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Editor's Note:

This is the 300th publication of *The Army Lawyer* as a Department of the Army pamphlet (DA Pam). Although publication began in August 1971, it was first designated as *DA Pam 27-50-()* in March 1973. The mastheads reproduced on the next two pages show that *The Army Lawyer* has changed its appearance slightly. Its mission, however, remains constant—"to be a timely source of information and research on current legal problems of interest to military attorneys."¹

During the past twenty-six years, *The Army Lawyer* has provided timely, practical information to judge advocates in all branches of the armed forces every month. It has become an invaluable tool for the practice of law in the military, and the legal community recognizes *The Army Lawyer* as a top-quality legal publication. Judge advocates can rely on *The Army Lawyer* to bring them articles and practice notes concerning issues that they face daily, as well as updates from the Environmental Law Division, the Litigation Division, and the U.S. Army Claims Service.

Technology has changed since *The Army Lawyer's* first edition, and the staff of *The Army Lawyer* has kept pace, striving to increase the publication's availability and to make access easy from a variety of sources. In 1971, *The Army Lawyer* was typed on a typewriter and sent to the printer to be typeset. Today, it is published through desktop publishing at The Judge Advocate General's School, U.S. Army, and it is then sent to the printer in camera-ready format. The use of desktop publishing streamlines the production process, reduces production time, saves money, and paves the way for publication on the Internet.

In 1971, *The Army Lawyer* was only available in paper copies. Today, it is also available on Westlaw and the Legal Automation Army-Wide System bulletin board service. As mentioned above, the use of desktop publishing is the first step toward making *The Army Lawyer* available on the Internet. It will be available on the JAG Corps homepage and through Lotus Notes within the next several months.

The staff of *The Army Lawyer* will continue its dedication to publishing a top-quality legal publication for military practitioners. The tradition of excellence which began in August 1971 will continue into the next century.

1. THE JUDGE ADVOCATE GENERAL'S SCHOOL, REG. 10-2, POLICIES AND PROCEDURES, at B-12 (1 May 1989).

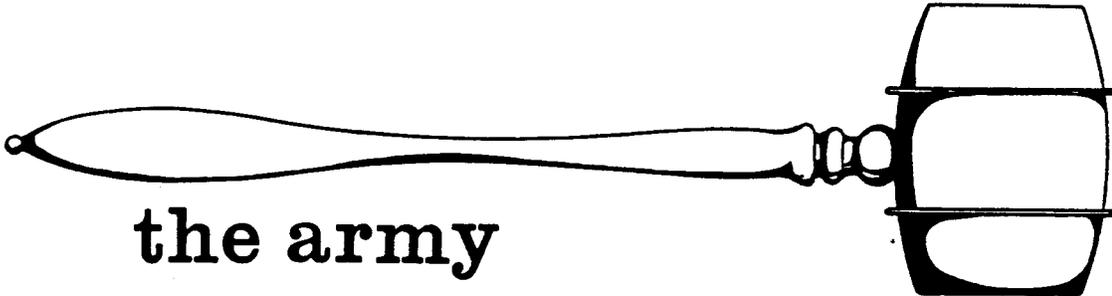


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HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet 27-50-56
August 1977

THE ARMY

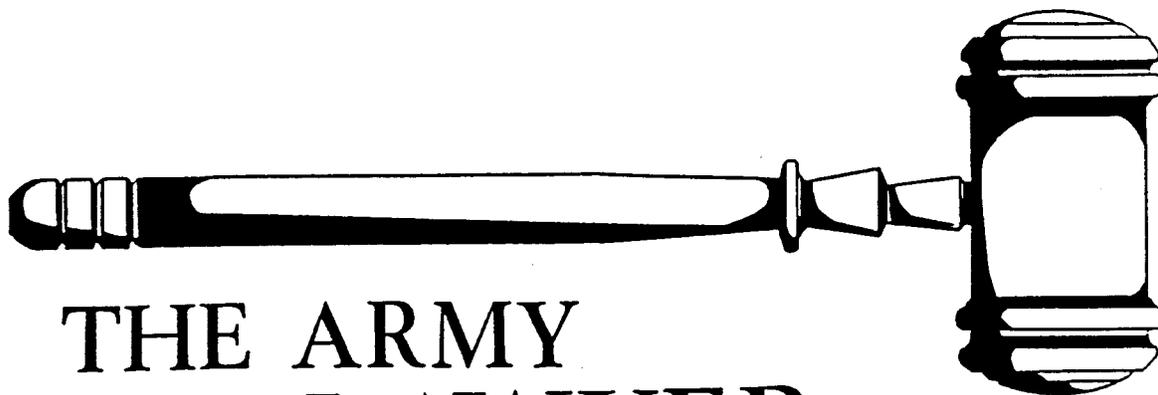


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27-50-129

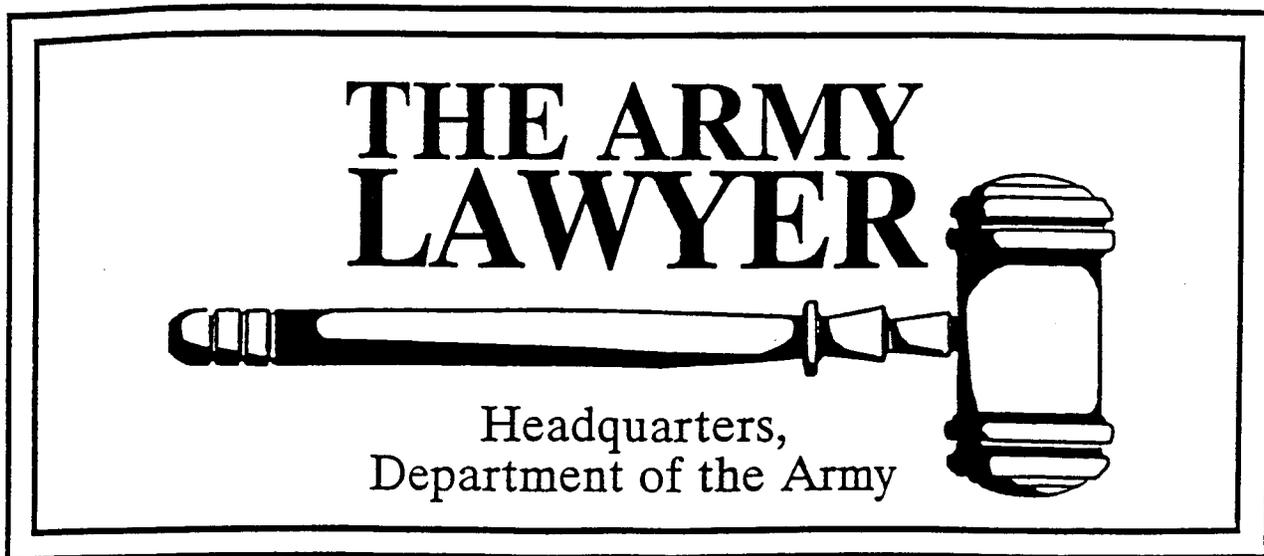
September 1983



THE ARMY LAWYER

Headquarters, Department of the Army.

Department of the Army Pamphlet
27-50-141
September 1984



Department of the Army Pamphlet 27-50-252
November 1993

Commanders' Coins: Worth Their Weight in Gold?

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*"A medal glitters but it casts a shadow."*¹

—Winston S. Churchill

Introduction

Army commanders have become increasingly enamored with the presentation of commanders' coins. Typical commanders' coins, which are about the size of half dollar coins, are often custom minted and emblazoned with the unit insignia.² Commanders recognize that these inexpensive coins are powerful and versatile tools which can instill unit pride, enhance esprit de corps, and reward outstanding performance. To show appreciation for a job well done, commanders give these tokens to individual soldiers, civilian employees, and entire units. Coins are equally effective in building community relations.³ The gift of a coin can build rapport, say thank you, and buy goodwill for the command and the commander. Surely these tokens are well worth their small price! Of course, the commander may use government funds to purchase such valuable items—or can he?

Few would question the inherent value of the commander's coin as a management tool. The propriety of purchasing and distributing commanders' coins, however, presents an interesting fiscal law issue. The crux of the issue is whether commanders' coins are the "object" of a congressional appropriation of funds. In other words, is an expenditure of appropriated funds (APFs) for coins made for a proper purpose?⁴ If not, are non-appropriated funds (NAFs) available for the purchase of these coins? The answers are neither simple nor clear cut and may depend on the purpose of giving the coin, the status of the recipient, and the proposed source of funding.

This article outlines a comprehensive approach to the vexing fiscal issues related to commanders' coins⁵ and examines when and under what circumstances APFs and NAFs may be used for the purchase of coins for awards or tokens of goodwill. It also advises practitioners that, under certain circumstances, APFs, NAFs, and official representation funds⁶ may be used for the purchase of commanders' coins.

Coins and similar devices may always be privately funded. Private funding for coins might come from an "informal fund," a formally organized private organization,⁷ or the commander's

1. TREVOR ROYLE, A DICTIONARY OF MILITARY QUOTATIONS 158 (1st Am. ed. 1989).

2. Suitable unit coins may also be available without special orders. Museum foundations frequently stock "unit coins" for resale. See U.S. DEP'T OF ARMY, REG. 870-20, MUSEUMS & HISTORICAL ARTIFACTS, para. 3-10 (9 Jan. 1987). Coins, medallions, and other commemorative items may also be sold in exchanges. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, app. C, para. c2(8) (15 Dec. 1992).

3. In fact, the use of commanders' coins for community relations purposes dates back to the nation's infancy. When Meriwether Lewis embarked on his historic exploration to the Pacific Coast in 1803, he carried with him Jefferson Peace Medals. These were essentially the equivalent of commanders' coins. They were embossed with the head and shoulders of President Thomas Jefferson. These coins were distributed to Indian chiefs encountered en route, for the purpose of establishing good relations between Native American tribes and the United States government. See STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST 158 (1997).

4. Restrictions on the types of items or services which may be purchased with APFs are found in the Constitution, article 1, section 9, clause 7; the "Purpose Statute," 31 U.S.C.A. § 1301a (West 1997); and the annual authorization and appropriations acts. See UNITED STATES GENERAL ACCOUNTING OFFICE, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW Ch. 4 (2d ed. 1991) [hereinafter FEDERAL APPROPRIATIONS LAW] (discussing the restrictions on items which may be purchased with APFs).

5. As a starting point for research in this area, the author consulted a memorandum on the subject by Colonel James O. Smyser. Memorandum, Staff Judge Advocate, Training and Doctrine Command (TRADOC), to TRADOC Installation Staff Judge Advocates, subject: Medallions (4 Oct. 1991). The memorandum has been posted on the Legal Automation Army-Wide System Bulletin Board Service and has been a valuable research tool for lawyers in the field for many years. This article is intended to update and expand upon that research. The author also acknowledges the invaluable assistance provided by Lieutenant Colonel Annamary Sullivan, Professor and Chair, Administrative and Civil Law Department, the Judge Advocate General's School, United States Army, who assisted with the initial research and who provided helpful editing advice.

6. See U.S. DEP'T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY (31 May 1996) [hereinafter AR 37-47] (governing official representation funds). These funds come from the portion of the Operation and Maintenance, Army, appropriation that is earmarked for emergencies and extraordinary expenses. See *infra* notes 66-77 and accompanying text.

7. See generally U.S. DEP'T OF ARMY, REG. 210-1, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS (14 Sept. 1990).

personal funds. Although commanders may not solicit donations of coins,⁸ they may encourage the donation of coins to the command in response to an inquiry by a private entity wishing to help the soldiers. Donated or privately purchased coins may be given to soldiers without running afoul of any limitations on gift giving. Items of little intrinsic value which are intended for presentation are specifically excluded from the Joint Ethics Regulation's definition of gifts⁹ and, as such, are not regulated. There are, therefore, virtually no restrictions on the use of coins purchased through private funding.

The Purpose Question

The "Purpose Statute" restricts the use of appropriations to the "objects for which the appropriations were made."¹⁰ The rule is simple, but its application can be tricky, especially when the question concerns the use of a lump sum appropriation such as the annual appropriation for Operation and Maintenance of the Army.¹¹ Lump sum appropriations contain little, if any, congressional guidance on appropriate expenditures of funds; they leave much to the discretion of agency officials. Lacking spe-

cific congressional guidance, lawyers must look to the decisions of the General Accounting Office (GAO) to gain insight into the proper use of appropriated funds.¹² As an additional source for guidance when questions arise about the propriety of making a particular payment of appropriated funds, the GAO will render an advance decision.¹³ These advance decisions compose much of the GAO case law.

As a starting point in an analysis of commanders' coins, one should ask, what is the purpose of the coin? Is it a gift, a memento, a souvenir, a token of appreciation, or an award? The answer is important, because it will determine whether the purchase can be justified as a necessary expense of the agency.¹⁴ The GAO has deemed the giving of a gift, memento, souvenir, or token of appreciation to be a personal expense. As such, these items cannot be purchased with appropriated funds, absent statutory authority.¹⁵

Different rules apply to NAFs. Statutory penalties¹⁶ bolster regulatory provisions that describe in broad terms the authorized and unauthorized uses of NAFs.¹⁷ Nonappropriated fund managers, however, are not entitled to GAO advance decisions,

8. U.S. DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS, para. 7a(5) (1 May 1981).

9. See Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635.203(b)(2), as contained in U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION (Aug. 30, 1993).

10. 31 U.S.C.A. § 1301(a) (West 1997).

11. In Fiscal Year 1997, this appropriation contained the following language:

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed \$11,437,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes; \$17,519,340,000 and, in addition, \$50,000,000 shall be derived by transfer from the National Defense Stockpile Transaction Fund: *Provided*, That during the current fiscal year and hereafter, funds appropriated under this paragraph may be made available to the Department of the Interior to support the Memorial Day and Fourth of July ceremonies and activities in the National Capital Region: *Provided further*, That of the funds appropriated in this paragraph, not less than \$300,000,000 shall be made available only for conventional ammunition care and maintenance.

Department of Defense Appropriations Act, Title II, Operation and Maintenance, Pub. L. No. 104-208, 110 Stat. 3009-73 (1996). As the reader can see, the appropriations language contains very little specific guidance.

12. For a discussion of the history of these decisions, also referred to as Comptroller General decisions, and the statutory basis for their issuance, see FEDERAL APPROPRIATIONS LAW, *supra* note 4, ch. 1.

13. 31 U.S.C.A. § 3529 (West Supp. 1997). A request for an advance decision must be made by a disbursing official, a certifying official, or an agency head. To date, the commander's coin issue has not been presented to the GAO.

14. The GAO has set out a three-part test to determine whether an expense is for a proper purpose. Is there a specific statutory basis for the expenditure, or is the expenditure necessary and incident to proper execution of the general purpose of the appropriation? Is the expenditure prohibited by law? Is the expenditure otherwise provided for? See Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (Oct. 25, 1954).

15. See, e.g., Decision of the Comptroller General, B-151668, 1979 U.S. Comp. Gen. LEXIS 2349 (June 30, 1979) (holding that the Department of Agriculture's proposed distribution of paperweights, leather products, and convenience foods to foreign visitors and official dignitaries to publicize the contributions of agricultural research was improper and that the items were personal gifts); Decision of the Comptroller General, B-195896, 1979 U.S. Comp. Gen. LEXIS 1993 (Oct. 22, 1979) (holding that photographs given to participants in ceremony to dedicate the Klondike Visitor's Center were not a necessary expense); U.S. Army Criminal Investigation Command (USACIDC) Appropriated Funds for Purchase of Marble Paperweights and Walnut Plaques, B-184306, 55 Comp. Gen. 346 (Oct. 12, 1975) (disapproving gifts given to governmental officials and others to facilitate good working relations and to foster goodwill).

16. See 10 U.S.C.A. § 2783 (West Supp. 1997).

17. U.S. DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, paras. 4-6, 4-7 (29 Sept. 1995) [hereinafter AR 215-1].

so there is no case law specifically applicable to the use of NAFs. Practitioners might find some interpretations in GAO audit reports which deal with NAF activities.¹⁸ Although the use of NAFs for personal gifts is not specifically addressed by regulation,¹⁹ NAFs may not be used “for any purpose that cannot withstand the test of public scrutiny or which could be deemed a waste of soldiers’ dollars.”²⁰ Furthermore, NAFs “are used only to pay for, or [to] defray the cost of, a wide range of [Morale, Welfare, and Recreation] activities”²¹ In light of this provision, GAO case law which forbids the use of APFs for personal gifts provides good guidance, although it does not provide binding authority concerning NAF spending.

Awards for Outstanding Performance

How can the popular commander’s coin be distinguished from an unauthorized personal gift? Most commanders insist that their coins are awards that are given on-the-spot to outstanding duty performers. To bolster that interpretation, some coins are inscribed with words such as “for excellence,” or “in recognition for outstanding performance.” Along with the coin, some commanders give a certificate which describes the recipient’s noteworthy achievement. Although the GAO has not dealt directly with the issue of commanders’ coins as awards, it has addressed other items proposed as “awards” for soldiers, federal civilian employees, and others. These opinions provide some insight into how the GAO, if asked, would

likely approach the question of coins that are purchased with APFs.

In evaluating the propriety of an award, the GAO first asks whether the award is authorized by statute.²² If a statutory basis exists, the GAO next asks whether the proposed award complies with implementing regulations.²³ Because the analysis rests on the interpretation of both statutes and regulations, the answer could differ depending upon whether the proposed recipient is a civilian employee, a military service member, or an unaffiliated person.²⁴ Regulatory differences between branches of the service could also lead to different results.²⁵ As applied to the question of commanders’ coins, the coins must comply with both statute and regulation to qualify as an award.

Awards to Soldiers

A strong argument can be made that Army commanders may use APFs to purchase coins as awards for soldiers.²⁶ The Army has a seemingly endless array of awards programs which might conceivably authorize the presentation of a coin as an award.²⁷ In the typical scenario, however, the commander gives the coin to recognize a soldier’s outstanding duty performance or special achievement. In such situations, the presentation of the coin appears to fall within the authority of the Secretary of Defense under 10 U.S.C. § 1125. This is the only statute that is potentially applicable to the presentation of a coin as a performance award for soldiers. That statute grants the Secretary of

18. The GAO has statutory authority to audit nonappropriated fund activities. See 31 U.S.C.A. § 3525.

19. Distributions to charities, however, are specifically prohibited. This prohibition extends to collecting or disbursing “donations of a private or personal nature.” AR 215-1, *supra* note 17, para. 4-7d.

20. *Id.* para. 4-7a.

21. *Id.* para. 4-6.

22. Many awards are based on specific statutes. For example, the Legion of Merit is authorized by 10 U.S.C.A. § 1122 (West 1997). Others were established by executive orders. For example, the Meritorious Service Medal is authorized by Exec. Order No. 11,448, 46 Fed. Reg. 35,251 (1969). These executive orders justify the awards because they are an exercise of the President’s authority as Commander-in-Chief. Although the GAO often discusses the statutory bases (or lack thereof) when addressing the propriety of awards, an argument could be made that the giving of awards is an inherent part of command authority.

23. See Decision of the Comptroller General, B-184306, 1980 U.S. Comp. Gen. LEXIS 2597 (Aug. 27, 1980) (holding that DOD Instruction 5120.16, which implements 10 U.S.C.A. § 1124 (West 1976), allows the awarding of a desk medallion to military personnel).

24. By “unaffiliated person,” the author is referring to a person who is not a soldier and is not employed by the federal government, as well as to a non-federal governmental entity.

25. For example, absent a statutory basis, no cash award may be given to military members of the Coast Guard for superior performance, even though a statute authorized cash awards for civilian employees. Coast Guard—Cash Incentive Awards, B-226928, 68 Comp. Gen. 343 (Mar. 24, 1989).

26. This assertion is the opinion of the author. It is not the official opinion of the Department of the Army. As the GAO has never ruled on this issue, it is possible that a subsequent GAO opinion could settle this question. The case most closely on point is the *Decision of the Comptroller General*, 1980 U.S. Comp. Gen. LEXIS 2597. That case, however, referred to a Navy regulation and to a DOD instruction which is no longer in effect.

27. Besides the award programs discussed in this article, there are a variety of other award programs. See, e.g., U.S. DEP’T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM (28 May 1988); U.S. DEP’T OF ARMY, REG. 672-73, ARMOR LEADERSHIP AWARD (1 Nov. 1980); U.S. DEP’T OF ARMY, REG. 672-201, THE SECRETARY OF THE ARMY RECRUITING/RETENTION/TRANSITION NONCOMMISSIONED OFFICER (NCO) OF THE YEAR AWARDS (14 Feb. 1992); U.S. DEP’T OF ARMY, REG. 672-304, THE ARMY RESEARCH AND DEVELOPMENT ACHIEVEMENT AWARDS (20 Apr. 1977); U.S. DEP’T OF ARMY, REG. 672-305, THE ARMY RESEARCH AND DEVELOPMENT LABORATORY AWARDS (21 Aug. 1975). There is also authority in AR 215-1 to give awards for athletic competitions and for Soldier of the Year. See AR 215-1, *supra* note 17. These award programs are beyond the scope of this article.

Defense the authority to: “award medals, trophies, badges, and similar devices to members, units, or agencies of an armed force . . . for excellence in accomplishments or competitions related to that Armed Force, and . . . [to] provide badges or buttons in recognition of special service, good conduct, and discharge under conditions other than dishonorable.”²⁸

*Army Regulation 600-8-22*²⁹ implements the statute. In addition to its provisions concerning individual decorations,³⁰ certificates of achievement, and memoranda or letters of commendation and appreciation,³¹ the regulation contains a chapter entitled “Trophies and Similar Devices Awarded in Recognition of Accomplishments.”³² This chapter includes the following language: “[t]rophies and similar devices³³ may be presented to military members, units, or Department of the Army agencies for excellence in *accomplishments or competitions* which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, and military aerial competition.”³⁴ The award guidelines that are set out in the chapter deal primarily with contests and events which are “announced officially”³⁵ and are “of a continuing nature.”³⁶ “However, awards *may be made on*

a one-time basis where the achievement is unique and clearly contributes to increased effectiveness.”³⁷ These regulatory provisions support the award to a soldier of a typical commander’s coin.³⁸

Having concluded that there is statutory and regulatory authority to give a coin to a soldier as an award and to purchase it with appropriated funds, what, if any, are the limits of that authority? Commanders must avoid the presentation of duplicate awards for the same act or achievement.³⁹ The cost of the coin must not exceed \$75 for an individual award or \$250 for a team award.⁴⁰ Finally, the purchase of coins for distribution as awards must be approved by the major command (MACOM) commander or the head of the principal Department of the Army agency.⁴¹

In addition to regulatory restrictions, thorny questions remain. How does the commander draw the distinction between a token of appreciation and an award as he strolls among his troops with a pocket full of coins? What constitutes an achievement which is “unique” and which “clearly contributes?” Finally, how many coins can be purchased and distrib-

28. 10 U.S.C.A. § 1125 (West 1997).

29. U.S. DEP’T OF ARMY, REG. 600-8-22, MILITARY AWARDS (25 Feb. 1995) [hereinafter AR 600-8-22].

30. *Id.* ch. 3.

31. *Id.* ch. 10, §§ III, IV.

32. *Id.* ch. 11.

33. The implementing Army regulation defines “trophies” expansively. A coin could be considered to fall within the definition of “trophy,” which states, “[t]rophies include, but will not be limited to, loving cups, plaques, badges, buttons, and similar objects which represent the type of achievement or contest.” *Id.* para. 11-3.

34. *Id.* para. 11-1a (emphasis added).

35. *Id.* para. 11-2a.

36. *Id.* para. 11-2b.

37. *Id.* (emphasis added).

38. It is reasonable to question whether the language in AR 600-8-22, paragraphs 11-1 and 11-2, is sufficiently broad to support the giving of coins as on-the-spot awards. Nevertheless, in taking the position that the provisions should be read so broadly, the author has considered the broad language of the underlying statute and the applicable DOD Directive, which states:

Accomplishments and contributions recognized under this Directive, including intramural sports and athletic competitions, officially shall be established and announced, and generally shall be of a continuing nature, *although awards may be made on a one-time basis where the accomplishment is as follows:*

- a. Unique.
- b. Clearly contributes to increased effectiveness or efficiency.
- c. Not covered in implementing instructions.

