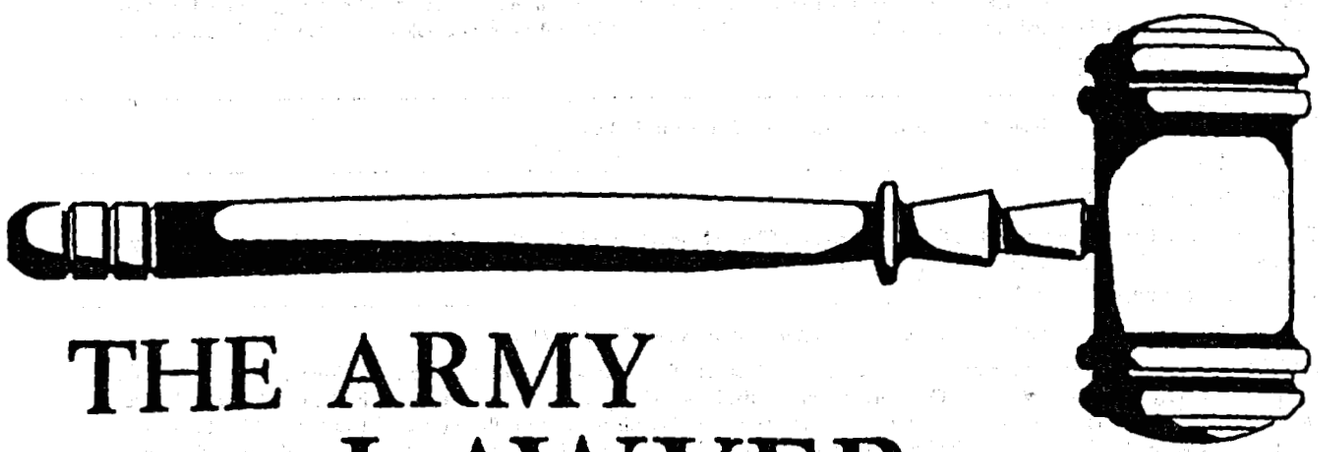

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Editor

Captain Benjamin T. Kash

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Address to the 40th Judge Advocate Officer Graduate Course

Commodore Peter R. Partner
The Judge Advocate General
Department of National Defence, Canada

Editor's Note—Commodore Peter R. Partner was the graduation speaker at the commencement exercises of the 40th Judge Officer Graduate Course on 15 May 1992. His speech marked the first time that the judge advocate general of another nation formally has addressed a graduation at The Judge Advocate General's School in Charlottesville.

Commandant, members of the faculty, students, ladies and gentlemen. It is a great honor for me to be here today to be able to deliver the commencement address at the graduation ceremonies of the 40th Judge Advocate Officer Graduate Course. When General Fugh first asked me to give the address, I wondered if I would have time enough to say all the things that I think are appropriate and so important on such a solemn occasion. That, in turn, put me in mind of the story about the ancient gentleman, very far along in years, who was before the court to be sentenced for a very serious crime. The judge looked down from the bench and said, "Mr. Jones, I realize that you are well along in years, but I also cannot ignore the fact that you have committed a very serious crime. I find myself obliged to sentence you to a period of twenty years in prison." The old man looked up, pathetically shook his head, and said, "My Lord, I'll never do it." At which point, the judge looked kindly down and said, "Well, just do as much as you can." And that, ladies and gentlemen, is what I will do today—just as much as I can.

I note that the graduating class is made up of sixty-four students. There are nine Marines, four naval officers, two Air Force officers, one Australian officer, one officer from Botswana, one Canadian officer, one Nigerian officer, one U.S. Reservist, one National Guard officer, and forty-three United States Army officers. My theme today will be national and international amity and cooperation, as exemplified by the presence here of such a mixed group—including particularly the foreign officers—with all the privileges and opportunities that I see around me as a result of the gracious kindness and willingness to work together of our United States Army legal branch hosts. You may ask why, when the menace of the Soviet Union has disappeared and communism has collapsed, it is still necessary to come here to learn and work together and to pursue our common goals. The answer to that is very simple. The whole geopolitical tendency in the world today is toward fragmentation. The term "Balkanization" has become all too clearly a harsh and violent reality. In this rapidly changing, uncertain world, where yesterday's alliances are broken into separate and possibly antagonistic states, it is even more important than before to have officers from such varied military legal backgrounds come together to achieve common standards of learning and proficiency, as well as codes of conduct and military jurisprudence which, in the final analysis, preserve the modern profession of arms from descending into savagery and barbarism. Although I am by no means a fascist, I think we can learn from the Latin word "fascis," which describes a simple bundle of sticks tied tightly together. Individually, each of those sticks can easily be broken. Bound together, they are impossible to break. That is why, ladies and gentlemen, when we come together in an institution of learning such as this and, having undergone our designated course of training, we leave to take up our day-to-day military work, we leave with the consciousness that we are then part of a group sharing common ideals, goals, and standards of conduct and behavior. None of you will ever forget that. In a sense, this learning experience has welded you together, transforming you from individual sticks into the unbreakable fascis.

Who can argue that, in coping with an international brigand such as Saddam Hussein and in all the other brush-fire wars in which our respective services are likely to be involved in the future, you are not so much better equipped as a result of having shared the common learning experience in Charlottesville, Virginia. I am particularly conscious of this, having gone through the NATO Defense College course some years ago. Ever since that time, I have had the feeling that, although my own service is, of course, the Canadian forces, I have been a member of a larger service, made up of brothers and sisters in arms from a whole variety of different countries. I know that you will have the same experience here. And I also wish to say loud and clear, speaking for myself, my service, and my country, that relations with that wonderful nation to the south have never been better and that our friendship and gratitude to our American comrades in arms is of the highest order.

