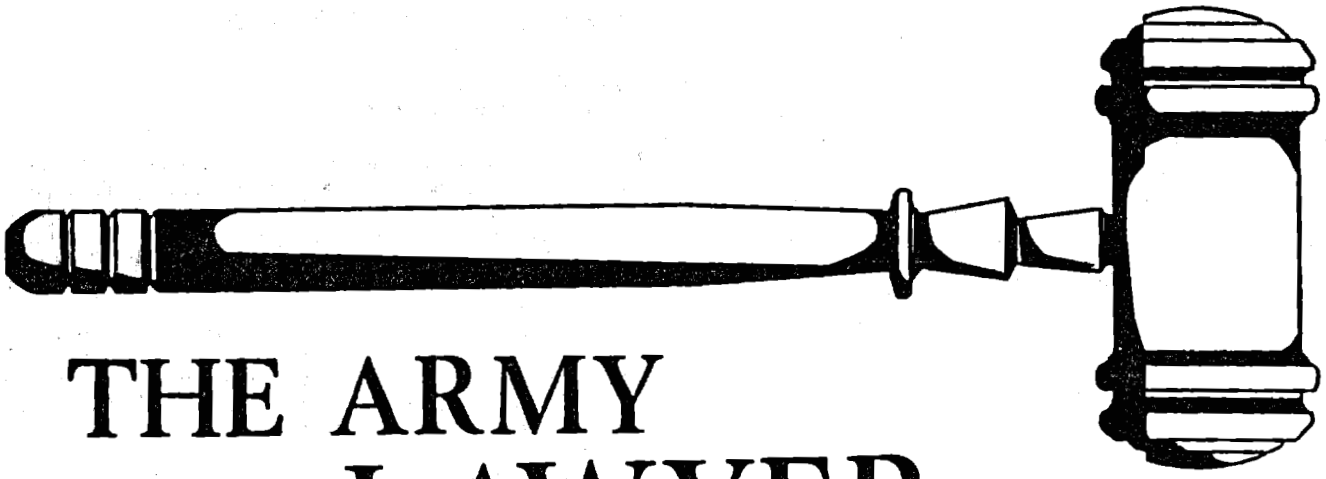

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Ten Steps to a More Successful Legal Assistance Practice

Major Chuck R. Pardue
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If the legal assistance officer pleases legal assistance clients, the SJA, the command, and him or herself, the legal assistance office succeeds. Making these individuals happy by providing quality legal assistance services and by resolving clients' legal problems expeditiously means a successful legal assistance practice.

Meeting these goals with limited legal resources is the crux of the legal assistance officer's challenge. Using creativity and resourcefulness will stretch limited resources far beyond perceived limitations. Discussed below are ten steps to a more successful legal assistance practice, guaranteed to save time for you and your clients.

Saving clients time should be a major consideration in every legal assistance office. The time clients spend with attorneys is usually twenty percent or less of the time they are away from duty for a legal assistance appointment. Consider the time they use to drive to the office, wait in the waiting room, the actual appointment, and the time it takes to return to duty. A good part of a morning or afternoon is lost even for a simple legal problem. Many problems take two or sometimes three appointments.

Try to see emergency problems within one duty day and routine problems within four duty days. You can save clients time by taking care of legal problems at the first appointment. One way to achieve this goal is to produce one stop wills, powers-of-attorney, and simple letters (explained below).

Triage

The first method to save both the client and the attorney time is to see only those individuals with true legal assistance problems. Legal assistance officers should borrow the concept of triage from the medical profession. Triage is the system which treats casualties in a priority based on the patients' physical condition. Separate those who need little immediate care from those who will benefit the most from immediate assistance. Also separate those who do not need legal assistance from those who do.

Making this classification early on in the legal assistance process saves many client and attorney hours. For example, clients who require the assistance of the Trial Defense Service (TDS) for military criminal matters should immediately be screened and referred to that office. All too often, clients wait several hours to see a legal assistance attorney only to be referred to another agency better suited to handle their problems.

Ideally, screen clients during their initial contact with the legal assistance office. Because this contact is with clerks, training clerks to properly screen clients is a profitable use of attorney time. If there is considerable personnel turnover, as is true in most offices, provide detailed written guidance. Require that this guidance be read by all legal assistance personnel (see procedures guide discussed below).

If a spouse of a soldier stationed at a distant installation comes in seeking immediate funds to feed her small children, the clerk would, upon securing the first available appointment, refer that spouse to Army Community Services (ACS), the Red Cross, Army Emergency Relief, and any appropriate civilian relief agencies. Detailed written guidance enables personnel to match the problem with the procedures to handle the problem. The procedures guide should contain phone numbers, office hours, and the name of the primary point of contact. After satisfying the immediate needs of that family, the attorney may work to arrive at a long range solution to the problem.

Routine

After triage screening, the next step to improve the efficiency and productivity of the legal assistance office is to make routine as many problems as possible. As most legal assistance attorneys are aware, about ten or fifteen legal problems constitute most of the total workload.

You should focus your time and energies only on those matters that require a legal professional, such as rendering legal advice or preparing a complex legal document. Clerks should do simple tasks, such as routine medical powers-of-attorney and bills-of-sales. Do not, however, let your clerks practice law. Monitor their work product closely and have samples readily available that will reduce error rates and time of preparation.

Using forms for drafts will improve relations with the word processing center and allow you to personalize each letter or document for each client. Every document should be individually printed to wean clerks from typing in the blanks on forms. If a letter is used three or more times a year, it should be in the legal assistance form book. Review form letters continuously, gradually improve them and, when applicable, draft several versions on the same subject.

Have clients write most of the necessary information on forms that are readily usable by word processing personnel. Be sure to check for spelling. Have clients complete these forms before their appointment or while they are in the waiting room. This keeps the clients from getting bored and saves attorney time.

The purpose of the use of forms and delegation to clerks is not to abdicate your responsibilities, but to channel your efforts to those matters requiring professional expertise. You should constantly look for new ways to increase productivity by more effectively using the word processing center.

Get Off the Phone

Legal assistance attorneys spend too much time on the telephone. Unless you like playing telephone tag and making memorandas for record proving the substance of calls, write letters. Contrary to the impression created by long

distance phone company advertisements, you can frequently write a simple letter in the time it takes to call someone. This is particularly true if most of the letter you want to write is already in your formbook.

The letter serves as a memorandum and in many cases is much more effective than an expensive long distance phone call. With a letter you avoid blood pressure-raising arguments. Send a copy of all correspondence written on behalf of your client to the client. By sending a copy of the letter to your client, you remind the client of your efforts. Attorneys who follow up on your work will not have to repeat your efforts. Get off the phone.

One Stop Wills and Other Routine Documents

Modern office technology enables a legal assistance officer to complete and execute a will in one appointment. Traditionally it took at least two appointments to complete a will. The attorney saw a client and recorded information in the first appointment. Sometime before the second appointment, the attorney painstakingly drafted the will or other routine document. During the second appointment, usually several weeks after the first, the client returned to execute the will. Assuming there were no typographical errors, the client successfully executed a will.

The large majority of wills prepared by military legal assistance offices are not complex, often only the names and attestation clause from a prior will need to be changed. Using will forms, word processors, and high speed printers, available in many legal assistance offices, a will can be completed and ready for execution in less than twenty minutes.

You can take full advantage of this modern office technology by scheduling will appointments one week in advance. Mail or give the client a will questionnaire that word processing personnel can readily use. Completing the questionnaire before the appointment mitigates the problem of not having all the necessary information at the will appointment. The will form reduces your writing time to zero in almost all wills. The questionnaire/word processing form should allow space to insert special will clauses. Refer complex wills involving extensive estates to civilian specialists.

During the will appointment, you should review the questionnaire, check for spelling, and ask questions raised by the responses on the questionnaire. If it is a routine will, the process will not take long. After you complete the questioning, give the questionnaire to the word processing clerk, who inputs the variable responses. The machine automatically types the boilerplate, including special attestation clauses.

The word processing clerk and the client should proofread the typed will and correct errors immediately. You can then review the will with the client again to verify that the will is consistent with the client's wishes and the will can be executed before the client leaves the office. Finally, provide the client a form letter with instructions on how to store the will, what the survivors should do with the will, and general information that recommends periodic updating of the will.

The one stop will procedure saves thousands of hours of lost client time each year. Additionally, it obviates the need to store unclaimed wills and saves your clerks from spending many frustrating hours trying to track down clients to execute wills. This procedure will make your office efficient and professional.

Apply the same procedure to other routine documents. Personalize powers-of-attorney on word processing equipment and avoid typing on forms. The result is a professional-looking document and a satisfied client.

Get Someone Else to Help

Delegate. Have clerks do simple matters not requiring an attorney. Tracking down the address of a nonsupporting spouse through the worldwide locater center is a job for a clerk, not an attorney. In addition to your clerks, others are available to help. You are limited only by your imagination and legal creativity.

For example, in the nonsupport area the person with the primary responsibility of ensuring support, according to Army Regulation 608–99, is the individual's commander.[1] A properly tailored form letter to the soldier's commander usually works wonders. Remember to send a copy of that letter to your client. Once the client has the information contained in your previously written detailed form letter to the commander, self-help is encouraged. Of course, you should encourage the client to return to you if the initial strategy does not work. The key to this point is that you save your legal expertise for difficult problems.

Procedures Guide

Every legal assistance office needs a good procedures guide. With the constant turbulence of personnel turnover, the procedures guide provides even the newest attorney or legal clerk with a general basis of how to proceed. Make it required reading for all who work in legal assistance, including reservists. It should do more than explain who to call for alerts.

At a minimum, the procedures guide should list other available resources with names and phone numbers, such as ACS, Red Cross, TDS, and civilian resources. Additionally, the procedures guide should explain office policies and procedures, including how to refer matters to civilian attorneys.

The legal assistance procedures guide should contain common legal assistance problems and suggested solutions. For example, an explanation of the recommended procedure to handle a child or spouse abuse problem in the military would be helpful to a reservist or a newly assigned active duty attorney. Detail in the guide common legal assistance tasks, such as preparation and execution of wills

[1] Dep't of Army, Reg. No. 608–99, Personal Affairs — Support of Dependents, Paternity Claims, and Related Adoption Proceedings, para. 2–6 (15 Nov. 1978).

and other documents. This promotes uniform preparation of documents and reduces typing errors.

Encourage all legal assistance personnel, including paralegals and clerks, to suggest improved solutions to the problems and tasks in the guide. These recommended solutions enhance the efficiency of the legal assistance office. The purpose of the guide is not to tie the hands of a creative attorney, but to save time by serving as a starting point for the solution of legal assistance problems.

Reservists

You should fully utilize reservists. Most reservists are licensed attorneys in the state where they perform legal assistance duty. Consequently, they have special expertise in matters involving local law. If properly motivated and supervised, they provide much needed additional legal talent at little cost to the local office.

Understand the different reserve and guard programs and encourage good attorneys to pull their reserve time at your legal assistance. In addition to weekend duties, some reservists can come in on a weekday afternoon or evening once a week to meet their training requirements.

If possible, recruit entire JAGC, Reserve or National Guard units to do their annual and weekend training at your location. Learn what their training requirements are and adapt to their needs. If you are fortunate enough to have units serve at your post, coordinate with the SJA to ensure that the unit has the opportunity to observe courts-martial and other office tasks in addition to having the individual attorneys see legal assistance clients. Go out of your way to make their training with your office interesting and professionally rewarding. The training works both ways. Encourage reservists to give classes to active duty attorneys in their areas of expertise.

Reservists usually schedule their training months in advance. A major source of irritation, particularly for those who serve on weekends, is the lack of clients. This problem may be alleviated by overbooking and by advertising their availability on the installation radio and newspaper. One weekend push wills, another weekend tax advice.

Support the reservists by providing clerical support, and show up early on a Saturday morning with some doughnuts and your procedures guide. This will significantly increase the reservists' morale and productivity.

The returns for actively supporting a reserve program at your installation are well worth the small investment in time and effort by legal assistance officers. By utilizing reservists and the guard, you can double the number of clients seen and greatly shorten the waiting time for appointments. Make your reserve program work for you by planning, supervising, and reviewing reserve activities.

Tax Season

Most soldiers only contact the legal assistance office once a year to pick up tax forms. Tax season is an excellent opportunity to enhance the reputation of your office. Again you must plan ahead.

At most installations, a legal assistance officer is the installation tax officer. An effective installation tax program requires coordination and implementation of the Volunteer Income Tax Assistance (VITA) program throughout the installation. Basically, the VITA program works by having the IRS train key volunteers each year to prepare basic tax forms. These volunteers train other volunteers, who serve as individual unit tax officers.

Individuals requiring assistance should go first to their unit tax officers for assistance. If the problem is beyond the tax officer's capability, the individual is referred to an IRS trained volunteer. In turn, if the problem is not solved by a trained volunteer, the client is referred to the legal assistance office. If the system is working as intended, it solves almost every tax problem at the unit level, leaving only the most troublesome tax problems for you.

To make this system worthwhile, identify VITA volunteers months before tax season. In addition to the IRS guidance that VITA volunteers receive, give detailed guidance to each volunteer on how the program works. Many installations publish a letter explaining the program in installation newspapers and place copies on unit bulletin boards.

There are various software packages for preparing tax forms. These software packages work by having data concerning an individual's finances input into a program. The program determines the most advantageous way for an individual to file and then prints completed tax returns. As all major accounting firms use these programs, local legal assistance offices may find it beneficial to take advantage of these products. Tax software is available or being developed for many of the word processors used by legal assistance offices.

These programs justify their cost to the Army by the time they save both the individual soldier and legal assistance offices. This is another area where clients can complete questionnaires before their appointments or while they are waiting to be seen. Of course, refer those individuals with high incomes and special tax problems to local tax professionals.

Perceptions

Your reputation depends on how others perceive what an attorney should be or should be doing. Consequently, it behooves you to emphasize that aspect of your practice. With proper attention to detail, even an attorney with average skills is perceived as effective.

You can enhance your reputation by projecting effort. People will forgive a multitude of sins if they believe that an individual cares about them and is trying his or her utmost. Project effort by sending clients copies of all correspondence written on their behalf. The impact a copy of a letter has on your client is another reason to write letters and get off the phone.

You receive referrals from almost every important office on an installation. How you respond to those referrals reflects directly on you. Whether they come from ACS or the commanding general's office, see those referrals promptly.

Report back to the referring agency that the client has been seen and that the problem has been resolved or properly referred to another agency. Establish an office policy to interrupt clients to take emergency calls from certain agencies, such as ACS, Red Cross, and commanders. In addition to drawing favorable attention to your office, it facilitates your referrals to those agencies. If you receive several calls a week from various key offices on the installation, asking for you personally, you are successful.

Project effort by letting clients know you are working on their problem. For example, if you work late on another problem, call a line officer at home to ask a question about his or her case or about the case of one of his or her young soldiers. Perhaps the question could wait, but imagine the impression on a line officer who receives a phone call from an attorney long after normal duty hours. It conveys to the client that you care about his or her case, and demonstrates that you work hard. Think about this the next time you go into the office on a Sunday afternoon to pick up your golf clubs you forgot to bring home. Twenty minutes of phone calls a week, properly timed, can go a long way to improve your reputation.

You are a professional. Project confidence. Soldiers who would never fear to take on an enemy company become terrified by simple legal problems such as indebtedness. Work out a payment program with your client's creditors. If a soldier has done all that he can do to pay the bills, tell him or her that if harassment by creditors continues, to refer the matter to you.

Credit

Give your clerks the proper credit for making you look good. Find opportunities to praise them in front of clients and other SJA office personnel. You cannot pay them overtime, but praise cost nothing. When the office receives praise from a satisfied client, pass it along to your clerks. When they make mistakes, give them constructive criticism in private. Involve clerks in exciting projects.

In any busy legal assistance office, upset clients sometimes abuse clerks verbally. If there are problems with clients that the clerks cannot handle, tell your clerks to refer those problems to you immediately. Support your clerks. On the other hand, do not let complaints leave the office without first having an opportunity to make things right.

Encourage your clerks to suggest improvements to forms and office procedures. Give them full credit and let everyone know which person found a better way to resolve a common problem.

Make your SJA look good. When you write a will or handle a legal problem for a general officer or other VIP on the installation, inform the SJA. Invariably, the general officer will comment to the SJA concerning your work. It enhances the SJA's credibility to know what is happening in all of his or her offices. If you please the VIP with your work, inform the VIP that the SJA always expects the highest standards for legal assistance at the installation and that the SJA devotes considerable time and effort to make the legal assistance program a good one. These efforts on your part make it easier for the SJA to convince the command to increase support for legal assistance.

Judge Advocate Training and Learning: "Newbees" and the Boss

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Management theories ranging from those with alphabet names, "X," "Y," and sometimes "Z," to Maslow's hierarchy, to Pavlov's dogs could all be applied to training new judge advocates.[1] The actual training of new judge advocates in the field, however, has been more a matter of individual style influenced by memorable judge advocates.

Law schools train students to think like lawyers. The Judge Advocate General School's Basic Course then introduces new judge advocates to military law and does an excellent job of providing them with resource material and an issue-orientation so they can recognize problems and begin finding legal solutions. In other words, law schools and the Basic Course provide the basic skills to new judge advocates, but these "newbees" learn to be lawyers at their first assignment in the field. This article suggests ways to keep the training and learning in step and to help avoid obstacles along the way.

Who Are They and Why Are They Here?

Each new judge advocate has much in common with every other new judge advocate in terms of ability, knowledge, experience, and a desire to succeed but each is a unique individual.[2] Supervisors of new judge advocates will have to decide how ready the "newbees" are to do their jobs and what training is needed. The "newbees'" supervisor is responsible for first-line evaluation and training, and is generally the chief or senior counsel of a section.

Finding out how able "newbees" are is in some ways easier than finding out how willing they are. The Officer Record Brief (ORB) contains a short history of the new judge advocate's education and experience. Some offices use questionnaires to supplement the ORB. Correspondence with "newbees" usually provides more details, including a forecast of enthusiasm for the new assignment. The strongest impression, however, often comes from the initial face-to-face interview, with the new judge advocate.

This interview establishes what "newbees" know about their jobs and what concerns them about their jobs. The "newbee's" first words should not be tales of woe or requests for transfer. It is a fact of life that first impressions are often the picture we hold in mind and change only with difficulty. For example, failing to smile at the first interview may stick a "newbee" with the reputation of a grouch; a weak handshake may seem to mark a weak spirit. While using the interview as a first evaluation, the supervisor must be careful not to make it a final judgment. Most new judge advocates have general knowledge of military law, although many are not quite ready to perform specific tasks without close direction, and they know it. They may seem unwilling to work when they only lack confidence. On the other hand, some "newbees" show extreme confidence and make a great impression, which turns out to be unjustified.

The supervisor also needs to be concerned with the "newbee's" impression of him or her and the office. The first interview begins the process of letting the "newbees'" know that they belong to the group of people at the office and that the boss cares about the welfare, not just how well they do their jobs. General Eisenhower had the simple good habit of first asking soldiers where they came from, rather than jumping in to interrogate them about their duties.[3] Few "newbees" are filled with joy when the first words from the boss amount to a quick rundown of the forty actions they are expected to pursue with zeal. The learning curve quickly bends backward if they think the supervisor considers them as no more than new machines to be plugged in at a desk. Make the "newbees" feel comfortable and give realistic encouragement.

Where Am I and What Am I Supposed To Do Now?

Everyone needs to know what they are supposed to do in the organization and what others do. The basic orientation for "newbees" begins with a description of the office, from personnel to furniture and equipment. There are stories of officers not knowing the names of their immediate subordinates and stories of subordinates who never recognized the other faces in the hallway and never knew the function or value of the people behind those nameless faces. The supervisor should explain who does what and place the mission of the office in perspective with the installation or organization it serves. The most important early advice is to tell the new judge advocates who they can go see for help. Most bosses have an open-door policy, but "newbees" have to know where they can turn for line-by-line assistance. Of course, they also need to know who they work for and who works for them.[4] Knowing the local rules about wearing the uniform, physical training, and greetings is important,

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[1] *See generally* D. McGregor, Leadership and Motivation (1969) and W. Ouchi, Theory Z: How American Business Can Meet The Japanese Challenge (1981). Theories "X," "Y," and "Z" examine how workers view their jobs and what is needed to improve productivity. Pavlov's dogs refers to work on conditioned reflexes done by the Russian physiologist Ivan Petrovich Pavlov. When a bell rang in Pavlov's experiments, laboratory dogs would be served food, causing the dogs to salivate in response. After a while, the dogs would salivate in response to the bell ringing, which they had learned to associate with the food service.

[2] In technical parlance, the degree of ability and willingness of individuals to take responsibility for directing their own behavior is referred to as their maturity level. P. Hersey & K. Blanchard, Management of Organizational Behavior: Utilizing Human Resources 151 (1982).

[3] Ambrose. Eisenhower: Soldier, General of the Army, President-Elect 163 (1983).

[4] *See generally* A. Maslow, Motivation and Personality (1954). This point in Maslow's hierarchy of needs might be characterized as stability, safety and security.

too. One "newbee" mistook the local "all the way, sir" greeting as "get out of the way, sir," because he was never told the tradition.