U.S. DEP’T OF DEFENSE, DIRECTIVE 1348.19, AWARD OF TROPHIES AND SIMILAR DEVICES IN RECOGNITION OF ACCOMPLISHMENTS (12 May 1989) (emphasis added). It is particularly clear in the DOD Directive that the limitations on the accomplishments for which the one-time award may be given do not require that the accomplishments be related to any event or competition, but only that they be unique and clearly contribute. *Id.*

39. AR 600-8-22, *supra* note 29, para. 1-18.

40. *Id.* para. 11-3.

41. *Id.* para. 1-7d.

uted without undue risk of allegations of fiscal abuse in a time of shrinking budgets? These practical problems create real challenges. This is an area where the potential for abuse and misinterpretation of the rules is high. Common sense and good judgment must prevail.

What is the difference between a gift and an award? There are numerous GAO cases which condemn proposals to distribute items to individuals. These cases repeatedly emphasize that APFs cannot be used for personal gifts. In determining whether the proposed item is a personal gift, the GAO looks not at the nature of the item to be presented,⁴² but rather at the agency's reason for giving it.⁴³ To steer clear of problems, commanders should ask themselves the following questions: Am I giving the coin to say "thank you" or "remember me?" Am I giving the coin to build esprit de corps or to instill unit pride?⁴⁴ Am I giving the coin to say "job well done?" Only in the last instance, when the commander's intent is to reward outstanding duty performance, can the coin properly be purchased with appropriated funds.⁴⁵

The requirements that the contribution be "unique" and that it "clearly contribute" are also potentially troublesome, because the regulation fails to further define those terms. The commonly understood definition of "unique," however, would encompass an achievement that is one of a kind, unusual, or of unusually high quality.⁴⁶ Clearly, the routine performance of regular duty would not merit a coin simply because it was observed by, or performed in the presence of, a high-ranking

commander. One can reasonably interpret the requirement that the achievement "clearly" contribute "to increased effectiveness" as the need for a direct connection between the act and the military mission. A commander should, in any case, be able to articulate his reason for giving a coin. As long as it is reasonable and the achievement to be awarded is duty-related,⁴⁷ the GAO is likely to defer to the commander's discretion.⁴⁸ A prudent commander might also keep a written record, however brief, which names the recipient and describes the accomplishment for which each coin is given.⁴⁹

As to the number of coins given out, commanders should remain sensitive to the potential for claims of wasteful spending.⁵⁰ Commanders of MACOMs might appropriately set some limits on the number of coins to be purchased using APFs in a given fiscal year and might limit such award authority to relatively senior level commanders.⁵¹ Even at a few dollars per coin, the aggregate cost of an installation's commanders' coins could easily amount to many thousands of taxpayer dollars.⁵² Commanders' displays of their own extensive collections of unique commanders' coins and unit coins suggest that these items may have become more collectors' items than awards. Coins traded or given as collectors' items cannot be funded with APFs.

Awards to Civilian Employees

42. In other words, the GAO was unconcerned that awarded items had monetary or practical value, or both.

43. The GAO has held that many proposed awards were actually "personal gifts." For example, the GAO disapproved the giving of photographs as mementos at a dedication ceremony, where the purpose was to thank individuals for their contributions. Decision of the Comptroller General, B-195896, 1979 U.S. Comp. Gen. LEXIS 1933 (Oct. 22, 1979). It disapproved a Forest Service proposal to give key chains to environmental educators to "stimulate" their future "advice and counsel" and to enhance the Forest Service's image. Expenditure for Key Chains for Educators Attending Forest Service Seminars, B-182629, 54 Comp. Gen. 976 (May 20, 1975). Other items which were determined to be personal gifts include caps to promote esprit de corps among volunteers, Decision of the Comptroller General, B-201488, 1981 U.S. Comp. Gen. LEXIS 1740 (Feb. 25, 1981); plaques designed to enhance relations between the criminal investigation command and community law enforcement officials, U.S. Army Criminal Investigation Command (USACIDC) Appropriated Funds for Purchase of Marble Paperweights and Walnut Plaques, B-184306, 55 Comp. Gen. 346 (Oct. 2, 1975); ice scrapers bearing a logo to discourage drinking and driving as part of an occupational health and safety program, Implementation of Army Safety Program, B-223608, 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988); and agricultural products to enhance the image of an agricultural research program, Decision of the Comptroller General, B-151668, 1970 U.S. Comp. Gen. LEXIS 2349 (June 30, 1970). In an easily distinguishable case, the GAO allowed the Forest Service to give out plaques to encourage state government's continued cooperation in Forest Service programs. To the Secretary of Agriculture, B-157368, 45 Comp. Gen. 54 (Oct. 27, 1965). The GAO approved payment of the voucher, only because the language of the appropriation indicated that its purpose included "cooperation with States." *Id.* Even so, the opinion advised that congressional approval should be sought for future purchases of such items. *Id.*

44. This purpose would not support the use of appropriated funds. See *Decision of the Comptroller General*, 1981 U.S. Comp. Gen. LEXIS 1740.

45. Of course, the commander could use his personal funds for all of the former purposes.

46. Unique means: "1. Being the only one of its kind: SOLE. 2. Being without equal or rival. 3. Informal. Unusual. An achievement of exceptionally high quality could be understood as being unequaled and/or unusual." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

47. See *IRS Purchase of T-shirts for Employees Contributing Certain Amounts to the Combined Federal Campaign*, B-240001, 70 Comp. Gen. 248 (Feb. 8, 1991) (Employee's decision whether to contribute to the Combined Federal Campaign was personal and unrelated to official duties. As such, Government Incentive Awards Act did not provide authority to give T-shirts to employees who contributed to the Combined Federal Campaign.).

48. An expenditure must bear a "reasonable relationship" to an appropriation. "The question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range." *Implementation of Army Safety Program*, 1988 U.S. Comp. Gen. LEXIS 1582. See also FEDERAL APPROPRIATIONS LAW, *supra* note 4, ch. 4, para. B (pertaining to the "necessary expense doctrine").

49. This would serve as a repeated reminder to the commander that the coin must be awarded only for merit. It would also be useful in the event of an audit.

The award of a commander's coin as a performance award to civilian employees presents few, if any, unresolved legal issues. As discussed previously, the propriety of giving a coin as an award rests upon the interpretation of the applicable statute and implementing regulations.⁵³ There are numerous GAO cases which specifically allow the giving of a wide variety of merchandise as awards for civilian employees. Cases both prior and subsequent to the abolishment of the Federal Personnel Manual have upheld the award of merchandise type items for good duty performance.⁵⁴ These opinions stress the Office of Personnel Management's (OPM) broad interpretation of the statute and the intentional flexibility of the OPM's implementing regulation.⁵⁵ The GAO opinions have approved many items that various agencies have given as awards, such as restaurant gift certificates, jackets, telephones, plaques, desk medallions, and even tickets to sporting events.⁵⁶ In reviewing these awards, the GAO has relied heavily on the OPM regulations.

The only potential issue, it would appear, is whether Army regulations contain any additional guidance. *Army Regulation 672-20*⁵⁷ established an extensive incentive award program, allowing a wide range of honorary awards which are usually evidenced by at least a certificate. While the regulation contains no specific authority for the award of a commander's coin, it grants MACOM commanders the authority to "establish supplemental recognition devices . . . adapted to major command requirements."⁵⁸ The implementing procedural guide provides that "[s]pecial plaques and other recognition devices may be established by activity commanders, consistent with MACOM policy."⁵⁹

For civilian awards, there is no specific regulatory dollar limitation for recognition devices. The GAO case law raises no concern about the appropriate nature of a coin of de minimis

50. The Army Deputy General Counsel (Ethics & Fiscal), Mr. Matt Reres, recently responded to a request from the administrative assistant to the Secretary of the Army for draft regulatory language to assist in curbing illegal spending for coins. The draft language will be presented by senior Army officials. Mr. Reres has recommended as follows:

Add the following new paragraph to *Army Regulation 600-8-22*, Military Awards, as paragraph 11-3b and number the current paragraph as [letter] a:

"b. Officers in the rank of 0-7 and above, Command Sergeants Major, and principal officials of HQDA, may present soldiers coin medallions as on-the-spot awards for performance of duties above and beyond the norm. Such coins will not be presented merely as greetings, gratuities, or tokens of appreciation. They will be presented only to sincerely recognize extraordinary effort exerted by a soldier in completing a mission."

Add to the end of *AR 600-8-22*, paragraph 11-4:

"To avoid waste of Army resources, award items procured in bulk will not include the presenting official's name unless the official is the Secretary of the Army; the Chief of Staff, Army; or the Sergeant Major of the Army. Items may be procured in bulk that contain the official's title and/or the organization's name. This limitation does not prohibit the specific inscribing or engraving of an award individually selected for presentation."

Add to *Army Regulation 672-20*, Incentive Awards, section 4-2:

"f. Officers in the rank of 0-7 and above, Command Sergeants Major, and principal officials of HQDA, may present soldiers coin medallions as on-the-spot awards for performance of duties above and beyond the norm. Such coins will not be presented merely as greetings, gratuities, or tokens of appreciation. They will be presented only to sincerely recognize [sic] extraordinary effort exerted by a soldier in completing a mission. To avoid waste of Army resources, coins procured in bulk will not include the presenting official's name unless the official is the Secretary of the Army; the Chief of Staff, Army; or the Sergeant Major of the Army. Coins may be procured in bulk that contain the official's title and/or the organization's name."

Memorandum, Army Deputy General Counsel (Ethics & Fiscal), to the Administrative Assistant to the Secretary of the Army, subject: Presentation of Coin Medallions by Senior Army Officials (11 Apr. 1997).

51. The provision in the military awards regulation which would cover commanders' coins is phrased in the passive voice: "awards may be made." *AR 600-8-22*, *supra* note 29, para. 11-2b. No approval level is set out for these awards, as it is for other decorations and medals. The MACOM commanders are free to decide whether authority to award coins should be available at the lowest levels of command or even to noncommissioned officers.

52. The author is aware of one purchase of 1,000 custom minted coins which cost \$2,750.00.

53. For the Army's civilian employees, the applicable statute is 5 U.S.C.A. § 4503 (West 1997). See also 5 C.F.R. § 451 (1997); U.S. DEP'T OF ARMY, REG. 672-20, INCENTIVE AWARDS (1 June 1993) [hereinafter *AR 672-20*]; U.S. DEP'T OF ARMY, PAM. 672-20, INCENTIVE AWARDS HANDBOOK (1 July 1993) [hereinafter *DA PAM 672-20*].

54. See National Security Agency—Availability of Appropriations to Purchase Food as a Nonmonetary Award Under the Government Employee Incentive Awards Act, B-271511, 1997 U.S. Comp. Gen. LEXIS 105 (Mar. 4, 1997).

55. In response to the GAO's request, the OPM advised that its regulation allowed the use of meals or food vouchers as awards. *Id.* The OPM's authority to publish regulations which implement the awards programs is found at 5 U.S.C.A. § 4506.

56. See *National Security Agency*, 1997 U.S. Comp. Gen. LEXIS 105.

57. *AR 672-20*, *supra* note 53.

58. *Id.* para 1-4d(2).

value as an award for excellence.⁶⁰ Commanders who wish to recognize civilian employees should, however, also take care to distinguish between personal gifts and awards and should exercise appropriate restraint concerning the number and frequency of coins presented.

Awards to NAF Employees

The Army's incentive awards regulation applies to both appropriated and nonappropriated fund employees.⁶¹ Therefore, NAF employees, like their APF counterparts, are eligible for honorary awards and "special recognition devices."⁶² Award eligibility under the Army regulation, however, does not determine the proper funding source. Commanders should use NAFs to pay for commanders' coins used to honor NAF employees.⁶³ Furthermore, commanders should award coins to NAF employees only for acts which contribute to Morale, Welfare, and Recreation (MWR) programs.⁶⁴ These employees "may be recognized individually or in groups" for superior performance.⁶⁵ Soldiers who are employed by NAF instrumentalities are also eligible.⁶⁶

Coins for Unaffiliated Third Parties

Can a commander's coin be given to an individual who is neither a soldier nor a civilian employee? For example, can the

installation commander present the newly elected mayor with a coin on the occasion of his visit to the installation? Can the commander present an "award" to recognize the contributions of a helpful unaffiliated individual or civilian agency? Can the commander present a coin to a family member or volunteer whose work has been particularly outstanding? If so, what is the proper source of funds?

Gifts to VIPs

The analysis for a proposed gift or memento to a distinguished visitor must begin with the general rule that gifts are a personal expense. In these circumstances, an award analysis is inapplicable, because the reason for giving the coin is not to reward performance. Nevertheless, some gifts or mementos are legitimate when they are given as "courtesies" for "authorized guests."⁶⁷ The Army has both statutory⁶⁸ and regulatory⁶⁹ authority to give such gifts and to pay for them with official representation funds (ORFs).

Subject to regulatory limitations and to the availability of the earmarked ORFs,⁷⁰ a commander could give a coin to the newly elected local mayor. Prior to any obligation of ORFs, however, the expenditure must be approved by both the representation fund custodian and the certifying and approving official.⁷¹ The gift may not exceed the specified regulatory dollar value.⁷² Finally, the gift⁷³ may be given only to "authorized guests in

59. DA PAM 672-20, *supra* note 53, para 3-6b. This authorization was contained in the predecessor AR 672-20, at para 8-13b (1 June 1982), but has since been deleted from AR 672-20 and moved to DA PAM 672-20.

60. The GAO has not objected to the award of items with some intrinsic value. *See supra* note 42 and accompanying text. For example, jackets valued at \$50.00 were considered appropriate. Federal Aviation Administration—Incentive Awards Program—Presentation of Jackets, B-243025, 1991 U.S. Comp. Gen. LEXIS 566 (May 2, 1991). There is no similar authority to award items with more than de minimis value to soldiers.

61. AR 672-20, *supra* note 53, para. 2-4, tbl. 2-1.

62. *See supra* note 57 and accompanying text.

63. Some oversight and management of morale, welfare, and recreation activities is done by APF employees. *See generally* AR 215-1, *supra* note 17, ch. 9. The person giving the award must use APFs when the awardee is an APF employee and NAFs when the recipient is a NAF employee. *Id.* para. 4-6c. Note also that the cost of "special achievement awards" and suggestion awards (where the suggestion benefits the NAF instrumentality) should be paid from NAFs. U.S. DEP'T OF ARMY, REG. 215-3, NONAPPROPRIATED FUNDS AND RELATED ACTIVITIES PERSONNEL POLICIES AND PROCEDURES, para 9-7 (10 Sept. 1009) [hereinafter AR 215-3]. The regulation is silent as to the funding source for honorary awards, which seem to be included as a separate category of awards, and for honorary awards to NAF employees. *Id.* para. 9-3. This issue is cleared up, however, by reference to AR 215-1. *See supra* note 61 and accompanying text.

64. The general rules on the use of NAFs dictate that NAFs be used for MWR functions. AR 215-1, *supra* note 17, para. 4-6. If a NAF employee performed some act or service which was beneficial to the official APF mission, the analysis should proceed as if the individual were an unaffiliated third party.

65. AR 215-3, *supra* note 63, para. 9-4a.

66. *Id.* para. 9-2a.

67. AR 37-47, *supra* note 6, para. 2-1a.

68. 10 U.S.C.A. § 127 (West Supp. 1997).

69. AR 37-47, *supra* note 6, para. 2-9a(1). *See also* U.S. DEP'T OF DEFENSE, DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (Mar. 3, 1995).

70. These funds are appropriated by Congress as "Emergency and Extraordinary Expense Funds." They are an earmarked portion of Operation and Maintenance funds. The typical statutory language states a dollar amount which the Army may not exceed. *See supra* note 11. Exceeding this limitation would violate the Antideficiency Act. 31 U.S.C.A. § 1341(a)(1)(A) (West 1997).

connection with official courtesies.”⁷⁴ Authorized guests include certain foreign citizens, national and local government officials, national or regional “dignitaries,” and similar officials.⁷⁵ The regulation prohibits the bulk procurement of items bearing the presenter’s name.⁷⁶ There is no corresponding provision in NAF regulations which would allow the giving of a gift solely because of an individual visitor’s status.⁷⁷

Recognition of the Contributions of Others

Commanders should not give coins purchased with APFs to unaffiliated individuals or nonfederal government agencies to create goodwill or to encourage or to reward cooperation with the military. While such goals are worthy, the GAO has determined that the distribution of such items, although potentially “desirable,” is not a necessary agency expense.⁷⁸ Although Army regulations authorize commanders to recognize unaffiliated individuals with “public service awards,” these awards are limited to those specific medals and certificates authorized by regulation.⁷⁹ There is no provision for other award devices.

In contrast, NAFs may be used for the purchase of “mementos of nominal value . . . for presentation to distinguished military and *other visitors*,” for recognition of their contributions to NAF instrumentality programs.⁸⁰ Commanders should not use NAFs to acknowledge those whose contributed to APF missions.⁸¹

Recognition of Volunteers

In these days of shrinking budgets, commanders greatly appreciate the efforts of volunteers. Absent statutory authority, however, commanders should not use coins purchased with APFs to recognize the efforts of volunteers.⁸² The GAO has regarded items given to promote retention in volunteer programs as personal gifts.⁸³ Contributions by, and achievements of, volunteers who provide support to Army Community Service, family support groups, and mayoral programs may be recognized with NAF-funded “mementos” and other “non-monetary awards.”⁸⁴

71. Approval procedures are set out in AR 37-47, chapter 3. Legal review is also required. AR 37-47, *supra* note 6, para. 3-1f(2).

72. The limitation is set out in DOD Directive 7250.13. It is currently \$225.00. *Id.* para. 2-9b.

73. Items which may be presented as gifts also include mementos or tokens. *Id.* para. 2-9a. Certain categories of gifts are prohibited. *See id.* para. 2-10.

74. *Id.* para. 2-9a.

75. *Id.* para. 2-3. Some senior DOD officials may fall within this definition.

76. *Id.* para. 2-9b.

77. *But see infra* note 80 and accompanying text. Mementos may be given to those who have made contributions to MWR programs.

78. U.S. Army Criminal Investigation Command (USACIDC) Appropriated Funds for Purchase of Marble Paperweights and Walnut Plaques, B-184306, 55 Comp. Gen. 346 (Oct. 1, 1975).

79. U.S. DEP’T OF ARMY, REG. 360-61, COMMUNITY RELATIONS, para. 3-8 (15 Jan. 1987) (discussing public service awards without mention of honorary medals, trophies, or other awards beyond those detailed in AR 672-20); U.S. DEP’T OF DEFENSE, PUB. 1400.25-M, CIVILIAN PERSONNEL MANUAL, subch. 451, para. O (Dec. 1996) (discussing public service awards, but containing no provision for local awards in addition to the honorary awards set out in Appendix B of that publication); AR 672-20, *supra* note 53. None of these sources contains any provision equivalent to the supplemental recognition devices described for soldiers and civilian employees.

80. AR 215-1, *supra* note 17, para. 4-6b.

81. *See generally id.* paras. 4-6, 4-7. These regulatory provisions indicate that NAFs should be used for MWR related functions.

82. Decision of the Comptroller General, B-201488, 1981 U.S. Comp. Gen. LEXIS 1740 (Feb. 25, 1981); *see also* Student Volunteers—Traveling and Living Expenses, B-201528, 60 Comp. Gen. 456 (May 11, 1981).

83. Some statutes which authorize the acceptance of voluntary services also allow for the payment of certain incidental expenses. For example, one statutory provision allows the DOD to accept the services of the Red Cross. 10 U.S.C.A. § 2602 (West 1997). It also states that the government may furnish transportation, meals, quarters, office space, etc. to the volunteers. *Id.* Another provision authorizes the DOD to accept numerous voluntary services. *Id.* § 1588. It also allows the payment of “incidental expenses incurred by the person in providing” the services and gives the Secretary the authority to determine whether these will be paid with APFs or NAFs. *Id.* § 1588(e). Awards or mementos, however, would not be incurred expenses. They might, however, be justified as an expense necessary for recruiting volunteers. The Secretary is also authorized by statute to recruit and to train volunteers. *Id.* § 1588(c). The author can find no case in which the “necessity” of giving awards or mementos as a recruiting expense under this statute has been addressed by the GAO. The issue of the statutory authority to pay volunteers incidental expenses has been raised, but the GAO left the issue undecided. Decision of the Comptroller General, B-201488, 1981 U.S. Comp. Gen. LEXIS 1740 (Feb. 25, 1981).

Conclusion

Commanders' coins are inexpensive yet powerful management tools. They can be purchased with government funds, given as awards, and, under limited circumstances, as gifts to hosted guests of the unit. It is important, however, that their purchase comply with funding rules and limitations. Commanders must understand the limitations on giving government-funded coins—no personal gifts, no tokens of appreciation, no recognition of the contribution of unaffiliated parties, and no recognition of volunteers unless specifically provided for by regulation. Additionally, commanders need a method of tracking each coin's funding source. Coins that are purchased with ORFs, for example, may only be given to hosted guests. They cannot be given to soldiers or civilian employees.

The unfettered purchase and distribution of these coins is certainly not worth jeopardizing a commander's career or reputation. So, what is a commander to do? How can he keep track of each coin's funding source? Perhaps some command-

ers, finding the rules too unwieldy and recognizing that these items are inexpensive, will choose a private funding alternative. For those who do not, the simplest method would be to ensure that each coin bears a distinctive motto which makes its purpose self-evident. A coin "for excellence" would be funded with APFs and given to soldiers or civilian employees. A coin purchased with ORFs might identify its bearer as a "friend" of the unit, and coins for NAF employees could include a morale, welfare, and recreation motto.

Understanding the rules of the game in this area is vital for practitioners. Helping individual commanders to seek the necessary approval and to determine appropriate parameters for the use of commanders' coins will keep commanders out of trouble. The lawyer's assistance in this area should also help to ensure that the giving of coins remains reasonable, escapes criticism, and survives close scrutiny, if necessary.

84. AR 215-1, *supra* note 17, para. 4-6j(9). *See also id.* para. 4-6a(3) (allowing the use of NAFs for "[a]wards honoring volunteers and gratuitous service personnel at volunteer recognition ceremonies"). But compare this to the restrictions on using APFs for volunteer expenses. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 608-10, CHILD DEVELOPMENT SERVICES, para. 3-15d (12 Feb. 1990) (stating that Child Development Services volunteers are not entitled to incidental expenses); U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAM, para. 1-19a(9) (30 Oct. 1990) (prohibiting the use of APFs for Army Community Service volunteer awards other than certificates of recognition).

Reengineering Household Goods Shipments: Personnel Claims Implications

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Introduction

The military is currently developing two programs to revise or to “reengineer” the way the military ships household goods. One of those programs, which is being developed by the Office of the Deputy Chief of Staff for Logistics (DCSLOG), will only apply to Army personnel. Under this program, a single contractor will provide a relocation package, including the shipment of household goods and the settlement of claims. Hunter Army Airfield in Georgia will test this program. The Military Traffic Management Command (MTMC) is developing the second program, which will apply to the household goods shipments of all the services. Under this program a number of contractors will handle most aspects of household goods shipments, from pre-move counseling to the settlement of claims. The contractors, however, will not provide the comprehensive relocation package involved in the DCSLOG program. The MTMC will test its program on household goods shipments coming from North Carolina, South Carolina, and Florida.

This article explains both programs and describes their impact on claims operations. Since these programs are still being developed, the information in this article may change. In addition, the opinions and conclusions expressed in this article are not the official views of the DCSLOG, the MTMC, or the Army; rather, they are the author’s own interpretations of the public information on both programs.

If either the DCSLOG or the MTMC program is adopted for all Army or Department of Defense moves, it will have a profound impact on claims. Since the programs encourage the direct settlement of claims with the contractor, the broad-based adoption of either one may reduce the number of personnel required to process transportation-related personnel claims. However, since the DCSLOG and MTMC pilot programs have

not begun yet, it is much too early to predict what, if any, reduction in personnel claims workload will result. In addition, neither program will be implemented on a broad scale any time soon.¹

Because of the potential claims impact of the DCSLOG and MTMC programs, it is important for field claims personnel to be familiar with both programs. At a minimum, field claims personnel need to know the claims aspects of the programs in order to properly process claims from service members whose moves are affected by the pilot programs.