I have said nothing about your being role models when you leave here, with the responsibility to impart to others what you have learned and to carry yourself in accordance with the precepts and standards of this military law school. I am quite sure that you don't need me to tell you that. The very fact that you have been selected to come here tells me that you are a special group, with very high personal and professional attributes.

I have also said nothing about particular legal matters or aspects of the training you have had here. I would, however, like to comment on one particular trend that we are seeing very clearly in Canada and I know exists in the United States and in other countries as well. That is the constant challenge and scrutiny we are under to ensure that our military structure,

regulations, and procedures not only are as consistent as possible with modern social trends and attitudes, but also, in our own field, are in keeping with natural justice and the administration of the civil law in the countries to which we belong. This is not easy because, as military lawyers, we are the watchdogs over the conduct of those to whom is entrusted the responsibility of safeguarding the state from her enemies and of acting as the final enforcers of our governments' political wills. To do that can—and often does—require us to maintain a very delicate balance between our responsibilities to the state and our other responsibility to recognize and uphold the rights of our members.

Some of you may have heard of two recent cases in the Supreme Court of Canada, where appeals from convictions by general courts-martial were allowed on the ground that the courts lacked the necessary degree of institutional independence required and guaranteed by the Charter of Rights and Freedoms, which is part of our constitution. This was because the presidents and members of the courts-martial were appointed by the general or admiral who convened the court and who, as a member of the executive, had a direct and immediate interest in its outcome. Amendments to the Canadian National Defence Act are now being prepared to address this problem in two ways: first, by putting the selection process for president and members of general and disciplinary courts-martial on a random basis; and second, by having the appointments made by an officer other than the convening authority, who has had no previous connection with the court-martial and who, therefore, has no official interest in its outcome.

I mention these cases as examples of the situation where an accommodation must be reached between the rights of the individual—in this case, the right to be tried by an independent tribunal—and the public interest in having discipline in the Armed Forces maintained and upheld through a duly constituted system of military courts. As it was in these cases, such an accommodation can, and must, be reached. It is in performing this all-important task that your training, experience, and expertise as military lawyers plays a vital part. In my own view, the only time when there is justification for a significant difference between the substantive or procedural provisions of the civil law on the one hand and the military law on the other is when there are such overriding military considerations as to render this difference imperative. This, in my view, applies regardless of whether bringing the two systems into conformity confers additional rights or protections on the state, or on the individual.

To give you another example, until February of this year, it was possible in Canada for the prosecution to appeal the finding or sentence of a civil court, but not a court-martial. It seemed to me that this was an anomalous situation, the origins of which, whatever they may have been, were no longer discernible or justifiable in the 1990's. I therefore took action to have the National Defence Act amended, and on the 4th of February of this year, it became possible for the prosecution to appeal the finding or sentence of a court-martial to the Court-Martial Appeal Court, which is a civilian court of appeal made up of judges from the supreme courts of the provinces and the Federal Court of Canada. This means that the individual member and the service now have identical rights of appeal and those rights of appeal are exactly those which exist under the civil-law system. The first case to be appealed by the prosecution under the new law is now in progress. It involves a member tried on a charge of first-degree murder in Germany, convicted of manslaughter, and sentenced to three years' imprisonment.

Ladies and gentlemen, that is almost all I have to say on this rather splendid occasion. You have been most fortunate to have the opportunity to come and study here and to gain knowledge and experience which you will find will stand you in good stead throughout your entire professional careers. I congratulate you and wish you well.

Child Support: Shopping for Options

Lieutenant Colonel Mark E. Sullivan, USAR
IMA, Army Legal Assistance Office, OTJAG

Introduction

Major Irene Smith stretched briefly and reached for her second cup of coffee. As Chief of Legal Assistance at Fort Swampy, North Carolina, she was busy drafting a response to yet another nonsupport complaint addressed to the commanding general.

She glanced down the hallway. Each office door was tightly shut. Each of her legal assistance attorneys (LAAs) was occupied with client interviews and counselling. Had she been able to eavesdrop, Major Smith might have overheard the following:

- Captain Brown was meeting with the post adjutant, discussing the adjutant's impending marital separation. The adjutant wanted his wife to help him to pay the college expenses of their two teenaged daughters. He was troubled by his wife's proposal that he

should increase his monthly child support payments periodically to match the gains in his net income until each girl entered college.

- Lieutenant Black was interviewing a corporal who had questions about a draft separation agreement prepared by his wife's civilian attorney. The corporal wanted to claim dependency exemptions for his children; he also wanted to ensure that they would be provided with proper medical care.

- Captain Green was helping a sergeant to respond to his ex-wife's motion for an increase in child support. The primary issues involved allocation of child support among the sergeant's three children and the date that child support would end for each child.

As she returned to the task in front of her, Major Smith began to ponder the following questions: Is my staff up to speed on family law counseling? Did they receive enough training in law school and at the JAG School? How can I ensure that my officers understand the basics of support options and negotiation?

These concerns are legitimate. Conscientious legal assistance supervisors address them every day. One way to teach attorneys about child support alternatives is to create a template for each major aspect of child support. This template should cover issues from the standpoints of the custodial and the noncustodial parent and should identify situations in which problems may arise. This article outlines options that an LAA should consider when conducting family support counseling.

Child Support: Monetary Amount

To determine the extent of a noncustodial parent's child support obligation, an LAA should consider at least three factors:

1. Have the parties agreed on a specific support obligation?

2. What sum is due under state child support guidelines?

3. What amount is due under service regulations?[1]

Not surprisingly, these three questions almost always yield different answers.[2]

Regardless of any tentative agreement between the parties, an attorney should calculate the alternative child support obligations under state guidelines and military regulations and should review these obligations with the client. This advice will help the client to determine a fair, reasonable figure for monthly child support payments before the parties actually execute a written agreement.