A general description of the new judge advocates' duties gets them moving in the right direction. If properly used, the Officer Evaluation Report Support Form can be invaluable to clarify duties and to set benchmarks and goals. "Newbees" must learn to order their duties, as some are essential and must be performed immediately, while others which are not essential are still highly visible attention-getters and must be done quickly. Some duties are simply functions that can be performed after the others are satisfied. Explain the priorities. Point out, though, that all must be done well.

Which Way to the Courthouse?

After the "newbees" learn what their jobs are and how their jobs fit into the office, they should be directed towards doing their jobs. The first item that the "newbee" needs, assuming that law books and Basic Course materials were not lost in transit, is the office Standard Operating Procedures. This handbook is actually the office memory, containing information from officer responsibilities to "how to do the job" instructions. Commonly used standard forms should be included with completed examples. Give the new judge advocates an office organization chart along with an installation chart, telephone book, and other local references.

Encourage new judge advocates to borrow from others and listen to others. Early on they should begin developing their own files of actions and notes, but it must be made clear to them that the work of others is not a forbidden reference. Old records of trials and office opinions beg to share their experiences. In addition to finding their way around the office library, "newbees" must visit the LEXIS/WESTLAW terminal, if available, and learn how to use it.

After this foundation comes the teacher. Most offices routinely assign experienced judge advocates to guide the new ones. The guides explain every action taken and make their good habits known. In trial practice, offices usually assign new judge advocates as assistant trial counsels or assistant defense counsels and gradually allow them to take the lead in cases. One way of helping "newbees" prepare for cases, and a way of evaluating their progress, is to require worksheets detailing specific aspects of each case. Even basic points such as listing charges with elements of the offenses matched against witnesses and evidence develops the thinking-through process. Putting together charge sheets and trial notebooks, and procuring and pinning down witnesses and evidence can be overwhelming without an orderly approach. What might be second nature to an experienced counsel may be a chore for "newbees." The worksheet becomes a checklist for trial and builds discipline, punctuality, and attention to detail.

Another method of helping "newbees" prepare for cases, which can be used in other types of practice as well, is the "strategy and status session." In trial practice, the afternoon or morning before docket call is a good time to bring all counsel together. Other sections could pick a standard time to review the log of suspense dates. This session allows the boss to check on the progress of cases, and helps new judge advocates to interact with other counsel, make suggestions, and participate in decision-making. As cases are discussed, "newbees" feel more a part of a team that is working together toward common goals.[5] Although poor performance should not be accepted and the boss must emphasize points for improvement, the main purpose of these meetings is to develop commitment to the job, loyalty, and a feeling of belonging and contributing to the group. The potential long-term benefits may be a greater gain to both the "newbees" and the organization than the short-term specific learning.

How am I Doing?

Commitment to the job and a feeling of contribution are supported by praising good work and offering advice that criticizes without condemning. "Newbees" are anxious to know how well they are doing their jobs, especially as they work more on their own. Periodic reviews of their OER Support Form objectives gives them point-by-analysis, but less formal and more frequent comments from the boss are also valuable. The boss should let "newbees" know that he or she recognizes and values their work, that there is more they can do, and that the boss has confidence they can do it.[6] Too often, the boss expects them to do well and says nothing unless something goes wrong. The silence is mistaken for undeserved, harsh criticism. When the boss waits until OER time to say good things, the rating becomes, in part, a reward for enduring the cold shoulder. Learning and improving have to be nurtured.

Conclusion

General Wickham has challenged every leader to "[b]e a teacher and a mentor . . . Sharing your knowledge and experience is the greatest legacy you can leave your subordinates."[7] Army legal offices provide a "hands-on" learning experience that can be greatly enhanced by the advice, guidance, and encouragement of supervisors and other judge advocates. Supervisors must evaluate the personal and professional needs of subordinates and then give them the training and tools to do their jobs. This training and learning should never end. By training and motivating, learning continues in a positive way, so that loyalty develops, personal satisfaction increases, and mission objectives are achieved.

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[5] *See* L Imundo, The Effective Supervisor's Handbook 7 (1980). Mr. Imundo indicates that the primary function of a manager (Boss) may be to create an environment where people (newbees) want to achieve common goals. In working toward these common goals, they satisfy their own personal needs.

[6] D. Bradford & A. Cohen, Managing For Excellence: The Guide To Developing High Performance In Contemporary Organizations 79 (1984). Although the authors stress that managers must encourage and motivate their subordinates, they also note that, "Young professionals like lawyers . . . will knock themselves out for several years, because they accept their hard labor as necessary training before they can handle even larger responsibility in the future."

[7] Dep't of Army, Pam. No. 600-50, White Paper 1985: Leadership Makes the Difference, at 5 (1 Apr. 1985).

Defense Technical Information Center: An Overlooked Resource

Whenever you change jobs, research a new issue, or seek to brush up on an area of the law, you probably reach for your Basic Course or Graduate Course Materials, only to find them out of date. You call TJAGSA for the latest edition and discover that the School is unable to help you because of budgetary constraints. There is a solution to this perennial problem.

The Defense Technical Information Center (DTIC) is a component of the Department of Defense's scientific and technical information program. DTIC is essentially a clearinghouse which provides government personnel and defense contractors access to DOD's vast collection of scientific and technical information. To increase the availability of TJAGSA materials for field use, many publications prepared or distributed by TJAGSA have been made available through DTIC.

There are two ways for your office to obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for your office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Military users overseas can order one copy of a publication at no charge. Publications ordered from DTIC are for government use only. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314, phone (202) 274–6871, AUTOVON 284–6871.

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

Upon request, users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

TJAGSA materials are but a few of the publications available to you as a DTIC user. Registering for and using DTIC will allow your office to expand its library of current legal reference material and help insure quality legal services to both soldiers and the command.

The following TJAGSA publications, arranged by subject area, are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375: Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).

AD B090376: Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).

AD B078095: Fiscal Law Deskbook/JAGS–ADK–83–1 (230 pgs).

Legal Assistance

AD B079015: Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/ JAGS–ADA–84–1 (266 pgs).

AD B077739: All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).

AD B089093: LAO Federal Income Tax Supplement/ JAGS–ADA–85–1 (129 pgs).

AD B077738: All States Will Guide/JAGS–ADA–83–2 (202 pgs).

AD B080900: All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).

AD B089092: All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).

AD B093771: All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).

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AD B086939: Criminal Law, Procedure, Posttrial/ JAGS–ADC–84–3 (80 pgs).

AD B086938: Criminal Law, Crimes & Defenses/ JAGS–ADC–84–4 (180 pgs).

AD B086937: Criminal Law, Evidence/JAGS–ADC–84–5 (90 pgs).

AD B086936: Criminal Law, Constitutional Evidence/ JAGS–ADC–84–6 (200 pgs).

AD B086935: Criminal Law, Index/JAGS–ADC–84–7 (75 pgs).

The following CID publication is also available through DTIC:

AD A145966: USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

The Advocacy Section

Trial Counsel Forum

Trial Counsel Assistance Program, USALSA

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Effective Use of Rape Trauma Syndrome

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Introduction

In last month's *Forum*, TCAP highlighted *United States v. Tomlinson*,[1] the first military opinion to address the admission of "rape trauma syndrome" testimony during the merits of a rape case.[2] This article will provide a more in-depth analysis of *Tomlinson* and suggest the best means of utilizing *Tomlinson* in your future rape prosecutions.

Before you place too much reliance on *Tomlinson*, remember that the Army court set aside the findings and sentence. The court concluded that the military judge abused his discretion under Mil. R. Evid. 403 in allowing expert testimony on "rape trauma syndrome," because it was not restricted to specific issues raised by the defense, and the military judge did not specifically advise the members of the restricted use for which they could consider this testimony.[3] In reaching this conclusion, the court included so many admonitions about the improper use of rape trauma syndrome testimony that counsel and military judges may be misled to conclude that rape trauma syndrome evidence is simply not admissible. In fact, the court provided specific examples where such testimony would be both relevant and properly admissible. A proper understanding of *Tomlinson* will allow you to decide if your case fits within those areas justifying expert testimony, and also will allow you to frame your offer to convince the military judge to allow admission.

The Court's Opinion

The victim in *Tomlinson* was a 4' 11" 22-year-old virgin who was a staff sergeant in the United States Air Force. The victim was a computer buff who worked the graveyard shift on the evening of the alleged rape, was on "comp time." The accused engaged her in conversation while they

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[1] CM 445673 (A.C.M.R. 26 July 1985).

[2] On 9 August 1985, the Air Force Court of Military Review became the second service court of review to address the admission of rape trauma syndrome during the merits of a rape case. In United States v. Eastman, ACM 24599 (A.F.C.M.R. 9 Aug. 1985), however, the Air Force court offered its favorable opinion as to the admissibility of rape trauma syndrome evidence, but decided the case against the government because it had not made a sufficient showing that the "expert" was qualified to "conduct a clinical evaluation of the complainant's psychological condition . . . ." (Id. slip op. at 9).

[3] The Army court's conclusion, in this author's opinion, inappropriately limited the military judge's discretion. A military judge is given "wide discretion" or "enormous leeway" when applying Mil. R. Evid. 403. United States v. Shields, 20 M.J. 174, 176 (C.M.A. 1985); United States v. Wright, 20 M.J. 518,521 (A.C.M.R. 1985). Reviewing courts should not disturb military judges' decisions in applying Mil. R. Evid. 403 unless there is a "clear showing of abuse of discretion," United States v. Brenizer, 20 M.J. 78, 81-82 (C.M.A. 1985). By its decision in *Tomlinson*, the Army court had to conclude that despite the military judge's "wide discretion" or "enormous leeway," the military judge clearly should have seen that the testimony offered and presented was "substantially more prejudicial than probative." Mil. R. Evid. 403. While the Army court saw this obvious and glaring imbalance, the detailed defense counsel did not; the defense counsel did not specifically object to the testimony based upon Mil. R. Evid. 403, nor did he ask for an instruction concerning this testimony or object to the military judge's instructions as given. Furthermore, while the Army court cited state decisions in support of its conclusion of clear abuse, state courts are in fact split as to the admission of rape trauma syndrome evidence. One state court would absolutely forbid its admission. *See* State v. Soldana, 324 N.W.2d 327 (Minn. 1982) (yet ironically, this same court would allow such testimony in an *unrestricted* way in a child sex abuse case. *See* State v. Meyers, 359 N.W.2d 604 (Minn. 1984)). Two state courts take the same position as the Army court: rape trauma syndrome testimony may be admitted for limited purposes restricted to precise issues raised by the defense (*e.g.*, why the victim delayed in reporting), and the expert should avoid the term "rape trauma syndrome." *See* People v. Bledsoe, 681 P.2d 291 (Cal. 1984); State v. Taylor, 663 S.W.2d 235 (Mo. 1984). Finally, two state courts support the government's position that where the defense is consent, the use of such testimony and of the term "rape trauma syndrome" is both relevant and *not* substantially more prejudicial than probative. *See* State v. Liddell, 685 P.2d 918 (Mont. 1984); State v. McQuillan, 689 P.2d 822 (Kan. 1984); State v. Marks, 647 P.2d 1292 (Kan. 1982). The wide divergence displayed by state supreme courts, which have the time and the resources to consider this issue fully, makes apparent that the military judge here, with little time, had a good feel for the issues raised at trial, made a proper decision that was clearly within the "wide discretion" granted him when applying Mil. R. Evid. 403. The Army court simply substituted its judgment, by following the example of two state courts, for the judgment of the military judge who ruled in accordance with two other state courts. That was improper. *See* United States v. Shields, 20 M.J. at 176 ("while we might have ruled otherwise had we been at trial, we cannot say that on the record before us, there was an abuse of discretion . . .").

were both playing video games at the base bowling alley and they began to talk about computers. The victim invited the accused to her barracks room where they played video games on her home computer until 0545, when she asked him to leave. Rather than leave, the victim testified that the appellant put a switchblade knife to her throat and raped her.

There was no physical corroboration of rape, only of sexual intercourse, and the appellant admitted during his testimony that he had had sexual intercourse with SSG H. The appellant was found with a switchblade knife, but testified that SSG H saw the knife with the blade exposed only because she expressed an interest in seeing it.

The defense theory at trial was that because SSG H was raised very strictly concerning sex before marriage, her guilt over consensual intercourse with the appellant caused her to falsely allege rape. In support of this theory, the defense highlighted the fact that after the alleged rape, the appellant allowed SSG H to use the latrine, and she returned to the room from the latrine, despite the fact that she had encountered other women there. The defense also called two Criminal Investigation Division (CID) agents who testified about inconsistent statements made by SSG H on the day of the rape and during an interview one month later. These agents also testified that the victim indicated that she might have enjoyed the experience "slightly" and nodded her head affirmatively when the agent suggested that she might have transferred her guilt, based upon her upbringing, to the accused.[4]

In rebuttal, the government called a clinical social worker, who had been counseling SSG H about certain psychological and physical reactions to the rape, to testify that these symptoms were consistent with "rape trauma syndrome" which involves a set of symptoms commonly observed in victims of "forced sexual attack." The expert explained that rape trauma syndrome is a sub-category of "post-traumatic stress disorder." The expert further explained that post-traumatic stress disorder is a set of symptoms that usually occur after a person has been through an experience or traumatic event that is not within the realm of normal human experience. He listed rape, assault, natural disasters like fires, earthquakes and tornadoes, and combat as examples. While not specifically stated by the expert, it is apparent that each of these experiences involve violence, or the threat of violence, and the loss of control over one's life.[5]

The Army court determined that this testimony was relevant, in some small measure, because testimony that a person suffered certain "psychological or physiological symptoms that correspond to a traumatic stress reaction is probative of the issue that the witness suffered a traumatic experience."[6] The court went on to presume, however, that the government offered this testimony *not* to show that the victim displayed symptoms common to victims of a *"forced* sexual attack," but only generally to show non-consent.[7] The Army court apparently did not consider the specific relevance of this testimony, i.e., to rebut the accused's claim that he never threatened the victim with his switchblade knife and to corroborate the victim's testimony that she had been threatened by the accused with a switchblade knife.[8] By finding the testimony relevant only to the general issue of consent, the court found it of little relevance, and, therefore, when weighing it against the potential for prejudice, the court found the balance so out of kilter as to require reversal.

The court found a tremendous potential for prejudice in three specific areas and concluded that the testimony amounted simply to improper bolstering of the victim's credibility. The court's concern for the danger of prejudice when such testimony is unrestricted is valid. The court's specific examination of these potential problem areas, however, demonstrates again that it did not fully consider the specific relevance of this testimony.

First, the court saw the clear danger of prejudice in the fact that the expert was allowed to testify about his reasons for counseling the victim. The expert testified that she came to see him "following a sexual assault." He also testified that the victim "exhibited anger at the 'rapist'." The court concluded that this testimony provided explicit support for SSG H's credibility.[9] While this testimony did support the victim's credibility, it was no different from the same support provided when a medical physician testifies that he examined a victim "following a sexual assault" and that she was "very emotional and angry at the rapist." Such testimony by a physician while corroborating the *physical* details of rape (*e.g.*, presence of sperm, abrasions, bruises) is routinely admitted.

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[4] Upon cross-examination, these agents modified these assertions somewhat and admitted that they had not had a female agent to assist with questioning. SSG H testified that she finally agreed with some of the agents' suggestions to terminate the questioning as the agents implied they did not believe her. SSG H, throughout all questioning, insisted that the accused threatened her with a knife and intercourse occurred because of that threat.

[5] In People v. Bledsoe, 681 P.2d at 294, 296, the expert testified that rape trauma syndrome is a "stress reaction to the threat of being killed . . . whether or not in some cases a weapon is even in evidence . . ." The expert also allowed that this same stress reaction could be observed in other life threatening situations, but especially from "deliberate man-made disasters . . . like bombs and torture."

[6] *Tomlinson* slip op. at 3–4.

[7] Id. at 4 ("the government ostensibly introduced [the expert's] testimony to rebut the defense's claim that the intercourse was consensual.").

[8] The testimony was relevant in showing non-consent, but *only* because it corroborated that violence, or threat of violence, was offered in this case, to *overcome* the lack of consent. The expert explained that victims of a car accident, fire, natural disaster, combat or assault (all violent encounters) will display a cluster of psychological symptoms. The expert testified that SSG H displayed these symptoms. This testimony was relevant because a fact finder could infer from that testimony that SSG H did suffer the threat of violence by appellant's switchblade knife as she claimed. Appellant had testified that he had *not* offered violence or the threat of violence, in the form of his switchblade knife. Furthermore, the defense had cross-examined SSG H extensively about her strict upbringing to suggest that she experienced the symptoms she testified to, which the expert later said were consistent with rape trauma syndrome, because of the guilt she experienced over consensual sex, not because appellant threatened her with a knife. This testimony was therefore clearly relevant to the issue of force which, combined with the lack of consent, form the elements of rape.

[9] *Tomlinson*, slip op. at 4.

Second, the court concluded that term "rape trauma syndrome" itself posed a real danger because it suggested that "the syndrome could only have been caused by rape." [10] This is a valid concern. While military panels are surely more educated and experienced than the usual state jury, and therefore should not be overwhelmed by the term "rape trauma," it is unnecessary to use the term when presenting this testimony. Rape trauma syndrome is a subcategory of post-traumatic stress disorder, which is just as useful in describing the relevant symptoms. [11]

Third, the court pointed out that the concept of rape trauma syndrome was not "devised to determine the 'truth' or 'accuracy' of a particular past event—i.e. whether, in fact, a rape in the legal sense occurred—but rather, was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients." [12] For example, counselors are trained to be accepting of rape victims, hence they would not probe for inconsistencies, or challenge the victim's claim of rape, as a criminal investigator would. Furthermore, the court pointed out that even if a female honestly believed she had been raped, and thus might manifest these symptoms, no rape would have occurred, as a matter of law, if she had "failed to make her lack of consent reasonably manifest." [13]

While the court made a valid observation, it inaccurately perceived the use of this testimony. The court's focus in making this assertion was upon the victim, while the testimony of the expert allowed the members to draw inferences about the *accused's* conduct. It is certainly true that a victim who fails to manifest lack of consent has not been raped in the legal sense. That observation, however, misses the point: rape involves *both* non-consent and the use of *force*. Force is applied or threatened by the *accused*. A woman who manifests these symptoms allows the inference that her life *was*, in fact, threatened; the force element of rape. She may nevertheless have not been legally raped if, in fact, she only imagined a threat (*e.g.*, "no, he didn't have a knife or gun, and he didn't threaten me, but he looked menacing"). In that instance, if no real threat or violence was displayed, and the victim made no attempt to show that she did not consent to intercourse, a rape did not occur. This rare situation, however, should not prohibit the introduction of such testimony. The answer to this dilemma is simply cross-examination (*e.g.*, "Doctor, you've heard of hypochondriacs? Isn't it true that they fully believe they have a disease, when in fact they are healthy?" or, "In fact, Ms. _____, the accused never displayed a weapon and he never issued a threat to you, did he?"). Furthermore, as the Minnesota Supreme Court correctly observed, when presented with a similar argument to prevent such testimony in a child sex abuse case:

> That [the expert's] observations of the complainant's psychological and emotional condition are not physically demonstrable does not justify the conclusion that they were of no help to the jury. The cause of many physical and emotional ailments, and *even the existence* of those conditions which are identified chiefly by subjective complaints cannot be demonstrated to an absolute certainty; they are nevertheless the subject of expert testimony . . . the reliability of expert testimony with regard to the existence or cause of a condition goes *not* to admissibility but to its relative weight. [14]

Finally, the court found the testimony overwhelmingly more prejudicial than probative because, in the court's view, the testimony amounted "simply to impermissible bolstering of SSG H's credibility." [15] The court likened this type of testimony to testimony offered by polygraphers: "lie detector evidence—whether human or mechanical—is not [permissible]." [16] Here, too, the court did not understand the basis for the relevance of this testimony.

Equating this testimony to polygraph evidence was inaccurate because it ignored the fact that the primary purpose of the testimony was to corroborate evidence directly related to the offense (*i.e.*, SSG H's symptoms were relevant to whether force was threatened). Polygraph evidence has nothing to do with the offense itself. Polygraph examinations occur after an offense and test physiological responses as a person answers questions about an offense. From those responses, an examiner infers whether a person was being truthful in giving answers to questions. Because it has nothing to do with the offense itself, the polygraph examiner is clearly offering testimony *only* to bolster the credibility of a witness.

An accurate analogy to the use of rape trauma testimony is the physician who testifies that a victim of an alleged rape had redness in the vaginal area. If the expert testifies that this finding can be consistent with a sexual assault or an aggressive sexual encounter, members can infer that it is more likely that the alleged victim is telling the truth when she claimed that a forcible, non-consensual sexual act occurred. The purpose of the physician's testimony is to corroborate the fact that intercourse was not consensual; a secondary result is that the victim's testimony becomes more believable. In a similar manner, the expert's testimony in *Tomlinson* allowed the members to infer that her psychological symptoms occurred as a result of violence, rather

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[10] *Id.* at 5.

[11] While still within the prohibition set forth in *Tomlinson*, however, the expert should be able to testify, if held to be relevant, that rape victims tend to display a more specific cluster of symptoms than displayed by individuals suffering from the more general post-traumatic stress disorder, as long as the term rape trauma syndrome is avoided.