The DCSLOG Program

The DCSLOG program is a quality of life initiative. It is intended to improve quality of life by improving customer satisfaction in household goods shipments. Another goal of the program is to realize transportation efficiencies.² However, the program is designed to obtain the best value move, rather than to simply award a contract to the lowest bidder.

The DCSLOG program requires the contractor to provide customers³ with a total relocation package. This package includes counseling customers on their entitlements and providing them with relocation services, to include home-finding and home-selling services. The package also requires the contractor to select and to monitor the performance of the carrier who moves the customer’s household goods.⁴ In addition, the package requires the contractor to handle claims for loss of, and damage to, household goods.⁵

The contractor will be paid based upon performance. The contractor will bill the government for the household goods shipment based on a percentage of the commercial tariff rate.⁶

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1. The conference report to the 1997 Appropriations Act directed that the MTMC program not be expanded in Fiscal Year 1997 or 1998 beyond the current pilot.
 2. Defense Supply Service, *Amendment of Solicitation/Modification of Contract*, § C3 (Transportation Services Project Statement of Work), paras. A.1, A.2 (14 July 1996) [hereinafter DCSLOG Work Statement]. This amendment incorporated all previous amendments and constituted the full and complete request for proposals. A copy of the DCSLOG Work Statement may be obtained from the Office of the Deputy Chief of Staff for Logistics (DCSLOG), Attention: Transportation Policy Division, Washington, D.C. 20310-0500. The claims provisions of the DCSLOG Work Statement are reproduced at appendix A of this article.
 3. This article will use the term “customers” to refer to service members, civilian employees of the military, and others who are entitled to the shipment of household goods at military expense.
 4. DCSLOG Work Statement, *supra* note 2, para. E (pertaining to statement of work tasks).
 5. *Id.* para. F (pertaining to liability).
 6. *Id.* para. I (pertaining to pricing). Interstate pricing will be based on the HGB Tariff 400L. Intrastate pricing within Georgia will be based on the Georgia Mover’s Tariff GPSC-MF No. 18. International pricing will be based on a negotiated rate. The rates and charges in effect on 5 May 1996 will be used. *Id.*

The contractor will receive a management fee as its compensation for managing the movement. Based on the contractor's performance, the military will adjust this fee up or down by either awarding the contractor an additional incentive fee or reducing the fee by offset action. Performance will be measured, in part, by customer satisfaction, which will be determined through a customer survey. The contract requires the contractor to conduct the survey.⁷

The DCSLOG program began with a pilot program at Hunter Army Airfield in Georgia.⁸ The final solicitation for this pilot program was issued on 14 July 1996,⁹ and the contract was awarded to HFS Mobility Services (HFS) on 31 January 1997. HFS submitted a bid of \$22.5 million to handle all of the household goods moves out of Hunter Army Airfield for three years.¹⁰ The General Accounting Office received two protests shortly after the award was made, but the protests were resolved in favor of the government on 19 May 1997. HFS began performance of the contract on 1 July 1997.¹¹

Notice to the Contractor

One of the main elements of the DCSLOG program is the requirement that the contractor settle claims directly with the customer. The contractor will provide the customer with a "claims notice form" on which the customer can annotate dam-

ages in the shipment. This form will be similar to the DD Form 1840/1840R, Joint Statement of Loss or Damage at Delivery/Notice of Loss or Damage, except that the claims notice will be sent directly to the contractor, not to a military claims office. The customer will have ninety days to notify the contractor of loss or damage,¹² not seventy days.¹³ Although the contract currently does not specify whether the notice must be post-marked or received by the contractor within ninety days, the DCSLOG is working on a modification to the contract to clarify that the notice will be considered to be timely as long as it is postmarked within ninety days of delivery.¹⁴ As is the case with other military moves, the contractor will not be liable for loss or damage unless the customer provides notice of loss or damage in a timely manner.¹⁵

For extenuating circumstances, such as special training, hospitalization, or medical disability, there are exceptions to the ninety-day time limit,¹⁶ and the time period may be extended for the length of the extenuating circumstances. These exceptions are similar to the exceptions to the seventy-day time limit for submitting the DD Form 1840R on ordinary military moves.¹⁷ If the contractor does not believe a circumstance is sufficiently extenuating, it shall submit the case to a contracting officer's representative—a person designated in writing by the contracting officer.¹⁸

7. *Id.* para. J (pertaining to pay for performance). The customer satisfaction levels will be based on a survey question: "How satisfied are you with your relocation moving experience?" Customers will choose one of five answers: excellent/very satisfied, very good/satisfied, good/neither satisfied nor dissatisfied, fair/somewhat dissatisfied, and poor/very dissatisfied. Based on these answers, the contractor can receive up to ten percent of the management price paid during the previous month or be offset up to ten percent of this price. In addition, incentive fees and offsets of up to twenty-five percent will be based on the number of direct deliveries made (i.e. deliveries without any storage-in-transit). For the purpose of awarding incentive fees, only shipments that are eligible for direct delivery (i.e., shipments where the member is prepared to accept immediate delivery) will be considered. *Id.*

8. *Id.* para. A.1. In 1995, Hunter Army Airfield moved 1902 household goods shipments, representing approximately 950 relocating customers. *Id.*

9. *Id.*

10. *PHH Wins Army Test*, GOV'T TRAFFIC NEWS, Feb. 28, 1997, at 2. Copies of this publication are available from the American Movers Conference, 1611 Duke Street, Alexandria, Virginia, 22314-3482, telephone (703) 683-7527. The company known as PHH Relocation Services recently changed its name to HFS Mobility Services. The HFS bid equaled approximately \$7.5 million per year for the approximately 1000 household goods moves per year coming out of Hunter Army Airfield, an average of over \$7,000 per move. *Id.* American Movers Conference statistics indicate that the average domestic military shipment costs \$2,641, including storage in transit and other accessorial. *Id.* According to the MTMC, the average international shipment costs \$2,403. *Id.*

11. Telephone Interview with Lisa Roberts, Office of the Deputy Chief of Staff for Logistics, Transportation Policy Division (July 9, 1997) [hereinafter Roberts]. See also *PHH's Army Test*, GOV'T TRAFFIC NEWS, June 23, 1997, at 1.

12. DCSLOG Work Statement, *supra* note 2, para. F.4 (pertaining to claim notice).

13. *Id.* Customers are given 70 days to submit the DD Form 1840R to a military claims office. The military claims office has an additional five days to dispatch the form to the carrier, which means that the form must be dispatched to the carrier no later than 75 days after delivery. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules, para. I.A (1 Jan. 1992), reprinted in ARMY LAW., Mar. 1992, at 45 [hereinafter Joint Military-Industry MOU]. An older version of the MOU is reproduced in *Department of the Army Pamphlet 27-162*. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS, app. E (15 Dec. 1989) [hereinafter DA PAM 27-162].

14. Telephone Interview with Lisa Roberts, Office of the Deputy Chief of Staff for Logistics, Transportation Policy Division (July 11, 1997).

15. DCSLOG Work Statement, *supra* note 2, para. F.4. For ordinary military moves, failure to submit a timely 1840R will result in a presumption that the loss or damage did not occur while the goods were in the possession of the carrier. See Joint Military-Industry MOU, *supra* note 13, para. I.B; see also DA PAM 27-162, *supra* note 13, para. 2-55b.

16. DCSLOG Work Statement, *supra* note 2, para. F.4.

Filing a Claim with the Contractor

In the DCSLOG program, the customer will have nine months to file a claim with the contractor.¹⁹ The contractor will provide the customer with a claims form for this purpose.²⁰ This nine-month deadline is much shorter than the two-year deadline for filing a claim with the military under the Personnel Claims Act.²¹ However, regardless of whether or not the customer meets this nine-month deadline, she will retain the right to file a claim with the military under the Personnel Claims Act within two years.²²

A customer's claim with the contractor will be timely if it is postmarked within nine months of the date of delivery.²³ This "postmark rule" is not the same as the rule for determining whether military claims are timely. Under the Personnel Claims Act, a claim is considered to be timely only if it is received at a military installation within two years of delivery.²⁴

The contractor will grant exceptions to the nine-month claim-filing period for extenuating circumstances, such as specific training, hospitalization, or medical disability.²⁵ Under the

Personnel Claims Act, the only exception to the two-year limitation for filing a claim is war or armed conflict.²⁶ Under the DCSLOG program, the length of the extension of the nine-month period shall be the length of the exceptional circumstance. The contracting officer's representative shall decide whether the circumstances warrant an extension of the nine-month period.²⁷

Under the DCSLOG program, the contractor will have thirty days to settle a customer's claim.²⁸ The contractor's liability under the contract is full replacement value: the contractor must either repair the item by putting it back in the same condition it was in prior to the move, pay the customer the cost of repairs, replace the item with a new item, or compensate the claimant for a new item.²⁹ Under the Personnel Claims Act, the contractor is only liable for the depreciated value of a lost or destroyed item.³⁰ The contractor's total liability under the DCSLOG program is \$6 times the net weight of the shipment, up to a maximum of \$75,000.³¹

Filing a Claim with the Military

17. The 70-day period for submitting the DD Form 1840R may be extended if the claimant is hospitalized or absent on official duty for a significant period of time that either overlaps the end of the notice period or exceeds 45 days. See Joint Military-Industry MOU, *supra* note 13, para. I.B; DA PAM 27-162, *supra* note 13, para. 2-55b(2).

18. DCSLOG Work Statement, *supra* note 2, para. F.4; Roberts, *supra* note 11. Since the claimant can file a claim with the military if she is not satisfied with the contractor's settlement of a claim, the local military claims office will have the ability to review whether the circumstance was extenuating in any event. DCSLOG Work Statement, *supra* note 2, para. F.11.

Currently, the contracting officer's representative is Janice DeLoach of the Transportation Office at Fort Stewart, Georgia; her telephone number is (912) 767-4221 (DSN 870-4221).

19. DCSLOG Work Statement, *supra* note 2, para. F.6.

20. *Id.* para. F.5.

21. 31 U.S.C. § 3721 (1994).

22. DCSLOG Work Statement, *supra* note 2, para. F.11.

23. *Id.* para. F.6.

24. U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS, para. 11-7a (1 Aug. 1995) [hereinafter AR 27-20].

25. DCSLOG Work Statement, *supra* note 2, para. F.6.1. These reasons for extending the nine-month time period for filing a claim are identical to the reasons for extending the 90-day period for notifying the contractor of loss and damage, except the term "special training" has been replaced with the term "specific training." *Id.* This difference appears to be a typographical error.

26. AR 27-20, *supra* note 24, para. 11-7b.

27. DCSLOG Work Statement, *supra* note 2, para. F.6.1; Roberts, *supra* note 11. Since the claimant can file a claim with the military if the contractor denies his or her claim, the local military claims office will have an opportunity later in the process to determine whether the circumstance was extenuating. DCSLOG Work Statement, *supra* note 2, para. F.11.

28. DCSLOG Work Statement, *supra* note 2, para. F.9.

29. *Id.* para. F.2.

30. Joint Military-Industry Depreciation Guide, reproduced in DA PAM 27-162, *supra* note 13, app. G-2.

31. The statement of work requires liability of at least \$5.00 times the net weight of the shipment. DCSLOG Work Statement, *supra* note 2, para. F.2.1. However, HFS' bid set the liability at the higher level of \$6.00 times the net weight of the shipment. Roberts, *supra* note 11.

The DCSLOG program also allows the customer to file a claim with the military.³² As mentioned above, the customer retains the statutory right to file a claim with a military claims office under the Personnel Claims Act within two years of delivery.³³ The customer can either file a claim with the military without filing with the contractor or file a claim with the military after filing a claim with the contractor.

If the customer files with the military first, without filing with the contractor, the claims office will treat the claim like any other personnel claim. The military claims office will pay the customer the depreciated value and should deduct for lost potential recovery if the customer did not file a notice of claim with the contractor within ninety days. The claims office will pursue recovery against the contractor by asserting a demand for the depreciated value.³⁴

If the customer initially files with the contractor, but is not satisfied with the resolution of the claim, he may also file with the military. The military claims office will pay the claimant the depreciated value, but it will assert a demand against the contractor for the full replacement value. If the military claims office recovers anything in excess of what it paid the customer, the claims office will return the excess to the customer.³⁵ For example, if the contractor refuses to pay a claim for a lost chair which has a depreciated value of \$100 and a replacement value of \$150, the claims office should pay the customer the depreciated value for the chair, \$100, and then assert a demand against the contractor for a new chair in the amount of \$150. Assuming the claims office is able to collect this amount, it would pay the customer the difference of \$50.

Inspection and Salvage Rights

As with the current system, the contractor in the DCSLOG program has the right to inspect the damaged items claimed by the customer. Unfortunately, there is no time limit on this right.³⁶ For other military moves, the carrier is required to exercise its inspection rights within seventy-five days of delivery or

forty-five days from the dispatch of notice of loss or damage, whichever is later.³⁷ Arguably, these limits should also be applicable to the contractor under the DCSLOG program. At a minimum, the contractor's exercise of its inspection rights must be reasonable; the contractor should not be able to inspect long after a claim is settled, by either the contractor or a military claims office.

The DCSLOG program also gives the contractor salvage rights. All damaged items which the contractor has replaced or for which the contractor has paid full current market value will become the property of the contractor. Again, there is no time limit on this right.³⁸ In ordinary military moves, a carrier must exercise its salvage rights within thirty days of receipt of a demand for payment from a military claims office or the end of its inspection period, whichever is later.³⁹ Arguably, this limitation could be imposed on the contractor under the DCSLOG program. At a minimum, the contractor should exercise its salvage rights within a reasonable period of time after the claim is settled.

Reporting

The U.S. Army Claim Service has requested that Army field claims offices report claims which are affected by the DCSLOG Program on the new personnel claims field database. Field office personnel should add the notation "HAA" (for Hunter Army Airfield) in the "special code" field in the database.⁴⁰

The MTMC Program

The MTMC program is similar to the DCSLOG program.⁴¹ The objectives of the MTMC program are to improve the quality of household goods shipments and to ensure that the Army is getting the best value for its money. It is designed to improve the number of on-time pickups and deliveries, to improve cus-

32. DCSLOG Work Statement, *supra* note 2, para. F.11.

33. 31 U.S.C. § 3721 (1994).

34. DCSLOG Work Statement, *supra* note 2, para. F.4.1.

35. *Id.* para. F.11

36. *Id.* para. F.8.

37. Joint Military-Industry MOU, *supra* note 13, para. I.C; DA PAM 27-162, *supra* note 13, para. 2-55a(6).

38. DCSLOG Work Statement, *supra* note 2, para. F.12.

39. Joint Military-Industry Memorandum of Understanding on Salvage, para. 3-8d(4), *reproduced in* DA PAM 27-162, *supra* note 13, app. E.

40. A message to this effect was published on the Claims Forum of the Legal Automation Army-Wide System electronic bulletin board system on 11 July 1997. The new personnel claims field database is scheduled to be fielded this year.

41. The DCSLOG program was patterned after the MTMC program.

customer satisfaction, to reduce loss and damage in shipments, and to adopt business processes to ensure world-class customer service. The program is also designed to simplify the process by reducing the administrative workload, to maintain the capacity to meet the Department of Defense's needs for moves, and to provide opportunities for small businesses.⁴²

A firm to which a contract is awarded under the MTMC program will handle most aspects of the household goods shipment, to include counseling, packing, loading, linehaul, ocean and air service, customs clearance, storage-in-transit, delivery, and destination services.⁴³ In addition, the contract will require the contractor to settle claims directly with the customer.⁴⁴ The contract will be a fixed price, indefinite delivery, indefinite quantity contract. The contract's duration will be one year, with two one-year options. The contractor will receive a guarantee of a certain minimum number of moves and can be awarded additional moves based on several factors, including customer satisfaction.⁴⁵ Customer satisfaction will be determined through a customer survey, which will be conducted by an independent auditor.⁴⁶

The MTMC program, like the DCSLOG program, will begin with a pilot program. The pilot program will cover fifty percent of outgoing shipments from North Carolina, South Carolina, and Florida.⁴⁷ The pilot program will cover the following military installations:⁴⁸

North Carolina

Fort Bragg
Marine Corps Air Station, Cherry Point
Marine Corps Base, Camp Lejeune
Seymour-Johnson Air Force Base

South Carolina

Fort Jackson
Marine Corps Air Station, Beaufort
Fleet and Industrial Supply Center, Charleston
Shaw Air Force Base

Florida

Fleet and Industrial Supply Center, Jacksonville
Naval Air Station, Pensacola
Eglin Air Force Base
7th Coast Guard District, Miami
Patrick Air Force Base
Naval Training Center, Orlando
Naval Air Station, Key West
MacDill Air Force Base

On 12 December 1996, the MTMC issued a draft solicitation for its program.⁴⁹ The MTMC issued the final solicitation on 14 March 1997.⁵⁰ From 10 June to 13 June 1997, the General Accounting Office received seven protests.⁵¹ The General Accounting Office will likely resolve these protests in the fall of 1997. The MTMC plans to implement the contract in the fall of 1998.⁵²

Notice to the Contractor

The claims aspects of the MTMC program are very similar to those of the DCSLOG program. Under the MTMC program, the contractor will be encouraged to settle claims directly with the customer. The contractor will provide the customer with two copies of a "loss and damage notice form" to annotate damages in the shipment, and the customer will have ninety days to notify the contractor of loss or damage. If the customer does not report loss or damage within ninety days, the loss or damage

42. Message, 121259Z Apr 97, Commander, Military Traffic Management Command (MTMC), MTOP-QR, subject: DOD Reengineering Personal Property (RPP) Initiative (12 Apr. 97) [hereinafter MTMC Message].

43. Headquarters, Military Traffic Management Command, *Reengineering the DOD Personal Property Program, Performance Work Statement*, para. 1 (7 Mar. 1997) [hereinafter MTMC Work Statement] (pertaining to scope of work). This statement of work may be found on the MTMC home page on the world-wide web at [HTTP://MTMC.ARMY.MIL](http://MTMC.ARMY.MIL). The claims provisions of the MTMC Work Statement are reproduced at appendix B of this article.

44. *Id.* para. 7 (pertaining to liability and loss/damage issues).

45. *Id.* para. 12 (pertaining to committed daily capacity and traffic award).

46. *See id.* attachment 3 (Performance Requirements Summary).

47. *Id.* para. 1.1.

48. *Id.* attachment 1 (Origin States and Personal Property Shipping Office Areas of Responsibility).

49. Ann Wilson, *MTMC Draft Solicitation Available on Internet*, 5:24 THE MOVING WORLD 1 (Dec. 31, 1996). A copy of this publication is available from the American Movers Conference, 1611 Duke Street, Alexandria, Virginia 22314-3482, telephone (703) 683-7410.

50. MTMC Message, *supra* note 42.

51. Telephone Interview with Ramone Morales, Office of the Staff Judge Advocate, Military Traffic Management Command (July 16, 1997) [hereinafter Morales].

52. Scott Michael, *MTMC Deadline Passes; Time for Alphabet Soup*, 6:12 THE MOVING WORLD 1 (June 30, 1997); Morales, *supra* note 51.

will be presumed not to have occurred during shipping, and the contractor will not be liable for the loss or damage. The timeliness of the customer's notice document will be measured by the postmark or facsimile date of the document.

As is the case under the DCSLOG program, there are exceptions to the ninety-day time limit for good cause, such as officially recognized absence or hospitalization. The local military claims office will decide whether the customer's excuse constitutes good cause.⁵³

Filing a Claim with the Contractor

As with the DCSLOG program, the customer will have nine months to file a claim with the contractor under the MTMC program. The postmark or facsimile date of the claim will determine whether a claim with a contractor is filed timely. The nine-month period will end on the day of the month after the numerical day of delivery, nine months later. For example, if the day of delivery was 1 January, a claim postmarked on or before 2 October would be filed timely.⁵⁴

Good cause, such as officially recognized absence or hospitalization, for all or a portion of the notice period will justify extensions of the nine-month period. Officially recognized absences include, but are not limited to, extended temporary duty or deployment. Once again, the local military claims office will determine whether the customer's excuse is sufficient to constitute good cause. The contractor will have sixty days to settle the claim, rather than only thirty, as under the DCSLOG program.⁵⁵

Inspection and Salvage Rights

The contractor will have inspection rights under the MTMC contract. The inspection rights will be similar to, but not identical with, those of a carrier for ordinary military moves.⁵⁶ The MTMC program provides that a contractor will have forty-five days to inspect damaged household goods in the United States and sixty days to inspect damaged goods overseas. If the con-

tractor encounters difficulty in arranging an inspection, it may contact a local claims office for assistance. If a customer refuses to permit the contractor to inspect, the contractor shall have an equal number of days (forty-five days in the United States and sixty days overseas), measured from the day the customer refused to cooperate, to complete the inspection. The contractor will not deny a claim because of its inability to inspect a hazardous item, such as broken glass or a moldy mattress, or an essential item which is not in operating condition, such as a refrigerator, a washer, a dryer, or a television, which requires immediate repair.⁵⁷

Under the MTMC program, the contractor will also have salvage rights similar to those a carrier currently has for military moves.⁵⁸ The contractor will be entitled to take possession of items located in the United States for which it has paid full replacement cost or which it replaced with an identical item or an item of like kind and quality. Overseas, the contractor shall have the same salvage rights under the contract, but the contractor's rights to take possession of the item will be governed by the laws of the foreign country.⁵⁹

If, at the time of delivery, the contractor does not advise the customer in writing concerning the salvage provisions, the contractor waives its salvage rights. The contractor must give the customer notice of its intent to exercise salvage rights within ten months of delivery or at the time the claim is settled with the contractor, whichever is earlier. The contractor will then have thirty days to exercise salvage rights. This period can be extended by an agreement between the contractor, the customer, and the claims office.⁶⁰

The contractor will not exercise its salvage rights when the replacement value of salvageable items in a shipment totals less than \$100.00 and the replacement value of each item is less than \$50.00. The contractor also will not exercise its salvage rights when the item involved is hazardous, such as a broken mirror, spoiled food, broken glass, or a moldy mattress.⁶¹

If the customer refuses to cooperate with the contractor in its exercise of salvage, the contractor will refer the matter to the claims office. If a contractor is unable to exercise its salvage rights because a customer disposed of an item, the contractor's

53. MTMC Work Statement, *supra* note 43, para. 7.2 (pertaining to loss and damage notification).

54. *Id.* para. 7.4 (pertaining to loss or damage claims filed with the contractor).

55. *Id.*

56. *See supra* note 37 and accompanying text.

57. MTMC Work Statement, *supra* note 43, para. 7.3 (pertaining to inspection of damaged property).

58. *See supra* note 39 and accompanying text.

59. MTMC Work Statement, *supra* note 43, para. 7.5 (pertaining to salvage rights).

60. *Id.* attachment 6 (Salvage Procedures).

61. *Id.*

liability shall be reduced by twenty-five percent of the item's replacement value.⁶²

The Contractor's Liability

The program limits to \$250 the contractor's liability for high value items, unless the customer lists the items on a special high value inventory. The contractor will provide the customer this special inventory during the movement counseling. A high value item is any item whose value exceeds \$250 per pound, based on its actual weight, and all items are presumed to weigh at least one pound.⁶³ For example, a \$200 china plate weighing one ounce would not be considered a high value item. It would be presumed to weigh one pound; thus, its value would not exceed \$250 per pound. A \$500 clock weighing one pound would be considered a high value item; if it was not listed on the high value inventory, the contractor's liability for the item would be limited to \$250.