Many couples include child support settlements in separation agreements. The law favors these agreements as an amicable way of settling marital differences out of court. Nevertheless, a court probably will modify or set aside an agreement's child support provisions if they appear to be unfair, unreasonable, inadequate, or unnecessary.[3]

Support provisions need not conform exactly to state guidelines or service regulations for a court to deem them reasonable; however, they fairly should reflect the parents' abilities to pay, their personal expenses, and the reasonable needs of their children. Moreover, federal law now requires state courts and agencies to treat the figures named in child support guidelines as rebuttable presumptions of the adequacy of child support.[4] If the parties deviate from the guidelines, their reasons for doing so should be made a matter of record, especially if their support agreement ultimately will be incorporated into a court order.

An LAA should beware of a separation agreement that expressly excuses the noncustodial parent from paying child support. One occasionally encounters this proposal, usually in connection with a provision denying visitation rights to the noncustodial parent. A court will not hesitate to set these provisions aside, even if both parents adopted them knowingly and voluntarily. Invariably, one of the parties will change his or her mind and will request child support or visitation rights from the other. If the other parent attempts to stand on his or her rights under the agreement, he or she will find the court remarkably unsympathetic. Child support and visitation are rights not of the parent, but of the child. Rather than deprive a child of these rights by enforcing an agreement to which the child is not a signatory, the court will exercise its broad protective powers to eliminate the offensive provisions from the agreement.[5]

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[1] *See generally* Army Reg. 608-99, Personal Affairs—Family Support, Child Custody and Paternity, ch. 2 (22 May 1987).

[2] *See* TJAGSA Practice Note, *Setting Child Support Obligations*, The Army Lawyer, July 1988, at 65.

[3] *See, e.g.*, Fuchs v. Fuchs, 133 S.E.2d 487 (N.C. 1963).

[4] *See* 42 U.S.C.A § 667(b) (West 1991).

[5] *See Fuchs*, 133 S.E.2d at 491 ("[N]o agreement . . . between husband and wife will . . . deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants"). For decisions reversing awards denying child support to custodial fathers, *see* Payne v. Payne, 370 S.E.2d 428 (N.C. Ct. App. 1988); McLemore v. McLemore, 366 S.E.2d 495 (N.C. Ct. App. 1988).

Allocation of Child Support

Whenever possible, parents with more than one child should decide how child support should be divided among the children. The attorney for the noncustodial parent should insist on an allocation clause because this clause is the key to modifying a support obligation when one of several children experiences a material change of circumstances. A material change of circumstances typically occurs when one child leaves the custodial parent—either to move in with the other parent or to reside elsewhere—or upon the occurrence of a date specified in the agreement for the termination of child support, such as the child's eighteenth birthday. In either situation, the noncustodial parent must know how much child support he or she will have to pay after the change occurs.

When a support clause fails to specify the support that a noncustodial parent must pay per child, parents often calculate an approximate value for the support each child should receive by dividing the total support obligation by the number of children originally entitled to support. When a noncustodial parent no longer has to support one child, he or she reduces the total support payment by an amount equal to this pro-rata share. Accordingly, a father supporting his son and daughter under an agreement directing him to pay "$500 per month for the minor children" might reduce his monthly payments to $250 when the older child reaches age eighteen.

Unfortunately, this simple approach conflicts with the law in many states. In North Carolina, for instance, the child support in the example described above probably would remain at $500 until *both* children attained majority.[6] To change a support obligation that is set out in a court order, the noncustodial parent should file a motion asking the court to clarify the order or to reduce the support that he or she must pay for the remaining child or children.[7] A court generally will not allow a noncustodial parent to determine unilaterally how much child support is attributable to each child or to reduce his or her payments without the benefit of a court order.[8]

From the standpoint of the custodial parent, a provision that does not allocate child support is best because it keeps child support at the highest level for the longest time. If a compromise is necessary, the custodial parent's attorney should try to divide the child support amounts unevenly. By doing so, he or she may accomplish a de facto increase in child support when one child attains legal majority or otherwise becomes ineligible for support. In the example described above, the noncustodial parent's support obligation of $500 per month could be divided into subpayments of $300 for the younger child and $200 for the older child. When the older child no longer requires support, the child support for the younger child effectively would increase. Instead of receiving $500 per month for two children—essentially, $250 per child—the custodial parent would receive $300 per month for one child.

Escalator Clauses

Occasionally, a couple will agree to recalculate future child support periodically to account for the increased future income of one or both parties or for the effect of inflation on child support.[9] Basically, four types of escalator clauses can be used. Whichever clause is considered, the LAA must ensure that the client fully understands the impact of the clause in a decree or separation agreement.

The first form of escalator clause is based on the noncustodial parent's net, or "take-home," pay. This clause derives from the theory that the parent's child support obligation should increase as his or her actual earnings increase. In general, this is a good idea, but it has its drawbacks—some of which are not obvious.

The term "net pay" is capable of a lot of manipulation. Assume, for example, that Sergeant John Stuart decides to bring home more pay at the end of each month by claiming a few more withholding allowances on his Form W-4.[10] These additional allowances, however, would not change the tax that Sergeant Stuart must pay on April 15 next year. Accordingly, an LAA could not assess Stuart's net income simply by reviewing his leave and earnings statement. The attorney would have to examine Stuart's federal and state tax returns after the end of the calendar year, subtracting all taxes due from Stuart's adjusted gross income to determine his net pay.

As this example shows, the use of a "net pay escalator clause" necessitates an exchange of tax returns—not merely an exchange of monthly pay stubs. Ordinarily, this might prove to be no problem. Consider, however, the situation that

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[6]Many courts recognize a presumption against the proportional reduction of child support when one child attains majority. *See, e.g.*, Gilmore v. Gilmore, 257 S.E.2d 116 (N.C. Ct. App. 1979). Accordingly, a court may deny a motion to modify a separation agreement or a consent order if the movant has premised the proposed modification on the allocation of previously undivided child support following one child's attainment of majority. *See* Hershey v. Hershey, 292 S.E.2d 141 (N.C. Ct. App. 1982).