[12] *Id.* at 6 (quoting People v. Bledsoe, 681 P.2d 299, 300).

[13] *Id.* at 7.

[14] State v. Myers, 359 N.W. 2d at 610–11.

[15] *Tomlinson*, slip op. at 7.

[16] *Id.* at 6.

than because of guilt in going against her parental upbringing.[17] In the process, this testimony did bolster her claim that she was threatened with a knife. All relevant evidence will bolster one side or the other. It was not, however, like a polygraph exam which corroborates nothing about the offense but addresses itself only to a person's truthfulness in response to certain questions. Only that type of evidence is improper bolstering.

In all cases where there is little direct corrobative evidence, the credibility of the accused and the victim will be paramount. Contrary to the Army court, two state courts and the Air Force court, in dicta, would not find this rape trauma evidence improper bolstering but instead, would find it essential in assisting the triers of fact to determine who was telling the truth.[18] The Court of Military Appeals has said in the similar circumstance of a one-on-one drug buy, which "essentially [comes] down to [an accused's] credibility versus that of an informant [victim], . . . it is preferable that as *much information as possible* be provided the court to aid it in its decision."[19]

The court went on to conclude that the expert's testimony in this case would have been admissible to explain why the victim might have made inconsistent statements to the CID agents *i.e.*, to explain that these statements might have been "the product of emotional trauma."[20] The court also said that in future cases, such testimony could be admissible in specific instances, (for example, to explain the delay in reporting a rape), but in any such instance, the testimony must be tailored to rebut the specific defense attack, and the military judge must instruct that the testimony was offered only for that limited purpose. Furthermore, the court cautioned that the testimony must be "couched in general terms and . . . not offered as a professional evaluation of the truthfulness of a witness."[21] When used to explain the delay in reporting, for example, the court cautioned that testimony should be limited to the observation that many rape victims delay reporting rather than the conclusion that this victim's delay is consistent with her having been raped.

Conclusion

While the court in *Tomlinson* concluded that the government offered rape trauma syndrome evidence only for its tendency, in general, to show non-consent, it actually rebutted a very specific defense attack: the defense claim that the victim made up the threat of the switchblade knife, and suffered physical symptoms such as nausea and sleeplessness, only because of guilt over consensual intercourse. The lesson to be learned is that a general offer of this testimony to "show non-consent" will be inadmissible after *Tomlinson.* Where trial counsel show by their offer, and if necessary, by their expert's foundational testimony, however, that the testimony is relevant to rebut controversy raised by the defense about whether violence was offered or threatened, it should be admissible.

What is clear is that if the defense attacks the victim upon her delay in reporting, an expert's testimony that this is a commonly observed phenomenon with rape victims, will be admissible in rebuttal. Furthermore, if the victim acted in a seemingly inexplicable way (*e.g.*, she spoke calmly of the rape and when reporting it, acted unconcerned) and the defense attempts to discredit her based upon that, an expert's testimony which can explain this should be admissible in rebuttal.

To show that your offer is specifically relevant, you must listen very carefully to the defense's cross examination and to the accused's testimony and highlight those areas for which specific rebuttal, by expert testimony, is necessary. Voir dire of members as to their lack of experience and training concerning rape can be useful in showing that expert testimony will aid the members. Finally, you must be sure that the expert never says the phrase "rape trauma syndrome" and that the military judge instructs the members that they may consider the expert testimony only for the limited purpose for which it was admitted.[22]

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[17] In dicta, the Air Force court in *United States v. Eastman* reached this same conclusion. The Air Force court noted that:

> [it] is fundamental to recognize that evidence of a rape victim's blackened eye, for example, is not relevant on the issue of lack of consent unless there is some evidence that the injury first appeared after the rape and was, arguably, inflicted in the course of the rape. Similarly, we see no reason why the prosecution should not be permitted to present evidence of *psychological injury,* as manifested by apparent somatic, behavioral, or emotional symptoms, if there is some evidence that such symptoms first appeared after the rape and were, arguably, a product of *forcible* non-consensual intercourse. *Id.*, slip op., at 6.

[18] *See State v. Liddell: State v. McQuillan; United States v. Eastman.*

[19] *United States v. Brenizer,* 20 M.J. at 81–81 (emphasis supplied). In addition to its conclusion that the testimony amounted to the improper bolstering of credibility, the *Tomlinson* court also concluded that the issue of credibility was one which the members "were fully competent to determine . . . . "(*Tomlinson,* slip op. at 5). By making this assertion, the court concluded that rape victims' credibility can be assessed, in the same way, and as readily, as all other victims of crime. In fact, because rape involves sex, which is a highly personal matter, all participants to the court-martial, not just the members, are affected by their own views and biases based upon parental upbringing, religious views, *etc.* Because of this, rape victims are often perceived, and their actions judged, by reference to many myths. (*e.g.* rape victims actually want to be raped and may have enjoyed the experience; good girls don't get raped). *See* Ross, *The Overlooked Expert in Rape Prosecution,* 14 U. Tol. L. Rev. 707 (1983). During voir dire, the members admitted that none of them had any personal experience with rape *i.e.*, no family member had ever been raped. Further, each member was male. Ironically, the *Tomlinson* court later concluded that expert testimony could be offered, in specific instances, to "disabuse" jurors of just such myths. (*Tolminson,* slip op. at 6). Those myths, which simply do not arise in other types of cases, directly affect the perception of the victim's credibility, and that is why, in fact, members may be in need of aid in determining credibility *itself* (*See* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984)). An effective voir dire of members by trial counsel can make this need readily apparent.

[20] *Tomlinson,* slip op. at 7.

[21] *Id.* at 6.

[22] It is certainly proper not to give a limiting instruction if the defense should object and ask that no instruction be given because it would further highlight such testimony. In doing so, the defense counsel is affirmatively waiving a limiting instruction. In *Tomlinson,* the failure of the defense to object to the instructions as given, or to offer a limiting instruction, did not cause the Army court to apply waiver. It is apparent, therefore, that the defense must act affirmatively before waiver will be applied.

There is no need for the use of rape trauma syndrome testimony in most cases where there is some combination of an immediate report and physical corroboration of rape (*e.g.*, torn clothing, bruises, tearing of vaginal area). Only where you have an urgent need for its use should you consider such testimony (*e.g.* where there is no physical corroboration of rape, the victim acted in a way the members may find difficult to understand, and the accused testifies the intercourse was consensual).

Finally, regardless of its use during the merits, be sure to consider its potential use in aggravation to explain the specific short-term repercussions of the rape as experienced by the victim, as well as the probable long-term repercussions.[23]

[23] United States v. Hammond, 17 M.J. 218 (C.M.A. 1984).

Recently, in the cases of *United States v. Roa*[1] and *United States v. Herring*,[2] the Air Force Court of Military Review determined that military jurisdiction existed over the offenses of burglary, larceny, and communication of a threat committed off post. The foundation for both opinions concerning the issue of jurisdiction was the Court of Military Appeals' decision in *United States v. Lockwood*.[3]

In *Roa*, the accused was a member of a ring that burglarized the off base quarters of officers assigned to his unit. A key member of the ring was an Air Force captain whose access to a duty roster insured that no one would be home when the accused and members of his ring broke in. On appeal, the accused maintained that, consistent with *O'Callahan v. Parker*[4] and *Relford v. Commandant*,[5] the Air Force court lacked jurisdiction to try the cases because there was no "service-connection."

The Air Force Court of Military Review held that there was sufficient service-connection in both cases to establish jurisdiction over the offenses. The court reached this determination for two reasons. The first reason was *Schlesinger v. Councilman* in which the United States Supreme Court stated:

> [The issue of service connection] turns in part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. *More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensible to inform any eventual review in Art. III courts.*[6]

As a second reason the Air Force Court of Military Review specifically felt that this "mandate" had been followed by the Court of Military Appeals in *United States v. Lockwood*, where that court stated: "[T]he criteria for service connection should be reexamined periodically in light of changes in the conditions under which the Armed Services perform their assigned missions and the accompanying changes in the impact of off-post crimes upon their ability to accomplish their missions."[7]

Accordingly, the Air Force Court of Military Review in *Roa* determined, consistent with the *Lockwood* rationale, that there were four essential factors in the case which provided jurisdiction: (1) one of the accused's accomplices was a military member; (2) the offenses had a significant adverse impact on the morale and discipline of the military organization; (3) the accused and the victims were members of the same unit; and (4) the opportunity to commit the crime as occasioned by the accused's status as a soldier.

Similarly, in *United States v. Herring*,[8] the Air Force Court of Military Review determined that there was jurisdiction over an off-base offense of communication of a threat. The facts in this case revealed that the accused communicated a threat to a fellow airman in the city of Alamogordo, New Mexico. Both airmen were members of the same unit. The Air Force Court of Military Review held that:

> An offense occurring off a military installation is "service-connected" if it has a significant impact on the installation. An additional factor to be weighed is whether the military has a greater interest in the prosecution of the offense than the civilian community. Here both parties were service members assigned to the same unit. They apparently saw each other on a daily basis. A confrontation off-base between two military members has a clear service-connection because of the logical likelihood that the dispute will continue when the individuals return to the base. While the State of New Mexico has an interest in seeing that public order is upheld in its borders, *the overriding concern in this situation is maintaining discipline within a military organization.*[9]

These cases help clarify the *Lockwood* rationale and provide trial counsel with a solution to the dilemma created for commanders when soldiers engage in "off-duty," off-post misconduct; particularly where local law enforcement has neither the interest in nor can effectively resolve the misconduct. Even so, trial counsel are reminded that cases such as *Roa* or *Herring* do not create a standard for "automatic service-connection." At trial, counsel must be prepared to go beyond theory. For example, an off-post fight between soldiers, while seemingly "service-connected," must be shown to be such by using the factors outlined in the *Lockwood, Roa, and Herring* line and by introducing evidence which palpably demonstrates the nexus between the misconduct and its effect upon the unit, the command, and the installation. In cases where off-post misconduct by

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[1] ACM 24730 (A.F.C.M.R. 18 July 1985).

[2] ACM S26750 (A.F.C.M.R. 16 Aug. 1985).

[3] 15 M.J. 1 (C.M.A. 1983).

[4] 395 U.S. 258 (1969).

[5] 401 U.S. 355 (1971).

[6] 420 U.S. 738, 756 (1975) (citation omitted) (emphasis added).

[7] 15 M.J. at 10.

[8] ACM S26750 (A.F.C.M.R. 16 Aug. 1985).

[9] *Id.*, slip op. at 2 (emphasis added).

a soldier has resulted in local publicity within the adjacent civilian community, newspaper articles should be preserved as evidence to demonstrate impairment of the military community's reputation and the relationship between the civilian and military community. Where soldiers have engaged in off-post misconduct which affects discipline within the unit, the commander and the victim should be called to render testimony to this effect.

Off-post misconduct by soldiers has long been a dilemma which has had a crippling effect upon military discipline. Too often, the difficulty in establishing jurisdiction has made the civilian community a haven for unresolved misconduct by soldiers. At the same time, because civilian law enforcement agencies either take no interest in misconduct by soldiers or assume that military authorities will take some form of corrective action, the military community often suffers a considerable loss of repute when such misconduct, unpunished and undeterred, is repeated. Trial counsel should be sensitive to this potential consequence and assess each case of off-post misconduct from the perspective of the *Lockwood, Roa, and Herring* decisions.

The Vandelinder Assessment

Shortly after the Court of Military Appeals decided the case of *United States v. Vandelinder,*[1] holding that evidence of an accused's "good military character" was pertinent to charges involving the illicit use and distribution of drugs, TCAP cautioned trial counsel to be prepared to answer "the central question whether an accused charged with illicit drug activity is entitled to the personal presence of the best character witnesses, past and present, wherever they are located."[2]

A precise logical assessment of these issues was presented by the Navy-Marine Court of Military Review in *United States v. Jones,*[3] providing trial counsel with an excellent methodology for determining when a defense requested character witness *must* be produced.

In *Jones,* the accused was charged with four specifications of possessing and distributing methamphetamine. At his trial held in Yokosuka, Japan, the accused requested the presence of several witnesses: Ensign M.A. Vaca, Yeoman Third Class White, Yeoman Chief Gebhardt, and Personnelman Third Class Carignan. Defense counsel urged that these witnesses were essential on the merits, as well as sentencing, as their testimony concerned the accused's character for truthfulness, work performance, and good general military character. The military denied the defense request.

The Navy-Marine Court of Military Review determined that the defense right to obtain witnesses under Article 46, Uniform Code of Military Justice[4] had to be evaluated on an *ad hoc* basis, weighing the materiality of the testimony sought against the equities of the situation. The court found that the case of *United States v. Tangpuz*[5] provided the essential starting point for such an evaluation:

> In *United States v. Tangpuz* the Court provided a "non-exhaustive list of relevant factors" determinative of when an accused is entitled to the personal attendance of a witness . . . .
>
> (1) the issues involved in the case and the importance of the requested witnesses to those issues;
>
> (2) whether the witness was desired on the merits or on sentencing;
>
> (3) whether the witness's testimony would be "merely cumulative;" [and]
>
> (4) the availability of alternatives to the personal appearance of the witness such as deposition, interrogatories, or previous testimony.[6]

The Navy-Marine Court of Military Review also found that there were other cases establishing additional factors for consideration:

> (a) unavailability of the witness, such as that occasioned by nonamendability to the court's process; *United States v. Bennett,* 12 M.J. 463 (C.M.A. 1982);
>
> (b) whether or not the requested witness is in the armed forces and/or subject to military orders, *United States v. Ciarlatta,* 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1954); *United States v. Davis,* 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).
>
> (c) the effect that a military witness's absence will have on his or her unit and whether that absence will adversely effect the accomplishment of an important military mission or cause manifest injury to the service, *United States v. Manos,* 17 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).[7]

In applying these considerations to the facts in *Jones,* the court found that the military judge's decision to deny the defense motion to produce Vaca, Gebhardt, and Miller was proper. The court also determined, however, that the military judge's decision denying the defense motion as to Carignan was error.

In reaching this conclusion, the court identified the critical issue in the accused's case: credibility. The court held that:

> In light of this circumstance, it became very important for the appellant to have witnesses who would present favorable opinion and reputation evidence concerning his character for honesty and truthfulness. Thus, we find that the expected testimony of the witnesses . . .Vaca, Gebhardt, and Miller, was material to the issues of the case and was important to the resolution of those issues.[8]

The court then determined that the testimonies of Vaca, Gebhardt, and Miller were virtually identical and thus cumulative. That being the case, the court opined that there were other witnesses available to testify for the accused whose testimony would be similar and no less worthy. Because Vaca, Gebhardt, and Miller were at the time of trial

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[1] 20 M.J. 41 (C.M.A. 1985).

[2] Government Brief, *COMA Returns Fire,* The Army Lawyer, July 1985, at 35.

[3] NMCM 84 2397 (N.M.C.M.R. 12 July 1985).

[4] Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1984) [hereinafter cited as UCMJ].

[5] 5 M.J. 426 (C.M.A. 1978).

[6] *Jones,* slip op. at 6 (citing *United States v. Tangpuz,* 5 M.J. at 429) (citation omitted).

[7] United States v. Jones, NMCM 84 2397, slip op. at 2 (N.M.C.M.R. 12 July 1985).

[8] *Id.,* slip. op. at 9.

deployed with the U.S.S. Detroit which was in support of the multi-national force in Beirut, Lebanon, the court determined that they were not available and that reasonable substitute for their testimony (stipulations of expected testimony) did not prejudice the accused.

The court viewed the expected testimony of the witness Carignan differently, however, Carignan was expected to testify that he worked with the accused daily for a period of one year. He also frequently socialized with the accused, knew that the accused was opposed to drug usage, and had never observed the accused to be involved in any manner with illicit drugs. At the time of trial, Carignan was assigned to the U.S.S. Reid which was homeported in Long Beach, California.

The court found that Carignan's testimony, was nearly identical to the testimony of a witness stationed in Japan, White, who had also been called to testify for the accused. White, however, had been previously charged with offenses similar to the accused and, although acquitted of these offenses, his name was associated with the accused's during the accused's trial. The court determined, consistent with *United States v. Jouan,*[9] that:

> Because of the taint placed on White's credibility by the numerous, albeit unsolicited, references to his drug activity, the fact that the requested witness Carignan was the appellant's roommate at a different time than White within the relevant period, and the fact that Carignan worked directly with appellant whereas White did not observe him daily on a professional basis, we cannot conclude that Carignan's testimony was "merely cumulative" with that of White. Furthermore, the facts peculiar to this case, and the important role played by the determination of the credibility of witnesses, mandated that this somewhat repetitive testimony be presented live in order to assure the accused a full and fair trial.[10]

The court further determined that even though Carignan was stationed in Long Beach, California, "[N]othing in the record of trial indicates that witness Carignan was taking part in military operations or that he was on such an important military mission that the use of the *extreme* alternative of a stipulation of expected testimony would be justified.[11]

And, in assessing the use of alternate forms of substitute testimony, the court determined, consistent with *United States v. Sweeney*[12] and *United States v. Cover,*[13] that: "The ruling that alternatives to live testimony such as depositions, interrogaties, and previous testimony would be an adequate substitute for the personal appearance of a material witness *must be read narrowly.*"[14]

Consequently, the court held that the substitute of a stipulation of Carignan's expected testimony denied the accused the essential ingredients of the witness's personal presence in court, namely, his demeanor and credibility:

> We find that under the facts of the instant case, where the accused was charged with effecting a transfer of a controlled substance at some point during a lengthy and unspecified period of time, where the transfer was said to have taken place at the accused's workplace, where the requested witness was closely acquainted with the accused as a work associate and as a roommate for the same period of time during which the alleged transfer was to have taken place and where the requested witness asserts that the accused was "never involved in drugs," a stipulation of expected testimony *was not a viable method of presenting that witness's testimony.*[15]

It is vitally important for a trial counsel to consider the benchmarks set forth in *Jones* in assessing defense requests for witnesses, particularly in illicit drug cases. This assessment should be conducted well before trial and be realistically applied to the factual setting of the case. A proper defense request for character witnesses should forecast the critical issues that will develop in the case. Within this framework, trial counsel should analyze each critical factor enumerated in the cases discussed above and utilized by the Navy-Marine Court of Military Review in *Jones.* There will be occasions where "military necessity" may appear to override the "equal opportunity" of the defense to obtain witnesses. Even so, trial counsel must be accurate in determining where military necessity ends and the right of the accused to compulsory process begins.

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[9] 3 M.J. 136 (C.M.A. 1977).

[10] *Jones,* slip op. at 13.

[11] *Id.,* slip op. at 15 (emphasis added).

[12] 14 C.M.A. 598, 34 C.M.R. 378 (1964).

[13] 16 M.J. 800 (N.M.C.M.R. 1983).

[14] *Jones,* slip op. at 13 (emphasis added).

[15] *Id.* slip op. at 14 (emphasis added).

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Post-Trial Proceedings

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I. Introduction

The military justice system has occasionally been the object of praise.[1] One reason for this praise is the post-trial review process, which is recognized as being broader than that of the civilian courts.[2] This article discusses only a small part of that review process—the rehearing,[3] the *DuBay* proceeding,[4] and post-trial sessions.[5] While the terms have been used interchangeably, uniformity dictates that each should have its own specific use and function. The purpose of this article is to discuss post-trial proceedings, to identify the confusion that has existed in this area, and to highlight the recent developments which may alleviate some of this confusion.

II. Rehearings

A. Types

Space does not permit an exhaustive review of the development of rehearings.[6] Suffice it to say that beginning in 1951 there was a statutory basis for rehearings in all the services.[7] Rehearings fall into one of three categories.[8] The first category is a rehearing in full on all the charges and specifications. This is, essentially, a new trial for findings and sentence. The second category is a rehearing on sentence alone. This occurs when a proper reviewing authority approves some or all of the findings but sets aside the sentence. While there was some doubt as to the validity of the sentence rehearing in the past,[9] its use is well-established today.[10] Special limitations on the rehearing tribunal in this situation will be discussed later. The third category is a combined rehearing. This occurs when a rehearing on sentence is combined with a trial on the merits of specifications which were not tried by the earlier court-martial, or if tried, were disapproved by a reviewing authority. The sentence is based upon those specifications of which the accused is convicted at the rehearing combined with those that were approved from the previous court-martial.

B. Authority to Authorize

Under UCMJ art. 60(e)(3) the convening authority, or another person taking action under that section, has the authority to order a rehearing. A prerequisite is that the reasons for the disapproval of the findings must be stated.[11] The convening authority may order a rehearing when taking action before the case is forwarded to The Judge Advocate General or when authorized to do so by superior competent authority, *e.g.*, a court of military review. The general rule is that a case directed to be reheard should be referred to the original convening authority.[12] When the original convening authority determines that a rehearing is not practicable,[13] the officer currently exercising general court-martial jurisdiction over the accused has no power to

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[1] F. Bailey, F. Lee Bailey for the Defense, at 31 (1976).

[2] Scott v. United States, 586 F. Supp. 66, 69 (E. D. Va. 1984).

[3] Uniform Code of Military Justice art. 63, 10 U.S.C. § 863 (1982) [hereinafter cited as UCMJ], Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 810 [hereinafter cited as R.C.M.].