Aside from the rules for high value items, the program makes the contractor liable for the full replacement cost of a lost or damaged item. The contractor must either repair the item, reimburse the customer for the cost of repair, replace it with an identical new item (or, if not available, a new item of like kind and quality), or compensate the claimant for a new item. The customer will make the initial decision whether an item can be adequately repaired. If there is a disagreement between the customer and contractor, the contractor can limit its payment to the repair costs when adjudicating the customer's claim. The customer can then file a claim with the military claims office. The claims office will review the contractor's decision and may seek recovery from the contractor for full replacement value. The contractor's total liability will be \$3.50 times the net weight of the shipment up to a maximum of \$63,000.⁶⁴

Filing a Claim with the Military

Under the MTMC program, as under the DCSLOG program, the customer can also file a claim with the military within two

years of delivery. If the customer files with the military within nine months, and has not filed with the contractor, the claims office will forward the claim to the contractor for adjudication.⁶⁵ Under the DCSLOG program, the claims office will not forward such claims, and the customer is limited to payment for the depreciated value of the lost or damaged items.⁶⁶ In the MTMC program, a claim that is filed with the military outside the nine-month time period will be treated like any other claim: the claims office will pay the customer the depreciated value, and the claims office will pursue recovery against the contractor for the depreciated value.⁶⁷ This is identical to the way such claims will be handled under the DCSLOG program.⁶⁸

Under the MTMC program, a customer can file a claim with the military if he is not satisfied with the contractor's resolution of the claim. The military claims office will pay the customer only the depreciated value, but it will assert a demand against the contractor for the full replacement value. Upon recovery from the contractor, the claims office will pay the customer the difference between what it collects (full replacement value) and what it originally paid the customer (depreciated value).⁶⁹ This method is identical to the way such claims will be handled under the DCSLOG program.⁷⁰

Conclusion

The DCSLOG and MTMC programs are designed to provide service members with better quality moves and to get industry to take over many of the administrative aspects of military moves, including the settlement of claims. The adoption of either program on a broad scale will have a profound impact on the operations of field claims offices. Even the pilot programs will have a significant impact, because claims personnel must learn how to process personnel claims under the two new programs.

During the pilot programs, field claims personnel should watch for shipments coming from Hunter Army Airfield in Georgia and from installations in North Carolina, South Carolina, and Florida. Field claims personnel should be familiar with the new ninety-day deadline for notifying contractors of loss and damage and the new nine-month deadline for filing

62. *Id.*

63. *Id.* para. 7.1.2.

64. *Id.* para. 7.1 (pertaining to liability).

65. *Id.* para. 7.6 (pertaining to loss or damage claims filed with the government).

66. *See supra* note 34 and accompanying text.

67. MTMC Work Statement, *supra* note 43, para. 7.6.

68. *See supra* note 34 and accompanying text.

69. MTMC Work Statement, *supra* note 43, para. 7.6.

70. *See supra* note 35 and accompanying text.

claims. During standard claims briefings, claims personnel should identify service members whose shipments may be affected by the two new programs and brief those people separately on the new notice and filing deadlines.⁷¹ Field claims personnel should be ready to give these potential claimants special assistance, since they may be confused by the new rules.

Since both the DCSLOG program and the MTMC program are still being modified, field claims personnel must be alert to

future changes. Claims personnel should look for updates on the programs in future editions of *The Army Lawyer* and on the claims forum of the Legal Automation Army-Wide System electronic bulletin board system.

71. Mentioning the new 90-day notice deadline to everyone during a general claims briefing is likely to cause confusion. It may give service members whose shipments are not affected by the new programs the mistaken impression that the existing 70-day deadline for submitting the DD Form 1840R has been changed, and may lead them to turn in their forms late.

APPENDIX A

DCSLOG WORK STATEMENT—CLAIMS PROVISIONS

14 July 1996

F. Liability.

F.1. The Contractor shall be insured to provide members full replacement value protection for damaged and/or lost household goods.

F.2. The Contractor shall provide full replacement value protection to the member for all household goods shipments. The Contractor shall guarantee either replacement of articles lost or damaged while in the Contractor's custody (in custody of the carrier is considered in the Contractor's custody), reimbursement for full replacement cost (as determined by current market value), or repairs, or the cost of repairs to damaged item(s) to the extent necessary to restore the item(s) to the same condition as when received by the Contractor from the member. Actual replacement articles, if any, shall consist of articles of like kind and quality without deduction for depreciation.

F.2.1. The Contractor shall provide Full Replacement Value Protection based on a minimum declared value of \$5.00 times the net weight of the shipment, limited to a maximum of \$75,000 per shipment. This protection and liability shall be at no additional cost to the Army or member. The Contractor's maximum liability shall not exceed the released or declared value on the shipment or the full cost of repair to the damaged property, whichever is less. The Contractor shall have the option of repair or replacement of damaged articles. The Contractor shall offer the member an option to purchase additional insurance above the computed value.

F.3. The Contractor shall accept responsibility for the repair, recalibration, and/or adjustment of electronics and appliances damaged during transit and/or storage regardless of external damage (or lack thereof). Failure of Contractor to take exception to the condition of electronics and appliances at origin shall result in Contractor acceptance of responsibility at destination.

F.4. Claim Notice: The Contractor shall provide a claims notice for use by the member. Members shall have 90 days from date of delivery to provide Contractor written notice of loss and/or damage. If [a] member fails to provide notice to Contractor within the 90-day period, the Contractor shall not be liable for settling such claim unless the member can show good cause for not meeting the 90-day notice period. Examples of extenuating circumstances include, but are not limited to: special training; hospitalization; and medical disability. The period may be extended for the length of the circumstance. The Contractor shall submit specific member cases of late submission to the COR for assistance in deciding whether the circumstances warrant extension of the 90-day period.

F.4.1. If a member provides the Contractor claim notice within the 90-day claim notice period but files a claim with the military claims office instead of the Contractor, the military claims office will assert a demand against the Contractor at depreciated value. By law, a member has up to two years from the delivery date to file a claim with the military claims office.

F.5. Claim Form: The Contractor shall provide a claims form for use by the member. This form shall reflect at a minimum: [a] description of the item(s) claimed, a description of the damage, purchase price of the item(s), year purchased, and replacement cost of the item(s), amount paid, and reason for partial payment or denial.

F.6. The Contractor shall accept a member's claim within 9 months of delivery of the shipment to final destination. A claim shall be accepted by the Contractor as timely received if the envelope is postmarked no later than 9 months from the date of final delivery.

F.6.1. The contractor shall accept a claim after 9 months if extenuating circumstances prevented a member from filing the claim within 9 months. The length of extension shall be the length of the circumstance. Examples include, but are not limited to, specific training; hospitalization; and medical disability. The COR shall decide whether the circumstances warrant extension of the 9 month period.

F.7. The Contractor shall obtain the estimates for repairs and losses and determine the replacement value of the property.

F.8. The Contractor shall have the right to inspect the damaged items claimed by the member.

F.9. The Contractor shall pay, deny, or make a firm compromise settlement offer in writing to the claimant within 30 calendar days after receipt of the claim. The Contractor shall settle all loss or damage claims within 30 days of receipt of a completed claim form. The Contractor may compensate the member for inconvenience due to delays in claims settlement. Compensation shall be consistent with current commercial standard business practices.

F.10. The Contractor shall provide to the member a complete adjudicated copy of the claim that reflects all of the information identified in paragraph F.5. Additionally, the Contractor shall provide a copy of the complete adjudicated claim with supporting documentation to the COR. The Contractor shall keep a copy of the claim and its associated documents for a period of three years from the date the claim is filed.

F.11. If a member cannot reach total satisfactory settlement and does not negotiate or accept the claims settlement, the member may file a claim with an Army field claims office for those items that were not satisfactorily settled with the contractor. For those items of personal property that the Army field claims office compensates the member, the Army field claims office or the Army Claims Service will assert a demand against the contractor at full replacement value for those items. By law, the member has up to two years from the household goods delivery date to file a claim with the military claims office.

F.11.1. If the Contractor erroneously denies or does not pay full replacement on a member's claim, the Army will proceed against the Contractor in an offset action against contract payments due to the contractor for full replacement coverage.

F.11.2. If the Contractor does not agree with the offset action taken, the Contractor may appeal the action under the Disputes Clause of this contract. See FAR, paragraph 52.233-1, Disputes, including Alternate 1. The Contracting Officer's decision shall be final unless the Contractor appeals or files suit as provided in the Contract Disputes Act of 1978, as amended.

F.12. All damaged items which are replaced or for which the full current market value has been paid become the property of the Contractor.

F.13. The Contractor shall refer suspected fraudulent claims to the COR for investigation.

F.14. The Contractor shall waive all claim settlement charges and value inventory item requirements for each type of move.

APPENDIX B

MTMC WORK STATEMENT—CLAIMS PROVISIONS

14 March 1997 (as amended 14 May 1997)

7. LIABILITY AND LOSS/DAMAGE ISSUES.

7.1. LIABILITY.

7.1.1. The contractor shall provide full replacement protection of \$3.50 times the net shipment weight but limited to a maximum of \$63,000 per shipment (to include matched sets and pairs) unless the customer purchases additional liability coverage from the contractor. The contractor shall provide the customer an opportunity to purchase additional coverage for declared valuation in excess of the maximum liability. The contractor may collect any fees necessary to purchase this insurance; the contractor's only remedy if the customer fails to pay such fees is denial of insurance coverage. The contractor shall guarantee either:

7.1.1.1. Replacement of articles lost or damaged while in the contractor's custody (replacement with an identical new item or, if not available, a new item of like kind and quality).

7.1.1.2. Reimbursement for full replacement cost (as determined by current market value without depreciation for an identical new item or, if not available, a new item of like kind and quality).

7.1.1.3. Repairs to damaged item(s) to the extent necessary to restore the item(s) to the same condition as when received by the contractor from the customer.

7.1.1.4. Reimbursement for the cost of repairs to damaged item(s) to the extent necessary to restore the item(s) to the same condition as when received by the contractor from the customer.

7.1.1.5. The customer will make the initial decision whether an item can be repaired to original condition. If there is a disagreement between the customer and contractor as to whether an item should be repaired or replaced, the contractor can decide to compensate the customer only for repair when adjudicating the customer's claim. If the customer subsequently files a claim with the military claims office, the claims office will review the contractor's decision and may seek recovery from the contractor for full replacement

value. The contractor is obligated to reimburse the customer for the full replacement cost if an item cannot be reasonably repaired, regardless of whether the customer purchases new items or comes to an agreement with the contractor.

7.1.2. The contractor's liability for high value items shall be limited to \$250 per pound per article unless such items are disclosed in writing to the contractor by the customer. For purposes of this paragraph all items shall be deemed to weigh at least one pound. The contractor shall provide the customer during movement counseling with a high value inventory form for the purpose of making disclosure. A high value item shall mean an item whose value exceeds \$250 per pound based on the item's actual weight. Upon disclosure of the high value item(s), the contractor's liability shall be as provided in paragraph 7.1.1. of this PWS.

7.2. **LOSS AND DAMAGE NOTIFICATION.** The contractor shall provide the customer, at time of delivery, two (2) copies of an appropriate notice document to be used by the customer in identifying lost or damaged items and a stamped self-addressed envelope addressed to the contractor's claims office. The notice document shall contain sufficient information highlighted, or in bold print, to advise the customer of the notification and claim filing requirements, the respective time limitation periods, and sufficient space to identify, at a minimum, the item damaged or missing, the appropriate inventory number, and a general description of the damage. The contractor shall also provide the customer, at time of delivery, an appropriate document advising the customer of the contract's salvage provisions. A copy of Attachment 5 to the PWS, Claims Instructions for the Customer, may be used to satisfy this requirement. Customers may provide the contractor at time of delivery with written notice of discovered lost or damaged items; however, customers will have 90 calendar days from date of delivery to notify the contractor of all discovered lost or damaged items (as measured by the dispatch date, i.e., postmarked date, facsimile date). The notice document overcomes the presumption of the correctness of the delivery receipt for items identified by the customer within the 90 calendar day notice period. Loss or damage reported by the customer after 90 calendar days will be presumed not to have occurred while in the contractor's possession unless good cause for the delay is shown and granted by the local claims office, such as officially recognized absence or hospitalization. Contractor's failure to provide the notice document to the customer will eliminate any requirement for notification to the contractor.

7.3. **INSPECTION OF DAMAGED PROPERTY.** The contractor shall have the right to inspect essential items, as defined herein, at time or tender of delivery. In addition, the contractor has the right to inspect damaged property located in the United States within 45 calendar days and damaged property located in a foreign country within 60 calendar days of delivery or dispatch of the customer's written notice document, whichever is later. Contractor shall notify the customer prior to any inspection to arrange a mutually agreeable time for the inspection. If difficulty is encountered in arranging an inspection (i.e., the customer refuses to allow the contractor to inspect), the contractor may contact an appropriate military claims office for assistance in facilitating an inspection. If the customer refuses to permit the contractor to inspect, the contractor will be provided with an equal number of days to perform the inspection (i.e., 45 calendar days for domestic or 60 calendar days for international shipments) from the day the customer refused to cooperate with the contractor. No claim will be denied solely because of the contractor's lack of opportunity to inspect prior to repair of a hazardous or dangerous item, such as broken glass or moldy mattress or an essential item that is not in operating condition such as a refrigerator, washer, dryer, or television requiring immediate repair. In such cases, the contractor shall be provided with copies of the required estimates or paid receipt.

7.4. **LOSS OR DAMAGE CLAIMS FILED WITH THE CONTRACTOR.** The customer shall be encouraged to file a claim with the contractor first. The customer shall have nine (9) months from the date of delivery to file a claim with the contractor. A claim shall be accepted by the contractor as timely received if the envelope is postmarked or the facsimile date is no later than nine (9) months from the date of the delivery unless good cause for delay is shown and granted by the local claims office, such as officially recognized absence or hospitalization of the customer during all or a portion of the nine (9) month period or failure of the contractor to counsel the customer as to the procedures for properly filing a claim. Officially recognized absence includes, but is not limited to, extended temporary duty or deployment during all or a portion of the filing period. The contractor shall make a good faith effort to settle the claim with the customer. The contractor shall pay, deny, or make a firm compromise settlement offer in writing to the customer within 60 calendar days after receipt of the claim by the contractor. A claim will be timely if postmarked or faxed on the day of the month after the numerical day of delivery, nine (9) months later.

7.5. **SALVAGE RIGHTS.** The contractor is entitled to take possession of all items, located in the United States, for which the contractor has paid full replacement cost, or replaced with an identical item or an item of like kind and quality. The contractor shall exercise salvage rights no later than 30 calendar days after the claim is settled. When the customer's property is located in a foreign country, the contractor's right to take possession of an item for which the contractor has paid full current market value, or replaced with an identical item or an item of like kind and quality, will be governed by the laws of the foreign country, provided the contractor has exercised its salvage rights within the time period specified above. See Attachment 6 to this PWS.

7.6. **LOSS OR DAMAGE CLAIMS FILED WITH THE GOVERNMENT.**

7.6.1. If the claim is filed with the military nine (9) months or less after the date of delivery, the claims service will promptly forward

it to the contractor for resolution. Such a claim received by a military claims office nine (9) months or less after delivery will be considered to be timely received by the contractor, regardless of the postmark date on the correspondence from the claims service.

7.6.2. If the customer files a claim within the nine (9) month time period and the contractor fails to respond or declines to pay a claim, or a mutually agreeable resolution between the contractor and customer cannot be reached on all or part of a claim within 60 calendar days after receipt of the claim by the contractor, the customer may file a claim with the military claims service for the unpaid or unresolved portion of the claim against the contractor. The military claims service will adjudicate and pay the claim pursuant to military claims acts based on depreciated replacement costs and seek recovery based on full replacement coverage up to the contractor's maximum liability. Any amount recovered above the amount paid to the customer by the claims service will be paid to the customer.

7.6.3. Where the claim against the contractor is only partially resolved and the customer files a claim against the U.S. with the military claims office for the remainder of that claim, the contractor may not avoid recovery action by the U.S. by making partial payment to the customer or by obtaining a release or waiver of liability from the customer. The customer also has the right to file a claim with a military claims office under the Personnel Claims Act without first filing a claim with the contractor.

7.6.4. If the claim is filed with the military more than nine (9) months after the date of delivery, but still within the two (2) year statutory period, the claims service will adjudicate and pay the claim based on depreciated replacement or repair costs and seek recovery from the contractor based on \$1.25 times the net weight of the shipment. See Attachment 7 to this PWS. Recovery by the United States for amounts properly paid to a customer (or properly owed to the customer by the contractor) because of loss or damage caused by the contractor shall only be barred if, without good cause, the customer failed to provide the contractor notice of damage within the 90-day notice period.

7.6.5. The contractor may submit itemized repair estimates in response to demands for reimbursement from the military claims services. If a claim has not been adjudicated upon receipt of the contractor's estimate of repairs and the contractor's estimate is reasonable and is the lowest overall, the claims office will consider the estimate in adjudicating the customer's claim. If the customer files a claim after nine (9) months from the date of delivery and no extension for good cause has been granted by the local claims office, the military claims service will notify the contractor of such a claim, and the contractor shall have 30 calendar days from the date postmarked on the envelope from the claims office located in the United States, and 60 days from a claims office located in a foreign country, to submit any estimates of repairs. The claims office will consider the estimate if it is reasonable and the lowest overall. If the estimate arrives after the 30th/60th day, but the claim has not been adjudicated, the claims office will consider the estimate if it is the lowest overall. If the contractor's estimate arrives after the demand on the contractor has been dispatched, it will be considered in the contractor's recovery rebuttal or appeal process if reasonable and lower than the estimate used by the claims office. Nothing in this paragraph will require a military claims office to delay processing a claim pending receipt of a contractor's repair estimate. If the contractor denies liability, cannot reach satisfactory settlement, or fails to respond to the claims service's demand within 60 calendar days of receipt, the claims service may direct the responsible official designated for determining the amount of the debt and for its collection to offset the contractor. If the contractor does not agree with the offset action taken, the contractor may appeal the action under the Disputes clause.

7.7. CLAIMS ACTIVITY REPORT. The contractor shall electronically transmit a monthly Claims Activity Report [which includes the following information], based on settled claim payments IAW paragraph 8.2. of this PWS to the Government . . . :

7.7.1. Contract Number;

7.7.2. Contractor's Name and SCAC;

7.7.3. Origin PPSOC;

7.7.4. Task Order Number;

7.7.5. Customer's Name;

7.7.6. Date of Incident (e.g., delivery date);

7.7.7. Date Claim Filed;

7.7.8. Amount Claimed by the Customer; [and]

7.7.9. Amount Paid in Settled Claims as Follows:

7.7.9.1. Money;

7.7.9.2. Value of Repairs;

7.7.9.3. Value of Replacement Items;

7.7.9.4. Value of any other services provided to the customer in an effort to settle the claim;

7.7.10. Amount of Claim Denied; [and]

7.7.11 Date Claim was Paid or Denied;

7.8. COLLECTION OR REFUND OF CHARGES.

7.8.1. The contractor shall not collect, or require the DOD to pay, any charges when the shipment is totally lost or destroyed in transit.

7.8.2. In the event any portion, but less than all, of a shipment is lost or destroyed in transit, the contractor, at the time it disposes of claims for loss or damage to the articles in the shipment, shall refund, to DOD, the portion of its charges corresponding to that portion of the shipment which is lost or destroyed in transit. No refund is required if the total weight of all items lost and destroyed is less than 25 pounds or if the freight charge for all items lost and destroyed is less than \$25, whichever is less.

Attachment 5

CLAIMS INSTRUCTIONS FOR THE CUSTOMER

Your shipment is part of a **TEST PROGRAM**; therefore, claims procedures and forms will be different. **READ THESE INSTRUCTIONS CAREFULLY TO UNDERSTAND WHAT YOU MUST DO!**

1. At the time of delivery, the contractor will provide you with a minimum of two copies of an appropriate document for you to identify lost and damaged items. You must list every item that is lost or damaged, and for damaged items describe all the damage you believe was caused in shipment. **PAY ATTENTION TO THE INSTRUCTIONS ON THE FORM. FAILURE TO FILL THE FORM OUT CORRECTLY OR TO MAIL THE FORM TO THE CONTRACTOR WITHIN 90 DAYS OF THE DELIVERY DATE MAY RESULT IN A REDUCTION OF THE AMOUNT YOU ARE COMPENSATED OR NO COMPENSATION.** You must mail the form back to the contractor in a self addressed envelope provided by the contractor. Additionally, you should keep one copy for your records.

2. The contractor has the right to inspect the items you have claimed as damaged. Please cooperate with the contractor to arrange a mutually agreeable time for the inspection.

3. **YOU HAVE NINE (9) MONTHS FROM THE DATE OF DELIVERY OF YOUR PERSONAL PROPERTY TO FILE YOUR CLAIM WITH THE CONTRACTOR TO RECEIVE FULL REPLACEMENT PROTECTION COVERAGE. DO NOT CONFUSE THIS TIME PERIOD WITH THE TIME PERIOD IN #1 ABOVE; THEY ARE DIFFERENT, AND BOTH MUST BE MET.** If you file your claim with a military claims office within the nine (9) month period, the military claims office will forward the claim to the contractor for action.

4. By settling your claim with the contractor directly, the contractor will provide full replacement protection up to the limits of the contractor's liability. This means that the contractor will replace a lost or damaged item with an identical new item, or if not available, a new item of like kind and quality; reimburse you for its full value without depreciation; or repair the item or pay you for the cost of repairs to the extent necessary to restore the item to the same condition as when received by the contractor.

5. The contractor has 60 calendar days after receipt of claim to settle your claim. If you cannot resolve your claim within that period, you may file a claim with the Government for all items that you and the contractor cannot settle. The contractor will provide you with a copy of the adjudicated claim, and you must include this claims form with any claim that you file against the Government. The Government will adjudicate your claim based on claims services' regulations, i.e., you are compensated for actual value of an

liability shall be reduced based upon the following method of determining the salvage value of the item(s):

- a. For an individual item which has a replacement value of less than \$50.00, the contractor will receive no credit for salvage.
- b. For any claim containing a salvageable item of \$50.00 or more or multiple salvageable items which have a combined total of \$100.00 or more, the item's (items') salvage value credited to the contractor will be 25 percent of the item's (items') replacement value, as calculated by the military claims office in its demand against the contractor or by the contractor in its settlement offer.

Attachment 7

RATES OF DEPRECIATION

1.1. Demands by the Government against the contractor on claims not filed with the contractor or military within nine (9) months of delivery will be subject to the depreciation guide contained in paragraph G-2 and Table G-2 of Appendix G of *Department of Army Pamphlet 27-162, Claims*, dated 15 December 1989, which is incorporated herein by reference, with the following modifications.

1.2. In paragraph G-2, exclude the sentence: "Dollar amounts computed under this guideline cannot exceed the 'limitation of carrier liability' as published in applicable rate tariffs (60 cents per lb. per article for domestic or 30 cents per lb. per article for international shipments, unless a higher released value is declared)."

1.3. In Table G-2, in the column titled "Notes," replace all references to the tariff with: "The contractor's liability for high value items, such as, but not limited to, currency, coins, jewelry, silverware and service sets, crystal figurines, furs, rare collectible items, objects of art, computer software programs, manuscripts and other rare documents, shall be limited to \$250 per pound per article unless such items are disclosed in writing on a high value inventory to the contractor by the customer. For purposes of this paragraph, all items shall be deemed to weigh at least one pound. A high value item shall mean an item whose value exceeds \$250 per pound based on the item's actual weight."

1.4. Add the following entry to Table G-2:

	Depreciation	Depreciation	Maximum	Flat
	Depreciation	Subsequent	Depreciation	Rate
	1st Year (%)	Years (%)	(%)	(%)
Compact Discs	10%

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates 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. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

Tax Law Notes

The Taxpayer Relief Act of 1997 And What It Got Us

The Taxpayer Relief Act of 1997¹ could easily be called the Tax Complication Act of 1997. This legislation modifies over 800 sections of the Internal Revenue Code and adds over 250 new sections. Although tax relief is provided by this legislation, it is targeted tax relief. The primary beneficiaries are homeowners, investors, families with children, and families with members who are seeking higher education.

Despite the widespread interest in the new tax legislation, most of the tax relief is not provided until next year. This year, the only relief that most taxpayers will see is a cut in the capital gains rate and the exclusion of gain on the sale of a principal residence. Taxpayers will only get this relief if their capital gains or the sale on their principal residence occurred after 6 May 1997. This note contains a review of some of the more important changes that will impact military personnel.