[7]*See, e.g.*, Berrier v. Berrier, 313 S.E.2d 616 (N.C. Ct. App. 1984); Tilley v. Tilley, 227 S.E.2d 640 (N.C. Ct. App. 1976).

[8]*See, e.g.*, Craig v. Craig, 406 S.E.2d 656 (N.C. Ct App. 1991); Brower v. Brower, 331 S.E.2d 170 (N.C. Ct. App. 1988); Gates v. Gates, 317 S.E.2d 402 (N.C. Ct. App. 1984).

[9]The effect of inflation on child support is well recognized. Courts even have taken judicial notice of the effect of dollar depreciation on support awards. *See* Walker v. Walker, 306 S.E.2d 485 (N.C. 1983); Broughton v. Broughton, 294 S.E.2d 772 (N.C. Ct. App. 1982).

[10]*See generally* TJAGSA Practice Note, *Withholding and Income Tax Refunds*, The Army Lawyer, Oct. 1991, at 48.

could arise if Sergeant Stuart were to remarry. Presumably, Stuart and his new wife would file joint tax returns. Would Stuart's bride want her income disclosed to the former Mrs. Stuart? Disclosure is inevitable if Stuart must exchange tax returns with his ex-wife. How will this affect Stuart's current marriage?

When confronted with such questions, many potential support payors revert to the "gross escalator clause." This clause ties child support increases to increases in the *gross* income of the noncustodial parent. Because increases to the noncustodial parent's wages or salary appear on his or her Form W-2, an exchange of tax returns is unnecessary.

Using a gross escalator clause avoids one major problem—that is, the revelation of a current spouse's income. A new problem, however, is created in the process—how does one determine the noncustodial parent's gross income? Does it include only his or her wage or salary income, as shown on the Form W-2, or should it also include passive income, such as dividends and interest? Is revenue from a rental property gross income? No single answer satisfies these inquiries. Realizing the difficulties inherent in describing this term, a good drafter will pay close attention to the phrasing of a gross escalator clause. The clause must provide the noncustodial parent with adequate notice of his or her duties to report income and to calculate child support increases.

A third possibility is to adjust the support obligation to reflect increased costs of living, using an objective, neutral index to determine the current rate of inflation. Because inflation affects both parties equally—at least in theory—the "Consumer Price Index" (CPI) may be a good basis on which to recalculate child support.[11] Should a legal assistance client wish to adopt this approach, however, an LAA should recommend that the parties identify and adopt a specific index[12]—contrary to popular belief, the federal government actually does not compile a universal CPI.

An LAA should be sure that a CPI clause is sufficiently specific to survive a challenge in court for vagueness. Only when an agreement clearly identifies a specific index will the parties be assured of knowing how to recalculate child support in the future.

A fourth mechanism for adjusting child support is the flat-rate escalator. In adopting this simple clause, the parties basically agree upon a fixed annual increase in child support, usually based on the anticipated rate of inflation or the expected wage increases of one or both parents. They then apply this figure annually to the previous year's level of child support to compute the payor's current support obligation. Because this approach is not linked directly to inflation or to the incomes of the parents, it arguably is not "perfectly fair." Nevertheless, it is "perfectly simple" to apply.

If the parties adopt an escalator clause other than the flat-rate clause, they should expect a considerable gap between the event that triggers a support increase and the increase itself. A delay of one year or more is not uncommon. For example, if Staff Sergeant Rosser's pay increases on 1 January 1993 from $1450 to $1550 per month, the former Mrs. Rosser will not realize the full benefit of a recalculated increase under her gross-wage escalator clause until she and the sergeant exchange W-2 forms in early 1994. A similar delay occurs when the parties use a CPI escalator clause. If the parties contact the regional office of the Bureau of Labor Statistics in August 1992 to request the most recent figures for the index they adopted in their escalator clause, they should receive a copy of the May 1992 CPI report in September. The figures for May 1992—the most recent data available—will reflect only the change in the CPI between June 1991 and May 1992.

Another consideration is whether the parties will design their escalator to go *down* as well as *up*. Most parents who receive child support are less secure financially than the parents who pay child support. Child support recipients want to receive only increases, not decreases. Accordingly, they normally will insist on a specified minimum level of child support as an absolute "floor" for escalator adjustments. A noncustodial parent might agree to this arrangement in exchange for an equivalent "child support ceiling"—that is, a fixed monthly or annual sum representing a "cap" on child support increases.

Finally, the parties must be told how, and when, to recalculate child support. The simpler the escalator clause, the easier this will be to accomplish. An LAA, however, should not be surprised to find that many child support payors routinely ignore escalator clause recomputations for several years in a row. Only an optimistic or naive attorney would imagine that the noncustodial parent would look forward eagerly to the next redetermination—read "*increase*"—of his or her support obligations. Too frequently, parents sign an agreement containing an escalator clause without considering the clause's implications. The noncustodial parent subsequently regrets, ignores, or attacks each redetermination, bitterly asserting, "Everyone else pays a flat amount of child support, but my obligation is always going up!"

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[11] For an overview of cases in this area, see Brown, *Exercising Care When Drafting COLAs*, 7 FAIR$HARE, Jan. 1987, at 9; Brown, *Rough Justice in Automatic Support Adjustments*, 5 FAIR$HARE, May 1985, at 5; Krause, *Automatic Cost of Living Adjustment Clauses*, 1 FAIR$HARE, Apr. 1981, at 3.

[12] The Department of Labor's Bureau of Labor Statistics maintains several indices. These include "wage-earner" and "urban" lists and indices for various regions of the country. The Bureau's many regional offices are excellent resources for LAAs with questions about using statistical compilations to calculate child support obligations. Attorneys also can write for information to the Bureau of Labor Statistics, United States Department of Labor, Washington, D.C. 20212.