[4] United States v. DuBay, 17 C.M.A. 145, 37 C.M.R. 411 (1967).

[5] R.C.M. 1102.

[6] One article dealing with the development of rehearings is Clausen, *Rehearings Today in Military Law*, 12 Mil. L. Rev. 145 (1961).

[7] *Id.* at 145.

[8] S. Rep. No. 53, 98th Cong., 1st Session. 23 (1983). *See also* Clausen, *supra* note 6, at 156–57.

[9] Clausen, *supra* note 6, at 156–57.

[10] UCMJ arts. 60(e), 66(d), 67(e), 69(c), and R.C.M. 1107, 1201, 1204.

[11] UCMJ art. 60(e)(3).

[12] *United States v. Phillippy*, 3 M.J. 523 (A.F.C.M.R. 1977), *petition denied*, 3 M.J. 300 (C.M.A. 1977).

[13] R.C.M. 1107(e)(1)(B)(iii) allows a convening authority to dismiss both specifications and charges if he finds a rehearing impracticable.

order a rehearing.[14] It does not appear, however, that the reverse is true. If the original convening authority determines that a rehearing is practicable, but then transfers authority over the charges to a different convening authority, the latter convening authority assumes the same prerogative with respect to those charges.[15] This means the new convening authority could determine whether a rehearing is practicable or whether the charges should be dismissed.

One noted deficiency in the post-trial area was that The Judge Advocate General lacked authority to order rehearings.[16] This lack of authority was recognized in the discussions of the Military Justice Act of 1983,[17] which permitted The Judge Advocate General to order rehearings.[18] The Judge Advocate General now may order a rehearing if he or she sets aside the findings or sentence, except when this action is taken because there was insufficient evidence in the record to support the findings.[19] As in any other case when a rehearing is ordered the convening authority can dismiss the charges if a rehearing is impracticable.[20]

The courts of military review and the Court of Military Appeals may order rehearings in cases which they are authorized to review.[21] This "order" is nothing more than an authorization because the convening authority may still dismiss the charges if he or she finds a rehearing impracticable.[22]

C. Special Problems

In the past, the sentence at a rehearing was limited to the lowest quantum of punishment approved by a convening authority, a reviewing court, or another authorized officer under the UCMJ prior to the second trial, unless the reduction in the sentence was solely and expressly predicated on an erroneous conclusion of law.[23] The sentence could be increased if, at the rehearing, the accused was found guilty of an offense not considered in the original proceedings or if the sentence was mandatory.[24] This caused concern in situations in which the accused had pled guilty at the original trial. Because of the limitations on the sentence at the rehearing, the accused could change his plea to not guilty and be none the worse for it. This was especially true if the sentence pursuant to the pretrial agreement was less than the sentence adjudged at trial. The accused was getting the benefit of the pretrial agreement without fulfilling the agreement to plead guilty.[25] This anomaly has been corrected. Under the 1984 Manual for Courts-Martial, (MCM, 1984), the accused only gets the benefit of the pretrial agreement if he or she fulfills its terms.[26] Otherwise, the accused gets a sentence not in excess of or more severe than that lawfully adjudged at the earlier trial.[27]

There have been problems in determining what is "in excess of or more severe than" when determining a sentence, especially when reviewed in relation to substituted punishments. Although the MCM, 1984, does not discuss substituted punishments as such, they are still authorized and cases interpreting the sentence limitations seem equally applicable.[28] In *United States v. Cavalier,*[29] the accused, at a rehearing, requested an instruction to the effect that a dishonorable discharge was more severe punishment than confinement at hard labor for one year and total forfeitures. The court stated that the cases involving rehearings only required that the members be instructed that the maximum punishment which may be adjudged is a punitive discharge and that any substitute punishment must be less severe than a punitive discharge. The cases did not require that the members be instructed on what punishment or combinations of punishments will constitute a less severe punishment than a punitive discharge.[30]

The UCMJ provisions which authorize the ordering of rehearings do so "except where there is a lack of sufficient evidence in the record to support the findings."[31] Usually the issue arises when evidence on review has been held inadmissible. The phrase "evidence in the record" is intended to authorize a rehearing where the prosecution has made its case on evidence which was improperly admitted and for

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[14] United States v. Smith, 16 C.M.A. 274, 36 C.M.R. 430 (1966).

[15] United States v. Phillippy, 3 M.J. 523, 525 (A.F.C.M.R. 1977), *petition denied,* 3 M.J. 300 (C.M.A. 1977).

[16] Clausen, *supra* note 6, at 154.

[17] House Armed Svcs. Comm., Military Justice Act of 1983, H. Rep. No. 549, 98th Cong., 1st Sess. 19, *reprinted in* 1983 U.S. Code Cong. & Ad. News 2177, 2185.

[18] UCMJ art. 69(c).

[19] *Id.;* R.C.M. 1201(b)(4).

[20] UCMJ art. 69(c); R.C.M. 1201(b)(4).

[21] UCMJ arts. 66, 67.

[22] R.C.M. 1203(c)(2), 1204(c).

[23] United States v. Palozolo, 39 C.M.R. 704 (A.B.R. 1968).

[24] R.C.M. 810(d); Manual for Courts-Martial, United States, 1969 (Rev.), para 81d.

[25] S. Rep. No. 53, 98th Cong., 1st Sess. 23, 24 (1983).

[26] R.C.M. 810(d)(2).

[27] *Id.*

[28] United States v. Cavalier, 17 M.J. 573 (A.F.C.M.R. 1983). *See also* United States v. Smith, 12 C.M.A. 595, 31 C.M.R. 181 (1961), United States v. Kelly, 5 C.M.A. 259, 17 C.M.R. 259 (1954), and United States v. Sippel, 4 C.M.A. 50, 15 C.M.R. 50 (1954).

[29] 17 M.J. 573 (A.F.C.M.R. 1983).

[30] *Id.* at 578.

[31] UCMJ arts. 60, 66, 67, and 69.

which there may well be an admissible substitute.[32] The more difficult question has been whether this substitute evidence had to exist at the time the rehearing was ordered. One writer[33] has theorized that it did have to exist at that time. In *United States v. Johnson,*[34] the court opined that substitute evidence of a documentary nature, memorializing a fact to be recorded (here it was forms used to account for personnel) need not exist prior to or at the time the rehearing is ordered. The theory was that the "information contained in the document existed, *or was known* at the time the rehearing was ordered."[35] It was immaterial that the document itself was not prepared until several days later. Johnson had been convicted using incompetent hearsay evidence. New documentary evidence was prepared subsequent to the convening authority's order for a rehearing. The defense, relying heavily on the Clausen article,[36] argued that the documentary evidence had to exist at the time the rehearing was ordered. The court found support for its decision in a Court of Military Appeals case[37] in which a rehearing was ordered after the government averred that the testimony of government agents who handled certain contraband would be available as a substitute for inadmissible chain-of-custody documents. As in *Johnson* the facts existed, but the testimony (evidence) was not in being.[38]

One last point concerning rehearings deals with the situation in which the accused, who pled guilty at the original trial, brings up matters inconsistent with his plea during a rehearing on sentence only. In *United States v. Barfield,*[39] the accused brought up matters inconsistent with his plea, but the inconsistent matters did not rise to the level of making the plea improvident. The court noted that the military judge's actions were limited by his mandate from the appellate court. If a rehearing was for sentence only, then the trial court would have no authority to vacate the previous plea of guilty or to proceed with the case as though a plea of not guilty had been entered.[40] The only remedy for the judge when the plea is found to be improvident[41] would be to suspend the proceeding and report the matter to the authority ordering the rehearing. This would be of little use in a situation such as *Barfield*[42] where only matters inconsistent with the plea were raised.

III. DuBay Proceedings

The *DuBay*[43] proceeding is a convenient tool used by appellate courts to gather information, not in the record, which is needed to make a ruling in a case. The proceeding has been called by various names, *DuBay* hearing,[44] *DuBay rehearing,*[45] *a DuBay*-type proceeding,[46] a limited rehearing,[47] and a limited *DuBay*-type hearing.[48] Regardless of its designation, its function has remained the same: to get information before the appellate court. One reason for the various designations is that it is not a hearing provided for in the UCMJ or the MCM.

In *DuBay,* the issue before the court was whether the convening authority violated UCMJ art. 37 (command influence), with respect to findings and sentence, or sentence alone, in a group of cases tried by general courts-martial appointed by him. The appellate court determined that affidavits would be unsatisfactory under the circumstances and ordered the case be returned to a convening authority other than the one who appointed the courts. While the term "*DuBay* hearing" has come to mean a limited rehearing of sorts, the court actually remanded the case for another trial with instructions for the law officer to order an out-of-court hearing.[49] The court then gave the following guidance:

> He [the law officer] will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon. If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines command control did not exist, he will return the record to the convening authority . . . .[50]

The record was then to progress through the normal UCMJ review process. The hearing was limited to a certain extent, but the action that could have been taken after the hearing

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[32] United States v. Johnson, 10 M.J. 556, 558 (N.C.M.R. 1980).

[33] Clausen, *supra* note 6, at 159–60.

[34] 10 M.J. 556 (N.C.M.R. 1980).

[35] *Id.* at 559 (emphasis added).

[36] Clausen, *supra* note 6.

[37] United States v. McKinney, 9 M.J. 86 (C.M.A. 1980).

[38] *Johnson,* 10 M.J. at 559.

[39] 2 M.J. 136 (C.M.A. 1977).

[40] *Id.* at 137.

[41] R.C.M. 810(a)(2)(B).

[42] 2 M.J. 136 (C.M.A. 1977).

[43] United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[44] United States v. Villenes, 13 M.J. 46 (C.M.A. 1982).

[45] United States v. Hounslea, 6 M.J. 814 (A.F.C.M.R. 1978).

[46] United States v. Martin, 4 M.J. 852 (A.C.M.R. 1978).

[47] United States v. Craig, 4 M.J. 141 (C.M.A. 1977).

[48] United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

[49] *Id.* at 149, 37 C.M.R. at 413.

[50] *Id.*

was not. The court further noted that the convening authority could "take appropriate action under the Code . . . if he deems a rehearing on the issue of command control impracticable."[51] This guidance is closer to action taken in a rehearing than in a "limited hearing."

From these humble beginnings the *DuBay* proceeding has evolved into an often used procedure to resolve a myriad of issues. While initially its parameters were not accurately defined, it is now generally recognized that a *DuBay* hearing is not a rehearing or a trial de novo to redetermine the accused's guilt. It is a proceeding utilized to gather additional evidence before determining an issue presented to the appellate tribunal.[52] This does not mean, however, that there is no confusion concerning the limits of the hearing. In *United States v. Roberts*,[53] a *DuBay* hearing was ordered to inquire into the sanity of the accused at the time of the offense. After the hearing, the military judge issued detailed findings of fact and conclusions of law—all of which went to the ultimate issue of mental responsibility. This was not the issue to be resolved by the military judge at the hearing, but rather was the issue to be decided by the appellate court.

Other matters which distinguish a *DuBay* proceeding from a rehearing are the personnel present and the choices of the accused. At a rehearing, an accused may insist on a trial by members, even though he had been tried originally by judge alone, and vice versa. Conversely, at a *DuBay* proceeding, members are not present, and it is not a jurisdictional prerequisite that members be appointed. The counsel present at the *DuBay* hearing will be counsel appointed by the appropriate authority. There is no right to have the appellate defense counsel appointed and it is not interference with the attorney-client relationship when he or she is not.[54] This is because the *DuBay* proceeding is not part of the appellate function; it is an extension of the original trial proceeding.[55] Further, it is not error when a convening authority does not appoint counsel for the accused while the convening authority is determining whether to hold a *DuBay* hearing or take some other action mandated by the appellate court.[56]

Generally, when a case is returned for a *DuBay* proceeding, the lower reviewing authorities are authorized to make any disposition appropriate with their statutory powers, *i.e.*, set aside the findings and sentence, order a rehearing, or dismiss the charges. Although this is the norm, it does not appear that the Court of Military Appeals views this as a requirement. In *United States v. Williams*,[57] the accused was charged with kidnapping under a statute which required the offense to be committed within the special maritime and territorial jurisdiction of the United States.[58] Because there was no evidence as to the nature of the jurisdiction at the place where the kidnapping occurred, the court returned the case to The Judge Advocate General of the Army with instructions to return it to the convening authority for referral to a military judge. The military judge was to hold a hearing to determine specific matters relating to the boundaries and jurisdiction of the place of the offense. The court further directed:

> The military judge will take testimony and receive such documentary evidence as he deems relevant to the above matters. At the conclusion of the proceedings he will enter findings of fact and conclusions of law thereon. After the record is authenticated *it will be returned directly to the Court for further action.*[59]

The subject matter for *DuBay* hearings is almost unlimited. In addition to those uses discussed earlier, the *DuBay* hearing has been used to determine factors which might explain ineffective assistance of counsel,[60] whether the accused was prejudiced by not having access to an informant,[61] the reasons for post-trial delay in a case,[62] and if the accused understood his rights to counsel.[63] The *DuBay* proceeding has also been recognized by the federal courts as an effective tool in the military appeals process.[64]

IV. Post-Trial Proceedings

A. Proceedings in Revision

A proceeding in revision is a useful tool if there is an apparent error or omission in the record or if the record shows an improper or inconsistent action by a court-martial with respect to findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.[65] There are definite things that cannot be considered at a proceeding in revision. It cannot:

> (1) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

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[51] *Id.*

[52] United States v. Roberts, 18 M.J. 192, 193 (C.M.A. 1984).

[53] *Id.*

[54] United States v. Martin, 4 M.J. 852 (A.C.M.R. 1978).

[55] United States v. Flint, 1 M.J. 428 (C.M.A. 1976).

[56] United States v. Jacobsen, 39 C.M.R. 516 (A.B.R. 1968).

[57] 14 M.J. 428 (C.M.A. 1983).

[58] 18 U.S.C. § 1201(a)(2) (1976).

[59] United States v. Williams, 14 M.J. 428, 429 (C.M.A. 1983) (emphasis added).

[60] United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982).

[61] United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980).

[62] United States v. Lucy, 6 M.J. 265 (C.M.A. 1979).

[63] United States v. Vasquez, 19 M.J. 729 (N.M.C.M.R. 1984).

[64] Scott v. United States, 586 F. Supp. 66 (E.D. Va. 1984).

[65] UCMJ art 60(e)(2).

(2) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article; or

(3) increase the severity of some article of the sentence unless the sentence prescribed for the offense is mandatory.[66]

A major advantage of a proceeding in revision is that it allows correction of defects early on in the review process. This expedites the appeal process because the appellate court does not have to send the case back for a rehearing. It is a great saver of both time and resources. Like a *DuBay* proceeding, it is not a second trial or rehearing, but a continuation of the original trial.[67] If the error is discovered early enough a proceeding in revision can be used in lieu of a rehearing.[68] This requirement of early recognition of errors is the major disadvantage of the proceeding. The convening authority must direct the proceeding in revision before taking initial action on the case, unless authorized to do so at a later time by a reviewing authority.[69] In *United States v. Carruth,*[70] the court held that a post conviction hearing to ascertain, on the record, whether there was a pretrial agreement was improper because it was held after the convening authority had acted on the case, and the accused was not present. Even though the case was a pre-MCM, 1984 case, the outcome would be the same today.

While the MCM, 1984 (and earlier MCMs) allows the convening authority to order the proceeding in revision, it has long been recognized that the court-martial may be reconvened at the suggestion of the prosecutor or on the initiative of the military judge.[71] The MCM, 1984, now specifically provides that the military judge may order a proceeding in revision at any time before the record is authenticated.[72] This makes sense considering the intended purpose of the proceeding, *i.e.*, correction of the record to reflect unintended omissions, to clarify ambiguities, and to correct improper and illegal sentence announcements. This provision has great potential to be a time saver.

Although proceedings in revision have been used for various reasons, the key is that the proceeding cannot materially prejudice the substantial rights of the accused. This can sometimes be a difficult call to make. Normally a proceeding may not be used to correct an instructional error such as failure to instruct on the elements of an offense.[73] The court in *United States v. Staruska,*[74] however, found that the judge's instructions on reconsideration, given in a proceeding in revision, were not prejudicial to the rights of the accused because the instructions related to a potential situation that did not materialize.[75] A proceeding in revision has been recognized to be appropriate to correct deficiencies in plea bargaining inquiries,[76] to correct a mistake in announcing sentence,[77] and to ensure the accused understood his or her rights to counsel.[78]

Because a proceeding in revision is merely a continuation of the trial, the members must be present if the original trial was before members and the particular subject matter requires the presence of members. The proceedings are not invalidated as long as at least five members are present in a general court-martial, and at least three members are present in a special court-martial.[79]

B. Article 39(a) Sessions

With the implementation of MCM, 1984 came the administrative recognition that military judges have authority to order post-trial Article 39(a) sessions.[80] It is ironic that in *DuBay* the limited power of the military judge was recognized. Addressing the round-about method of getting the command influence issue before the law officer, that court wrote:

> Normally, collateral issues of this type would, on remand in the civil courts, be settled in a hearing before the trial judge. The court-martial structure, under the Uniform Code of Military Justice, however, is such that this cannot be accomplished. Accordingly, it is necessary to refer the matter to a court as such, although it is to be heard by the law officer alone.[81]

Rule for Courts-Martial (R.C.M.) 1102 recognizes the trend toward approval of greater post-trial responsibilities of the military judge. The Rule appears to have developed from a group of cases from the Court of Military Appeals. This proceeding is no different from the proceedings discussed earlier in that it is difficult at times to accurately define what the post-trial proceeding actually is. In *United*

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[66] *Id.*

[67] United States v. Steck, 10 M.J. 412 (C.M.A. 1981).

[68] *Id.*

[69] R.C.M. 1102(d).

[70] 6 M.J. 184 (C.M.A. 1979).

[71] United States v. Roman, 22 C.M.A. 78, 46 C.M.R. 78 (1972).

[72] R.C.M. 1102(d).

[73] United States v. Worsham, 10 C.M.R. 653 (A.F.B.R. 1953).

[74] 4 M.J. 639 (A.F.C.M.R. 1977).

[75] *Id.* at 641.

[76] United States v. Steck, 10 M.J. 412 (C.M.A. 1981).

[77] United States v. Hollis, 11 C.M.A. 235, 29 C.M.R. 51 (1960).

[78] United States v. Barnes, 21 C.M.A. 169, 44 C.M.R. 223 (1972).

[79] R.C.M. 1102(e)(1)(A)(i).

[80] R.C.M. 1102.

[81] *DuBay,* 17 C.M.A. at 149, 37 C.M.R. at 413n.2 (1967).

States v. Mead,[82] the military judge failed to take judicial notice of a regulation which was the basis for the offense. The convening authority directed a proceeding in revision. The court held that judicial notice could be taken of a general service regulation under these circumstances. Although the court designated it a proceeding in revision, it appears that under R.C.M. 1102 it could now be designated as either a proceeding in revision or a post-trial Article 39(a) session. Of course, just as in *Mead,* it would have to be a judge alone case.

The judge in *United States v. Brickey*[83] was faced with a slightly different problem. The defense counsel discovered after trial but before the record had been authenticated that the trial counsel withheld information impacting on the credibility and competency of a key government witness. He made a request for a "Post-Sentence Article 39(a) Session," basically asking the judge to conduct an inquiry, hear evidence, make findings of fact, enter conclusions of law, and either order relief or forward the record to the convening authority to do so. The military judge decided that the request did not qualify as a proceeding in revision because new evidence could not be presented. It could not be a rehearing because a rehearing could not be held prior to the convening authority's disapproval of findings and sentence. Finally, the judge said it was not a valid issue for an Article 39(a) session. The Court of Military Appeals opined that Article 39(a) allows the military judge to call the court in session without the presence of members. As there was no express limitation on the stage of the proceedings to which it applied, the court assumed that Congress meant for the judge to possess post-trial powers customarily enjoyed by his or her civilian counterpart.[84] The court had trouble designating exactly what the proceeding would be called, a proceeding in revision, a *DuBay* hearing, or something else. In analyzing those procedures, the court said in this situation there was no reason the military judge could not conduct a hearing on his or her own motion prior to authentication.

Further confusion as to what to call these post-trial hearings was evident in *United States v. Witherspoon.*[85] The court recognized that the proper procedure to determine whether a court member's visit to the crime scene was prejudicial to the accused was a hearing to be held by the military judge, *i.e.,* an Article 39(a) session. In his concurring opinion, Chief Judge Everett noted that the convening authority could have ordered a *DuBay* hearing or the military judge could have held a hearing on his own initiative or upon motion by the parties.[86]

The end result is that R.C.M. 1102 removes any doubt as to whether a military judge has the authority to order a post-trial Article 39(a) session. The only questions remaining are to what extent and how this post-trial Article 39(a) session can be used. There is no procedural guidance given. The only limitations are that it cannot be for:

> (1) reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;
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> (2) reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the Code; or
>
> (3) increasing the severity of the sentence unless the sentence prescribed is mandatory.[87]

Courts will likely encourage its use for reasons of judicial economy. Defense counsel will likely use it because the "sky is the limit" as far as matters which can be raised. Conversely, the government will likely not want to use it because it takes up the time of the trial counsel, court reporter, witnesses, *etc.,* it will add to processing time, and it costs money. Trial judges may be reluctant to utilize the procedure at first because it is so new and ill-defined.