Sale of Principal Residence

Since members of the military are very mobile, probably one of the more significant benefits contained in the Taxpayer Relief Act of 1997 is the exclusion of gain on the sale of a principal residence.² A taxpayer can now exclude up to \$250,000 in gain (\$500,000, if a joint return is filed) on the sale of his principal residence.³ To qualify for this exclusion, the taxpayer must have owned and lived in the home for at least two of the last five years, and the sale must have occurred after 6 May 1997.⁴

If a taxpayer sold his home between 7 May 1997 and 5 August 1997, the taxpayer may elect to take this exclusion or to roll over the gain on the sale of his home.⁵ Since a roll-over of the gain would only make sense when the gain on the sale of a home exceeds \$250,000 (\$500,000 in the case of a joint return), most military taxpayers who sold their homes between these dates will choose to take advantage of the exclusion. If a taxpayer sold his home after 4 August 1997, the taxpayer must use the exclusion.⁶ Section 1034, which permitted a taxpayer to roll over the gain from the sale of a home, was repealed as of 5 August 1997.⁷

Although Section 1034 has been repealed, the repeal of this roll-over provision was not retroactive.⁸ Thus, a taxpayer who sold his home before 7 May 1997 may still roll over the gain into a new principal residence to avoid paying taxes on that gain. The taxpayer must roll over the gain from the sale of the home within the roll-over period, which is generally two years.⁹ This two-year roll-over period is suspended for up to two years while a taxpayer serves on active duty.¹⁰ As a result, active duty service members usually have four years to roll over the gain on

1. Pub. L. No. 105-34, 111 Stat. 788 (codified in scattered sections of 26 U.S.C.).

2. *Id.* § 312, 111 Stat. at 836 (codified at I.R.C. § 121).

3. *Id.* (codified at I.R.C. § 121(b)).

4. *Id.* (codified at I.R.C. § 121(a)).

5. *Id.* (codified at I.R.C. § 121).

6. *Id.*

7. *Id.* at 839 (codified at I.R.C. § 1034(b)).

8. *Id.*

9. I.R.C. § 1034(a) (West 1997).

10. *Id.* § 1034(h)(1).

the sale of their homes. The two-year roll over-period is also suspended while a taxpayer is serving overseas; however, in no case will the total period of suspension go beyond eight years from the sale of the home.¹¹

Once a taxpayer rolls over his gain into a new residence, the taxpayer will be able to take advantage of the new exclusion upon the sale of his new home. In fact, the period that he owned the old home automatically counts towards the two years required to own his home under this principal residence exclusion provision.¹² For example, if a taxpayer owned a home for three years, sold it at a gain, and purchased a new home within the roll-over period, he is considered to have owned and occupied the new home for three years. As a result, if he were to sell it one year later, he would have owned and occupied the home for four years for tax purposes and be able to exclude up to \$250,000 (or \$500,000 if a joint return is filed).

As a general rule, taxpayers will only be able to take advantage of this new exclusion once every two years. This makes sense in light of the fact that taxpayers are required to have owned and to have occupied the property for two years in order for it to qualify as their principal residence. There are some exceptions to this rule which are potentially important to military taxpayers. If a taxpayer has to sell because of "a change in place of employment, health, or, to the extent provided in regulations, unforeseen circumstances," the taxpayer may exclude a pro rata share of the gain, even if he has not lived in the home for two years.¹³ Since the legislation was only recently enacted, there are currently no regulations in this area. Nonetheless, taxpayers can clearly take advantage of this exclusion more often than once every two years if they move because of a change in place of employment. If a taxpayer takes this exclusion more than once every two years, the amount of the exclusion will be prorated.

Another change in the rules governing the sale of a principal residence may benefit divorcing spouses. Previously, the spouse who left the home was often unable to roll over the gain. Since the taxpayer no longer lived in the home, the home did not qualify as his principal residence. A new code section governing the exclusion of gain on the sale of a principal residence treats the absent spouse as having lived in the house for pur-

poses of the exclusion so long as the remaining spouse was granted the use of the property pursuant to a divorce or separation instrument.¹⁴ A written separation agreement qualifies as a separation instrument.

Despite the new exclusion, taxpayers must still recognize gain to the extent of any depreciation taken for the rental or other business use of the property, but only for periods after 6 May 1997.¹⁵ Some tax savings are available in this area. For example, if a taxpayer has rented property for a period of time, he could move back into the home, live in it for two years, and exclude all of the gain except the gain related to depreciation taken after 6 May 1997. Further, a taxpayer who is currently renting property could sell that property and would be able to exclude all of the gain except for the depreciation taken after 6 May 1997, so long as the taxpayer lived in the home for at least two of the past five years.

Reduction in Capital Gains Rate

The other major provision of the Tax Relief Act of 1997 that takes effect this year is the cut in the capital gains rate. The capital gains rate is reduced for certain capital gains occurring after 6 May 1997.¹⁶

The new rate structure is more complicated. If property has been held for more than eighteen months and is sold after 6 May 1997, the capital gains rate is twenty percent.¹⁷ The twenty percent rate also applies to property that was sold between 6 May 1997 and 29 July 1997, if the property had been held more than twelve months.

The eighteen-month holding period is the result of a rather complex set of rules. Long-term capital gain continues to be defined as property held over twelve months. Net capital gain, which was formerly the gain to which the maximum capital gains rate applied, continues to be defined as net long-term capital gain minus short-term capital losses.¹⁸ As a result, the new maximum capital gains rate applies to "adjusted net capital gain," which is defined as net capital gain excluding, among other items, mid-term capital gain.¹⁹ Mid-term capital gain is defined as gain from assets held more than twelve months, but

11. *Id.* § 1034(h)(2).

12. Pub. L. No. 105-34, 111 Stat. 788, 839 (codified at I.R.C. § 121(g)).

13. *Id.* at 837 (codified at I.R.C. § 121(c)(2)(B)).

14. *Id.* (codified at I.R.C. § 121(a)(3)).

15. *Id.* at 838 (codified at I.R.C. § 121(a)(6)).

16. *Id.* § 311, 111 Stat. at 831 (codified at I.R.C. § 1(h)).

17. *Id.* at 832 (codified at I.R.C. § 1(h)(1)(E)).

18. I.R.C. § 1222(11) (West 1997).

no longer than eighteen months.²⁰ This convoluted system was necessary to ensure that the old maximum capital gains rate of twenty-eight percent continues to apply to assets held more than twelve months, but not more than eighteen months.

The current twenty-eight percent capital gains rate will continue to apply to sales before 7 May 1997 and after 28 July 1997 for property that is held for more than twelve months, but less than eighteen months.²¹ The twenty-eight percent rate will also apply to the sales of collectibles held over twelve months.²²

A maximum capital gains rate of ten percent may apply to certain taxpayers who are in the fifteen percent tax bracket.²³ Again, they must hold the asset for over eighteen months. Another rate of twenty-five percent will apply to real estate recapture that is treated as capital gain.²⁴ Finally, the maximum capital gain rate will be reduced to eighteen percent for property purchased after 31 December 2000 and held more than five years at the time of sale.²⁵ Thus, the new eighteen percent rate will not take effect until at least 2005.

Individual Retirement Accounts (IRAs)

In the area of Individual Retirement Accounts (IRAs), Congress enacted significant changes that will become effective in 1998. Several improvements have been made to the "old" IRAs.²⁶ First, Congress improved the ability to deduct contributions to these IRAs by increasing the phase-out dollar limitations. Since all active duty military personnel are covered by a pension, active duty service members will directly benefit from this change. Previously, married taxpayers filing a joint return faced a phase-out of the amount of a deductible contribution to an IRA beginning at \$40,000 and were not able to make a deductible contribution when their adjusted gross income exceeded \$50,000 (for single taxpayers, the phase-out was from \$25,000 to \$35,000).²⁷ Beginning in 1998, the new law will increase the upper limit of the phase-out from \$50,000 to \$60,000 (for single taxpayers, the phase-out will be from \$30,000 to \$40,000).²⁸ The result is that more active duty service members will be able to make deductible IRA contributions.

Second, a taxpayer is no longer treated as being covered by a pension plan simply because his spouse is covered.²⁹ The result is that a military spouse is no longer subject to the phase-out limitations so long as: (1) the military spouse is not covered by a pension plan and (2) the couple's combined income is less than \$150,000.³⁰ Thus, many active duty service members who file joint returns with their spouses will be able to make a \$2,000 deductible contribution to a spousal IRA, even though they cannot make one themselves because they are subject to the phase-out rules above.

Another change is that taxpayers can make penalty-free IRA withdrawals so long as the money is withdrawn for qualified higher education expenses.³¹ For purposes of IRA deductions, qualified higher education expenses include tuition, fees, books, supplies, and equipment for attendance at institutions of higher learning for the taxpayer, the taxpayer's spouse, or any child or grandchild of the taxpayer.³²

Withdrawals from IRAs can also be made without penalty so long as the money is used to purchase a first home.³³ The home must be purchased within 120 days of the withdrawal of funds from the IRA.³⁴ A taxpayer can withdraw only \$10,000 during his life and still be able to avoid the ten percent early withdrawal penalty.

Roth IRAs

Another major change in the area of IRAs is the creation of the Roth IRA,³⁵ a completely new type of IRA. Contributions to Roth IRAs are limited to \$2,000 per taxpayer per year, and the contributions are not deductible.³⁶ The principal advantage of a Roth IRA is that qualified withdrawals are not subject to any tax at all.³⁷ This is a significant advantage over the old IRAs, especially if the taxpayer earns too much to be able to make a deductible contribution to a regular IRA.

A distribution from a Roth IRA will not be treated as a qualified distribution unless the distribution is made at least five years after the taxpayer makes his first contribution to a Roth

19. Pub. L. No. 105-34, § 311, 111 Stat. 788, 833 (codified at I.R.C. § 1(h)(4)).

20. *Id.* (codified at I.R.C. § 1(h)(8)).

21. *Id.* at 832 (codified at I.R.C. § 1(h)(1)(c)).

22. *Id.* at 833 (codified at I.R.C. § 1(h)(41)).

23. *Id.* at 832 (codified at I.R.C. § 1(h)(D)).

24. *Id.* (codified at I.R.C. § 1(h)(B)).

25. *Id.* (codified at I.R.C. § 1(h)(2)).

26. *Id.* § 301, 111 Stat. at 824 (codified at I.R.C. § 219).

27. I.R.C. § 219(g) (West 1997).

IRA.³⁸ Provided that the taxpayer meets this requirement, “qualified distributions” are distributions made: after the taxpayer has reached age fifty-nine and a half; to beneficiaries as a result of the death of the taxpayer; to the taxpayer when the taxpayer is disabled; or other special purpose distributions.³⁹ Special purpose distributions are distributions that are made for

a first-time home purchase, but they do not include distributions made to pay expenses for higher education.⁴⁰

Taxpayers are limited to total contributions of \$2000 to all their IRAs each year.⁴¹ Thus, the total amount of contributions to both regular IRAs and Roth IRAs cannot exceed \$2000 for any year. However, taxpayers can mix their contributions

28. Pub. L. No. 105-34, § 301, 111 Stat. at 824. The phase-out amount will increase each year over the next nine years. The applicable dollar amount is the amount at which the phase out begins. The phase-out range is over \$10,000; however, the phase-out range for joint returns is scheduled to increase to \$20,000 in 2007. The applicable amounts each year are as follows:

(i) In the case of a taxpayer filing a joint return:

For taxable years beginning in:	The applicable dollar amount is:
1998	\$50,000
1999	\$51,000
2000	\$52,000
2001	\$53,000
2002	\$54,000
2003	\$60,000
2004	\$65,000
2005	\$70,000
2006	\$75,000
2007 and thereafter	\$80,000

(ii) In the case of any other taxpayer (other than a married individual filing a separate return):

For taxable years beginning in:	The applicable dollar amount is:
1998	\$30,000
1999	\$31,000
2000	\$32,000
2001	\$33,000
2002	\$34,000
2003	\$40,000
2004	\$45,000
2005 and thereafter	\$50,000

Id. at 824-25.

29. *Id.* at 825 (codified at 26 U.S.C. § 219).

30. *Id.*

31. *Id.* § 203, 111 Stat. at 809 (codified at 26 U.S.C. § 72(t)(2)(E)).

32. *Id.*

33. *Id.* § 303, 111 Stat. at 829 (codified at 26 U.S.C. § 72(t)(2)(F)).

34. *Id.* at 830.

35. *Id.* § 302, 111 Stat. at 825 (codified at I.R.C. § 408A).

36. *Id.* at 826 (codified at I.R.C. § 408A(c)).

37. *Id.* at 827 (codified at I.R.C. § 408A(d)).

38. *Id.* (codified at I.R.C. § 408A(d)(2)(B)).

39. *Id.* (codified at I.R.C. § 408A(d)(2)(A)).

40. *Id.* at 828 (codified at I.R.C. § 408A(d)(3)(E)(5)).

between the two types of IRAs. For example, a taxpayer who can make a \$1000 deductible contribution to a regular IRA would probably be best advised to make that contribution and also contribute \$1000 to a Roth IRA.

Taxpayers can also roll over funds currently in a regular IRA to a Roth IRA, provided that their adjusted gross income does not exceed \$100,000.⁴² Careful planning is necessary to determine whether this would be advantageous for a client. Taxpayers who elect to roll over their regular IRAs into a Roth IRA will have to pay income taxes for the amount in the regular IRA that is attributable to deductible IRA contributions and to growth as a result of earnings.⁴³ Taxpayers who roll over their regular IRAs into Roth IRAs in 1998 can include this income in their gross income over a period of four years.⁴⁴

Taxpayers cannot make a contribution to a Roth IRA if their income exceeds certain limits. Taxpayers who file a joint return will have their ability to contribute to a Roth IRA phased out when their adjusted gross income is between \$150,000 and \$160,000.⁴⁵ They will not be able to make any contribution to a Roth IRA when their adjusted gross income exceeds \$160,000. Single taxpayers will be phased out from \$95,000 to \$110,000 and will not be able to make a contribution to a Roth IRA when their income exceeds \$110,000. A married taxpayer filing a separate return will be phased out from \$0 to \$15,000 and will not be able to contribute to a Roth IRA when his income exceeds \$15,000.

Educational IRAs

A final change in the area of IRAs is the creation of educational IRAs.⁴⁶ A taxpayer can contribute up to \$500 per year to

an educational IRA, and the money in the IRA will grow tax free.⁴⁷ The distributions from the IRA will not be included in the gross income of the recipient so long as the money is used for qualified educational expenses.⁴⁸ If distributions are not used for qualified educational expenses, the distribution will be subject to income tax in the same manner as regular IRAs and will also be subject to a ten percent penalty.⁴⁹ A single taxpayer's ability to contribute to an educational IRA is phased out when his modified adjusted gross income (MAGI) exceeds \$95,000, and he cannot contribute when his MAGI exceeds \$110,000. In the case of a joint return, the ability to contribute is phased out when the taxpayers' MAGI exceeds \$150,000, and they cannot contribute when their MAGI exceeds \$160,000.

Child Tax Credit

The Taxpayer Relief Act of 1997 adds a new credit, called the child tax credit.⁵⁰ The child tax credit will be \$400 in 1998 and will increase to \$500 thereafter.⁵¹ In order to qualify for the child tax credit, a taxpayer must first have a qualifying child. A qualifying child is defined as a child the taxpayer can claim as a dependent; who has not attained the age of seventeen as of the close of the calendar year; and is either a son or daughter (or a descendant of either), stepson, stepdaughter, or an eligible foster child of the taxpayer.⁵² Note further that the child must be a U.S. citizen or a resident of the United States.⁵³

The credit is phased out when a taxpayer's MAGI exceeds certain levels. The ability to take this credit begins to be phased out at \$110,000 for joint returns, \$75,000 for single and head of household returns, and \$55,000 for married filing separately returns.⁵⁴ The credit is reduced by \$50 for each \$1000 by which

41. *Id.* at 826 (codified at I.R.C. § 408A(c)(2)).

42. *Id.* (codified at I.R.C. § 408A(c)(3)(B)).

43. *Id.* at 827 (codified at I.R.C. § 408A(d)(3)(A)).

44. *Id.* at 828 (codified at I.R.C. § 408A(d)(3)(A)(iii)).

45. *Id.* at 826 (codified at I.R.C. § 408A(c)(3)(C)).

46. *Id.* § 213, 111 Stat. at 813 (codified at I.R.C. § 530).

47. *Id.*

48. *Id.* at 814 (codified at I.R.C. § 530(d)(2)).

49. *Id.* (codified at I.R.C. § 530(d)(1)).

50. *Id.* at 796 (codified at I.R.C. § 24).

51. *Id.* (codified at I.R.C. § 24(a)).

52. *Id.* at 797 (codified at I.R.C. § 24(c)(1)(C)).

53. *Id.* (codified at I.R.C. § 24(c)(2)).

54. *Id.* (codified at I.R.C. § 24(b)(2)).

the taxpayer's MAGI exceeds the above amounts.⁵⁵ Thus, a married couple with one child and an MAGI of \$111,000 would have their credit reduced by \$50, i.e., from \$400 to \$350. For example, in 1998 (when the credit is \$400), they would lose their ability to take this credit when their MAGI exceeds \$118,000. After 1998 (when the credit is \$500), they will lose their ability to take this credit once their MAGI exceeds \$120,000. In contrast, if the couple had three children in 1998 (with a total credit of \$1,200) the credit would not be completely phased out until their MAGI exceeded \$134,000.

For most taxpayers, this credit is not a refundable credit.⁵⁶ That is, it can reduce a taxpayer's income tax to zero, but it cannot result in a refund. Taxpayers who have three or more children or who are eligible for the earned income credit may be able to qualify for a credit above this amount. The amount of the refundable credit will equal the greater of: (1) the credit allowed without regard to the nonrefundable limitation or (2) taxable income, increased by the amount of social security taxes paid, but reduced by certain other tax credits, to include part of the earned income credit. Those who are confused by this are not alone. The amount of credit allowed in these circumstances will have to be determined by reference to IRS worksheets and charts.

Education Incentives

In addition to the previously mentioned educational IRA, several new educational incentives are included in the new law. Taxpayers who have children in college have several different credits and deductions of which they may be able to take advantage. The Hope Scholarship Credit⁵⁷ and the Lifetime Scholarship Credit⁵⁸ can potentially result in a taxpayer taking a total credit of up to \$2000. This credit is not available for taxpayers who are married and filing separate returns. The Hope Scholarship Credit is not available until 1 January 1998, and the Life-

time learning credit is only available for expenses paid after 30 June 1998 for education furnished after such date.

The Hope Scholarship Credit is a credit for the amount of money spent on tuition and related expenses. The credit can be as much as \$2000 per student. The credit consists of one hundred percent of the first \$1000 spent on tuition and related expenses and fifty percent of the next \$2000 so spent.⁵⁹ The Hope Scholarship Credit is only allowed for tuition and related expenses incurred in the first two years of post-secondary education.⁶⁰ The credit is not available if the student has been convicted of a federal or state felony offense involving the possession or distribution of a controlled substance.⁶¹

The Lifetime Learning Credit is a credit equal to twenty percent of the qualified tuition and related expenses that do not exceed \$5000; thus, the maximum credit is \$1000.⁶² This \$5000 limit is scheduled to increase to \$10,000 beginning after 1 January 2003, at which time the maximum credit will be \$2000.⁶³ Unlike the Hope Scholarship Credit, this credit is available to any taxpayer for any year.⁶⁴ As a result, this credit is available during the third and fourth years of an individual's college education. Also, anyone can take additional courses and qualify for this credit so long as the courses are taken at qualified educational institutions.

Qualified tuition and related expenses include the tuition and fees required for the attendance of the taxpayer, spouse, or dependent at a qualified educational institution.⁶⁵ Qualified tuition and expenses do not include student activity fees, athletic fees, insurance expenses, or other expenses unrelated to an individual's academic course of instruction.⁶⁶ The amount of qualified tuition and related expenses are also reduced by any scholarships that the student may have; any education assistance allowance that the student may receive; or any payment other than a gift, bequest, devise, or inheritance that is excluded from the student's gross income.⁶⁷

55. *Id.* (codified at I.R.C. § 24(b)(1)).

56. *See* I.R.C. § 26 (West 1997).

57. Pub. L. No. 105-34, 111 Stat. 788, 799 (codified at I.R.C. § 25A(b)).

58. *Id.* (codified at I.R.C. § 25A(c)).

59. *Id.* at 800 (codified at I.R.C. § 25A(b)(1)).

60. *Id.* (codified at I.R.C. § 25A(b)(2)(A)).

61. *Id.* (codified at I.R.C. § 25A(b)(2)(D)).

62. *Id.* at 801 (codified at I.R.C. § 25A(c)(1)).

63. *Id.*

64. *Id.* (codified at I.R.C. § 25A(f)).

65. *Id.*

66. *Id.*

These educational credits are also phased out when a taxpayer's MAGI exceeds certain levels. If taxpayers file a joint return and have an MAGI above \$80,000, their credit begins to be phased out. When their income reaches \$100,000, the credit is completely phased out and is no longer available to them. Between these amounts, the credit is phased out in a pro rata manner.⁶⁸ For example, taxpayers filing a joint return with an MAGI of \$90,000 are entitled to take fifty percent of the credit that they would be entitled to had their income been less than \$80,000. This credit is phased out for all other taxpayers when their MAGI exceeds \$40,000 and is completely phased out when their MAGI reaches \$50,000.⁶⁹ The phase-out limits for both joint return filers and other filers are scheduled to be increased for inflation beginning in 2002.

Another tax benefit for those incurring educational expenses is a deduction for interest on qualified education loans.⁷⁰ This new deduction is an above-the-line deduction. That is, the taxpayer does not need to itemize in order to take advantage of this new deduction. Eventually, the maximum deduction allowed for interest on qualified educational loans will be \$2500; but this will be phased in over 4 years as follows: in 1998, the amount will be \$1000; in 1999, it will be \$1500; in 2000, it will be \$2000; and in 2000 and thereafter, it will be \$2500.⁷¹

This deduction is phased out for taxpayers with an MAGI between \$40,000 and \$55,000 (\$60,000 to \$75,000 for joint filers).⁷² Also, deductions for interest on educational loans are only allowed during the first sixty months that interest payments are required.⁷³

A qualified education loan includes any indebtedness incurred to pay qualified higher education expenses for the tax-

payer, taxpayer's spouse, or any dependent of the taxpayer.⁷⁴ Qualified higher education expenses include the cost of attendance at a qualified educational institution, but are reduced by the amount of any scholarship, allowance, or payment.⁷⁵

Another educational incentive is the broadening of the definition of what can be included in a state plan. Beginning in 1998, qualified state plans can include room and board.⁷⁶ Taxpayers can purchase room and board as part of a state tuition plan and obtain the same tax advantages that they receive for tuition. The advantages of investing in a qualified state tuition plan are numerous: contributions to the program are not treated as gifts; accrual of money in the program is not subject to income tax; and qualified distributions from the program are also not subject to tax.⁷⁷

Estate and Gift Taxes

Some final changes worth mentioning are in the area of estate and gift taxes. There is currently a \$10,000 exclusion for the gift of a present interest in property.⁷⁸ Beginning in 1999, the \$10,000 annual exclusion will increase with inflation; however, since it will only increase in \$1000 increments and inflation is currently below four percent, it most likely will not increase for several years.⁷⁹

Taxes on estates will also decrease. The lifetime credit currently allowed for estates is \$192,800.⁸⁰ This credit equals the amount of tax that would be charged to an estate valued at \$600,000. This credit will slowly increase so that by 2006 the credit will equal the amount of tax due on an estate valued at \$1,000,000.⁸¹ For 1998, the credit will increase to an amount which will equal the amount of tax due on an estate valued at \$625,000.⁸² Lieutenant Colonel Henderson.

67. *Id.* at 802 (codified at I.R.C. § 25A(g)).

68. *Id.* at 801 (codified at I.R.C. § 25A(d)).

69. *Id.*

70. *Id.* at 806 (codified at I.R.C. § 221).

71. *Id.* (codified at I.R.C. § 221(b)(1)).

72. *Id.* (codified at I.R.C. § 221(b)(2)).

73. *Id.* at 802 (codified at I.R.C. § 221(d)).

74. *Id.* (codified at I.R.C. § 221(e)(1)).

75. *Id.* (codified at I.R.C. § 221(e)(2)).

76. *Id.* at 810 (codified at I.R.C. § 529(e)(3)(B)).

77. *Id.* (codified at I.R.C. § 529(b)).

78. I.R.C. § 2503(b) (West 1997).

79. Pub. L. No. 105-34, § 501, 111 Stat. 788, 846 (codified at I.R.C. § 2503(b)).

80. I.R.C. § 2010(a).

Update for 1997 Federal Income Tax Returns

Legal assistance attorneys around the world who are preparing for the 1997 federal income tax filing season may find this update useful in publicizing the information that is of the most concern to military taxpayers.⁸³

Which Form Must Be Used?