An LAA looking for practical guidelines on drafting CPI clauses may want to review the following articles: Merrill & Robertson, *The Consumer Price Index and Child Support Proceedings*, 2 The LAMPlighter, Summer 1990, at 5; *Sample Clause: Consumer Price Index Clause for Agreements*, 4 The Matrimonial Strategist, summer 1986, at 5; Bair, *Arguing Escalator Clauses*, 1 The Matrimonial Strategist, Mar. 1983, at 2.

Medical Care—A Hidden Factor

Clients need to be informed about much more than the "cash amount" of child support. Most child support cases involve at least two other hidden factors—medical insurance and uncovered health care expenses.

Medical Insurance

Health insurance covers most, but not all, costs of medical problems. At the outset, an LAA must learn whether the nonmilitary parent has private medical insurance covering his or her children and, if so, what medical treatments the insurance will cover. A typical policy has an annual deductible of $150, covers eighty percent of most medical expenses, and excludes elective surgery, routine physical examinations, and dental work from its coverage. As military dependents, the children of service members also are entitled to medical treatment at military hospitals[13] and are covered for many civilian health care expenses by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).[14] Ordinarily, CHAMPUS covers eighty percent of a claimant's allowable medical expenses. The annual deductible for outpatient care is fifty dollars per person or one hundred dollars per family for sponsors of a pay grade of E-4 or below.[15] For sponsors above this grade, the deductible is $150 per person or $300 per family.[16]

When both parents work, each can maintain health care insurance for the children. This "double coverage"—usually provided through CHAMPUS and an inexpensive, employer-sponsored plan—may reduce uncovered medical expenses substantially. Alternatively, the noncustodial parent could maintain medical coverage, either through CHAMPUS or through a private insurance carrier, and both parents could split the uncovered medical expenses equally. The advantage of the latter option is that it places part of the financial burden directly on the custodial parent—the parent more likely to "take a child with the sniffles to the emergency room," according to the complaints of some noncustodial parents.

Another factor that an LAA must consider is the payment of extraordinary unreimbursed medical expenses. If a child suffers a catastrophic illness or injury, the parent earning the higher income arguably should be liable for the excess payments. Accordingly, a clause allocating responsibilities for health care expenses could provide that medical insurance would be maintained by the parent with the *lower* income, that the parties would share uncovered expenses *equally* up to an annual, per-parent ceiling of $150, and that any uncovered expense exceeding this amount would be paid by the parent with the *higher* income.

A Problem of Definition

What are "uncovered health care expenses?" Depending on the policy language, the finances of the parents, and the needs of the children, these expenses might include payments for prescription drugs, psychological counseling, dental checkups, orthodontia, eyeglasses, routine physical examinations, and cosmetic surgery.

Not all of these costs are easily foreseen. Deciding whether to state specifically in a separation agreement which parent must pay for each expense can be equally difficult. A custodial mother may be wise *not* to specify what "uncovered health care costs" means if doing so would jeopardize an otherwise generous order or agreement. A noncustodial father, on the other hand, might want to exclude orthodontia and elective health care procedures from "uncovered expense" treatment. Alternatively, he might be willing to share these costs, but only if he is consulted about, and expressly agrees to, the proposed medical or dental procedures before the mother incurs any expenses for them. In considering the allocation of uncovered medical expenses between two parents, an LAA must consider these factors carefully.

Paying the Bills

A support agreement should state specifically how promptly a noncustodial parent must reimburse the custodial parent for a child's medical expenses after those expenses are incurred. No "right" answer or choice exists here—only the urgent need for the parties to choose a due date. Leaving this requirement unspecified may render it unenforceable.

A sample clause might provide as follows:

1. The custodial parent shall provide the noncustodial parent with a bill or statement for health care or treatment of a child within seven days of this care or treatment.

2. The noncustodial parent shall pay any *uncovered portion* directly to the health care provider (or to the custodial parent if he or she has paid this amount already) within seven days of receipt of the bill or statement.

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[13] Army Reg. 40-3, Medical, Dental, and Veterinary Care, paras. 4-12 to 4-18 (15 Feb. 1985).

[14] *See generally* Dep't of Defense Directive 6010.8, Administration of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) (Oct. 24, 1984).

[15] *See* Office of Civilian Health and Medical Program of the Uniformed Servs., OCHAMPUS Fact Sheet 18 (May 1991).

[16] *Id.* For more detailed information, an LAA should contact the CHAMPUS office on his or her installation or the Office of the Civilian Health and Medical Program of the Uniformed Services, Aurora, Colorado 80045-6900.

3. The noncustodial parent immediately shall submit the bill to his or her insurance carrier for payment.

4. If the custodial parent already has paid the *entire bill*, the noncustodial parent shall reimburse him or her in full within seven days after receiving the bill or statement from the custodial parent.

5. If the health care provider has not been paid and must be reimbursed, the noncustodial parent shall make the health care provider the payee for the insurance check or shall pay the health care provider promptly upon receipt of the insurance check.

6. The bill or statement provided to the noncustodial parent shall include a description of the child's treatment and the health care provider's prognosis or diagnosis. It also shall state whether the health care provider has applied directly to a medical insurance carrier for payment.

Life Insurance

An attorney drafting a separation agreement should consider using a life insurance clause to provide for the payment of insurance proceeds as a substitute for child support if one parent dies while child support or college expenses are still due. Because both parents are legally responsible for supporting the children, this provision logically should apply to both parents—not merely to the parent who is responsible for paying child support.