V. Conclusion

The state of the law concerning rehearings has remained relatively consistent for a number of years. The areas which still seem to cause the most problems are determining what is "punishment in excess of or more severe than" that punishment adjudged at trial and the existence of substitute evidence at the time the rehearing is ordered. It is questionable whether the other Courts of Military Review would follow the Navy if they were dealing with non-documentary evidence.

The fact that The Judge Advocates General now have authority to order rehearings should save time in the appeals process and result in cases going before the appellate courts in a greater degree of completeness. Another advantage of these types of rehearings is that the issues to be litigated will be addressed while fresh in the minds of the witnesses (at least fresher than waiting for appellate courts to order a rehearing).

Regardless of how a *DuBay* hearing is designated, it will still be used to assist the appellate courts in properly making decisions on the issues. With the changes discussed above it would not be surprising to see the number of *DuBay* proceedings decrease.

There will still be some confusion in post-trial hearings, given the difficulty in determining exactly what a hearing after trial should be called. This difficulty should be lessened, however, because of the authority of the military judge to hold Article 39(a) sessions after trial. Again, this is an action which will contribute to judicial economy in the appellate process. The results may not be immediate because of the uncertainty of the procedural process and the

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[82] 16 M.J. 270 (C.M.A. 1983).

[83] 16 M.J. 258 (C.M.A. 1983).

[84] *Id.* at 263.

[85] 16 M.J. 252 (C.M.A. 1983).

[86] *Id.* at 255. *See also* United States v. Carr, 18 M.J. 297 (C.M.A. 1984).

[87] R.C.M. 1102(c).

limits on the kinds of issues which can be addressed. Initially there will probably be some appellate litigation in this area, if for no other reason than to establish the parameters of the judge's authority.

"Fraternization" and the Enlisted Soldier: Some Considerations for the Defense

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I. Introduction

Prosecution of enlisted soldiers for heterosexual relationships with soldiers of a different grade has dramatically accelerated since the integration of female soldiers into the Army in 1978.[1] Defense counsel for enlisted soldiers accused of fraternization offenses must distinguish between criminal associations and relationships and those which are merely unwise or inappropriate. This article will enable defense counsel to make this important distinction by discussing present policies and principles governing fraternization prosecutions and suggesting specific defense tactics. The article concludes by exploring the current trends in this field through summaries of the more important cases. This article will not address the prosecution of officers for fraternization with enlisted soldiers in violation of Article 134, Uniform Code of Military Justice[2] or lawful general regulations.

II. The Historical Development of Fraternization Offenses Involving Enlisted Soldiers

"Fraternization" by enlisted soldiers was not historically regarded as an offense under the Uniform Code of Military Justice.[3] Today, both case law[4] and the 1984 Manual for Courts-Martial[5] make clear that enlisted soldiers may not be prosecuted for "fraternization" in violation of Article 134, but that they may be prosecuted for violating "otherwise lawful general regulations" which proscribe certain unofficial contacts between members of different grades. As increasing numbers of women have enlisted, the number of reported cases involving prosecution of enlisted soldiers for "fraternization" has significantly increased.[6] Without exception, these have been prosecutions of senior male enlisted soldiers for contacts with female trainees or junior female soldiers which were regarded as potentially exploitative of the junior soldier. In theory, however, the broad language of some local regulations[7] permits prosecution of enlisted soldiers for "fraternization" with officers and with other enlisted soldiers in nonexploitative situations.

The traditional proscription of "fraternization," which was considered an "officers only" offense,[8] was grounded upon the command and leadership role of officers and the notion that "familiarity breeds contempt."[9] The gravamen of the offense was an association between an officer and enlisted soldier on the basis of military equality in a manner which would adversely affect or prejudice good order and discipline.[10]

It is not clear when training installations became sufficiently concerned about potential abuses by enlisted cadre and permanent party soldiers to adopt punitive regulations circumscribing their relationships with trainees and receptees.[11] One of the earliest reported cases discussing enlisted fraternization involved a violation of a Fort Dix regulation promulgated less than one year after abolition of the Women's Army Corps and integration of female soldiers into the Army.[12] Changes in the Army's gender composition eventually led to the promulgation of a new version of Army Regulation 600–20 in October, 1980.[13] That version, which is still in effect, states, in pertinent part:

> Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good

[1] The author's research disclosed no reported appellate military cases regarding enlisted fraternization involving heterosexual relationships prior to 1978.

[2] Uniform Code of Military Justice, art. 134, 10 U.S.C. § 934 (1982) [hereinafter cited as UCMJ].

[3] Colonel Winthrop's treatise cites "demeaning himself by an officer with soldiers or military inferiors" as an example of conduct unbecoming an officer and a gentleman. W. Winthrop, Military Law and Precedents 716 (2d ed. 1920 reprint). While gambling by an NCO with enlisted members is cited as an offense under the general article, *id.* at 730, Winthrop makes no mention of any offense or custom of the service proscribing other associations between NCOs and members of other grades.

[4] United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984). On 2 March 1984, the Army Court of Military Review granted a motion for reconsideration of its decision in *Stocken*, and subsequently reaffirmed that decision in an unpublished memorandum opinion.

[5] Manual for Courts-Martial, United States 1984, Part IV, para. 83 analysis [hereinafter cited as MCM, 1984].

[6] United States v. Horton, 14 M.J. 96 (C.M.A. 1982); *United States v. Stocken*; United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983); United States v. Goodyear, 14 M.J. 567 (N.M.C.M.R. 1982); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981).

[7] As an example, a soldier of any grade could be charged with violating Fort Leonard Wood Reg. No. 600–2 (3 Mar. 1982), which proscribes "any personal social relationship . . . between members of different grades" "by its nature contrary to good order and discipline, or of a nature to bring discredit upon the Armed Forces." That regulation cites socializing between members of different grades in the presence of lower ranking enlisted members as an example of relations contrary to good order and discipline. Its validity is questionable after the decision in United States v. Martin, CM 445343 (A.C.M.R. 31 Jan 1985), in which the court set aside a finding of guilty based upon the above-quoted language, holding that it did not "identify with sufficient particularity the conduct that is prohibited." *Id.*, slip op. at 1.

[8] *See* Winthrop *supra* note 3 at 716; Letter 600–84–2, HQDA, 23 Nov 84 subject: Fraternization and Regulatory Policy Regarding Relations between Members of Different Ranks, Enclosure at 1–2 [hereinafter cited as HQDA letter].

[9] See HQDA letter, *supra* note 8, Enclosure at 2.

[10] *Id. See* MCM, 1984, Part IV, para. 83 (discussion of the Article 134 offense of fraternization) *supra* note 5, and the Court of Military Appeal's recent discussion of the offense in United States v. Johanns, 20 M.J. 155 (C.M.A. 1985).

[11] All of the reported cases cited *supra* note 6, were decided in the 1980's.

[12] United States v. Heard, 12 M.J. 563 (A.C.M.R. 1981).

[13] Dep't of Army Reg. No. 600–20, Personnel-General Army Command Policy and Procedures (15 October 1980) [hereinafter cited as AR 600–20].

order, discipline, and high unit morale. Such relationships will be avoided. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between service members of different rank—

(1) Cause actual or perceived partiality or unfairness,

(2) Involve the improper use of rank or position for personal gain, or

(3) Can otherwise reasonably be expected to undermine discipline, authority, or morale.[14]

Although there are no TRADOC or FORSCOM supplements to AR 600–20, the regulation has been widely supplemented and implemented at the installation level.

The 1984 Manual for Courts-Martial identified and clarified Army policies underlying the prosecution of fraternization offenses.[15] The new Article 134 offense applies only to officers, but the general purpose of proscriptions of officer fraternization should be equally applicable to prosecutions of enlisted soldiers under Article 92. The Manual provides:

> Not all contact of association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced . . .[16]

Arguably, local fraternization regulations applied to enlisted soldiers to proscribe conduct which could not cause these pernicious effects serve no valid military purpose and are not lawful general regulations within the meaning of the Manual for Courts-Martial.[17]

The Department of the Army sought to further clarify the service's fraternization policy in light of the 1984 Manual. On 29 November 1984, the Deputy Chief of Staff for Personnel for the Department of the Army distributed a letter[18] which sets forth implementation guidelines for AR 600–20. The letter targets "social, commercial or duty relationships" between individuals in the same chain of command and relationships where there is the *possibility* of the senior soldier influencing personnel actions, assignments, or other benefits or privileges of the junior soldier.[19] The letter notes:

> Commanders' actions should not result in an unfavorable evaluation or efficiency report, relief from command, or other significant adverse action unless there can be demonstrated and documented either actual favoritism or the improper exploitation of rank or position by the superior, or some actual or clearly predictable adverse impact on discipline, authority, or morale. The adverse action must address the behavior that results from the relationship, or the actual or clearly predictable results of the relationship, and not merely the relationship itself.[20]

As to relationships which merely have the potential for creating an appearance of partiality or preferential treatment, the letter states, "counselling the individuals concerned is the most appropriate initial action,"[21] and advises that "AR 600–20, paragraph 5–7*f*(3), will be changed to clarify that an actual or clearly predictable adverse impact upon discipline, authority, or morale is required under this paragraph."[22]

The letter contains a twelve-page enclosure, entitled "Relationships between Soldiers of Different Ranks in the Army," which explains the evolution of the Army's current policy.[23] The enclosure gives twelve factual situations, some involving enlisted personnel relationships, with suggested resolutions. The examples illustrate an important point about "fraternization" which should be remembered and emphasized by trial defense counsel in appropriate cases. While a particular relationship may be undesirable, unwise, or inappropriate, it might not be properly categorized as unlawful. As the enclosure notes: "[I]n fact, any relationship which diminishes or predictably will diminish the ability of the ranking member to influence a subordinate through the exercise of leadership or command is a relationship not desired in the military. However, such relationships are not always criminal."[24]

The trial defense counsel should argue that the purposes of the fraternization policy stated in the HQDA letter and the 1984 Manual are exhaustive. If a relationship does *not* compromise the chain of command, result in partiality or favoritism or the appearance thereof, or otherwise have a very clear prejudicial effect on good order and discipline or

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[14] AR 600–20, para. 5–7*f*. This regulation was still effective as of 30 Aug. 1985.

[15] MCM, 1984, Part IV, para. 83.

[16] *Id.*

[17] MCM, 1984, Part IV, paras 16 and 14c(2)(a)(iii).

[18] HQDA letter, *supra* note 8, para. 3c.

[19] *Id.* para. 3*b*.

[20] *Id.*

[21] *Id.*

[22] *Id.* para. 3c, No clarifying change had been issued at the time this article was written.

[23] HQDA letter, *supra* note 8, Enclosure at 1.

[24] *Id.*

morale, it should not be criminal, regardless of the breadth of an applicable local regulation.

III. Defending Officer-Enlisted "Fraternization" Offenses

While there are no reported cases involving prosecution of enlisted soldiers for fraternization with officers, such prosecution is not outside the realm of possibility. For example, the HQDA letter[25] cites a situation in which a female enlisted clerk sought to seduce her supervisor (of unspecified rank) to secure favorable treatment. It is quite possible that this supervisor could be an officer. Another example would be a situation in which an enlisted cadre soldier is charged with fraternization with an officer student. Several training installation regulations would, by their language, appear to criminalize non-duty relationships between such personnel.[26]

The trial defense counsel whose enlisted client is charged under Article 92 for fraternization with an officer should argue that the drafters of the 1984 Manual did not contemplate prosecution of enlisted soldiers for fraternization with officers. The purpose of officer-enlisted fraternization rules is to preserve the special status of the officer by placing controls upon the *officer's* conduct. By limiting the application of the Article 134 offense of fraternization to officers who associate with enlisted soldiers, and by omitting reference to enlisted soldiers' association with officers in the list of *other* conduct prejudicial to good order and discipline which is stated in the manual[27] the drafters arguably intended to preclude criminal prosecutions of enlisted soldiers in those situations.

IV. Defending Cases Involving "Fraternization" Between and Among Enlisted Soldiers

Most cases will involve relationships between and among enlisted personnel. In evaluating the conduct of an enlisted client charged with having an improper relationship with another enlisted soldier, the defense counsel should ask:

1. Is the offense properly charged under Article 92 of the Uniform Code of Military Justice? Defense counsel should be aware that under *United States v. Stocken*,[28] and the 1984 Manual, an enlisted soldier may not be charged with "fraternization" in violation of Article 134. Likewise, an enlisted soldier cannot be convicted under Article 92 for violating a local regulation which merely restates Article 134 by proscribing "fraternization" which is "service-discrediting or prejudicial to good order and discipline."[29]

2. Is the regulation in question an otherwise lawful general regulation? Counsel should pay particular attention to:

a. The timing and applicability of the regulation—was it in effect at the time of the alleged incident? Was it properly published so that the accused had actual or constructive knowledge thereof? Recent cases suggest that enlisted soldier must have *actual* knowledge of fraternization regulations.[30]

b. The punitive nature of the regulation—does it specify that violations may be punished under the UCMJ? Remember that AR 600–20 itself is not punitive and that an accused may not be prosecuted for "fraternization" absent some other lawful and punitive regulation.

c. The language of the regulation—is it sufficiently clear and definite to identify the conduct which is proscribed? Or is it so lacking in specificity as to be unconstitutionally vague? Did the client have notice of the regulation? If so, did he or she have reason to believe or suspect that his or her conduct might be subject to its prohibitions? A regulation is unconstitutionally vague if it did not give the accused fair notice that the conduct was prohibited.[31] Insofar as there is no custom of the Army prohibiting enlisted "fraternization" (as opposed to officer-enlisted fraternization), in light of the Court of Military Appeals' decision in *United States v. Johanns*,[32] counsel should seriously consider a vagueness challenge to any local "fraternization" regulation which does not very precisely and explicitly proscribe the conduct alleged.

d. The purpose of the regulation—is it lawful, *i.e.*, is it legitimately related to a valid military purpose of accomplishing a particular mission, maintaining good order and discipline, or promoting morale? Orders or regulations lacking such a purpose are not "lawful" and may not interfere with a soldier's private rights or personal affairs.[33]

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[25] *Id.*

[26] *See e.g.*, Fort Jackson Reg. No. 600–5; Fort Leonard Wood Reg. No. 600–2 (3 Mar. 1982).

[27] MCM, 1984, app. 21, para. 83, discusses the offense of fraternization by officers with enlisted members. That paragraph states:

> *Introduction.* This paragraph is new to the Manual for Courts-Martial, although the offense of fraternization is based on longstanding custom of the services, as recognized in the sources below. Relationships between senior officers and junior officers and between noncommissioned or petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline. This paragraph is not intended to preclude prosecution for such offenses.

[28] 17 M.J. 826 (A.C.M.R. 1984).

[29] *See* United States v. Martin, CM 445343 (A.C.M.R. 31 Jan. 1985), which, citing *Stocken*, held that a regulation proscribing "social relationships . . . contrary to good order and discipline, or of a nature to bring discredit upon the Armed Forces," did not identify with sufficient particularity the prohibited conduct. *Id.*, slip op. at 1.

[30] *See, e.g.*, United States v. Johanns, 20 M.J. 155 (C.M.A. 1985); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981).

[31] *See* Kolender v. Lawson, 461 U.S. 352 (1983); United States v. Cannon, 13 M.J. 777 (A.C.M.R. 1982), *petition denied*, 14 M.J. 226 (C.M.A. 1983) and cases cited therein.

[32] 20 M.J. 155 (C.M.A. 1985).

[33] *See* MCM, 1984, Part IV, paras. 14c(2)(a) and 16.

e. The source of the regulation—was it promulgated by an officer with general court-martial jurisdiction, or a general officer in command? Is it consistent with policy established by higher authorities? Local regulations inconsistent with AR 600–20 or the HQDA policy letter should be attacked as *ultra vires*. For example, a local regulation mandating criminal prosecution under circumstances where the HQDA policy letter suggests "counseling" or other administrative action should be attacked as inconsistent with Department of the Army policy.

f. The effect of the regulation upon other rights—does it infringe on constitutional or statutory rights of the accused? In *Johanns*, the Court of Military Appeals noted:

> Under the First Amendment and also in light of the Supreme Court's interpretation of Article I, Section 8, Clause 14 of the Constitution . . . some social contacts may be constitutionally protected . . . . On the other hand, restrictions of contacts—male/female or otherwise—where there is a direct supervisory relationship, can be imposed. However, we need not speculate further about the legality of hypothetical directives that may be issued at some future time.[34]

Counsel should treat this language as an invitation to assert constitutional rights as a barrier to "fraternization" prosecutions, even though the void-for-vagueness standard in the military has been limited to the economic standard of "notice."[35] Counsel should argue that where fundamental constitutional guarantees are concerned, only the "least intrusive alternative" necessary to accomplish the legitimate military objective is acceptable. Some rights which may be affected by fraternization regulations include:

> The freedom of speech. While most regulations will not be so broad as to proscribe simple communication between enlisted members of different grades, some regulations *have* been applied this broadly. For example, in *United States v. Adams*,[36] the court members found, by exceptions and substitutions, that the accused, a training NCO, had fraternized with a trainee in his unit by, *inter alia*, sending her a Christmas card signed simply, "SSG Adams."
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> The freedom of association. By their nature, fraternization regulations restrict the freedom of association. Wherever possible, counsel should argue that the regulatory restrictions on this basic freedom are unnecessarily great in light of the asserted military purpose.
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> The right to privacy. The Army Court of Military Review has rejected the argument that the right to privacy protects sexual liaisons between "supervisors and subordinates" because such relationships are "fatal to discipline."[37] What about sexual relationships between soldier's of different grades who have no supervisory link? Because the Court of Military Appeals has not yet fully addressed the issue, counsel should continue to argue that the right of privacy protects consensual, private, nondeviant, heterosexual relations between adults, even soldiers of different rank, where there is no direct supervisory relationship between them. This argument should be employed even in cases arising in training environments because, despite the important government interest in regulating trainee-cadre and instructor-student relationships, the Court of Military Appeals has not ruled that these persons have no right of privacy.

3. Is the regulation and its application in the particular case consistent with the intent of the drafters of the 1984 Manual and with the HQDA letter of November 29, 1984? For example, prosecution of a newly promoted sergeant who continues to socialize with his or her former peers who are corporals is not consistent with the Army policy stated in the HQDA letter.

4. How does the regulation compare to other regulations which the military appellate courts have considered? A very specific regulation proscribing only certain well-delineated relationships between trainees and their supervising cadre, when those relationships are by their nature likely to involve exploitation of the junior soldier, would be fairly impervious to attack.[38] On the other hand, a vaguely-worded regulation proscribing "social relationships or associations" between "soldiers of different rank" which are "to the prejudice of good order and discipline" or "committed in the presence of lower-ranking enlisted soldiers" would be too vague to be upheld.[39]

5. What military purpose does the regulation serve, and to what environment has it been applied? Regulations proscribing social relations between cadre and trainees, whether on or off post, are likely to be upheld. Regulations proscribing certain personal relations between soldiers in the same rating chain also have a readily recognizable military purpose. Regulations proscribing relationships between soldiers of different grades and not in the same rating chain, however, in a noncombat, non-training environment, would not enjoy the same near-presumptive validity. As the Army Court of Military Review noted in *United States v. Stocken:*

> "Socializing" and "drinking alcoholic beverages" by themselves, are innocuous activities, occurring daily among enlisted persons of different grade in Noncommissioned Officer/Enlisted clubs on military installations throughout the world. Absent an allegation that it was unlawful, "smoking marijuana" states

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[34] 20 M.J. at 161 (citations omitted).

[35] Parker v. Levy, 417 U.S. 733, 756 (1974). Chief Judge Everett has noted that his economic standard "seems unnecessary" in matters affecting important personal rights and liberties of service members. *See* Everett, *Military Justice in the Wake of* Parker v. Levy, 67 Mil. L. Rev. 1, 5 (1975). Chief Judge Everett authored the majority opinion in *Johanns*.

[36] 19 M.J. 996 (A.C.M.R. 1985).

[37] *Id.* at 998.

[38] *See Id.*; United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981).

[39] United States v. Martin, CM 445343 (A.C.M.R. 31 Jan. 1985).

no offense. Finally, despite one's moral persuasions, fornication, in the absence of aggravating circumstances, is not an offense under military law .... [AR 600–20] adds nothing to military criminal law .... Nothing appellant allegedly did is criminal.[40]

6. Even if the regulation itself is invulnerable, does your client's case fit within the language of the regulation? Or is the regulatory language being stretched to cover a situation which its drafters did not fairly intend to proscribe? Should the government properly have prosecuted the incident as a different offense under another article, *e.g.*, as adultery, assault, sodomy, or indecent acts?

7. What is your client's grade, and what is the grade of the individual(s) with whom he or she allegedly "fraternized?" There is a greater military interest in regulating relationships between NCOs, who occupy a leadership role, and non-NCOs, than there is in regulating relationships among NCOs or among non-NCOs.