The tax form that a taxpayer should use depends on his filing status, income level, and the type of deductions and credits he claims. The IRS has established the following guidelines for choosing tax forms:⁸⁴

* Use Form 1040EZ⁸⁵ if you meet the following conditions *during the tax year*: (1) you are single or married filing jointly; (2) you (and your spouse, if married) were under 65 on 1 January 1998; (3) you (and your spouse, if married) were not blind at the end of 1996; (4) you do not claim any dependents; (5) your taxable income is less than \$50,000; and (6) your taxable interest income was \$400 or less. If you use this form, you may not itemize deductions, claim credits, or take adjustments.

81. Pub. L. No. 105-34, § 501, 111 Stat. 788, 845 (codified at I.R.C. § 2010(c)).

82. *Id.* The exclusion amount that the credit will equal is as follows:

In the case of estates dying,
and gifts made during:

1998	\$625,000
1999	\$650,000
2000 and 2001	\$675,000
2002 and 2003	\$700,000
2004	\$850,000
2005	\$950,000
2006 or thereafter	\$1,000,000

83. This update will be included in JA 269, *Tax Information Series*, a handbook of tax information flyers published each January by The Judge Advocate General's School, U.S. Army. This publication contains a series of camera-ready tax information handouts that may be reproduced for use in local preventive law programs. This update is currently in Microsoft Word format on the Bulletin Board of the Legal Automation Army-Wide System as JA269.DOC. The 1997 edition of JA 269 will be uploaded before the end of December 1997.

84. These guidelines are contained in the instructions to the various forms discussed in this section.

85. U.S. Internal Revenue Serv., Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents (1997).

86. U.S. Internal Revenue Serv., Form 1040A, Income Tax Return for Single and Joint Filers (1997).

87. U.S. Internal Revenue Serv., Form 1040, Income Tax Return for Single and Joint Filers (1997).

88. I.R.C. §§ 6072, 7502 (West 1997).

89. Treas. Reg. § 1.6081-5 (1990).

90. I.R.C. § 6601.

91. *Id.* § 112(c)(2). The only areas qualifying for combat zone treatment as of 1 October 1997 were the Arabian Peninsula areas, which include the Persian Gulf, the Red Sea, the Gulf of Oman, that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude, the Gulf of Aden, and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates. See Exec. Order No. 12,744, 1991-1 C.B. 31 (1991).

* Use Form 1040A⁸⁶ if your taxable income from wages, salaries, tips, interest, and dividends is less than \$50,000. If you use this form, you may not itemize deductions. You can claim credits and take adjustments.

* If you intend to itemize deductions, have any capital gains, or have gross income over \$50,000, you must use Form 1040.⁸⁷

When to File?

Tax returns must be postmarked by 15 April 1998.⁸⁸ Taxpayers who are living outside the United States and Puerto Rico on 15 April 1998 have until 15 June 1998 to file their returns.⁸⁹ If a taxpayer owes the IRS money, however, he will have to pay interest on the amount he owes from 15 April 1998 until the IRS receives his payment.⁹⁰ Taxpayers who are living outside the United States and Puerto Rico and want to take advantage of this extension should indicate on either their returns or an attached statement that they were overseas on 15 April 1998.

Taxpayers who served in a combat zone⁹¹ or a qualified hazardous area⁹² have at least 180 days from the time they left the combat zone in which to file their returns.⁹³ If a taxpayer was

deployed outside the United States and away from his normal duty station in support of Operation Joint Endeavor or Operation Joint Guard, he is also entitled to this extension, even if he did not serve in the qualified hazardous duty area. No interest or penalties for failure to file or failure to pay will be assessed during this extension.⁹⁴

Taxpayers who do not qualify for the overseas or combat zone extension can still obtain an extension. First, a taxpayer can receive an extension to 15 August 1998 by filing Form 4868 no later than 15 April 1998.⁹⁵ Although this gives an automatic extension to 15 August 1998, the taxpayer must still pay any taxes owed by 15 April 1998. If he does not pay all taxes owed by 15 April, he will be subject to a "failure to pay" penalty and will be charged interest on any taxes not paid.

Taxpayers may also receive an additional two-month extension to 15 October 1998 by filing Form 2688.⁹⁶ This request for an additional extension will only be approved if the taxpayer can show good cause. The taxpayer will also be subject to a "failure to pay" penalty and interest charges if he does not pay his taxes in full by 15 April 1998.

What Are the 1997 Tax Rates?

The tax rates for 1997 remain unchanged and are 15%, 28%, 31%, 36%, and 39.6%. The following tables⁹⁷ show the adjusted tax rates by filing status for 1997:

Married Individuals Filing Joint Returns and Surviving Spouses

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not Over \$41,200	15% of the taxable income
Over \$41,200 but not over \$99,600	\$6180 plus 28% of the excess over \$41,200
Over \$99,600 but not over \$151,750	\$22,532 plus 31% of the excess over \$99,600
Over \$151,750 but not over \$271,050	\$38,698.50 plus 36% of the excess over \$151,750

Over \$271,050	\$81,646.50 plus 39.6% of the excess over \$271,050
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Heads of Household

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not Over \$33,050	15% of the taxable income
Over \$33,050 but not over \$85,350	\$4857.50 plus 28% of the excess over \$33,050
Over \$85,350 but not over \$138,200	\$19,601.50 plus 31% of the excess over \$85,350
Over \$138,200 but not over \$271,050	\$35,985 plus 36% of the excess over \$138,200
Over \$271,050	\$83,811 plus 39.6% of the excess over \$271,050

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

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not Over \$24,650	15% of the taxable income
Over \$24,650 but not over \$59,750	\$3697.50 plus 28% of the excess over \$24,650
Over \$59,750 but not over \$124,650	\$13,525.50 plus 31% of the excess over \$59,750
Over \$124,650 but not over \$271,050	\$33,644.50 plus 36% of the excess over \$124,650
Over \$271,050	\$86,348.50 plus 39.6% of the excess over \$271,050

Married Individuals Filing Separate Returns

92. Tax Benefits for Servicemen in Bosnia and Herzegovina, Pub. L. No. 104-117, § 1, 109 Stat. 827 (1996). Bosnia, Herzegovina, Croatia, and Macedonia are currently considered to be qualified hazardous duty areas. Also, taxpayers who performed services outside the United States as part of Operation Joint Endeavor or Operation Joint Guard and were away from their permanent duty stations are considered to have served in a hazardous duty area.

93. I.R.C. § 7508.

94. *Id.*

95. Temp. Treas. Reg. § 6081-4T (1996).

96. Treas. Reg. § 6081-1 (1989).

97. Rev. Proc. 96-59, 1996-2 C.B.

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>	Head of Household	\$6050
Not Over \$20,600	15% of the taxable income	Unmarried Individuals	\$4150
Over \$20,600 but not over \$49,800	\$3090 plus 28% of the excess over \$20,600	(other than surviving spouses and heads of household)	
Over \$49,800 but not over \$75,875	\$11,266 plus 31% of the excess over \$49,800	Married Individuals Filing a Separate Return	\$3450
Over \$75,875 but not over \$135,525	\$19,349.25 plus 36% of the excess over \$75,875		
Over \$135,525	\$40,823.25 plus 39.6% of the excess over \$135,525		

Estates and Trusts

<u>If Taxable Income Is:</u>	<u>The Tax Is:</u>
Not Over \$1650	15% of the taxable income
Over \$1650 but not over \$3900	\$247.50 plus 28% of the excess over \$1650
Over \$3900 but not over \$5950	\$877.50 plus 31% of the excess over \$3900
Over \$5950 but not over \$8100	\$1513 plus 36% of the excess over \$5950
Over \$8100	\$2287 plus 39.6% of the excess over \$8100

The IRS allows the elderly and the blind to claim a higher standard deduction.⁹⁹ A minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction, and that standard deduction is limited to the greater of \$650 or the child's earned income.¹⁰⁰ Thus, if a minor child did not work and had only investment income, the child would take a standard deduction of \$650. If the child worked and had income of \$2500, the child would take a standard deduction of \$2500. The child's standard deduction would never exceed the standard deduction for a similar taxpayer.¹⁰¹ Thus, if the child were unmarried and earned \$5000, the child would take a standard deduction of \$4150.

What Is the 1997 Personal Exemption?

The personal exemption amount has increased to \$2650 for 1997.¹⁰² Social security numbers are required for all dependents claimed on a tax return. The personal exemption begins to phase out at \$181,800 for taxpayers filing a joint return; \$151,500 for heads of household; \$121,200 for unmarried taxpayers (other than surviving spouses or heads of household); and \$90,900 for taxpayers who are married and filing separately.¹⁰³

What Are the 1997 Standard Deductions?

The following table shows the standard deduction⁹⁸ amounts for 1997:

<u>Filing Status</u>	<u>Standard Deduction</u>
Joint Returns and Surviving Spouses	\$6900

Earned Income Credit

The earned income credit will again be available. Taxpayers will be eligible if their adjusted gross income is less than \$9770 and they have no children; \$25,760 and they have one child; or \$29,290 and they have two or more children.¹⁰⁴ Lieutenant Colonel Henderson.

98. *Id.*

99. I.R.C. § 63(c)(3) (West 1997).

100. *Id.* § 63(c)(5).

101. *Id.* § 63(c)(2).

102. Rev. Proc. 96-59, 1996-2 C.B.

103. *Id.*

104. *Id.*

Contract Law Note

Federal Circuits Split on Application of the Major Fraud Act to Government Contracts

*"A little neglect may breed mischief, . . . for want of a nail, the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost."*¹⁰⁵

—Benjamin Franklin

In *United States v. Brooks*,¹⁰⁶ the United States Court of Appeals for the Fourth Circuit recently held that the one million dollar jurisdictional threshold of the Major Fraud Act¹⁰⁷ is satisfied when a prime contract is valued at one million dollars or more, regardless of the value of the particular subcontract which was tainted with fraud. This holding is contrary to the Second Circuit's opinion in *United States v. Nadi*.¹⁰⁸ In *Nadi*, the court specifically held that the value of the contract, for jurisdictional purposes under the Major Fraud Act, is determined by the value of the contract upon which the actual fraud is based.¹⁰⁹ This conflict between the federal circuits creates a certain amount of ambiguity for the practitioner who must

decide whether to pursue a particular contractor under the Major Fraud Act.

The facts in *Brooks* are rather straightforward. Edwin, John, and Stephen Brooks operated B & D Electric Supply, Inc. (B&D).¹¹⁰ The company sold electrical supplies to both military and civilian customers.¹¹¹ The fraud committed by B&D involved two subcontracts that it held with firms that had entered into prime contracts with the U. S. Navy.¹¹² The first subcontract was with Jonathan Corporation for fourteen shipboard motor controls for a total price of \$51,544.¹¹³ The prime contract between Jonathan Corporation and the Navy was valued at approximately nine million dollars.¹¹⁴ The second subcontract was with Ingalls Shipbuilding, Inc. (Ingalls) for six rotary switches for a total price of \$1470.¹¹⁵ The value of Ingalls' prime contract with the Navy was five million dollars.¹¹⁶ As a result of fraud in the performance of the subcontracts, B & D was convicted in the United States District Court for the Eastern District of Virginia for, among other things, violations of the Major Fraud Act.¹¹⁷

On appeal to the Fourth Circuit, B&D challenged the district court's interpretation of the Major Fraud Act.¹¹⁸ It argued that the value of the contract under which the Major Fraud Act is triggered should be determined by looking at the value of the

105. OXFORD DICTIONARY OF QUOTATIONS (Oxford Univ. Press 1979), quoting BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1758).

106. 111 F.3d 365 (4th Cir. 1997).

107. 18 U.S.C. § 1031(a) (1994). The statute provides:

Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent (1) to defraud the United States, or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more, shall, subject to the applicability of subsection (c), be fined not more than \$1,000,000, or imprisoned not more than 10 years or both.

Id. (emphasis added).

108. 996 F.2d 548 (2d Cir. 1993).

109. *Id.* at 551.

110. *Brooks*, 111 F.3d at 368.

111. *Id.* The majority of B&D's business involved reselling new components produced by well-known and well-established manufacturers of electrical components. Under some limited circumstances, B&D sold certain electrical components that it custom-assembled. *Id.*

112. *Id.*

113. *Id.* In this contract, B&D assembled the controllers itself, but it attempted to mislead the Navy by affixing to the controllers the trademarks of Cutler-Hammer Company, an approved military supplier of controllers. *Id.*

114. *Id.*

115. *Id.* In this contract, B&D attempted to mislead the Navy by representing that the switches were new when B&D actually had only assembled or rebuilt them. *Id.*

116. *Id.*

117. *Id.* at 365.

118. *Id.* at 368.

specific contract upon which the fraud is based. Thus, B&D contended that the fraudulent misconduct involved subcontracts which were only valued at \$51,544 and \$1470 respectively.¹¹⁹ Accordingly, B&D argued that the fraudulent conduct did not fall within the Major Fraud Act's jurisdictional amount of one million dollars.¹²⁰

The Fourth Circuit disagreed. The court stated that any contractor or supplier involved with a prime contract with the United States who commits fraud is guilty so long as the prime contract or subcontract is valued at more than one million dollars, regardless of privity with the United States.¹²¹ The court specifically stated:

This reading [of the Major Fraud Act] recognizes that the seriousness of this species of fraud is measured not merely by the out-of-pocket financial loss incurred on a particular subcontract, but also by the potential consequences of the fraud for persons and property. In military contracts in particular, fraud in the provision of small and inexpensive parts can have major effects, destroying or making inoperable multi-million dollar systems or equipment, injuring service people, and compromising military readiness. By extending the statute's coverage even to minor contractors and suppliers whose fraudulent actions could undermine major opera-

tions, Congress enabled prosecutors to combat effectively the severe procurement fraud problem that Congress identified.¹²²

The Fourth Circuit explicitly recognized that its decision was contrary to the position taken by the Second Circuit in *United States v. Nadi*.¹²³

In *Nadi*, the Department of Defense awarded two contracts in 1990 and 1991 to supply packaged salt and pepper to American troops in the Persian Gulf War. One contract (for packaged salt) was for \$426,000, and the other contract (for packaged pepper) was for \$1,074,000.¹²⁴ The contracts were awarded to Robbins Sales Company,¹²⁵ which subcontracted the work to My Brands, a condiment packager based in Bronx, New York. My Brands was the only subcontractor and performed all of the contract work.¹²⁶ In order to produce large amounts of salt and pepper, My Brands expanded its plant capacity and entered into an agreement with a vendor to purchase five condiment packing machines at \$50,000.¹²⁷ My Brands only received four of the machines and paid for only two of them.¹²⁸ After the Persian Gulf War ended, the Department of Defense terminated the contracts for convenience.¹²⁹ My Brands subsequently submitted a false claim seeking reimbursement for all five machines at \$115,000 each, more than double the sales value of the equipment.¹³⁰ The contractor was convicted in the United States District Court for the Southern District of New York for, among other things, violations of the Major Fraud Act.¹³¹

119. *Id.*

120. 18 U.S.C. § 1031(a) (1994).

121. *Brooks*, 111 F.3d at 369. In addition to the specific language of Section 1031(a), the court explored the legislative history underpinning the statute. The court quoted at length from the senate report, which stated:

Procurement fraud is the most costly kind of fraud, accounting for about 18% of total losses. The Department of Defense reports losses of \$99.1 million due to procurement fraud for fiscal years 1986 and 1987. Prosecutions of individual companies reveal other disturbing facts: Two corporate officials of Spring Works, Inc. were convicted of deliberately providing defective springs for installation in critical assemblies of the CH-47 helicopters, the Cruise Missile, and the F-18 and B-1 aircraft. Two corporate officials of MKB Manufacturing were sentenced for their role in the deliberate provision of defective gas pistons for installation in the M60 machine gun. Installation of the defective part would cause the gun to jam. Thus, the evidence shows that, besides causing financial losses, procurement fraud could cost the life of American soldiers and could threaten national security. These facts compel a legislative solution.

S. REP. NO. 100-503, at 2 (1988).

122. *Brooks*, 111 F.3d at 369.

123. 996 F.2d 548 (2d Cir. 1993).

124. *Id.* at 548-49.

125. *Id.* at 549. Robbins was a broker with no production capacity of its own.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Under the contracts, the Department of Defense had the right to terminate performance unilaterally. In the event of the termination, the contractor had the corresponding right to claim reimbursement for actual "out-of-pocket" expenses. *Id.*

On appeal, My Brands claimed that the Major Fraud Act did not define “value of the contract” and thus created a “trap for the unwary and permits arbitrary enforcement.”¹³² The court disagreed with My Brands, noting that the common sense interpretation of “value of the contract” is confirmed by the statute’s legislative history: “[t]he phrase ‘value of the contract’ refers to the value of the contract award or the amount the government has agreed to pay to the provider of services whether or not this sum represents a profit to the contracting company.”¹³³

In dicta, however, the *Nadi* court stated:

Nonetheless, we find that a reasonable reading of the statute, in light of the legislative history, requires that we adopt the rule, argued for by Defendants, whereby the value of the contract is determined by looking to the specific contract upon which the fraud is based. *So, for example, in a case where the value of a subcontract is less than \$1,000,000 but the prime contract is for \$1,000,000 or more, the subcontractor would escape liability under section 1031. We adopt this rule with reference to the language of the statute.*¹³⁴

Thus, the court in *Nadi* believed the focus should be on the specific contract that was tainted with fraud.

For the practitioner, it is virtually impossible to reconcile the contrary positions taken by the Fourth and Second Circuits. The application of the Major Fraud Act by the two circuits was not fact-dependent; it was simply a matter of statutory interpre-

tation. The more expansive reading of the Major Fraud Act by the Fourth Circuit is more beneficial to the government. In justification, the Fourth Circuit summed up its position by stating, in part:

But the jurisdictional amount requirement of the major fraud statute, like any bright line rule, dictates that some cases will fall outside the scope of the law. We believe that our reading of the statute is no more anomalous than one which allows small subcontractors to escape prosecution under the provision, regardless of the overall project which their fraud affects, simply by ensuring that their own subcontract stays below the \$1 million jurisdictional amount. The *Nadi* court’s interpretation could significantly undermine the purpose of the statute because pervasive fraud on a mult-million dollar defense project would be unreachable under the statute, despite Congress’ intent, if it were perpetrated in multiple separate subcontracts, each involving less than the jurisdictional amount.¹³⁵

In deciding what cause of action to pursue, the practitioner should recognize that there is a split of authority between the circuits. The United States Supreme Court will be the ultimate arbiter of how 18 U.S.C. § 1031(a) will be interpreted. Until such time, *United States v. Brooks*¹³⁶ provides an aggressive approach to ferret out fraudulent conduct by subcontractors on government contracts. Major Wallace.

130. *Id.* The contractor asked the vendor who sold the condiment machines (Suffolk Mechanical, Inc.) to issue false billing statements reflecting the price of the machines at \$115,000 each. *Id.*

131. *Id.* at 548.

132. *Id.* at 550.

133. S. REP. NO. 100-503, at 12 (1988).

134. *Nadi*, 996 F.2d at 551 (emphasis added).

135. *United States v. Brooks*, 111 F.3d 365, 369 (4th Cir. 1997).

136. *Id.* at 368.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Lawyering Through Your Eyes

"The Next Question Must Be More Important"

You are sitting in a bar with a good friend. He looks at you and says, "So, tell me about the case you tried last week." As you launch into your latest acquittal with gusto, your friend immediately turns his head from you and begins to scan the bar, apparently looking for more interesting conversation. You cut your story short and eat another pretzel.

Perhaps a more familiar setting for the judge advocate is the "boss' signal." You walk in to discuss a case with the Staff Judge Advocate. He asks you a question, and, shortly into your answer, his eyes fall and lock on a document on his desk—a document you didn't give him. He reads it while you talk and grunts the occasional "mmm . . ." and "right." You shorten your case description and quickly exit, not wanting to waste any more of his time.

What is the message from this classic human behavior? The message is, "I'm not interested, it's time to move on" or "this conversation is over." What thoughts bolt through the speaker's mind? Perhaps it is reluctance to continue speaking or to expand on a thought or the story, incentive to cut short the description, resentment, anger, disgust, or a combination of these things.

Think back to your last trial and the signals you transmitted. After you asked a witness a question, did you look down at your notes, *during the answer*, to find your next question? You were probably listening, but you were also ensuring you had the next question in the chamber, ready to fire. Your attention and concentration were *divided* or *appeared* to be divided, which is equally destructive.

The consequence of this behavior, like the bar scene or the boss' office, is deadly. You have signaled to your witness that you are not interested in the question or the answer. The witness thinks, "he's looking at the next question, not at me; he must not be interested in this answer." As a result, the witness is inclined to shorten an answer because you look like you want to move on.

This nonverbal speech is also dangerously apparent to a panel. It, too, picks up signals. The members think, "he's looking to the next question, *this* question must not be that important. It's the *next* question that's important." When the advocate continues with similar behavior throughout an examination, it is hard to identify a single, apparently important question.

This behavior most often occurs in a relatively low threat arena, such as introducing a witness—a court-sanctioned bolstering opportunity which, more often than not, counsel squander by blazing through, eyes on the paper and the next "important question." Counsel must take this opportunity to personalize the witness and to engage him.

The Floor and Ceiling Have No Questions or Answers

Think back to a recent opening or closing. Can you remember the faces of the panel members? Can you remember connecting eye-to-eye with a member and delivering an important point to that member? Probably not. This is because we typically *scan* our listeners with our eyes. Even worse, we pace "thoughtfully," with our eyes scrutinizing the ceiling tiles or the crumbs on the floor. This most often occurs during opening statement and closing argument. We do not engage interested members *individually*. We simply roll over them like water over a dam or avoid them entirely by looking at the floor and ceiling.

The trial attorney must be constantly aware of not only what sound is coming out but also how that sound is dressed. Like the bar scene or the "talk" with the Staff Judge Advocate, are our courtroom eyes engaged in their own persuasive yet counter-productive conversation?

Solutions

Your eyes are simply another powerful tool to further your cause. When you rehearse an opening or closing, think through, calculate, and plan your "eye speech." You should concentrate on establishing eye contact with each member at some point in your delivery.

Ideally, you should engage each member a number of times as you talk. That is, you speak "individually" to that member and deliver a singular thought or point. Only then should you move to a new member, lock on, fire the next point, and move to the next target. To avoid a monotony and predictability, you should inject a random quality into this process and avoid singling out members by over-relying on those with whom you connect more easily.

Drills

Improving Eye Contact With Members

As highlighted extensively in *The Advocacy Trainer, A Manual for Supervisors (The Advocacy Trainer)*,¹ drilling is essential to every profession. The baseball player practices fielding and hitting. The basketball player practices the jump shot. The doctor practices on cadavers (and, in university hospitals, on living, breathing patients!). The trial advocate must also practice his art.

The somewhat unorthodox drill below will improve your eye contact with members—guaranteed.

Deliver a portion of your opening, closing, or sentencing argument during a training session. As you speak, establish eye contact with a “member” and then shake the member’s hand (yes, take the person’s hand in yours; you need not shake the hand, simply grip it) while you “deliver” a single thought or point to that person. Once the point is delivered, move randomly to another member, establish eye contact, shake her hand, and deliver the point. Continue this through your statement.²

You will find that a number of interesting things happen during this drill. First, you lock on the person, and she tends to lock onto you. Second, you have now invested that thought or point with that member, you have given her ownership of it, you have asked her to hold that thought for you throughout the case. An additional benefit of this technique is your inevitable “run on the bank.” Once you have invested an important point of fact or law with a particular member, you can later “cash in” and have her recall that fact while you are looking at her. Gripping the hand of the member also adjusts your pace (typically slowing it down), and it tends to enhance your emphasis on what is important.

After a few minutes, continue the argument without the handshake. Your natural inclination will be to continue “hand delivery” of thoughts, points, and concepts with individual members. When you find yourself backsliding to the scanning mode, picture the handshake in your mind and return to individual delivery.

Improving Eye Contact With the Witness

As a trial advocate, you must keep your eyes on the prize—your witness. During a practice direct examination, you should force yourself to keep your eyes on the witness *during* your question and *during* the answer. You must fight off the desire to look to your paper to upload the next question. You should find the question by either continuing to look at the witness or really listening to the witness so that the flow of your questions comes from the witness, in conjunction with your overall plan of attack. Try to move away from your step-by-step pretrial notes. Alternatively, if you feel compelled to follow your scripted examination, find the next question after the witness completes the answer. Simply pause and collect into your quiver the next two or three questions and begin again.

