F-F47).

4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

9-13 September: 2d Procurement Fraud Course (5F-F101).

9-13 September: USAREUR Administrative Law CLE (5F-F24E).

16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

### 3. Civilian Sponsored CLE Courses

#### December 1995

4-6, ALIABA: Environmental Laws and Regulations Compliance Course, Williamsburg, VA.

4-8, GWU: Construction Contract Law, Washington, D.C.

4-8, ESI: Accounting for Costs on Government Contracts, Washington, DC.

4-8, ESI: Federal Contracting Basics, Las Vegas, NV.

8, ALIABA: Habitat, Seattle, WA.

11, GWU: Contract Award Protests: GAO, Washington, D.C.

11-14, ESI: Source Selection: The Competitive Proposals Contracting Process, San Diego, CA.

11-14, ESI: Contract Pricing, Washington, DC.

12, GWU: Contract Award Protests: GSBGA, Washington, D.C.

14-15, ALIABA: Wetlands, Portland, OR.

14-16, ALIABA: Civil Practice and Litigation Techniques in the Federal..., Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially

<u>Jurisdiction</u>	<u>Reporting Month</u>
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

\*Military exempt

\*\*Military must declare exemption

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is 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: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified

and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD A265755 Government Contract Law Deskbook vol. 1/ JA-501-1-93 (499 pgs).
- AD A265756 Government Contract Law Deskbook, vol. 2/ JA-501-2-93 (481 pgs).
- A DA265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

#### Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance/JA-2 61(93) (293 pgs).
- AD A281240 Office Directory/JA-267(94) (95 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A82033 Preventive Law/JA-276(94) (221 pgs).
- AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).
- AD A266177 Wills Guide/JA-262(93) (464 pgs).
- AD A268007 Family Law Guide/JA 263(93) (589 pgs).
- AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A269073 Model Income Tax Assistance Guide/JA 275-93) (66 pgs).
- AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).
- \*AD A289411 Tax Information Series/JA 269(95) (134 pgs).
- AD A276984 Deployment Guide/JA-272(94) (452 pgs).
- AD A275507 Air Force All States Income Tax Guide—January 1994.

#### Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).
- AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).
- AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- \*AD A298059 Government Information Practices/JA-235(95) (326 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

#### Labor Law

- 286233 The Law of Federal Employment/JA-210(94) (358 pgs).
- \*AD A291106 The Law of Federal Labor-Management Relations/JA-211(94) (430 pgs).

#### Developments, Doctrine, and Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

#### Criminal Law

- AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).
- AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).
- AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).
- AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

- AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).
- AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

#### International and Operational Law

- AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

#### Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

#### 2. Regulations and Pamphlets

*Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander  
U.S. Army Publications  
Distribution Center  
2800 Eastern Blvd.  
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

#### (1) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will

forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send

their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

### 3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

#### b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office  
Attn: LAAWS BBS SYSOPS  
9016 Black Rd, Ste 102  
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip {space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date **UPLOADED** is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	<i>Army Lawyer/Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.\
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense, Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/2-inch or 3 1/4-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

#### 4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

#### 5. Articles

The following information may be of use to judge advocates in performing their duties:

James T. Richardson, Gerald P. Ginsburg, Sophia Gatowski, and Shirley Dobbin, *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995).

International Committee of the Red Cross, 304 INT'L REV. RED CROSS, Jan-Feb 1995 (containing a variety of articles dealing with the protection of war victims and the implementation of international humanitarian law).

## 6. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Nell Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

Law librarians having resources available for redistribution should contact Mrs. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

James R. Tanner, DSN 790-2119/2536, commercial (801) 833-2119-2536, located at

DOA Tooele Army Depot  
Legal Office, SIOTE-CS-LG  
Building 1002  
Tooele, UT 84074

has the following material:

Colorado Revised Statutes  
Colorado Session Laws  
US Law Week (prior to 1992)  
US Code Congressional and Administrative News  
(prior to 1992)  
West Pacific Digest  
Comptroller General Decisions  
ALR Fed.  
Supreme Court Reports  
Arizona Revised Statutes  
New Mexico Statutes  
New Mexico Digest

Mary Henriksen, commercial (402) 221-3229, located at

Department of the Army  
Corps of Engineers, Omaha District  
215 North 177th Street  
Omaha, Nebraska 68102-4978

has the following material:

Shepard's Northwestern Reporter Citations, vol. 1, pts. 1-3 (1985); vol. 2 (1985); Supplement (1985-1990)

Shepard's Federal Citations (for Federal Reporter), 1989 set, vols. 1-14, plus 1989-90 Supplement, pts. 1-2, plus 1990-91 and 1991-92 Supplement

Shepard's Federal Citations (for Federal Supplement), vols 1-7 (1990); 1990-92 Supplement (2) Shepard's Military Justice Citations, Cases and Statutes (1985)

CW2 Tommy Worthey, DSN 315-768-7179, located at

HHC, 19th TAACOM  
ATTN: EANC-JA  
Unit 15015, Box 2278  
APO AP 96218-0171

has the following material:

Military Justice Reporters, vols. 1-10, 16-36

LTC Davis, DSN 291-2438, commercial (202) 782-2124, located at

Legal Counsel Armed Forces Institute of Pathology,  
Washington, DC 20306-6000

has the following material:

Court Martial Reports, vols. 1-50  
ALR Federal Cases and Annotations, vols. 1-114,  
with Index  
ALR 2d, vols. 1-100, with Index  
ALR 3d, vols. 1-100, with Index  
ALR 4th, vols. 1-90, with Index  
ALR 5th, vols. 1-21, with Index

(Note: Because the ALLS no longer purchases the above listed publications, the annual update of the ALRs would be the responsibility of the command).

CW4 Gardner, DSN 357-5136, commercial (206) 967-5136, located at

Office of the Staff Judge Advocate  
Headquarters I Corps and Fort Lewis  
Fort Lewis, Washington 984-5000

has the following material:

Corpus Juris Secundum, Vols 1-173

(Note: Because the ALLS no longer purchases the above listed publications, the annual update of the ALRs would be the responsibility of the command).

Ms. Linda Daniels, DSN 229-5259, commercial (703) 349-5259, located at

CECOM—Vint Hill Legal Office  
Vint Hill Farms Station  
Warrenton, Virginia 22186-5005

has the following material:

Court-Martial Reports, vols. 1-50  
(to include Citor/Index); 1-25 and 26-50

Military Justice Reporter, vols. 1-35 plus  
some looseleafs

SFC Beushausen, DSN 485-8905, located at  
Department of the Army  
Legal Office European Health  
Service Support Area  
CMR 402  
APO AE 09180

has the following material:

**Military Justice Reporter, vols. 33-38**

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By Order of the Secretary of the Army:

**DENNIS J. REIMER**  
*General, United States Army*  
*Chief of Staff*

Official:

Distribution: Special

  
**JOEL B. HUDSON**  
*Acting Administrative Assistant to the*  
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US Army  
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Charlottesville, VA 22903-1781

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