8. Most importantly, what are the merits of the case? Despite this academic discussion of regulatory purposes, most cases are won or lost on their merits; the appellate cases in which the appellants have achieved the greatest success were cases in which the government's evidence was deficient.[41] If the only witness to the alleged incident was the soldier with whom your client allegedly fraternized, is he or she credible? Are his or her statements consistent, or self-contradictory? Does he or she have a reputation for truthfulness, or untruthfulness?[42] Is there a motive to lie? Is he or she technically an accomplice?

V. An Overview of Military Case Law Addressing "Fraternization" Issues

Counsel representing clients accused of fraternization must be familiar with the case law. The following discussion serves only as a summary, and counsel should refer to the cases themselves when seeking to apply or distinguish them. Even if a case appears to be squarely on point, counsel should consider whether it has continued validity in light of more recent cases, the 1984 Manual and the HQDA policy letter. Of course, even if it is consistent with those authorities, counsel should, in an appropriate case, advocate for a change in the law.

The only enlisted fraternization case which the Court of Military Appeals has discussed in a full opinion was *United States v. Horton.*[43] In *Horton,* a male master sergeant at Fort Campbell, Kentucky, was found guilty of fraternization in violation of Article 134 by sleeping with two junior enlisted women in his unit. The Court of Military Appeals did not reach the question of whether enlisted soldiers could be prosecuted for fraternization under Article 134, however, because Horton had been discharged and had reenlisted before the charges were filed, depriving the court-martial of jurisdiction.[44]

The courts of military review have addressed the merits of fraternization cases more frequently. In one recent case, *United States v. Stocken,*[45] the Army Court of Military Review held that an NCO could not be convicted of fraternization under Article 134 where his conduct in socializing, drinking alcohol, smoking marijuana, and having sexual relations with junior enlisted women off post was not in violation of an otherwise lawful general regulation. In an opinion subsequently cited by the Court of Military Appeals in an officer fraternization case, *United States v. Johanns,*[46] Judge Yawn traced the history of fraternization as an officer offense and concluded: "Absent an otherwise lawful regulation prohibiting such behavior between a non-commissioned officer and an enlisted member of a lower grade, the appellant's conduct does not constitute the offense of fraternization nor has it ever been an offense under military law."[47]

The primary inquiry for the trial defense counsel, then, is whether the installation's fraternization regulation is "an otherwise lawful regulation." Counsel should compare the local regulation with the recognized permissible purpose of fraternization regulations, and employ the regulatory analysis suggested below.

In *United States v. Hoard,*[48] a male sergeant, a member of the permanent party, used trainees to clean and paint his quarters, socialized and drank with a female receptee, had

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[40] 17 M.J. 826, 829 (A.C.M.R. 1984) (citations omitted).

[41] *See* United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985) (setting aside specification alleging that the appellant had intercourse with a female trainee whose testimony was uncertain and self-contradictory and who had a poor reputation for truthfulness); United States v. Goodyear, 14 M.J. 567 (N.M.C.M.R. 1982) (setting aside conviction of chief petty officer for fraternization by having intercourse with female seaman recruit whose testimony was incredible).

[42] *United States v. Adams.*

[43] 14 M.J. 96 (C.M.A. 1982). The Court of Military Appeals found it unnecessary to address an enlisted fraternization issue in its disposition of United States v. Bishop, 18 M.J. 14 (C.M.A. 1984) (summary disposition).

[44] In *United States v. Clardy,* 13 M.J. 308 (1982), the Court of Military Appeals ruled that an early discharge for the purpose of reenlistment would not preclude courts-martial jurisdiction. This ruling was prospective only and did not apply to *Horton.*

[45] 17 M.J. 826 (A.C.M.R. 1984).

[46] 20 M.J. 155–161 (C.M.A. 1985).

[47] 17 M.J. at 829–30. SSG Stocken's offense occurred in 1981, when Fort Lee (a training installation) lacked a fraternization regulation. On 16 April 1984, HQ Quartermaster Center & Fort Lee Reg. No. 600–27 became effective. The regulation prohibited "fraternization" between permanent party and AIT personnel, officer students and AIT personnel, and officer and enlisted members. "Fraternization" was very broadly defined as "any actual or attempted personal relationships" between these categories of personnel, on or off post, which were "not required to accomplish the training mission." Although the regulation listed certain exempt, authorized activities such as use of the gymnasium and attendance at unit and sporting activities, it gave no examples of prohibited conduct. The result is that even a soldier who attends post-wide or unit activities or sporting events does so at his or her peril, as the regulation exempts only those activities which are "properly supervised and conducted in an orderly and professional manner." This regulation appears to be no more specific than the Article 134 violation for which SSG Stocken was convicted.

[48] 12 M.J. 563 (A.C.M.R. 1981).

sexual relations with another female receptee, and socialized with several trainees. He was convicted under Article 92 of violating a Fort Dix general regulation which proscribed certain specific misconduct between permanent party and trainees/receptees, including social contact, use "of trainees for personal gain or personal use," and socializing, "to include dating and any other unofficial personal association."[49] The court found that the regulation had the proper purpose of preventing trainees and receptees from potentially troublesome relationships and influences; upheld the regulation against an overbreadth challenge, saying that it regulated conduct and not mere expression; and upheld the regulation against a vagueness challenge, finding that Sergeant Hoard had demonstrated clear knowledge that his conduct was criminal. During the providency inquiry, he stated that he had warned the trainees of the dangers of them visiting his home. Thus, in determining whether a vagueness challenge against a fraternization regulation is appropriate, the trial defense counsel should seek to establish whether the client had notice of the regulation, and whether his or her conduct belied such knowledge or indicated an ignorance of the regulation.

In *United States v. Goodyear,*[50] the Navy Court of Military Review held that a seaman's conviction for fraternization rested upon the "singularly incredible" testimony of the alleged "victim" and set aside the conviction for insufficient evidence. Similarly, in *United States v. Adams,*[51] a majority of the court found the testimony of an emotionally impaired trainee with a reputation for untruthfulness insufficient to sustain the appellant's conviction for fraternization by having sexual intercourse with her, but held the evidence sufficient to sustain his conviction for socializing with, holding, and embracing her. The *Adams* court upheld Fort Jackson Regulation No. 600–5 as neither vague nor overbroad and found no right to privacy in sexual relations of the type alleged because they were "fatal to discipline."[52] The court set aside the findings because the military judge had failed to instruct the court members that conviction could not be based upon uncorroborated and uncertain accomplice testimony. Under the language of the regulation, trainees as well as cadre could technically be prosecuted, and the complainant's administrative discharge from military service prior to trial did not make her any less an accomplice.

The only reported case involving a fraternization conviction of an enlisted soldier other than a noncommissioned officer is *United States v. Moorer.*[53] Moorer was a Fort Gordon personnel clerk responsible for processing administrative discharges. He was convicted under Article 92 for requesting a date from a female trainee in return for expediting her discharge, and for suggesting monetary gratuities from male trainees as a method of expediting their discharges. The court upheld his conviction without discussing the validity of the Fort Gordon policy letter. The policy letter broadly prohibited "relationships or associations with soldiers in a training status which are prejudicial to good order and discipline of the Armed Forces," including "social fraternization . . . acceptance of gratuities . . . and sexual abuse" of trainees.[54]

The holding in an unpublished decision of the Army Court of Military Review, *United States v. Snowden,*[55] demonstrates the military interest in regulating relationships in the training environment. Sergeant First Class Snowden, a member of the permanent party at Fort McClellan, Alabama, was convicted, *inter alia,* of fraternization by having sexual intercourse with a female trainee. An installation regulation prohibited "fraternization/socializing to include dating and any other unofficial personal association between permanent party and trainee personnel." Examples of prohibited activities included:

> (1) Any type of sexual activity, including kissing, hugging, hand-holding or physical caressing.
>
> (2) Drinking of alcoholic beverages together.
>
> (3) Meeting privately for any purpose of entertainment; dining, recreation, sport, or intimacy.[56]

In upholding the regulation against a challenge that it was unconstitutionally overbroad and that it impermissibly burdened the freedom of association without a corresponding military need, the Army court noted:

> The regulation, it is true, does place restrictions on freedom of association which is guaranteed by the first amendment. But the right must be viewed in the context of a military training center. As the court in *Stanton v. Froehlke,* 390 F.Supp. 503, 506–07 (D.D.C. 1975) stated in rejecting a freedom of association argument: "Persons certainly do not forfeit constitutional protections upon entrance into the military. Still, the different character of military life and of the military community may require a restriction of certain conduct that is considered to adversely affect discipline and the proper performance of duties. While similar limitations might be offensive if applied to civilians, in the context of military life the prohibitions on specified types of fraternization serves a valid and necessary purpose."[57]

The court held that the prohibition was justified because of abuses, such as instructors' abuses of their positions, and

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[49] *Id.* at 569

[50] 14 M.J. 567 (N.M.C.M.R. 1982).

[51] 19 M.J. 996 (A.C.M.R. 1985). Judge Naughton dissented in part, finding the evidence insufficient to sustain the appellant's conviction under either specification.

[52] *Id.* at 998.

[53] 15 M.J. 520 (A.C.M.R. 1983).

[54] *Id.* at 523.

[55] CM 441695 (A.C.M.R. 29 Mar. 1983)

[56] Fort McClellan Reg. No. 632–1, para. 5 (28 Dec. 1979).

[57] *Snowden,* slip op. at 4.

consequential adverse impact upon morale which could otherwise result.[58]

Counsel should also be aware of the recent decision by the Court of Military Appeals in *United States v. Johanns,*[59] involving the prosecution of an officer for having sexual relations with female non-commissioned officers. The court found that "Captain Johanns lacked the notice from custom or otherwise which, even under the relaxed standard of review established in *Parker v. Levy, supra,* is constitutionally necessary to meet the due-process requirements of the Fifth Amendment."[60] The court acknowledged, however, that "clear directives as to permissible contacts . . . will obviate the issues present in this case."[61] The court reemphasized a recommendation made previously in *United States v. Pitasi*[62] that appropriate specific regulations to proscribe fraternization offenses be drafted.[63] Chief Judge Everett reiterated the importance of the notice standard which governs the constitutional void-for-vagueness doctrine in military law.[64]

VI. Conclusion

As the court in *Johanns* noted, the law of fraternization is still evolving. Standards have historically been uncertain and difficult to define and although there has been significant progress in this area, prosecutions of enlisted members for fraternization offenses under uncertain, poorly written regulations continues. Soldiers should not be punished for exercising their freedom of association, absent a clear and overriding military interest which has been expressed and made known to them in specific, understandable language. Where local regulations fail to meet minimal due process standards, trial defense counsel must be prepared to vigorously attack charges of "fraternization."

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[58] *Id.* at 5.

[59] 20 M.J. 155 (C.M.A. 1985).

[60] *Id.* at 161.

[61] Id.

[62] 30 C.M.A. 601, 608, 44 C.M.R. 31, 38 (1971).

[63] 20 M.J. at 160.

[64] *Id.* at 161.

Contract Law Note

Contract Law Division, TJAGSA

Termination for Convenience: Can the Government Back Out of a Bad Deal?

One feature which distinguishes government acquisitions from commercial transactions is the right of the government to terminate contracts for convenience, thereby avoiding a breach of contract and limiting the damages to which a contractor is entitled. As part of a convenience termination, contractor recovery is contractually limited to costs incurred, profit associated with the work performed, and settlement expenses.[1] The contractor does not receive anticipated profits on work not performed, which would be the measure of its damages for breach of contract under the common law. For obvious reasons then, contractors often try to characterize non-default terminations as government breaches, while the government contends they are actual or constructive terminations for convenience.

Jurisdiction to Consider Breach

Prior to 1 March 1979, the boards of contract appeals had jurisdiction only over claims arising under the contract.[2] Accordingly, even in an obvious breach situation, the boards, in an effort to fashion some remedy for the contractor, characterized government breaches as either a change for which the contractor could receive an equitable adjustment under the changes clause[3] or as a termination for convenience for which the contractor could receive a settlement under the terminations for convenience clause.[4] On the other hand, the Court of Claims had jurisdiction to consider claims both arising under and relating to the contract[5] and could, therefore, consider alleged breaches of the contract. With the passage of the Contract Disputes Act of 1978,[6] the boards were given the same jurisdiction as the Court of Claims and began to recognize breaches for what they were.

Bases for Convenience Terminations

Under the terminations for convenience clause, the government may terminate and avoid a breach whenever the contracting officer determines it to be "in the Government's interest."[7] A proper basis for a convenience termination has always been a change of circumstances of the bargain or expectations of the parties since the time of contract award (*e.g.*, decreases in the number of items needed or obsolescence of the items).[8] If the government were required to continue such contracts, unnecessary expenditures of tax dollars would result.

When the boards had only limited jurisdiction, terminations were found to be "for convenience" even when circumstances had not changed.[9] Although the Court of Claims always had jurisdiction to consider breaches, it also broadly interpreted the test that terminations for convenience were proper if "in the government's interest."[10] For example, in *Colonial Metals Company v. United States,*[11] the government at the time of award had actual or constructive knowledge that copper was available for prices lower than it was agreeing to pay as part of the contract. After award, the contracting officer terminated the contract to take advantage of better prices elsewhere. The court held this to be a valid termination for convenience and refused to pay the contractor anticipated profits for breach.

This broad construction has recently been modified. In 1982, the Court of Claims reversed itself and refused to exculpate the government from a breach in *Torncello v. United States.*[12] The contractor, Soledad, had won the aggregate award of a requirements contract to perform services at an installation. One service was to provide pest control, for which Soledad was to be paid $500 per call, an amount considerably higher than that offered by competing bidders on the solicitation. When the need for pest control arose, the contracting officer placed an order with one of the other contractors. Soledad sought common law damages for breach of the contract and the government, relying upon *Colonial Metals,* denied the claim, stating that Soledad should consider the pest control portion of its contract to be constructively terminated for convenience.

In overruling *Colonial Metals,* the court held that the government may not use a termination for convenience to "dishonor with impunity its contractual obligations."[13] The court stated that because the government knew a lower

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[1] *See, e.g.,* Federal Acquisition Regulation § 52.249–2, Termination for Convenience of the Government (Fixed Price) (1 Apr. 1984) [hereinafter cited as FAR].

[2] Armed Services Procurement Regulation § 7–103.12; Defense Acquisition Regulation § 7–103.12.

[3] FAR § 52.243–1, Changes—Fixed Price.

[4] FAR § 52.249–2.

[5] 41 U.S.C. §§ 1491–1507 (1982).

[6] Pub. L. No. 95–563, 92 Stat. 2383 (1978), codified at 41 U.S.C. §§ 601–613 (1982) *amended by* Pub. L. No. 97–164, 96 Stat. 25 (1982).

[7] FAR § 52.249–2(a).

[8] *See* Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

[9] Preventi-Med Corp., ASBCA No. 22268, 79–2 B.C.A. (CCH) ¶ 14088.

[10] Kalvan Corp., Inc., 543 F.2d 1298 (Ct. Cl. 1976).

[11] 494 F.2d 1355 (Ct. Cl. 1974).

[12] 681 F.2d 756 (Ct. Cl. 1982).

[13] *Id.* at 772.

price for pest control was available at the time of award, it was bound by its bargain, even though it was a bad one.

The boards of contract appeals soon followed suit. In *S & W Tire Services, Inc. v. United States,*[14] the General Services Board of Contract Appeals (GSBCA) awarded breach damages to a contractor when the government stopped placing orders against a requirements contract and diverted work to another contractor.

Tests for Breach

Prior to *Torncello,* the sole basis for finding government breach of contract was bad faith.[15] In *Torncello,* the court held that bad faith was not a sufficient test for breach because the government's presumption of good faith dealings was so difficult to overcome.[16] Accordingly, the court restricted the availability of the terminations for convenience clause to "situations where the circumstances of the bargain or the expectations of the parties have changed . . . ."[17] Under the *Torncello* rationale a contractor need only show that there was no change of circumstances to prove breach; it is not necessary to prove government bad faith.

The Armed Services Board of Contract Appeals (ASBCA) has not adopted the *Torncello* "no change of circumstances" test for breach. Rather, it has retained the "bad faith" standard, at least until a clear majority of the Claims Court adopts the new standard.[18]

A few cases have indicated that *Torncello* should be limited to its facts.[19] The ASBCA, however, expanded the potential application of *Torncello* in *Tamp Corporation.*[20] Tamp was an incumbent contractor which lost the competition for the next year's contract. Protests and responsibility determinations delayed award of the new contract, requiring the government to seek a one-month extension of Tamp's contract. Tamp wanted a three-month extension and the parties agreed on two months. The contracting officer executed a two-month extension even though he anticipated terminating the contract at the end of one month when problems with the new contract would be resolved. The contracting officer did in fact terminate the contract for convenience one month into the two-month extension. Citing *Torncello,* the board held that the termination for convenience was an abuse of discretion by the contracting officer.[21] The ASBCA adopted the *Torncello* holding that the government may not terminate a contract to take advantage of a more favorable price which it knew about at the time of contract award. The board concluded that the real lesson of *Torncello* was that the government may not use the termination clause to terminate when it had the intent to terminate at the time it entered into the contract.[22]

Because one cannot predict to which forum a disgruntled contractor will appeal, the government must be prepared to defend its terminations for convenience from attacks based upon both "no change in circumstances" and "bad faith."

Requirements Contracts

Torncello was a requirements contract. The court and boards have closely scrutinized government terminations in this type of agreement primarily due to the nature of consideration given by the government: a promise to purchase all its needs from the contractor. To allow the government to back out of a requirements contract via a termination for convenience would make the government promise illusory.[23] Some requirements contract terminations for convenience have, however, been upheld since *Torncello.* In *Maintenance Engineers,*[24] the ASBCA held that under the standard requirements clause[25] the government was only obligated to order all supplies or services required to be purchased outside the government. Accordingly, the government did not commit a breach in allowing housing occupants themselves to perform maintenance covered by a requirements contract. Similarly, the board held in *Dynamic Science*[26] that the use of an in-house work force was not considered a breach of a requirements contract so long as the government did not expand its in-house capabilities during the performance period and its use of in-house workers was not so widespread that the contractor was deprived of a substantial portion of the work it would have otherwise obtained.

Choice of Terminations Clause

Several cases before the GSBCA have turned upon which convenience termination clause was used in the contract. Under the standard termination for convenience clause,[27] the contractor is entitled to an equitable adjustment of the

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[14] GSBCA No. 6376, 82-2 B.C.A. (CCH) ¶ 16048.

[15] National Factors, Inc. v. United States, 492 F.2d 1383 (Ct. Cl. 1974).

[16] *Torncello,* 681 F.2d at 771.

[17] *Id.*

[18] Vec-Tor, Inc., ASBCA No. 25807, 85-1 B.C.A. (CCH) ¶ 17755. Only three of the six judges deciding *Torncello* based a finding of breach upon "no change in circumstances."

[19] Drain-A-Way Sys., GSBCA No. 722, 84-1 B.C.A. (CCH) ¶ 16928.

[20] ASBCA No. 25692, 84-2 B.C.A. (CCH) ¶ 17460.

[21] *Id.* at 86,978.

[22] *Id.* at 86,977.

[23] *Torncello,* 681 F.2d at 760.

[24] ASBCA No. 25464, 84-1 B.C.A. (CCH) ¶ 17100.

[25] FAR § 52.216-21, Requirements.

[26] ASBCA No. 29510, 85-1 B.C.A. (CCH) ¶ 17710. *See also* Ralph Constr., Inc. v. United States, 4 Cl. Ct. 727 (1984).

[27] FAR § 52.249-2.

unit price of items to be delivered under a partial termination. The contractor is allowed to recoup costs which it had planned to allocate across the total contract quantity by receiving a higher unit price for those items actually delivered. If the "short form" termination for convenience clause[28] is used, the contractor is not entitled to recoup these costs. Even when finding a breach, the GSBCA did not pay breach damages but rather limited a contractor to recovery as provided for in the standard termination for convenience clause where that remedy was considered adequate.[29] Where the remedy was not considered adequate because the "short form" was used, however, the board awarded breach damages.[30]

Suggestions

How then may the government structure a contract to avoid a later breach when at the time of award it has reason to believe that its needs will change during the performance period? Use of indefinite quantity contracts or contracts with option quantities may be viable alternatives to requirements contracts when the government is willing to accept the possibility of higher unit prices in exchange for more flexibility in ordering. Another solution may be the inclusion in the contract of an additional "termination" clause which would allow the government to terminate the contract and settle with the contractor regardless of the basis for the termination, so long as the government binds itself to something that will provide consideration for the contract.[31]

Counsel should watch for future developments in this area as courts and boards attempt to solidify the test for breach and the remedies which flow therefrom.

[28] FAR § 52.249–1, Termination for Convenience of the Government (Fixed-Price) (Short Form).

[29] *Drain-A-Way Sys. See also* Inland Container, Inc. v. United States, 512 F.2d 1073 (Ct. Cl. 1975).

[30] *S & W Tire Services, Inc. v. United States.*

[31] *Torncello,* 681 F.2d at 772.