Trial advocates must practice this skill. *The Advocacy Trainer* contains many drills that force counsel to improve their eye contact.³

Counsel must remember that there are many interconnected skills in successful advocacy. Eye contact is a skill over which an advocate can easily exercise control. It also has an incalculable effect on his listeners. However unorthodox it may be, the drill above will help advocates to master the art of “lawyering through their eyes.”

The Advocacy Trainer, A Manual for Supervisors

The Advocacy Trainer marched into the hands of all Staff Judge Advocates (SJAs) during the SJA Worldwide CLE held at The Judge Advocate General’s School, United States Army (TJAGSA), during the week of 6-10 October 1997. For military justice supervisors who are not colocated with their SJAs, TJAGSA will mail copies by the end of October 1997. The Criminal Law Department welcomes input on *The Advocacy Trainer* and suggestions for future supplements. Those who have comments or suggestions can call (804) 972-6340 or e-mail advtrngm@otjag.army.mil.

1. CRIMINAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY (1997) [hereinafter THE ADVOCACY TRAINER].

2. This technique is a component of advocacy training conducted by the Naval Justice School, Newport, Rhode Island.

3. See THE ADVOCACY TRAINER, *supra* note 1, Tab B, Modules 1 and 2.

Note from the Field

Army Discharge Review Board Streamlines and Reduces Processing Times

Captain Bronte' I. Montgomery
Military Review Boards Agency

On 10 February 1996, the National Defense Authorization Act For Fiscal Year 1996¹ was signed into law. Under Section 554 of the Act, the Secretary of Defense is required to "review the system and procedures used by the Secretary in the exercise of authority under section 1552, Title 10, United States Code, in order to identify potential improvements that could be made in the process for correcting military records."² Prior to this statutory directive, the Assistant Secretary of the Army for Manpower and Reserve Affairs identified the need for a revamping of the Army's major review agency and directed a complete restructuring of the agency, in an attempt to improve service to soldiers. The agency was renamed the Army Review Boards Agency (ARBA) and gained new leadership.

The ARBA has made great strides in its reorganization. Two of its major goals were to reduce the backlog of cases before its boards and to reduce the processing time of its cases. The Army Discharge Review Board (ADRB), which reviews

requests by former service members for discharge upgrades, met the challenge. In June 1996, the ADRB had a backlog of approximately 4600 cases, and the processing time for discharge upgrade requests averaged four years. The ADRB successfully eliminated this backlog within a year. The ADRB projects the processing of a new case will now take approximately 120 days under normal circumstances.

The ADRB has worked hard to meet the challenge of restructuring in a manner that was efficient and fair to applicants. Prior to 1997, the upgrade rate was less than five percent. During 1997, the upgrade rate has been approximately ten percent. However, defense counsel should continue to stress to clients that, while the responsiveness to new applications for discharge upgrades has been greatly improved, a discharge upgrade is not automatic.

1. Pub. L. No. 104-106, 110 Stat. 186 (1996).

2. *Id.* § 554.

USALSA Report

United States Army Legal Services Agency

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)*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 4, number 12, is reproduced in part below.

CERCLA Section 113(h) Protects the Army from Challenges to Ongoing CERCLA Remedial Actions

In an effort to allow federal agencies to conduct cleanups without constantly having to defend their cleanup decisions in court, Congress enacted Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as part of the 1986 Superfund Amendments and Reauthorization Act. Section 113(h) of the CERCLA deprives federal courts of subject matter jurisdiction over ongoing CERCLA response actions. This somewhat controversial provision in the CERCLA has caused a split in the federal courts and continues to be a key issue in litigating cases that relate to ongoing cleanups.

Much of the controversy surrounding Section 113(h) began with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Colorado*.¹ In that case, the Tenth Circuit upheld a Resource Conservation and Recovery Act (RCRA) challenge to an ongoing CERCLA remedial action that was being conducted by the Army at Rocky Mountain Arsenal. As a result, the Army was required to obtain, and to comply with, a RCRA Part B permit, even though the cleanup was a CERCLA response action.² Despite Army arguments that this case is limited to its unique set of facts,³ *United States*

v. Colorado continues to be cited as authority for bringing non-CERCLA challenges to ongoing CERCLA cleanups.

More recent authority suggests that *United States v. Colorado* is indeed a very limited precedent. In *McClellan Ecological Seepage Situation v. Perry*,⁴ for example, the Ninth Circuit held that "any challenge" to a CERCLA cleanup is subject to CERCLA Section 113(h), even if the challenge is brought under a statute other than the CERCLA.⁵ In *McClellan*, a local environmental group brought an action to require the Air Force to comply with various environmental laws while conducting a CERCLA cleanup at McClellan Air Force Base, located near Sacramento, California. The Air Force asserted the CERCLA Section 113(h) defense, arguing that the court lacked jurisdiction to entertain challenges to an ongoing CERCLA cleanup. The plaintiffs argued in response that CERCLA 113(h) operates only as a bar to challenges brought under the CERCLA. In holding for the Air Force, the Ninth Circuit concluded that "Section 113 withholds federal jurisdiction to review any of [McClellan Ecological Seepage Situation's] claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions."⁶

While cleanups may be conducted under the authority of any of a number of statutes, including the Defense Environmental Restoration Account, the RCRA, and various Base Realignment and Closure statutes, the CERCLA should be cited as the primary authority under which environmental cleanups are conducted. This will increase the likelihood that the Army will be allowed to conduct its cleanup in relative peace, without repeated interruptions by litigation. Captain Stanton.

Stakeholder Meetings on Resource Conservation and Recovery Act Reform Legislation

Although Congress is currently focusing on Superfund reauthorization, the Clinton administration is considering the potential for legislative reform of the Resource Conservation and Recovery Act (RCRA).⁷ In both June and August 1997, the

1. 990 F.2d 1565 (10th Cir.), *cert. denied*, 114 S. Ct. 922 (1993).

2. *Id.*

3. For example, the Army had submitted the RCRA Part B permit application shortly before commencing the CERCLA cleanup, but subsequently decided that the permit was no longer required.

4. 47 F.3d 325 (9th Cir.), *cert. denied*, 116 S. Ct. 51 (1995).

5. *Id.*

6. *Id.* at 328.

7. 42 U.S.C.A. §§ 6901-92 (West 1995).

Council for Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) convened meetings in Washington, D.C. to discuss with stakeholders the subject of amending the RCRA to modify the regulation of remediation waste. Participants in the meetings included industry, state environmental agencies, national environmental groups, and local community groups. The CEQ and the EPA also invited congressional staff members and federal agency representatives to the meetings as observers.

The Clinton administration identified remediation waste management as an area for reform of the RCRA in the 1995 RCRA Rifleshot Initiative. Last year's legislative proposals resulted in a great deal of debate on reform of the RCRA, but no consensus was reached. The June and August meetings emphasized that the administration remains committed to pursuing legislative change in this area.

The first stakeholder meeting in June was structured around seven specific controversial issues. These issues were posed as questions to elicit a discussion of solutions on which reform policies could be based. There was not, however, agreement on whether legislative reform was the preferred method of implementing changes to the remediation process. Although some stakeholders believed that legislation was the most efficient means of addressing cleanup problems, environmental and community groups feared that changes to the statute could erode the protection currently provided by the RCRA. These groups felt that the current statute provides the framework to develop regulations that are equipped to address the particular cleanup requirements of a site.

At the June meeting, the stakeholders also considered issues such as: how to structure oversight of alternative standards for RCRA remediation waste management and disposal; how to ensure community involvement in remediation waste management reform; what the minimum requirements should be for alternative remediation waste management and disposal standards; what types of remediation waste would be eligible for alternative management or disposal standards; how reform legislation should ensure adequate accountability and oversight for state remediation waste management programs; and how to ensure, through legislation, adequate enforcement of alternative remediation waste management and disposal standards.

The August meeting included a detailed discussion of public participation issues. The discussion addressed whether minimum public participation opportunities should be guaranteed at every waste remediation site and whether a variance from an

established minimum should be granted in certain circumstances. The meeting also included a discussion of state authorization issues. The stakeholders considered what type of authorization model might be appropriate for authorization of an alternative remediation waste standard and to what extent it should be predicated on existing state authorization. No follow-on meetings on RCRA reform have been announced by the CEQ or the EPA. Major Anderson-Lloyd.

Application of Joint and Several Liability for Natural Resource Damages Under the CERCLA and Determining Who Can Recover for Natural Resource Damages

Although joint and several liability is not expressly mandated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁸ CERCLA liability is joint and several where two or more defendants have contributed to a single indivisible harm. The majority of courts adopt the rule that damages should be apportioned only if the defendant can demonstrate that the harm is divisible.⁹ The defendant's limited degree of participation is "not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment."¹⁰

Imposing the burden of proving divisibility of the harm on the defendant has resulted in defendants rarely escaping joint and several liability due to the difficulty of reasonably ascertaining the proportional causes of environmental harm.¹¹ Therefore, a defendant may be responsible for paying an unequal share of the harm. Although the potential inequitable nature of joint and several liability has not gone unnoticed, the courts generally reason "that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty."¹²

The CERCLA provides for the restoration or replacement of natural resources that have been injured, lost, or destroyed by the release of hazardous substances. The CERCLA defines "natural resources" broadly, to include "land, fish, wildlife, biota, air, water, groundwater, [and] drinking water supplies" that belong to, are managed by, or are held in trust by the federal government, a state or local government, a foreign government, or an Indian tribe.¹³ Section 107(a)(4)(C) of the CERCLA states that generators of hazardous wastes "shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such

8. *Id.* §§ 9601-75.

9. *See, e.g.,* United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-11 (S.D. Ohio 1983).

10. *Monsanto*, 858 F.2d at 171.

11. *See, e.g., Id.* at 172-73; *Chem-Dyne*, 572 F. Supp. at 811.

12. *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

injury, destruction, or loss resulting from such a release.”¹⁴ It extends liability for natural resource damages to the same classes of parties that are liable for cleanup.¹⁵ However, section 107(f)(1) of the CERCLA expressly limits those who can assert a claim under Section 107(a)(4)(C). “[L]iability shall be to the United States Government and to any State” and “the President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages.”¹⁶

Joint and several liability applies to both natural resource damages and response actions.¹⁷ One area of contention, however, is whether a municipality can bring an action pursuant to section 107 of the CERCLA for natural resource damages. As noted above, section 107(f)(1) expressly limits to the President or an authorized representative of a state the power to assert a claim for natural resource damages. In *Boonton v. Drew Chemical Corp.*,¹⁸ the court held that governmental subdivisions, such as municipalities, are encompassed within the meaning of “state” or, alternatively, that a municipality is an “authorized representative of a state” and is entitled to bring an action for natural resource damages. The court reasoned that it was proper to expand the definition of “state” to effectuate the remedial purpose of the CERCLA.¹⁹ Also, the court pointed out that since the definition of “natural resources” under the CERCLA includes property belonging to local governments, it would be anomalous to deny relief to a local government when its natural resources are expressly listed within the protected coverage of section 107(a)(4)(C).²⁰ The rationale and holding of the *Boonton* court were endorsed by the court in *New York v. Exxon Corp.*,²¹ where the court held that the City of New York could bring an action for natural resource damages under section 107(a)(4)(C) of the CERCLA.

Other courts, however, have refused to adopt this view. In *Philadelphia v. Stepan Chemical Co.*,²² the court disagreed with the holdings in *Boonton* and *Exxon*. Relying primarily on the plain meaning of the statute, the court held that political subdivisions are not included in the definition of “state.” The court found no support in the statutory language or in the legislative history for the holdings in *Boonton* and *Exxon*.

The court in *Bedford v. Raytheon Co.*,²³ agreed with the *Stepan* court, noting that, since the decisions of the *Exxon* and *Boonton* courts, Congress has amended the CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA). The SARA permits states to appoint natural resources trustees to bring lawsuits seeking natural resource damages. The *Bedford* court stated:

Prior to [the] SARA, a policy-driven, expansive interpretation of the word “State,” designed to include local governments, was the only way a municipality could bring a natural resource damages action under [the] CERCLA. In [the] SARA, Congress provided an express means for states to bring natural resource damage actions by permitting the states to designate natural resource trustees.²⁴

In *Rockaway v. Klockner & Klockner*,²⁵ Judge Ackerman, the same judge who wrote the *Boonton* decision, was persuaded by the arguments in the *Stepan* and *Bedford* decisions and concluded that “the approach of the [*Stepan* court] is the better one. I am, therefore, constrained to retreat from my earlier decision in *Boonton*.”²⁶

13. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 101(16), 42 U.S.C. A. § 9601(16) (West 1997).

14. 42 U.S.C.A. § 9607(a)(4)(C) (West 1997).

15. See CERCLA § 107(a).

16. 42 U.S.C.A. § 9607(f)(1).

17. Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 E.L.R. 10,201 (1997) (“As with liability for cleanup, liability for natural resource damages is strict, joint, and several.”).

18. 621 F. Supp. 663 (D.N.J. 1985).

19. *Id.* at 666.

20. *Id.*

21. 633 F. Supp. 609 (S.D.N.Y. 1986).

22. 713 F. Supp. 1484 (E.D. Pa. 1989).

23. 755 F. Supp. 469 (D. Mass. 1991).

24. *Id.* at 472.

25. 811 F. Supp. 1039 (D.N.J. 1993).

Joint and several liability applies to natural resource damages in the same manner it applies to response actions. A few district courts have extended the definition of "state" to include municipalities so that local governments can bring a natural resource damages action. With the enactment of the SARA, which provides a procedural mechanism for municipalities to bring a natural damages action, the inclusive definition of "state" may no longer be necessary. Mr. Song.²⁷

Regulation of Oil-Water Separators Under the RCRA's Underground Storage Tank Regime

The approach of the 22 December 1998 underground storage tank (UST) upgrade deadline has prompted several questions regarding oil-water separators. One question in particular concerns whether collection tanks for oil that is isolated by the separator are considered USTs or whether these collection tanks are exempt from the UST regulations. The answer to this question depends on the type of oil-water separator involved and the facts of each particular situation.²⁸

Underground storage tanks are regulated by the 1984 amendments²⁹ to the Resource Conservation and Recovery Act (RCRA).³⁰ The implementing regulations for the UST provisions of the RCRA are at 40 C.F.R. part 280.³¹ Under the regulations, a UST is defined as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of

the ground."³² In the preamble to the final rule for USTs, the Environmental Protection Agency (EPA) acknowledged that the statutory directive in the RCRA amendments was to "establish a UST program 'as may be necessary to protect human health and the environment,'"³³ and recognized that the statute provides "some flexibility for the [agency] to concentrate its resources on tanks that pose the greatest potential environmental threat."³⁴ The EPA further explained that this flexibility allowed the agency "to define the universe of regulated facilities in a manner that focuses regulatory resources on the tanks posing substantial risk from storage of regulated substances and, thereby, fosters development of a program that most effectively protects human health and the environment."³⁵

Using this flexibility, the EPA created "regulatory exclusions"³⁶ to exempt four classes of tanks from the UST regulations, one of which was wastewater treatment systems permitted under the Clean Water Act (CWA).³⁷ The EPA included in the universe of waste water treatment systems "any oil-water separators subject to regulation under either section 402 or 307(b) of the Clean Water Act."³⁸ Most oil-water separators fall into this exemption. By virtue of these exclusions, therefore, the UST regulations do not apply if the oil-water separator collection tank is included in a "wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act."³⁹

In some cases, however, the oil collection tank is located in close proximity⁴⁰ to the oil-water separator but is not covered by either CWA National Pollutant Discharge Elimination System permit requirements or pretreatment standards. The EPA

26. *Id.*

27. Mr. Song was an intern at the Environmental Law Division's Compliance Branch and the Restoration and Natural Resources Branch during the summer of 1997.

28. This article examines this question in terms of the federal UST program.

29. Pub. L. No. 98-616, 98 Stat. 3221 (1984). The amendments added Subtitle I, which is codified at 42 U.S.C. § 6991.

30. 42 U.S.C.A. §§ 6901-91(i) (West 1995).

31. Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, 40 C.F.R. pt. 280 (1996).

32. *Id.* § 280.12.

33. Preamble to Final Rule for Underground Storage Tanks, Technical Requirements, 53 Fed. Reg. 37,082 (1988) [hereinafter Preamble] (available in LEXIS, Genfed Library, Allreg Files at *42).

34. *Id.*

35. *Id.* at 37,108.

36. The EPA noted that "[u]nlike statutory exclusions, regulatory exclusions may be modified by the Agency in the future should new information show that regulations of an excluded tank type is necessary." *Id.* at 37,107.

37. 33 U.S.C.A. §§ 1251-1387 (West 1995).

38. Preamble, *supra* note 33, at 37,108.

39. *Id.* at 37,194-95. Under the CWA, section 402 imposes National Pollutant Discharge Elimination System permit requirements, and section 307(b) imposes Pretreatment Standards upon discharges of pollutants. See 33 U.S.C.A. §§ 1251-1387.

chose to defer these tanks from the UST regulations. Specifically, the EPA deferred from regulation those tank systems that treat waste water but are not subject to section 402 or 307(b) of the CWA.⁴¹

Although the EPA did not specifically mention the collection tanks described above, these tanks presumably are included in the deferred subset of tanks that includes oil-water separators for several reasons. First, the regulations envisioned USTs being defined in terms of "tank systems."⁴² Second, the EPA created the deferral in conjunction with the exclusion for waste water treatment "tank systems."⁴³ Finally, a "tank system" is defined as an "underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any."⁴⁴ Under these criteria, an oil-water separator with an immediately adjacent collection tank would qualify as a waste water treatment "tank system" composed of an underground storage tank designed to receive and to treat an influent wastewater through physical, chemical, or biological methods and would also include any connected underground piping, underground ancillary equipment, and containment system. In such a situation, the collection tank would be deferred from the UST regulations.⁴⁵ Major DeRoma.

Litigation Division Note

Recent Decision:

Blue Fox, Inc. v. The United States Small Business Administration and the United States Army

Introduction

On 25 August 1997, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued a decision in *Blue Fox, Inc. v. The United States Small Business Administration and the United States Army*⁴⁶ which reversed the district court's grant of

summary judgment to the United States Army (Army). The Ninth Circuit held that a subcontractor may bring suit against the government to recover funds owed to the subcontractor by the prime contractor on a government contract for upgrade of telecommunications at an Army depot.⁴⁷ As the circuit court's decision runs counter to long-standing precedent insulating the government from lawsuits by subcontractors under the doctrine of sovereign immunity, the Army recommended that the Department of Justice seek rehearing en banc of the circuit court's decision. The Department of Justice concurred with the Army's recommendation and on 9 October 1997 filed a petition seeking rehearing en banc with the Ninth Circuit.

Background

Plaintiff-Appellant, Blue Fox, Inc. (Blue Fox), was a subcontractor on a project which required the prime contractor, Verdan Technology, Inc. (Verdan), to upgrade the telecommunications capability of the Army Depot in Umatilla, Oregon. The contract between the Small Business Administration⁴⁸ (SBA) and Verdan contemplated two phases of work: (1) construction of a facility to house telephone switching equipment and (2) the installation, testing, and putting on-line of the switching equipment. Verdan subcontracted with Blue Fox to construct the twenty-five foot by twenty foot concrete block building that would house the system; to install all of the electrical, heating, ventilation, and air conditioning systems for the building; and to construct a cable vault that would run underneath the building. The subcontract represented forty-three percent of the overall contract.

The Army treated the contract as a service contract, not a construction contract, and thus did not require Verdan to furnish, nor did Verdan furnish, a payment or performance bond as required in certain instances by the Miller Act.⁴⁹ Blue Fox alleges that it was unaware until it completed performance that

40. In the question that prompted this article, "close proximity" is defined as two or three feet away.

41. Preamble, *supra* note 33, at 37,108. The tank systems, however, are exempt only from Subparts B-E and G and are, therefore, subject to all remaining applicable provisions of the UST regulations. *Id.* at 37,194. Furthermore, exclusion and/or deferral of a UST does not excuse noncompliance with other statutes, such as the CWA or the Clean Air Act, 42 U.S.C.A. §§ 7401-7671(q) (West 1995).

42. Preamble, *supra* note 33, at 37,082.

43. *Id.* at 37,194.

44. *Id.* at 37,125.

45. Thus, in this scenario, the answer regarding UST regulation of the adjacent collection tank under the federal UST program is "probably not." However, the more remote the collection tank is from the separator system, the more probable the answer is "yes."

46. No. 96-35648, 1997 WL 489034 (9th Cir. Aug. 25, 1997).

47. *Id.* at *1.

48. The contract was solicited pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). Section 8(a) instituted a business development program for those contractors determined to be socially and economically disadvantaged. The statute required certain government contracts to be set aside so that the SBA could award them to eligible firms. The Army set aside this contract to the SBA in September 1993. However, the Army, the SBA, and Verdan thereafter signed a tripartite agreement under which the SBA delegated responsibility for administering the contract back to the Army.

no bond had been furnished. The Army made all payments on the contract directly to Verdan. However, Verdan failed to pay Blue Fox money due, in the amount of \$46,518.14, for work performed. Blue Fox notified the Army, in writing, of Verdan's failure to pay. The Army, after making additional contract payments to Verdan, subsequently terminated Verdan for default in January 1995 for, among other things, failure to adhere to the contract's delivery schedule. The Army modified an existing services contract with another contractor to obtain completion of the project. Blue Fox obtained a default judgment against Verdan and its officers in January 1995 in the Tribal Court of the Yakima Indian Nation, but Blue Fox was unable to collect any money from Verdan.

Blue Fox brought suit against the Army in the United States District Court for the District of Oregon, alleging, inter alia, that the Army violated the Miller Act by failing to ensure that a bond was in place to protect Blue Fox.⁵⁰ Blue Fox sought an equitable lien upon the money retained by the Army under the original contract or appropriated for use on the contract to complete the work. On 24 May 1996, the district court entered judgment for the Army and against Blue Fox on cross-motions for summary judgment.⁵¹ The district court held that it had no jurisdiction to determine Blue Fox's claim against the Army because the "waiver of sovereign immunity provided by the [Administrative Procedure Act] does not apply to the claim of Blue Fox."⁵²

Analysis

The fundamental question addressed by the district and circuit courts was whether the district court had jurisdiction to consider Blue Fox's claim against the Army. The Army argued

that, absent a waiver, the doctrine of sovereign immunity protects the United States and its agencies from such lawsuits.⁵³ The Administrative Procedure Act (APA)⁵⁴ provides that a suit may be brought against the federal government where the plaintiff seeks some type of relief other than money damages. Thus, the courts' analyses, under the APA, turned to whether Blue Fox sought relief other than money damages. Blue Fox argued that the relief it sought was an equitable lien against the United States, not money damages.

The district court initially looked to *Bowen v. Massachusetts*⁵⁵ and the analysis employed by the United States Supreme Court when determining if a suit seeks money damages and is thus barred. In *Bowen*, the Court held that if the damages sought were compensation for a suffered loss, the suit sought money damages.⁵⁶ Conversely, if the suit was simply a claim for "the very thing to which the plaintiff was entitled,"⁵⁷ the suit sought specific relief, not money damages, and sovereign immunity was waived under the APA. Accordingly, the district court's analysis focused on whether Blue Fox was *entitled* to the unpaid contract funds under the Miller Act.⁵⁸

Upon review of the Miller Act's requirements, the district court determined that Blue Fox was *not* entitled to reimbursement from the Army for Verdan's failure to pay the subcontractor. The court found that the act "neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract."⁵⁹ Since the court interpreted the act as imposing no statutory or contractual obligation on the Army to pay the subcontractor, it held that Blue Fox could not seek specific relief under the act and that Blue Fox's claim was for money damages.⁶⁰ Accord-

49. 40 U.S.C. § 270a(a)(2) (1994). The act, in pertinent part, requires that on all contracts in excess of \$25,000 that involve the construction, alteration, or repair of any building or public work, the contractor must furnish certain bonds. One of the required bonds is a payment bond with a surety or sureties that will protect those individuals supplying labor and material for the work provided under the contract.