Determining the Extent of Coverage

To draft a life insurance clause, an attorney must calculate the coverage that each party should obtain. If the parents cannot agree on a set figure for the face amount of each policy, the attorney should start by estimating how much child support would go unpaid if the noncustodial parent were to die immediately after the agreement or the decree becomes effective. By calculating yearly child support for each child for the duration of the noncustodial parent's support obligation, the attorney can determine the noncustodial parent's total child support obligation. To be economically accurate, this sum should be reduced to present value to reflect the future investment potential of money "in hand"; it also should be adjusted upwards for future inflation. The remaining figure, the sum of all future child support payments, is a fair starting point for the face value of a policy. It represents the maximum foreseeable financial exposure of the custodial parent if the noncustodial parent's death deprives the children of further support.

As the years go on, the face amount of the life insurance could be reduced gradually to account for the decreasing number of years in which the noncustodial parent must pay child support. Some life insurance carriers offer policies with a reducing face value, but the benefits of finding and selecting such a policy when negotiating a life insurance clause rarely are worth the time and effort they entail. Instead of searching for a policy that will pay the cheapest possible substitute for child support, the noncustodial parent should arrange to pay any "excess" directly to the child upon attainment of majority, termination of college studies, or at some other appropriate date.

Calculating the face amount of life insurance for the custodial parent is difficult because he or she provides support *in kind*—not in monthly cash payments. In some states, an attorney may use state child support guidelines to determine the amount of support for which the custodial parent is responsible.[17] If this option is not available, the attorney may assign a nominal value to the in-kind support the custodial parent provides each month. In either case, the attorney then would calculate the face value of the custodial parent's insurance in the same way that the noncustodial parent's insurance value is determined. Finally, if the custodial parent is employed outside the home and the employer provides life insurance as an employment benefit, the parties could agree to use whatever amount of life insurance is available to the custodial parent as the measure of the custodial parent's life insurance protection.

Life insurance provisions may be secured by a policy that belongs to the premium payor and builds up cash value or equity (a whole life or universal life policy); by a policy that belongs to the payor, but builds up no cash value (term life insurance); or by a policy that has no equity or cash value and does not belong to the person who pays the premiums (a group life policy, such as Serviceman's Group Life Insurance). The owner of an insurance policy wields considerable power. He or she designates the initial beneficiary and must consent to any proposed changes in beneficiary. Moreover, the insurer must inform the policy owner of any attempts to cancel the policy and of nonpayment of premiums if nonpayment could result in cancellation of coverage. Finally, no one but the policy owner can borrow against the life insurance policy.

A premium payor can defeat the purpose of the life insurance clause in a separation agreement by exercising any of the powers incident to ownership of the policy. If, pursuant to a separation agreement, both parents purchase life insurance for the benefits of their children, each parent will want to prevent the other from abusing his or her powers of ownership. To accomplish this, the parties should agree to a cross-transfer of ownership of the insurance policies. (Most insurance companies will allow a collateral assignment of ownership of a whole life, universal, or term life policy to a person other than

[17] *See, e.g.*, N.C. Gen. Stat. § 50-13.4(c)(1) (1991).

the payor.) Accordingly, the separation agreement should provide that each parent shall own the other's insurance policy or policies for the duration of the support agreement. Ownership of the policies would revert to the original owners when the terms of the agreement have been satisfied. A cross-transfer of ownership protects each parent, preserving their promises and eliminating any temptations to cancel the policies or to change beneficiaries.

Choosing a Beneficiary

Clearly, choosing a proper beneficiary is important. The simplest choice would be to have the parents name each other as beneficiaries; however, this approach can be dangerous. Unless the insured party somehow limits the named beneficiary's right to use the life insurance proceeds, the beneficiary may spend these benefits for any purpose. A surviving parent could go on a wild spending spree upon the death of the insured parent, utterly ignoring the best interests of the children.

Some parents may suggest that the children be named as beneficiaries. This approach has a certain attraction because the children are the intended recipients of the money from the life insurance policy. A closer examination, however, reveals the flaws in this arrangement. In most cases, a parent will want the money from an insurance policy to be used to pay a child's regular, day-to-day expenses. In essence, the parent sees the insurance benefits as a substitute for child support. Many states, however, will not allow proceeds payable to a minor child to be used in this manner. The surviving parent must obtain letters of guardianship to receive the money from the insurance company. Moreover, the surviving spouse probably will have to hold the money in trust for the child until the child attains majority. State law *may* allow the guardian to request an interim allocation of the proceeds for a large emergency expense that the guardian cannot afford to pay personally; however, it very likely will prohibit distribution and disbursement of trust assets for the child's ordinary living expenses.

A further complication is the requirement that the guardian disburse insurance proceeds to a minor beneficiary as soon as the child attains majority. Only rarely is a person capable of managing large sums of money at age eighteen or twenty-one. A parent probably would prefer to have insurance proceeds held in trust for the child until he or she attains sufficient maturity to handle this money wisely. A typical trust disbursement provision would allow the trustee to pay half the funds to a child at age twenty-five and the other half at age thirty.

All these considerations indicate that a parent should create a trust for a child, rather than naming the other parent or the child as a beneficiary under the life insurance policy. This trust should empower the trustee—ordinarily, but not necessarily, the surviving parent—to use insurance proceeds to promote the health, education, safety, and welfare of the minor child. For example, the trust could direct the trustee to draw a regular monthly allowance to cover the child's expenses for lodging, utilities, transportation and schooling. The trust agreement also could permit one-time payments from the trust for major expenses, such as purchasing a car for the child or the payment of major medical bills. Finally, the language in the trust should be sufficiently broad to allow the trustee to enroll the child in a private school and to pay college tuition until the child completes his or her undergraduate studies.

In addition to provisions governing transactions during the lifetime of the trust, the trust document should contain specific directions for the disbursement of assets when the trust terminates. If the parties have more than one child, the trust agreement should specify whether the proceeds must be held in separate trusts from the outset or should be maintained in a unitary trust with individual portions split off as each child attains the specified age of distribution.