Court-Martial and Nonjudicial Punishment Rates Per Thousand

US Army Judiciary, USALSA

Table 1
Fiscal Year 1983

	Army-Wide	CONUS	Overseas
GCM	2.03	1.60	2.76
BCDSPCM	2.65	2.07	3.66
SPCM	.99	.92	1.12
SCM	3.65	2.95	4.84
NJP	168.56	168.73	168.25
(Summarized NJP)	(37.30)	(38.65)	(35.01)

Table 2
Fiscal Year 1984

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	1.85	1.41	2.57	2.30	4.49
BCDSPCM	1.81	1.59	2.10	2.82	1.43
SPCM	.59	.57	.71	.43	.41
SCM	2.09	1.91	2.51	1.62	3.47
NJP	144.66	149.33	134.98	144.38	151.97
(Summarized NJP)	(34.18)	(38.89)	(26.17)	(23.07)	(40.48)

Note: The FY 1984 geographical breakout conforms to DOD reporting requirements. "Other" includes Alaska, Panama, and Puerto Rico.

Table 3
First Quarter, Fiscal Year 1985; October–December 1984

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	.45 (1.80)	.35 (1.40)	.60 (2.40)	.70 (2.80)	.66 (2.64)
BCDSPCM	.39 (1.56)	.34 (1.36)	.44 (1.76)	.71 (2.84)	.20 (.80)
SPCM	.12 (.48)	.10 (.40)	.12 (.48)	.28 (1.12)	.07 (.28)
SCM	.39 (1.56)	.34 (1.36)	.46 (1.84)	.56 (2.24)	.33 (1.32)
NJP	37.65(150.60)	38.85(155.40)	35.79(143.16)	37.19(148.76)	31.95(127.80)
(Summarized)	(8.92 (35.68))	(10.23 (40.92))	(6.75 (27.00))	(7.22 (28.88))	(5.70 (22.80))

Note: Figures in parentheses are the annualized rates per thousand.

Table 4
Second Quarter, Fiscal Year 1985; January–March 1985

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	.41 (1.64)	.28 (1.12)	.57 (2.28)	.77 (3.08)	1.07 (4.28)
BCDSPCM	.42 (1.68)	.38 (1.52)	.47 (1.88)	.73 (2.92)	.13 (.52)
SPCM	.11 (.44)	.10 (.40)	.11 (.44)	.21 (.84)	.07 (.28)
SCM	.43 (1.72)	.75 (3.00)	.38 (1.52)	.60 (2.40)	.27 (1.08)
NJP	38.53(154.12)	41.44(165.76)	33.32(133.28)	35.47(141.88)	34.64(138.56)
(Summarized)	8.40 (33.60)	10.02 (40.08)	5.57 (22.28)	6.47 (25.88)	5.51 (22.04)

Note: Figures in parentheses are the annualized rates per thousand.

Criminal Law Notes

Criminal Law Division, TJAGSA

New Developments in Impeachment of Verdicts

The military, like most civilian jurisdictions, has a strong policy against impeaching a verdict once it has been announced. This policy is embodied in the deliberative privilege[1] which promotes finality and encourages full and free discussion during deliberations by limiting the admissibility of evidence offered to demonstrate irregularities in the deliberation process. The deliberative privilege allows testimony or affidavits of a court member to be used to impeach a verdict only if the alleged irregularity involves the improper exertion of outside influence on a court member, the consideration of extraneous prejudicial information by a court member, or unlawful command influence.[2]

In *United States v. Rice,*[3] the Air Force Court of Military Review considered a defense counsel's attempt to impeach the verdict of a military judge. The defense alleged that, in reaching a verdict, the trial judge had erroneously relied on a version of the facts which was only circumstantially implicated by the evidence presented at trial and which was, in fact, false in fact. Although Mil. R. Evid. 509 specifically protects only court member deliberations, the court applied the deliberative privilege to verdicts rendered in a trial by military judge alone. The specific irregularity alleged by the defense counsel in *Rice* did not fall within one of the exceptions in Mil. R. Evid. 606, so testimony or affidavits concerning the trial judge's mental processes in reaching a verdict were privileged.

Three other cases—*United States v. Carr,*[4] *United States v. Accordino,*[5] and *United States v. Martinez*[6]—dealt with the unlawful command influence exception to the deliberative privilege. These three cases addressed the following issues:

(1) Does the term "unlawful command influence" include the use of superiority of rank by a senior court member to influence a junior court member?

(2) If use of superiority of rank is a ground for impeachment, what is the proper role for the president of the court during deliberations?

(3) If the specter of unlawful command influence is raised after trial, how should it procedurally be handled?

The drafters of Mil. R. Evid. 606 intended for the military to adopt the same exceptions to the deliberative privilege provided for in Fed. R. Evid. 606,[7] with one additional exception—unlawful command influence.[8] The Air Force Court of Military Review was the first appellate court to interpret this new exception. In *United States v. Accordino,*[9] the defense wanted to impeach the panel's guilty verdict by offering an affidavit from a junior court member which indicated that, during deliberations, the president of the court had precluded the junior court member from discussing his misgivings about the government evidence. The Air Force court held that the affidavit of the court member was privileged because the unlawful command influence exception covered only command influence exerted by persons outside the panel and did not cover the use of superiority of rank by a senior court member to influence a junior court member. In reaching this conclusion, the court chose to

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[1] Mil. R. Evid. 509 provides: "Except as provided in Mil. R. Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations, are not privileged." For a discussion of past developments concerning the deliberative privilege, *see generally* Dean, *The Deliberative Privilege Under M.R.E. 509,* The Army Lawyer, Nov. 1981, at 1.

[2] Mil R. Evid. 606 provides:

> (a) *At the court-martial.* A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party, except in a special court-martial without a military judge, shall be afforded an opportunity to object out of the presence of the members.
> (b) *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter of statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was properly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

[3] 20 M.J. 764 (A.F.C.M.R. 1985).

[4] 18 M.J. 297 (C.M.A. 1984).

[5] 20 M.J. 102 (C.M.A. 1985).

[6] 17 M.J. 916 (N.M.C.M.R. 1984).

[7] Mil. R. Evid. 606 analysis.

[8] Mil. R. Evid. 606(b).

[9] 15 M.J. 825 (A.F.C.M.R. 1983).

disregard the clear intent of the drafters[10] and instead relied on federal case law.

The Court of Military Appeals gave a more expansive interpretation to the unlawful command influence exception in *United States v. Accordino*[11] and *United States v. Carr.*[12] In rejecting the Air Force court's analysis in *Accordino* the Court of Military Appeals held that the lower court's reliance on federal case law was misplaced. The court found that the concept of unlawful command influence was a uniquely military concept which should be interpreted in light of military precedents, and held that the drafter's analysis controlled in interpreting the potentially ambiguous term "unlawful command influence."

The Court of Military Appeals returned *Accordino* to the lower court for further review (consideration of the court member's affidavit) and gave some guidance on the permissible role for the president of the court during deliberations. Senior members of the court, like any other members, are "free to express their opinions in the strongest terms and to engage in the most robust discussions without fear of retribution or appellate sniping."[13] Furthermore, presidents of the court perform a legitimate administrative function in controlling deliberations and have "the discretion to call for a vote when, in their judgment, discussion of the issues is complete or further debate would be pointless."[14] The court concluded that unlawful command influence is present only "when recourse is made to rank . . . to coerce a subordinate to vote in a particular manner."[15] Although this case affords some guidance, it did not fix a standard for courts to apply in deciding whether a subordinate has been coerced to vote in a particular manner. Does the defense have to demonstrate actual overt coercion, or is it sufficient to demonstrate that a reasonable court member would have been influenced by the senior member's conduct, or does the government have the burden of rebutting the presence of command influence once it is raised by evidence tending to show that a court member might have been influenced?

United States v. Carr[16] was actually the first case where the Court of Military Appeals made it clear that they would not tolerate intra-panel unlawful command influence. About a week after Specialist Four Carr was convicted of rape and possession of marihuana, the trial judge received an unsigned letter purportedly sent by a junior court member on the panel that heard the case. In the letter, the court member indicated that he had not voted his conscience because of pressure put on the junior court members by the president of the panel. After an initial ballot which resulted in a not guilty verdict, the president became very angry and influenced the other members to reconsider their verdict. The allegations made in the unsigned letter were corroborated by a statement signed by eight character witnesses who overheard a loud, angry voice in the deliberation room. The Court of Military Appeals held that these allegations, if true, would constitute unlawful command influence for the purpose of impeaching the verdict and set aside the findings of guilt because the accused had been prejudiced by the trial judge's (and staff judge advocate's) failure to conduct a timely post-trial hearing into the allegations.

Carr highlights the need for trial judges, staff judge advocates, and trial counsel to identify potential impeachment situations and build a factual record properly exploring the irregularities. In *United States v. Martinez*[17] the Navy-Marine Court of Military Review set out a methodology for handling impeachment situations. The president of the court in *Martinez* announced the verdict in open court but failed to say that voting was by "secret written ballot." This omission went undiscovered until the trial judge was authenticating the record of trial and noticed that not only was "secret written ballot" not announced in court, but those words were also redacted from the findings worksheet. The Court noted that the trial judge's first responsibility was to determine whether the irregularity constituted an impeachment of findings situation. According to the Navy-Marine court, voting by oral ballot implicated the possible use of superiority of rank and thus raised the possibility of unlawful command influence. At this point (prior to authentication of the record) the trial judge can, and *should,* convene a post-trial Article 39(a) session[18] to determine the objective facts pertaining to the voting procedure and to determine whether the accused has been prejudiced. If irregularities come to light after authentication of the record, the proper procedure is for the convening authority with jurisdiction over the case to order an Article 39(a) session or a proceeding in revision.[19] In *Martinez,* the trial judge properly received testimony from the president of the court and a junior court member establishing that, in fact, oral balloting was used to reach a verdict. The Navy-Marine court held that this created a presumption of prejudice which the government had the burden of rebutting. In exploring the issue of prejudice in *Martinez,* the trial judge also received testimony from the junior court member that the oral balloting in no way affected his vote. The Navy-Marine court held that this inquiry went too far in eliciting privileged information. The "subjective thoughts, impressions, motivations, or emotions"[20] of a court member cannot be used to rebut the

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[10] *Id.* at 833 n.8. The court even took the unusual step of contacting one of the drafters to insure that the court understood the drafter's analysis.

[11] 20 M.J. 102 (C.M.A. 1985).

[12] 18 M.J. 297 (C.M.A. 1984).

[13] 20 M.J. at 105.

[14] *Id.*

[15] *Id.*

[16] 18 M.J. 297 (C.M.A. 1984).

[17] 17 M.J. 916 (N.M.C.M.R. 1984).

[18] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1102(d).

[19] *Id.*

[20] 17 M.J. at 920.

presumption of prejudice and are never a proper area of inquiry even when exploring an irregularity that falls within one of the exceptions to the deliberative privilege.

The unlawful command influence exception to the deliberative privilege will be an area of continued future development. Clearly the use of superiority of rank by a senior court member is a ground for impeaching a verdict, and clearly there is a premium on early development of the facts at a post-trial Article 39(a) session or proceeding in revision. Future appellate decisions will no doubt address the legal standards which should be employed to determine whether unlawful command influence has actually taken place in a given factual context.

Evidence on Reconsideration

In *United States v. Harrison,*[21] the United States Court of Military Appeals, in a divided opinion, denied an accused's petition for extraordinary relief. The accused sought to overturn a trial judge's ruling on reconsideration that was based upon the judge's consideration of additional evidence presented by the government after the accused's motion to dismiss due to a denial of the right to a speedy trial had been granted. Judge Cox and Chief Judge Everett both agreed that the trial judge had properly considered the additional evidence, but their reasoning diverged as to why there was no error meriting relief.

The facts of the case are of particular significance because the judges could not agree on the legal rationale that those facts compelled. The accused had moved to dismiss the rape and attempted sodomy charges pending against him at a general court-martial. Based on the stipulated chronology of events offered by the prosecution, the judge found that ninety days of the delay before trial, while the accused was in pretrial confinement, were chargeable to the government. The judge then incorrectly held that *United States. v. Burton*[22] had been violated and ordered the charges dismissed. Subsequently, the government sought reconsideration. The convening authority, acting under the provision of Article 62(a), UCMJ,[23] requested that the judge reconsider the ruling and also authorized the trial judge to hear and consider additional evidence on the issue. The military judge granted the request to reconsider and the government offered additional evidence. The defense objected but the military judge heard the evidence. Before the judge began reconsidering, however, he acknowledged that he had erred in the original ruling. The additional evidence was critical to the ruling on reconsideration, which reversed the original decision and reinstated the charges.

The issue raised was one of first impression before the court. Judge Cox authored the lead opinion. He recognized that the court had authorized the receipt of additional evidence during a proceeding in revision under Article 62(b), UCMJ.[24] Judge Cox then reasoned that a similar process would be acceptable for a reconsideration proceeding under Article 62(a), UCMJ. Additionally, Judge Cox held that "in the interests of justice, a trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith."[25]

Chief Judge Everett wrote a separate opinion concurring in the result. He began by recognizing that the military judge had erred in his original ruling. Accordingly, he wrote, the trial judge was required to reconsider the issue and such reconsideration could properly include additional evidence. The Chief Judge analogized the circumstances to a judge whose ruling had been reversed on appeal. In such a case, additional evidence may be received at a rehearing on the issue. He concluded that Article 62(a), UCMJ, afforded the same scope for reconsideration to a trial judge "after determining upon reconsideration that he had made a legal error which tainted his initial ruling."[26]

The critical difference between the two opinions is the existence of a necessary predicate for receiving additional evidence on reconsideration. While the trial judge had acknowledged his error before hearing the additional evidence, that was not controlling in Judge Cox's view. Indeed, under Judge Cox's theory, a military judge has inherent authority to consider such additional evidence. In contrast, Chief Judge Everett would limit the receipt of additional evidence on reconsideration to those cases in which the trial judge first acknowledged the error in the initial ruling. Judge Everett also cautioned that, in cases where the parties have entered a stipulation of fact, the additional evidence must not contradict that stipulation. One other concern of the Chief Judge was that the accused must not be twice put in jeopardy by any reconsideration process. Judge Everett also pointed out that a trial judge may exclude additional evidence offered on reconsideration if the party "failed negligently to arrange for its presentation at the initial proceeding . . . ."[27]

While it is clear that a party may offer additional evidence on reconsideration, the circumstances in which a trial judge will accept such evidence may vary. First, the offering party must not be deemed to have been negligent in failing to introduce the evidence in the course of litigating the issue during the original hearing. Second, the judge should acknowledge that the initial ruling was erroneous before considering any additional evidence to satisfy the legal rationale for receiving such additional evidence. This will satisfy the concerns of both appellate judges in *Harrison.* If, however, a trial judge will not acknowledge an error in the ruling but is willing to hear additional evidence on reconsideration, the inherent power of the judge to do so satisfies Judge Cox's rationale. Because the convening authority is

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[21] 20 M.J. 55 (C.M.A. 1985), Judge Fletcher did not participate in the decision.

[22] 21 C.M.A. 112, 44 C.M.R. 116 (1971).

[23] Uniform Code of Military Justice art. 62(a), 10 U.S.C. § 862(a) (1982) [hereinafter cited as UCMJ].

[24] UCMJ art. 62(b); United States v. Mead, 16 M.J. 270 (C.M.A. 1983).

[25] 20 M.J. at 57.

[26] *Id.* at 59.

[27] *Id.* at 60.

no longer required to request reconsideration of a ruling,[28] the convening authority need not authorize the consideration of additional evidence. A third circumstance must be noted: reconsideration or the receipt of additional evidence must not violate the former jeopardy rule or, in Judge Everett's view, contradict the previously stipulated facts unless the stipulation is set aside for some good cause.

Seeking reconsideration is encouraged when a judge has entered an adverse ruling that may be subject to appeal under Article 62, UCMJ, and R.C.M. 908.[29] If additional evidence is relevant to the issue, the government should offer it and attempt to get the judge to acknowledge an error before its receipt. This, of course, does not bind the judge to reverse the initial ruling. It may be that even with the additional evidence the government still will not prevail. At that point the government's appellate remedy must be considered. If the military judge will not first acknowledge an error, the government should urge that Judge Cox's views on the inherent power of the trial judiciary are correct under these circumstances and seek the consideration of the additional evidence on that basis. If the judge will not consider it, trial counsel should make an oral or written offer of proof for the record of the nature and substance of the additional evidence available and why it is relevant to the ruling.

Motions *in limine* and *Luce v. United States*

Introduction

A motion *in limine* may be defined broadly as any motion made before or during trial to exclude prejudicial evidence before the evidence is offered in open court. Rule for Courts-Martial 906(b)(13)[30] defines the motion *in limine* as a motion for appropriate relief which seeks a preliminary ruling on the admissibility of evidence. This section is new to the Manual, although motions *in limine* have long been recognized and treated as an accepted form of the motion for appropriate relief.[31] The motion may be made by any party.[32]

The recent decision of the United States Supreme Court in *Luce v. United States*[33] sheds valuable light on the use of motions *in limine* to determine the admissibility of previous convictions to impeach a witness. Specifically, *Luce* addressed whether a defendant must testify to preserve on appeal a ruling of the trial judge on a motion *in limine* admitting the previous conviction to impeach the defendant's testimony. The Court in *Luce* said yes to this question, and this note will discuss the opinion and assess its impact on military practice.

Luce *and Military Precedent*

In *Luce*, the defendant sought by motion *in limine* to prevent the government from using his prior felony conviction for possession of a controlled substance to impeach him in his trial on federal drug charges. The federal district court held the conviction admissible for impeachment under Federal Rule of Evidence (Fed. R. Evid. 609(a). The defendant failed to declare his intent to testify if the motion was granted, made no proffer of expected testimony, and in fact never took the stand. The Sixth Circuit Court of Appeals affirmed the conviction and held the trial judge's ruling on the motion *in limine* non-reviewable because the defendant never testified and the conviction was never offered against him.

The Supreme Court granted *certiorari* to resolve conflicts between the federal circuits on the issue of waiver.[34] The Court affirmed the lower court ruling and held that to raise and preserve an appeal based on impeachment by use of a prior conviction, the defendant must testify.

The opinion discussed admissibility of prior convictions for impeachment under Fed. R. Evid. 609 (a)(1). In any such case, the Court said, the trial judge must weigh the probative value of the conviction against its prejudicial effect. When the defendant does not testify and the conviction is not used, this balancing test cannot be performed. Without testimony and cross-examination, the trial judge is unable to test for possible prejudice, and unable to reverse earlier erroneous rulings.

Subsequently, appellate courts are handicapped in attempting to review the lower court's ruling. Absent testimony by the defendant, any harm from an *in limine* ruling is "wholly speculative."[35] The Court went on to say that even if the defendant made a commitment to testify, such commitment was risk-free and unenforceable, and the reviewing court must guess whether the chilling effect of the trial judge's ruling deprived the defendant of his or her right to testify when other reasons for such a choice were equally plausible. Lastly, any ruling which deprived the defendant of a fundamental right must be examined for harmless error, which usually compels reversal and which allows the defendant to "plant" reversible error by refusing to testify. The Court addressed these appellate concerns to ensure that questions concerning the use of prior convictions are presented to reviewing courts in a "concrete factual context."[36]

The Court of Military Appeals has not had occasion to consider *Luce's* application to military practice. *United*

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[28] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 905(f) [hereinafter cited as R.C.M.].

[29] *See* United States v. Tucker, 20 M.J. 602 (N.M.C.M.R. 1985). In *Tucker*, the court also commented on the nature of the evidence admissible on reconsideration. That court, also relying on the inherent powers of the trial judge, said such evidence was limited to "newly-discovered evidence, matters not reasonably available for introduction at the earlier proceedings, or similar subjects." *Id.* at 604.

[30] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 906(b)(13) [hereinafter cited as R.C.M.].

[31] R.C.M. 906(b)(13) analysis.

[32] R.C.M. 905(b); R.C.M. 906(a). *See generally*, Siano, *Motions* in Limine: *An Often Neglected Common Law Motion*, The Army Lawyer, Jan. 1976 at 17.

[33] 105 S. Ct. 460 (1984).

[34] *Id.* at 463.

[35] *Id.*

[36] *Id.* at 464 (quoting United States v. Portash, 440 U.S. 450, 462 (1979) (Powell, J., concurring)).

States v. Cofield[37] is the court's latest ruling on the issue. In *Cofield*, the court held that an accused may appeal a ruling *in limine* admitting a prior conviction for impeachment *without* testifying.

On the other hand, two military courts of review have addressed the impact of *Luce*. In *United States v. Means*,[38] concerning attempted impeachment of a government witness by evidence of prior sexual acts, the Army court cited *Cofield* for the proposition that an offer of proof of admissibility was required under Mil. R. Evid. 103(a)(2). The court explained in a footnote that "the holding in *Cofield* and its progeny that allows an accused who has not testified to preserve his appeal from an adverse evidentiary ruling of a motion *in limine* has been overruled by the United States Supreme Court in *Luce v. United States* . . . ."[39] No further explanation was offered.

The Air Force Court of Military Review confronted the issue directly in *United States v. Goins*.[40] In *Goins*, the accused sought unsuccessfully by motion *in limine* to exclude use of his prior conviction by special court-martial for impeachment under Mil. R. Evid. 609(a). As in *Luce*, the accused made no offer of proof and failed to take the stand in his own behalf. The prior conviction was never used and the accused was convicted.