50. Blue Fox asserted jurisdiction under 28 U.S.C. § 1331, the Administrative Procedure Act (APA).

51. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Dep't of the Army*, No. 95-612, 1996 U.S. Dist. LEXIS 8264 (D. Or. May 24, 1996).

52. *Id.* at *13. The court found that the Miller Act did not apply to the contract in question, as it was primarily a service contract, and that even if the Act had applied, it created no statutory obligation for the Army to pay Blue Fox.

53. *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *United States v. Testan*, 424 U.S. 392, 400 (1976); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940).

54. 5 U.S.C. § 702 (1994). The act states, in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. (emphasis added).

55. 487 U.S. 879 (1988).

56. *Id.* at 895.

57. *Id.*

58. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Dep't of the Army*, 1996 U.S. Dist. LEXIS 8264, at *10 (D. Or. May 24, 1996).

ingly, the court held that Blue Fox's claim was not cognizable under the APA.⁶¹

The Ninth Circuit reversed this holding, with the majority finding that Blue Fox's claim was *not* barred by the doctrine of sovereign immunity, reiterating that the immunity had been waived as to suits "seeking relief other than money damages" under the APA. The majority cited to *Bowen* as well, and to the Court's quote from Judge Bork's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*,⁶² in which he drew the distinction between "money damages" and "specific remedies." Judge Bork characterized money damages as compensatory damages, and specific remedies or performance as "an attempt to give the plaintiff the very thing to which he was entitled."⁶³ The majority, citing *Aetna Casualty and Surety Co. v. United States*,⁶⁴ disagreed with the district court's holding that Blue Fox had to be statutorily entitled to the specific relief requested. Instead, the majority held that Blue Fox sought an equitable lien, which was an equitable remedy, not an action for damages, and thus was included within the APA's waiver of sovereign immunity.⁶⁵

The dissent in the circuit court's decision rejected this conclusion, stating that "no matter how you slice Blue Fox's claim, it seeks funds from the treasury to compensate for the Army's failure to require Verdan to post a bond."⁶⁶ The dissent viewed Blue Fox's claim as accomplishing "by indirection a result that [it] . . . could not reach under the Miller Act."⁶⁷ The dissent dismissed the majority's holding that the district court was wrong in requiring that a statutory remedy exist for the APA to apply, indicating that the real question was whether the government has a duty—in this case, under the Miller Act—which can be specifically enforced. As the dissent found no such duty, it

found that no waiver of sovereign immunity or independent cause of action exists.⁶⁸

As the dissent noted, the majority decision runs contrary to what has been "the law for decades," that "subcontractors cannot enforce a lien on government property unless the government has waived sovereign immunity."⁶⁹ The dissent accurately indicated that no court has ever held that a subcontractor may sue the government for payment of money that prime contractors failed to make to subcontractors, absent an agreement by the government to allow such suits.⁷⁰ The dissent found that no such agreement existed in the instant case and, accordingly, that the suit was barred.⁷¹

Conclusion

The implications of this decision for the government, and the practitioner involved with government contracting, are numerous. It is likely to open the floodgates to increased litigation by subcontractors seeking to enforce liens against the government for payments not made by prime contractors. Additionally, such a break in long-standing precedent will make it more difficult for federal agencies to dispose of such lawsuits promptly at the threshold. Moreover, if the decision stands, it will adversely affect the procurement process for all federal agencies, not just the Army.

Those who are involved with the drafting and administration of government contracts must be careful to properly characterize these contracts.⁷² Should the Miller Act apply, the government must require the necessary bond, thereby giving subcontractors an avenue by which they may seek to recover

59. *Id.* at *12 (citing *Fanderlik-Locke Co. v. United States ex rel. M.B. Morgan*, 285 F.2d 939 (10th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1288 (7th Cir. 1984)).

60. *Id.*

61. *Id.*

62. 763 F.2d 1441, 1446 (D.C. Cir. 1985).

63. *Id.*

64. 71 F.3d 475 (2d Cir. 1995).

65. *Blue Fox, Inc. v. United States Small Bus. Admin. and U.S. Army*, No. 96-35648, 1997 WL 489034 (9th Cir. Aug. 25, 1997).

66. *Id.* at *6.

67. *Id.* at *7.

68. *Id.*

69. *Id.* at *6.

70. *Id.* It has long been recognized that subcontractors have no enforceable rights against the United States for such compensation. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947); *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 650-51 (9th Cir. 1992); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990); *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1289-90 (7th Cir. 1984); *United Elec. Corp. v. United States*, 647 F.2d 1082, 1087 (Ct. Cl. 1981).

71. Additionally, no privity of contract exists between Blue Fox and the Army; the privity exists between the Army and the prime contractor, Verdan.

unpaid money, by suing on the bond in the name of the United States.⁷³ Major Risch.

72. Although the district court held that the Miller Act did not apply because the Army had properly decided that the contract was primarily a service contract, the dissent in the circuit court's decision, based on the Army's concession before the district and circuit courts that the contract *was* subject to the Miller Act, indicated that there was "no question that the Army should not have approved the Verdant contract without ensuring that there was an adequate surety bond" *Blue Fox*, 1997 WL 489034, at *7.

73. *See* 40 U.S.C. § 270b(b) (1994).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Proper Procedure for the Use of Carrier-Provided Estimates

In 1992, the Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU)¹ was modified to include, in part, procedures for the use of carrier-provided repair estimates. Claims offices must note what is required of the carrier and what information the estimate must contain before a claims office is obligated to use the carrier-provided estimate. The MOU states that the military services shall evaluate an itemized repair estimate submitted by a carrier from a qualified and responsible firm in the same manner as any estimate submitted by a claimant when either of the following situations occur:

(1) the claims office receives an itemized repair estimate from the carrier within forty-five calendar days of delivery of the items, and it is the lowest estimate overall (note that this is not forty-five days after dispatch of the DD Form 1840R); or

(2) the claims office receives the itemized repair estimate more than forty-five calendar days after delivery if: (a) the claim has not already been adjudicated and (b) the estimate is the lowest overall.²

If the carrier provides the claims office with a low repair estimate after the claims office dispatches the Demand on Carrier, that estimate will be considered in the carrier's rebuttal or the appeals process if it is lower than the estimate used by the claims office and if the carrier establishes that the claimant's estimate was unreasonable in comparison with the market price in the local area or in relation to the value of the goods prior to being damaged. Additionally, if a carrier provides an estimate based on an inspection following receipt of the DD Form 1840, the carrier is entitled to make an additional inspection and to provide an additional estimate following receipt of the DD Form 1840R.³

When the carrier fulfills these requirements and its estimate is still not used, the claims office is required to provide to the carrier, in writing, a justification for not using the estimate. Claims offices have a number of acceptable responses available to justify not using a carrier-provided estimate. First, carrier estimates frequently do not meet all of the criteria set forth in the MOU. In a recent appeal to the Defense Office of Hearings and Appeals which involved the repair and replacement of damaged picture frames, the U.S. Army Claims Service (USARCS) emphasized that the carrier-provided estimate was not obtained from a responsible and qualified repair firm.⁴ The USARCS argued that, in order to be qualified, a business must have the skill to do the specialized repairs required for the specific type of property involved. The estimate obtained by the carrier was from a furniture repair shop, not a picture frame repair shop. The USARCS argued that: (1) the repair shop was not in the business of repairing that type of property; it repairs furniture, not picture frames and (2) while the furniture shop claimed it could touch-up the frames, two different frame repair shops stated that the frames could not be touched-up due to the unique finish of the frames. Moreover, the owner has the legal right to have the repair firm of his choice complete the work.⁵

A second justification for not using a carrier-provided estimate is that the carrier's estimate may be incomplete. For example, an estimate may be incomplete if the repair quote covers only a portion of the work required. In a recent case, the carrier provided the USARCS with an estimate to replace only the missing hardware from a piece of furniture when the claimed damage included scratches and gouges in addition to missing hardware. The estimate was much lower than that provided by the owner, but, because it did not cover the total extent of the damage, it was dismissed as unreasonable and therefore did not have to be used. The government has the right to reject an estimate provided by the carrier based on the finding that it is unreasonable.⁶ The Comptroller General has ruled that in the absence of competent evidence from the carrier, it will not reverse an administrative determination by the government on this issue.⁷ A lower estimate available to the carrier from a particular firm does not show that the military member's estimate is unreasonable.⁸

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

2. *Id.*

3. *Id.*

4. This case is currently still pending.

5. See *Interstate International, Inc.—Damage to Household Goods*, B-197911.6, 1989 WL 240769 (Comp. Gen. May 25, 1989); *Allied Van Lines, Inc.*, B-182696, 1977 WL 12961 (Comp. Gen. May 20, 1977).

6. See MOU, *supra* note 1.

Claims offices should also reject a carrier's estimate for many of the same reasons it would reject an owner's estimate, even if the carrier submits the estimate in a timely manner. Claims personnel should not accept estimates from firms that have reputations for being unreliable, firms that exaggerate estimates, firms that cannot perform the work in a timely manner, firms that cannot make the repairs in the claimant's home, or firms located a considerable distance from the claimant. Ms. Barto.⁹

Checking for the DD Form 1840R

When a claimant submits a personnel claim for a transportation loss, it is essential for personnel in the claims office to conduct a quick check to ensure that a DD Form 1840R or similar notice document has been dispatched.¹⁰ This is especially important if a backlog in the office prevents the claim from being adjudicated on the same day it is received. Field claims personnel should conduct this check before the claimant leaves the office, so they can ask the claimant where the DD Form 1840R was turned in, if this is not obvious.

If a DD Form 1840R has not been completed, claims personnel should assist the claimant in completing the necessary notice documents. The simplest way of doing this is to mail to the carrier the completed DD Form 1844, which will serve as a substitute for the DD Form 1840R.¹¹

If a claims office does not check to ensure that the claimant completed the necessary notice documents and if the claimant submitted the claim within seventy-five days of delivery, it may be appropriate to waive the standard deductions for lost potential carrier recovery. Ordinarily, if a claimant fails to provide timely notice to a carrier or warehouse, the amount of money that could have been recovered from the carrier or warehouse must be deducted from the amount payable on the claim.¹² However, such a deduction need not be made if the claimant can substantiate that he or she received misinformation from a field claims office.¹³ When a claimant turns in a claim within seventy-five days of delivery, failing to tell the claimant that the carrier has not been properly notified of loss and damage may

be equivalent to providing misinformation, especially if the claimant asks general questions, such as "is this all I need to do?" Lieutenant Colonel Masterton.

Clarity of Documents

When preparing demands against carriers, field claims personnel must check all documents for clarity. If the copy of the DD Form 1844, List of Property and Claims Analysis Chart, an estimate, or any other document is too light or is unreadable, claims personnel should make a better photocopy to ensure that all information is clear.

At a recent meeting of the carrier industry and the military services, representatives of the carrier industry complained that many of the documents submitted in the demand packet are illegible or difficult to read. The carrier industry indicated that the DD Form 1844 is sometimes too light, and the carrier liability portion of the form often is not reproduced on the copy.

When a claimant submits an inventory that is so light that it is virtually illegible, the claims office should contact the carrier and request a better copy. Clear original documents and copies should speed up the claims process and reduce the need for extra correspondence with carriers. Ms. Schultz.

Claims Training

1997 - 1998 USARCS VTC Schedule

The U.S. Army Claims Service (USARCS) will hold its video teleconferences (VTC) on the following dates at the times indicated:

4 December 1997	1300-1500 EST
12 February 1998	1300-1500 EST
8 April 1998	1300-1500 EST
10 June 1998	1300-1500 EST

7. See *Beach Van & Storage*, B-234877, 1989 WL 241537 (Comp. Gen. Dec. 11, 1989).

8. See *Interstate International*, 1989 WL 240769; *Allied Van Lines*, 1977 WL 12961. The Defense Office of Hearings and Appeals recently reaffirmed this position. See DOHA Claims Case, No. 96070212 (Nov. 27, 1996).

9. Ms. Barto was a summer intern at the U.S. Army Claims Services.

10. The DD Form 1840R is not the only document which may be used for this purpose. Other documents, such as a Government Inspection Report, DD Form 1841, or a personal letter from the claimant, may also constitute proper notice of loss or damage. See generally Personnel Claims Note, *What Constitutes Timely Notice?*, ARMY LAW., June 1997, at 59.

11. *Sherwood Van Lines—Loss and Damage to Household Goods—Notice of Damage*, 67 Comp. Gen. 211 (Jan. 29, 1988).

12. U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS, para. 11-21a(3) (1 Aug. 1995).

13. *Id.* para. 11-21a(3)(c).

The Fort Meade VTC Center has a twenty-four hookup capacity, and the following twenty-four locations are scheduled: Fort Benning, Fort Bliss, Fort Bragg, Fort Campbell, Fort Carson, Fort Drum, Fort Eustis, Fort Gordon, Fort Hood, Fort Huachuca, Fort Irwin, Fort Jackson, Fort Knox, Fort Leavenworth, Fort Leonard Wood, Fort Lewis, Fort McPherson, Fort McClellan, Fort Pope, Fort Riley, Fort Rucker, Fort Sam Houston, Fort Sill, and Fort Stewart.

Field claims personnel are encouraged to participate through comments, presentations, and questions during the VTC. For more information, claims personnel should contact CW2 John Lawson by telephone at (301) 677-7009, extension 341, or by e-mail at lawsonjo@claims.army.mil.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *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 on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend 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.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromeo,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
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Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster,fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE
1997-1998 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*</u>	<u>ACTION OFFICER</u>
1-2 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55425 (612) 854-3411	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ John Moran LTC Karl Ellcessor COL Thomas Tromeay MAJ Tom Tate P.O. Box 41 South St. Paul, MN 55075 (612) 455-4448 bpn: (612) 457-6750
15-16 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Jacqueline Little MAJ Kay Sommerkamp MAJ Juan Rivera COL Myron J. Berman 370 Lexington Avenue Suite 715 New York, NY 10017 (212) 696-0165 Fax (212) 696-0493
10-11 Jan 98	Long Beach, CA 78th MSO	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue MAJ Martin Sitler CDR Mark Newcomb MAJ Juan Rivera LTC Andrew Bettwy 5241 Spring Mountain Road Las Vegas, NV 89102 (702) 876-7107
31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Criminal Law Contract Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara MAJ Charles Pedo MAJ David Wallace COL Thomas Tromeay LTC David F. Morado 909 1st Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david_morado@hud.gov
7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue CPT Stephanie Stephens MAJ Geoffrey Corn MAJ Juan Rivera LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol.com

21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter COL Thomas Tromeo	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue MAJ Stewart Moneyemaker MAJ Scott Morris COL Thomas Tromeo	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol.com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG John F. DePue MAJ Thomas Hong LTC Richard Jackson Dr. Mark Foley	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60008 (312) 443-6064
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Tromeo	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364

25-26 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Trng Ctr 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley Dr. Mark Foley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (508) 796-2140/2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	COL Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton COL Keith Hamack	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17May	Kansas City, MO 89th RSC Westin Crown Center 1 Pershing Road Kansas City, MO 64108 (816) 474-4400	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	COL Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. 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 nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must 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 Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

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

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

November 1997

3-7 November	144th Senior Officers Legal Orientation Course (5F-F1).
17-21 November	21st Criminal Law New Developments Course (5F-F35).
17-21 November	51st Federal Labor Relations Course (5F-F22).

17-21 November 67th Law of War Workshop (5F-F42).

December 1997

1-5 December	145th Senior Officers Legal Orientation Course (5F-F1).
1-5 December	USAREUR Operational Law CLE (5F-F47E).
8-12 December	Government Contract Law Symposium (5F-F11).
15-17 December	1st Tax Law for Attorneys Course (5F-F28).

1998

January 1998

5-16 January	JAOAC (Phase 2) (5F-F55).
6-9 January	USAREUR Tax CLE (5F-F28E).
12-15 January	PACOM Tax CLE (5F-F28P).
12-16 January	USAREUR Contract Law CLE (5F-F15E).
20-22 January	Hawaii Tax CLE (5F-F28H).
20-30 January	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).
21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).
26-30 January	146th Senior Officers Legal Orientation Course (5F-F1).
31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).

February 1998

9-13 February	68th Law of War Workshop (5F-F42).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).

23-27 February	42nd Legal Assistance Course (5F-F23).	1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
March 1998		8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
2-13 March	29th Operational Law Seminar (5F-F47).	8-12 June	28th Staff Judge Advocate Course (5F-F52).
2-13 March	140th Contract Attorneys Course (5F-F10).	15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).	15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
23-27 March	2d Contract Litigation Course (5F-F102).	29 June-1 July	Professional Recruiting Training Seminar.
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).	July 1998	
30 March-3 April	147th Senior Officers Legal Orientation Course (5F-F1).	6-10 July	9th Legal Administrators Course (7A-550A1).
April 1998		6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).	7-9 July	29th Methods of Instruction Course (5F-F70).
27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).	13-17 July	69th Law of War Workshop (5F-F42).
27 April-1 May	50th Fiscal Law Course (5F-F12).	18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
May 1998		22-24 July	Career Services Directors Conference.
4-22 May	41st Military Judges Course (5F-F33).	August 1998	
11-15 May	51st Fiscal Law Course (5F-F12).	3-14 August	10th Criminal Law Advocacy Course (5F-F34).
June 1998		3-14 August	141st Contract Attorneys Course (5F-F10).
1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).	10-14 August	16th Federal Litigation Course (5F-F29).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).	17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).	17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).

24-28 August 4th Military Justice Managers Course (5F-F31). Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600

24 August-4 September 30th Operational Law Seminar (5F-F47). ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

September 1998

9-11 September 3d Procurement Fraud Course (5F-F101). CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

9-11 September USAREUR Legal Assistance CLE (5F-F23E).
14-18 September USAREUR Administrative Law CLE (5F-F24E). CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

3. Civilian-Sponsored CLE Courses

1997

November

14-15 Nov. Fourth Annual Alternative Dispute Resolution Institute Atlanta, GA ICLE
CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

5 Dec. Employment Law Atlanta, GA ICLE
ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055
FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	(800) 932-4637
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	PLI: Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	TBA: Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
MICLE:	Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516	TLS: Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100	UMLC: University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA	UT: The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482	VCLE: University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 229054.
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557 (702) 784-6747	
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003	
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774	

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September 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		after an initial one-year period; thereafter triennially
Indiana	31 December annually		
Iowa	1 March annually	Pennsylvania**	30 days after program
Kansas	30 days after program	Rhode Island	30 June annually
Kentucky	30 June annually	South Carolina**	15 January annually
Louisiana**	31 January annually	Tennessee*	1 March annually
Michigan	31 March annually	Texas	31 December annually
Minnesota	30 August triennially	Utah	End of two-year compliance period
Mississippi**	1 August annually	Vermont	15 July biennially
Missouri	31 July annually	Virginia	30 June annually
Montana	1 March annually	Washington	31 January triennially
Nevada	1 March annually	West Virginia	31 July annually
New Hampshire**	1 August annually	Wisconsin*	1 February annually
New Mexico	prior to 1 April annually	Wyoming	30 January annually
North Carolina**	28 February annually	* Military Exempt	
North Dakota	31 July annually	** Military Must Declare Exemption	
Ohio*	31 January biennially		For addresses and detailed information, see the July 1997 issue of <i>The Army Lawyer</i> .
Oklahoma**	15 February annually		
Oregon	Anniversary of date of birth—new admittees and reinstated members report		

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. Bamberg Military Community (<http://www.bamberg.army.mil/>).

This site provides information and services related to the American Community in Bamberg, Germany. However, the site also provides useful links and allows the visitor to download software and plenty of Department of the Army forms in Microsoft Word and Form Flow format.

b. Department of the Army Pamphlet (DA PAM) 25-30 Online (<http://www.pubs.5sigcmd.army.mil/pam.htm>).

You can use this web site to search DA PAM 25-30, the Army's index of publications. If you do not have access to the CD-ROM or the Microfiche, this web site will enable you to find the Army regulation or publication that addresses your topic of interest. You will not be able to access publications directly; however, this is a great starting point to find the regulation number and latest date of publication.

c. Electronic Library of USAREUR Publications/Forms (<http://www.aeaim.hqusareur.army.mil/>).

This is the only official electronic library of authenticated United States Army, Europe (USAREUR), command publications and Army in Europe (AE) forms. The Office of the Deputy Chief of Staff, Information Management (ODCSIM), HQ USAREUR/7A, has sole authority for publishing USAREUR publications and AE forms. The publications and forms in this library take precedence over all other electronic versions of the same publications and forms on other websites.

d. The Legal Pad (<http://legal-pad.com/>).

The Legal Pad contains a searchable index of legal related Internet resources, including law schools, law firms, lists of other legal resources on the Internet, and legal clip-art.

2. TJAGSA Materials Available through the Defense Technical Information Center

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

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways.

The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$6, \$11, \$41, and \$121. The majority of documents cost either \$6 or \$11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

JA-234-95 (268 pgs).

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

Legal Assistance

AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).

Labor Law

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (59 pgs).

AD A323692 The Law of Federal Employment, JA-210-97 (288 pgs).

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

Developments, Doctrine, and Literature

AD A282033 Preventive Law, JA-276-94 (221 pgs).

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

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

Criminal Law

AD A297426 Wills Guide, JA-262-97 (150 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

*AD A280725 Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A322684 Tax Information Series, JA 269-97 (110 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

Administrative and Civil Law

AD A327379 Military Personnel Law, JA 215-97 (174 pgs).

International and Operational Law

AD A310157 Federal Tort Claims Act, JA 241-97 (136 pgs).

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

AD A301061 Environmental Law Deskbook,

Reserve Affairs

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

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

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

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(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.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a Personnel and Administrative Center (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 Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655

Woodson Road, St. Louis, MO 63114-6181. 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, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*).

(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 Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (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) *Army Reserve National Guard (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 Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (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 Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. 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 St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described 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-LM, Alexandria, VA 22331-0302.

c. 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 St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution re-

quirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (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) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

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

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

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions

to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the com-

munications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. 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 or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. 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>			
			CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.	CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.	EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.	FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.	FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review</i> Database ENABLE 2.15. Updated through the 1989 <i>The Army Lawyer</i> Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.	FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview (Part 1), November 1995.
			FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview (Part 2), November 1995.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).	FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.

21ALMI.EXE	April 1997	Administrative Law for Military Installations Deskbook, March 1997.	JA235.EXE	January 1997	Government Information Practices, August 1996.
			JA241.EXE	June 1997	Federal Tort Claims Act, May 1997.
50FLR.EXE	June 1997	50th Federal Labor Relations Deskbook, May 1997.	JA250.EXE	April 1997	Readings in Hospital Law, January 1997.
			JA260.ZIP	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	JA262.ZIP	June 1997	Legal Assistance Wills Guide, June 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	JA263.ZIP	October 1996	Family Law Guide, May 1996.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.	JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.	JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA200.EXE	September 1997	Defensive Federal Litigation, August 1997.	JA267.ZIP	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA210DOC.ZIP	April 1997	Law of Federal Employment, May 1997.	JA269.DOC	December 1996	Tax Information Series, December 1996.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.	JA271.EXE	September 1997	Legal Assistance Office Administration Guide, August 1997.
JA215.EXE	June 1997	Military Personnel Law Deskbook, June 1997.	JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.	JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA230.EXE	April 1997	Morale, Welfare, Recreation Operations, August 1996.	JA275.EXE	June 1997	Model Income Tax Assistance Guide, June 1997.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.	JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.			

JA281.EXE	February 1997	15-6 Investigations, December 1996.	JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.	JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.	JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.	JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/Reference), February 1997.	JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.	JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.	JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.	JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.	JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.	JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.	JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.	JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.	JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
			JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
			1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.

1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.	OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.	OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.	OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.	TJAG-145.DOC	October 1997	TJAGSA Correspondence Course Enrollment Application, October 1997.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.			
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.	YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.	YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.			
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.	YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.			
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.	YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.	YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.	YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.			

YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

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, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

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, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

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

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
 PKZIP110.EXE
 PKZIP.EXE
 PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\:" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP NOVEMBER.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. TJAGSA Information Management Items

a. The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms, pentiums in the Computer Learning Center, completed the transition to Win95 and Lotus Notes, and are now preparing to upgrade to Microsoft Office 97 through the school.

b. The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the IMO.

c. Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978 and the receptionist will connect you with the appropriate department or directorate. For additional information please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS 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.

b. Law librarians having resources purchased by ALLS available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.