Allocating the Dependency Exemption

In the absence of an agreement to the contrary, a parent who has custody of a minor child for more than half of each year may claim the child as a dependent for tax purposes.[18] The right to claim the dependency exemption may be transferred by a separation agreement or a court order. Similarly, the custodial parent may transfer the right by completing Treasury Form 8332, signing it, and giving it to the noncustodial parent to attach to his or her federal tax return.

In the 1991 tax year, a taxpayer could claim a dependency exemption of $2150 as a deduction from income. This sum, however, was not the actual dollar value of the exemption. For a person in the fifteen-percent federal tax bracket, the exemption was worth roughly fifteen percent of $2150—that is, $322. For a taxpayer in the twenty-eight-percent tax bracket, the dependency exemption was worth approximately $602.[19]

An LAA who represents a custodial parent may find that the best course of action is not to mention the dependency exemption at all. The custodial parent well may need the money the exemption represents and may not wish to part with it. On the other hand, an LAA representing a noncustodial parent normally should try to convince the other side to transfer the

[18] I.R.C. § 152(e) (Maxwell Macmillan 1991).

[19] These figures reflect only the amounts by which a dependency exemption can reduce a taxpayer's federal income tax. A taxpayer, however, also may use a dependency exemption to reduce his or her state income tax liability. Accordingly, the exemption is more valuable if the taxpayer must pay both federal and state income taxes.

dependency exemption to the LAA's client. In most divorces, the noncustodial parent is the parent with the higher income. Accordingly, he or she arguably needs the dependency exemption more than the custodial parent.

Through skillful negotiation, an LAA may persuade the custodial parent to "give away" the dependency exemption to preserve an otherwise satisfactory settlement. This task, however, is often difficult. If the custodial parent refuses to give the dependency exemption to the noncustodial parent, the attorney should consider advising the noncustodial parent to "purchase" the exemption.

The purchase price of a dependency exemption usually is equal to the additional income taxes that the custodial parent would have to pay if he or she could not claim the exemption. This sum can be calculated easily. The rough calculations, based on the parent's tax bracket, are outlined above.[20] To define the price more precisely, the attorney should prepare two dummy tax returns for the custodial parent—one excluding the dependency exemption and one including it. The difference in taxes is the amount the custodial parent would lose annually by relinquishing the exemption.[21]

A custodial parent need not transfer a dependency exemption permanently. He or she could transfer the exemption to the noncustodial parent in alternating years. Similarly, parents who have more than one child could apportion the dependency exemptions for the children between themselves. If the parties agree to split multiple exemptions, an LAA usually should advise his or her client to claim the dependency exemption for the *younger* child. The younger child will remain a minor longer than his or her older sibling; therefore, his or her exemption is more valuable.

Another issue that an LAA must consider when representing a custodial parent is whether the transfer of an exemption to the noncustodial parent should be complete or conditional. Only rarely will a custodial parent want to transfer a dependency exemption unconditionally. More frequently, a transfer will be conditioned on the noncustodial parent's complete compliance with all child support requirements—including college expenses, medical insurance, and uncovered health care expenses. For example, a transfer agreement could require the noncustodial parent to meet all of his or her support obligations by December 31 of each year as a viable condition precedent to the custodial parent's execution of a Form 8332 each January.

College Expenses

Today, many children find that college is not a luxury—it is a necessity. More military parents than ever before can afford to send their children to college; however, few find the costs of higher education easy to bear. A sensible parent will want to consider college expenses as part of his or her child support settlement strategy.

The first issue to be decided is how long the educational support obligation will last. Typically, a college-expense clause will fund a child's undergraduate education for four years. This four-year period can be consecutive or cumulative. An obligation extending for eight semesters undoubtedly would accomplish the same result.

Occasionally, a child will need more than four years to complete college. Accordingly, a five-year obligation might be a more realistic target if the child's parents want to ensure the child earns a degree. Alternatively, the parties could provide that the payment period shall continue until the child reaches a certain age. The parties also should decide whether the child must attend college full-time to be eligible for educational support or whether part-time attendance is permissible.

Next, the parties must determine which costs the college-expense clause will encompass. Most expense clauses cover a child's expenses for room, board, books, tuition, and fees. A clause also should state which parent will pay the child's expenses during the summer. Finally, the clause may direct one parent to provide the child with a stipulated amount of spending money per month or with travel money if the school is not located near the custodial parent's home.

A college expenses clause must describe each parent's obligations specifically. The parties should reject a clause that requires a parent "to help with college expenses if he [or she] is able to do so," or that states that a parent "will assist with college expenses in a fair and reasonable manner." At best, such vague promises may lead to costly litigation; at worst, they are unenforceable.[22]

Once the parties have decided on the terms described above, two issues remain. The first is whether the clause should include performance or scholastic qualification requirements. Parents usually will want to condition their child's entitlement to educational support upon the quality of

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[20] *See supra* text accompanying note 19.

[21] Suppose, for instance, that a custodial mother would have to pay an additional $600 in federal taxes each year if she could not claim a dependency exemption for her daughter. Assuming that she would incur no additional state tax liability by transferring the exemption, she would have to receive an extra $50 per month in child support from the child's father to equalize her economic position. This sum represents the purchase price of her daughter's dependency exemption. The mother, however, is not bound to accept this price. If the benefit that the father would gain through a transfer of the exemption exceeds the cost the mother would incur by transferring the obligation—for example, if he was in a 28% tax bracket and she was in the 15% bracket—the mother could attempt to set a higher price for the exemption.

[22] *E.g.*, Rosen v. Rosen, 413 S.E.2d 6 (N.C. Ct. App. 1992).

the child's academic performance and the merit of the program in which he or she is enrolled. A good example of this would be a requirement that the child must maintain a "C" average in pursuit of a generally recognized degree at a duly accredited institution.