The Air Force court considered *Cofield*, but held that the accused waived review of the admissibility of his prior conviction by his failure to testify at trial. The court concluded that the reasoning in *Luce* favored its application to courts-martial: "We are convinced that *Luce v. United States, supra*, now represents the prevailing precedent on this issue *except* for prior convictions by summary courts-martial where the accused was not afforded counsel."[41]

Analysis and Conclusion

Notwithstanding the authority of a Supreme Court ruling, there are several good reasons why military courts should adopt *Luce* as precedent. As pointed out by the Air Force court in *Goins*, Mil. R. Evid. 609 is taken from the federal rule controlling impeachment by prior conviction, and the protections formerly accorded to the accused under the Manual for Courts-Martial, United States, 1969 (Rev. ed.) with regard to impeachment have been deleted under the Military Rules of Evidence.[42] Other reasons why appellate review should be restricted to cases where the accused testifies, such as providing a record the appellate court can review for actual prejudice, and preventing the defense from "planting" reversible error without the risk of testifying, are both logical and persuasive.

Luce raises other questions for military trial attorneys and judges which cannot be fully resolved in this note. One difficulty is in defining the trial judge's ruling on a motion *in limine*. In the strictest sense, such rulings are purely preliminary and the military judge in the exercise of discretion may reverse any ruling not amounting to a finding of not guilty.[43] For good cause, a ruling on a motion *in limine* may be deferred altogether.[44] Reversing or deferring any ruling on a motion *in limine* may, of course, create a potential mistrial.[45]

Under R.C.M. 908, the government may appeal an adverse ruling by the miliary judge which excludes evidence, a right subject to prejudice if the military judge fails to make a timely ruling on a motion *in limine*. To avoid such prejudice, military judges may be tempted to rule in favor of the defense to trigger the government's right of appeal, and defer rulings only when they are likely to decide for the government.

One last unresolved issue is impeachment by evidence of summary court-martial conviction. *Goins* excepted such convictions from its holding, but is this required by *Luce*? The question is unique to military practice, and there is disagreement as to the admissibility of summary court convictions.[46]

Luce provides a clear solution to one dilemma encountered in motions practice. At the same time, it highlights other questions without clear or immediate answers, questions which should encourage trial counsel, defense counsel, and military judges to exercise creativity and initiative in litigating motions *in limine*.

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[37] 11 M.J. 422 (C.M.A. 1981).

[38] 20 M.J. 522 (A.C.M.R. 1985).

[39] *Id.* at 526 n.5 (citations omitted).

[40] 20 M.J. 673 (A.F.C.M.R. 1985).

[41] *Id.* at 677.

[42] *Id.*

[43] R.C.M. 905(f).

[44] R.C.M. 905(d).

[45] *Cofield*, 11 M.J. at 430; *Goins*, 20 M.J. at 676.

[46] *See* Middendorf v. Henry, 425 U.S. 25 (1976); *Cofield*; United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1977); United States v. Rogers, 17 M.J. 990 (A.C.M.R.), *petition denied* 19 M.J. 110 (C.M.A. 1984); Mil R. Evid. 609(a).

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Authority of Noncommissioned Officers to Perform Notarial Acts

Legal assistance officers serving outside the continental United States should be interested in a recent change to AR 27–55, Authority of Armed Forces Personnel To Perform Notarial Acts, dated 21 March 1980. That change will permit noncommissioned officers in the grade of sergeant or above to perform notarial acts when the noncommissioned officer is serving under the direct supervision of a judge advocate. This authority may only be exercised outside the continental United States. The change, however, only provides the noncommissioned officer with regulatory authority to perform notarial acts. Whether that act would be recognized by state authorities depends on the requirements of the specific state in which the notarized instrument or document is to be used. If the instrument or document is to be used in more than one state, the statutory requirement of all of those states must be considered. The All States Notarial Guide has been provided to the field for ease in checking the requirements of the various states. This guide is currently under revision and is expected to be available to the field by October 1985.

Legal Services Agency Poverty Guidelines

Legal assistance officers frequently need to find an alternate source of assistance for personnel they cannot represent due to a shortage or resources, conflict of interest, or because the assistance sought is outside the scope of the legal assistance program. One possible source of help is the Legal Services Corporation. The Legal Services Corporation recently published its guidelines for establishing eligibility for their services, which are as follows:

Family unit size	All states except Hawaii and Alaska	Alaska	Hawaii
1	$6,562	$8,225	$7,550
2	$8,812	$11,012	$10,137
3	$11,062	$13,825	$12,725
4	$13,312	$16,637	$15,320
5	$15,562	$19,475	$17,900
6	$17,812	$22,262	$20,487
7	$20,062	$25,075	$23,075
8	$22,312	$27,887	$25,662

In states other than Alaska and Hawaii, for family units with more than eight members, add $2,250 per additional family member. For Alaska, add $2,812 for each additional family member over eight. For Hawaii, add $2,587 for each additional family member over eight.

Tax Notes

U.S. Taxation of Survivor Benefit Plan Annuities to Nonresident Alien Spouses

The following information was provided by Mr. John L. Simmons, Chief, Legal Assistance Division, Office of the Judge Advocate, Headquarters, U.S. Army Europe and Seventh Army, APO New York 09403. This information is the result of his efforts to obtain tax relief for clients in Europe, but has application to nonresident aliens in other commands as well.

Annuity payments to nonresident aliens are subject to U.S. income taxation at a flat rate of 30% or such lesser rate as provided by tax treaty. The mandatory withholding rate is the same amount as the tax rate (*i.e.*, 30%). There is no tax treaty with the Federal Republic of Germany that reduces the tax rate. On the other hand, a U.S. citizen surviving spouse residing in Germany is taxed according to normal graduated tax schedules, as is a resident alien surviving spouse. This disparate treatment is a consequence of tax rules of general applicability and legislative relief is unlikely.

Partial relief is, however, available for the nonresident alien. Several legal assistance attorneys have successfully advanced the premise that Survivor Benefit Plan (SBP) payments are not taxable to the extent that creditable service leading to the annuity was served outside the United States. The question was posed to the IRS by Mr. Simmons and a favorable response was received. IRS Foreign Operations District letter, dated July 19, 1985, reads in part, "If part of the total service giving rise to the annuity was for services performed outside the United States then the allocation rules of Section 863(b) of the Internal Revenue Code would apply." Thus, for example, if 12 years of a 20-year career were served outside the United States, 12/20 of the SBP payments is excludable and the 30% tax need only be paid on 8/20 of the annual SBP payments. For nonresident aliens to get a refund of the allocable part of the 30% that was withheld, they must file an IRS Form 1040NR (Nonresident). Returns may be filed for years not closed by the statute of limitations. Years not currently closed are calendar years 1982, 1983, and 1984. Legal assistance attorneys who are helping clients file an IRS Form 1040NR may wish to refer to the IRS letter, the text of which is reprinted here.

July 19, 1985

Mr. John L. Simmons
Chief, Legal Assistance
Office of the Judge Advocate
Headquarters, U.S. Army, Europe,
and Seventh Army
APO New York 09403

Dear Mr. Simmons:

This is in response to your letter of inquiry dated June 5, 1985, whereby you requested the taxability of military "Survivor Benefit Plan" annuity payments to nonresident alien surviving spouses of deceased military personnel. Your query further requested whether or not public employment retirement annuities paid to nonresident aliens are/are not taxable to the extent that the creditable

service leading to the annuity was served outside the United States.

To provide the clarification you requested, reference is hereby made to sections 861, 862, and 863 of the Internal Revenue Code. The specific cite is listed under section 863(b) of the Internal Revenue Code in regards to the allocation method. All military "Survivor Benefit Plan" annuities are taxable to nonresident alien surviving spouses of deceased military personnel. If part of the total service giving rise to the annuity was for services performed outside the United States, then the allocation rules of Section 863(b) of the Internal Revenue Code would apply.

Sincerely,
J. Keith Mong
Chief, Quality Review Staff

A few caveats are in order. First, preparation of the return is easy if no other U.S. income exists. The return will be more complicated if the client received other income from U.S. sources (*e.g.*, rental or sale of property or social security payments). Additionally, the refund will be delayed unless the questions on the bottom half of page 3, Form 1040NR are fully answered each year. Finally, a few countries have treaties with the U.S. which reduce the flat-rate tax to 5%–15% rather than 30%. If the client is from some country other than West Germany, the legal assistance officer should determine whether there are any applicable treaty provisions and, if so, use the appropriate column on page 4 of Form 1040NR.

Legal assistance officers may also consider writing to Mr. David L. Gagermeier, U.S. Army Finance and Accounting Center, Indianapolis, IN 46249, proposing that the 30% withholding be reduced to exclude the amount that can be excluded under the allocation rules of section 863(b). This amount is readily obtainable from the statement of service portion of DD 214, Armed Forces of the United States Report of Transfer or Discharge, which shows total service and foreign service.

The IRS has also been queried about the applicability of the allocation rules of section 863(b) to two other classes of annuitants who may be entitled to legal assistance: surviving nonresident alien spouses of retired military personnel or military personnel who died on active duty who are receiving a civil service retirement annuity, and those receiving a social security annuity. Arguably, the allocation rules would apply to civil service retirement recipients and possibly to social security annuitants as well.

Mr. Simmon's efforts demonstrate the benefits which can be achieved through an active preventive law program.

Ceremonial Uniforms

In the July 1985 issue of *The Army Lawyer*, the Legal Assistance Items section included an article by LTC Matt C.C. Bristol of the Air Force entitled, "The President's Tax Reform Proposal: Potential Impact and Planning Opportunities." Part of that article discussed deductions for ceremonial uniforms and has caused some confusion. The Air Force has a ceremonial uniform which, by Air Force regulations, can only be worn during ceremonies. Because of the regulatory restriction on the wear of the uniform, the cost and maintenance of the uniform are arguably tax deductible. In the Army, the same is true for fatigue and BDU uniforms when their off-duty wear is precluded in a social setting. The Army, however, does not have a dress uniform with comparable regulatory restrictions governing its wear. Accordingly, the deductibility of the cost and upkeep of dress uniforms by Army personnel is doubtful.

Bad Checks in Illinois

Illinois has a new statute which will aid victims of bad checks in obtaining payment. The Illinois legislature recently amended the Illinois Criminal Code to provide civil liability for any person who issues a check and fails to pay the amount due within thirty days after receiving a written demand from the payee. The law provides for liability for treble damages if the amount is more than $100 but less than $500. Additionally, the payee can sue to recover attorneys fees and court costs. If, prior to any hearing, the defendant tenders a sum equivalent to the amount of the check, court costs, service, and attorney's fees, the defendant will be deemed to have satisfied any claims the payee has against him or her for issuance of the bad checks.

Statutory Military Clause for Maryland Leases

Legal assistance officers should be aware that a Maryland statute now provides for early termination of leases by military personnel who have received reassignment orders. The recently-passed statute is the result of an initiative of Captain Kathleen Vanderboom while she was assigned as a legal assistance officer at the National Security Agency. Captain Vanderboom noticed that landlords were increasingly including in residential leases a clause imposing a significant penalty against soldiers who, upon receiving reassignment orders, invoked a right under their lease agreement to terminate the tenancy early. She discussed the problem with officials in Maryland, and in the process found a friend of the military who introduced a bill to correct the situation. The result is new section 8–212.1 of Maryland Real Property Article which reads as follows:

> Notwithstanding any other provision of this title, if a person who is on active duty with the United States military enters into a residential lease of property and subsequently receives permanent change of station orders or temporary duty orders for a period in excess of 3 months, any liability of the person for rent under the lease may not exceed: (1) 30 days' rent after written notice and proof of the assignment is given to the landlord; and (2) the cost of repairing damage to the premises caused by an act or omission of the tenant.

The bill took effect on 1 July 1985. It is not expected to be applied retroactively; rather, it will apply only to leases which are entered into on or after that date. Interestingly, the statute applies to soldiers who receive either permanent change of station orders or temporary duty orders as long as the temporary duty orders require the soldier to be gone for a period in excess of three months. Liability of the soldier who invokes this right is limited to thirty days rent measured from the day notice and proof of the written orders were given to the landlord, plus any charge for repairs.

The result is a statute which will benefit military personnel for years to come. This demonstrates the positive results which can be obtained through initiative and an active preventive law program.

North Carolina Right to Cancel Enacted

Effective 1 October 1985, it is a criminal offense in North Carolina for a door-to-door salesperson to refuse to honor a valid notice of cancellation on a door-to-door sale. The law will also apply to managers or other officials of the company conducting the door-to-door sale, as well as the salesperson making the sale.

Punishment for this misdemeanor offense includes the possibility of thirty days imprisonment and a $100 fine, if the failure is found to have been willful. The new provision applies to a sale, lease or rental of consumer goods or services with a purchase price of $25 or more in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer.

Oregon Child Support Income Withholding Made Mandatory

Oregon has made income withholding for child support mandatory when the person obligated to pay support under a support order has failed to make payments which are equal to one month's support obligation. Such mandatory income withholding orders have also been given priority over other legal process in Oregon. Included as payments that are not exempt under Oregon law are pensions, annuities, retirement benefits, returns of contributions on retirement plans, optical benefits and death benefits.

The amount to be withheld is 25% of the obligors's disposable earnings plus an employer's fee, or the amount of the support obligation plus an employer's fee. The amount to be withheld cannot, however, exceed the percentage limitations contained in 15 U.S.C. § 1673. The court may also fine an employer who fails to comply with the law and the employer will be liable for any amount which should have been paid pursuant to the wage withholding order but was not.

Oregon Debt Collection Contracts Limited

The Oregon dept collection law has been amended, effective 20 September 1985, to limit contact by debt collectors with debtors. The debt collector may contact the debtor at the debtor's place of employment only when the debt collector in good faith has made an unsuccessful attempt to telephone the debtor during the day at home or between 6 and 9 p.m. in the evening. Even then, the debt collector cannot contact the debtor at the debtor's place of work if the debt collector knows or has reason to believe that the employer prohibits such contacts.

Suggestions For Proposed Revision Of Army Regulation 27–3

Army Regulation 27–3, Legal Services-Legal Assistance, was published in March 1984 with an effective date of April 1, 1984. It has been approximately eighteen months since the regulation took effect and experience under the regulation has led to several proposed changes from the field to improve or clarify certain provisions.

Legal assistance attorneys are invited to send comments on their experience under the regulation and their suggestions for improvements or changes to the regulation to: Colonel Richard S. Arkow, Chief, Legal Assistance Office, Office of The Judge Advocate General, ATTN: DAJA–LA Washington, D.C. 20310–2215.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Dates for Reserve Component Training Announced

Judge Advocate Triennial Training (JATT)

Judge Advocate Triennial Training (JATT—previously called JAGSO Triennial Training) for court-martial trial and defense teams will be conducted at The Judge Advocate General's School (TJAGSA) from 16–27 June 1986. Inprocessing will take place on Sunday, 15 June 1986. Attendance is limited to commissioned officers only; alternate active training should be scheduled for warrant officers and enlisted members. The 1036th U.S. Army Reserve School (USARS), Farrell, PA, will host the training; orders will reflect assignment to the 1036th USARS with duty station at TJAGSA.

Judge Advocate Triennial Training is mandatory for all JAGSO court-martial trial and defense detachments. Individual's belonging to these units will be excused only by their CONUSA staff judge advocate with the concurrence of the Director, Guard and Reserve Affairs Department, TJAGSA. Units should forward a tentative list of members attending AT at TJAGSA to The Judge Advocate General's School, ATTN: JAGS-GRA (Mrs. Park), Charlottesville, VA 22903–1781, not later than 15 November 1985. A final list of attendees must be furnished not later than 15 April 1986. Units are responsible for ensuring attendance of unit personnel. "No-shows" will be reported to respective ARCOM commanders for appropriate action. Trial and defense detachment members who do not appear on the final list of attendees submitted by the unit should not be issued orders. Personnel who report to Charlottesville who have not been previously enrolled in JATT will be sent home. Commanders are encouraged to visit their units during the training; these visits, however, must be coordinated in advance with either Mrs. Park or Captain Wittman of the Guard and Reserve Affairs Department at 804–293–6121, FTS 938–1301/1209, or autovon 274–7110, ext. 293–6121. ARNG judge advocates are invited to attend this training, and may obtain course quotas through channels from the Education Branch, National Guard Bureau.

Judge Advocate Advanced Course (JAOAC), PHASE II

The Judge Advocate Officer Advanced Course (JAOAC), Phase II, is also scheduled at TJAGSA from 16–27 June 86. Course quotas are available through channels from the Education Branch, National Guard Bureau (NGB), for ARNG personnel and through channels from the JAGC Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN) (800–325–4916) for USAR personnel. Requests for quotas must be received at NGB or ARPERCEN by 15 April 1986. JAGSO court-martial trial and defense detachment officers who wish to take JAOAC instead of JATT must obtain a JAOAC quota. No transfers between courses will be permitted after arrival at TJAGSA. Personnel who report to Charlottesville without a quota from NGB or ARPERCEN will be sent home. All personnel who attend either course are reminded that they must meet Army height/weight standards on arrival at TJAGSA and must successfully complete the Army Physical Readiness Test (ARPT) while at TJAGSA.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

November 4-8: 81st Senior Officers Legal Orientation Course (5F-F1).

November 12-15: 21st Fiscal Law Course (5F-F12).

November 18-22: 7th Claims Course (5F-F26).

December 2-13: 1st Advanced Acquisition Course (5F-F17).

December 16-20: 28th Federal Labor Relations Course (5F-F22).

January 13-17: 1986 Government Contract Law Symposium (5F-F11).

January 21-28 March 1986: 109th Basic Course (5-27-C20).

January 27-31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 7-11: 15th Law Office Management Course (7A-713A).

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workshop (5F-F42).

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28-8 August 1986: 108th Contract Attorneys Course (5F-F10).

August 4-22 May 1987: 35th Graduate Course (5-27-C22).

August 11-15: 10th Criminal Law New Developments Course (5F-F35).

September 8-12: 85th Senior Officers Legal Orientation Course (5F-F1).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the August 1985 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

January 1986

6–10: UMCC, Institute on Estate Planning, Miami, FL.

9–11: ALIABA, Real Estate Syndication, Beverly Hills, CA.

13–14: PLI, Insurance, Excess & Reinsurance Coverage Disputes, New York, NY.

16–17: PLI, Mechanics of Underwriting, New York, NY.

16–17: PLI, Tax Aspects of New Financial Instruments, New York, NY.

22: PBI, Basic Estate Planning & Administration (Video), State College, PA.

23–24: PLI, Unjust Dismissal and At Will Employment, Los Angeles, CA.

26–30: NCDA, Trial Advocacy, Reno, NV.

27–28: PLI, Insurance, Excess & Reinsurance Coverage Disputes, San Francisco, CA.

27–31: GCP, Contracting With the Government, Washington, DC.

30–31: PLI, Mechanics of Underwriting, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 383–6516.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775–0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988–6215.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE–NEWS; (215) 243–1630.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501) 371–2024.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262–4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W., Washington, D.C. 20007. (202) 965–3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800) 424–9890; (202) 452–4420.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642–0223; (213) 825–5301.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608) 262–3833.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944–0575.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638–0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20003.

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, D.C. 20006. (202) 337–7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676–6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W. Washington, D.C. 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217) 787–2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257–2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421–5722; (504) 566–1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388–5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635–4128.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749–1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507–8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NE 68508.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 328–4815 ext. 225; (800) 752–4249 ext. 225; (612) 644–0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784–6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527–5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452–0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505) 842–6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463–3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212) 598–2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11

West 42nd Street, New York, NY 10036. (212) 790–1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108. (800) 932–4637; (717) 233–5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765–5700 ext. 271.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475–6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214) 690–2377.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036. (202) 337–7000.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, D.C. 20036, (202) 237–7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372–0140.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276–1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284–4762.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22903. (804) 924–3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Current Material of Interest

1. Regulations & Pamphlets

Number	Title	Change	Date
AR 190–5	Motor Vehicle Traffic Supervision	906	17 Jul 85
AR 190–40	Serious Incident Report		14 Aug 85
AR 210–7	Commercial Solicitation on Army Installations	902	12 Jul 85
AR 340–1	Record Management Program	1	28 May 85
AR 340–18	Army Functional Files System	1	28 May 85
AR 340–21	Army Privacy Program		5 Jul 85
AR 612–11	The Army Sponsorship Program		25 Jul 85
UPDATE #5	Officer Ranks Personnel Update		30 Jul 85
UPDATE #7	Morale, Welfare and Recreation Update		26 Aug 85
UPDATE #13	Reserve Components Personnel Update		1 Aug 85

2. Articles

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Bierman & Masters, *The Need for Hatch Act Clarification*, 36 Lab. L.J. 313 (1985).

Brennan, *"How Goes the Supreme Court?"* 36 Mercer L. Rev. 781 (1985).

Fishman, *Electronic Tracking Devices and the Fourth Amendment:* Knotts, Karo *and the Questions Still Unanswered*, 34 Cath. U.L. Rev. 277 (1985).

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Smith, *Government Contracts: Contesting the Federal Government's Award Decision*, 20 New Eng. L. Rev. 31 (1984–85).

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Note, *Military Dissent and the Law of War: Uneasy Bedfellows*, 58 S. Cal. L. Rev. 871 (1985).

Note, *Soviet Prisoners in the Afghan Conflict*, 23 Colum. J. Transnat'l L. 497 (1985).

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