The second issue is financial—how much money will be spent and who will spend it? The parties must decide whether one parent will assume sole pecuniary responsibility for a child's higher education or whether the parties will divide the child's college costs between them.

Whenever one party bears sole responsibility for college expenses, that party's attorney should insist on some form of "cap" on this obligation. Not even a well-meaning parent who is anxious to send his or her child to school wants to incur a college-expense obligation that involves unknown and possibly unaffordable costs. In lieu of a specific monetary limit, a clause could state that the parent shall not be required to pay an amount greater than the in-state tuition at the state university or public-supported college nearest the residence of the child when the child enters college.

Parents frequently decide to share college costs. The lawyer drafting the support agreement then must attempt to divide these expenses fairly. This task is not always simple. An equal division might sound logical and equitable, but this might not be so if a wide disparity exists between the incomes of the parties. If the father earns twice as much as the mother, a fair agreement might require the father to pay two-thirds of the college costs.

Occasionally, an attorney or a client may be tempted to delay a precise allocation of educational expenses until the child enters college. This is rarely a wise idea. For example, a college clause could state that the parties will pay their shares of the college costs in proportion to their respective gross incomes when the child enters college. This arrangement, however, could induce either parent to drop out of the workforce. By reducing his or her wage income drastically just before the child's freshman year, one parent effectively could saddle the other with all of the child's college expenses. This unfair tactic harms not only the parent who continues to work, but also the child. Accordingly, the parties should avoid any clause that would encourage these machinations.

Reduction of Child Support for Visitation

In general, a noncustodial parent's exercise of visitation rights does not affect his or her obligation to pay child support.[23] Absent a specific, contrary provision in a decree or separation agreement, the noncustodial parent is not entitled to any decrease in child support during extended visitation periods.[24] The parties, however, may agree to this arrangement to encourage the noncustodial parent to spend more time with the children. Similarly, they may wish to acknowledge that, during the children's visits, the noncustodial parent faces substantially higher expenses, while the custodial parent's expenses drop significantly.

To eliminate child support entirely for the one- or two-month period each summer when the children live with the noncustodial parent rarely is desirable or acceptable. The custodial parent's expenses may decline during these visitation periods, but they do not disappear. Even when the children are absent, the custodial parent must pay for various "embedded" child care costs, such as furniture, clothing, and obtaining and maintaining a home with extra living space. A reasonable compromise would halve the noncustodial parent's child support for each month that the children stay with the noncustodial parent. This approach recognizes the costs the custodial parent must bear without ignoring the increased expenses the noncustodial parent incurs during the children's visit.

Termination of Child Support

A support agreement should identify specific events as conditions for the termination of child support. Among these events are the child's death; emancipation by marriage, entry into military service, or another specific act connoting entry into adult life; attaining legal majority; graduation from high school; or moving away from the custodial parent.

The child's death or legal emancipation *always* should be identified explicitly as irrevocable termination events. Accordingly, most decrees or settlement instruments state that child support will end when the child dies or attains majority.

The age of legal majority varies among the states between eighteen and twenty-one. State law, however, also may contain a "savings provision." A savings provision typically requires a parent to support an adult child for a specified period if the child remains in high school after attaining majority.[25] Some states extend this requirement still further, permitting their courts to order parents to support their children until the children complete college. Finally, state law may provide that parents must support an incompetent child indefinitely. If the parties to a separation agreement are residents of a state that imposes this duty, they should consider including a clause in the agreement that will allocate a child's future expenses fairly between the parents if the child is incapable of self-support when he or she reaches age eighteen.[26]

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[23] *E.g.*, Evans v. Craddock, 300 S.E.2d 908 (N.C. 1983); Cohen v. Cohen, 396 S.E.2d 344 (N.C. Ct. App. 1990).

[24] *E.g.*, Goodson v. Goodson, 231 S.E.2d 178, 182 (N.C. Ct. App. 1977).

[25] *See, e.g.*, N.C. Gen. Stat. 50-13.4 (1991) (a parent's obligation to support a child shall continue while the child remains in high school if the child is not yet 20 years old).

[26] *See, e.g.*, Yates v. Dowless, 379 S.E.2d 79 (N.C. Ct. App. 1989), *aff'd per curiam*, 386 S.E.2d 200 (N.C. 1990).

An attorney should take great care when drafting a clause that purports to eliminate child support when the child moves away from the home of the custodial parent. A child may leave home temporarily or permanently. Few would dispute the propriety of terminating child support to the custodial parent if the child takes up *permanent* residence elsewhere. To determine conclusively that the child has made a "permanent" change of residence, however, often is difficult. When drafting a support agreement, an attorney may want to create a bright-line distinction in a termination clause—providing, for example, that the noncustodial parent's support obligation shall terminate after the child has been absent from the custodial parent's home for more than thirty consecutive days. On the other hand, the attorney may find that the client might benefit from a more nebulous standard. In that case, the attorney might draft a clause stating that the obligation shall terminate if the child has chosen to live elsewhere indefinitely. No simple answer exists. In each case, an LAA must recognize the issue and must discuss it with the client to obtain an enforceable solution that is agreeable to both parties.

Conclusion

When all is said and done, there is a great deal more to child support than meets the eye. Legal assistance attorneys often lack experience in litigating contested support issues in the civil courts. Consequently, their supervisors must train them to see, analyze, and resolve child support issues. A close examination of the child support issues outlined in this article, combined with local continuing legal education training, will give LAAs keys to solving most child support problems. The checklist that follows gives a visual outline of the most important aspects of child support negotiations and alternatives.

Checklist for Child Support Options

___ MONETARY AMOUNT

- Check state child support guidelines?
- Check service regulations?
- Allocate support among children? (Always do this when representing a noncustodial parent!)
- Include an escalator clause? With or without a cap?

  > net pay escalator?
  > gross pay escalator?
  > CPI escalator?
  > flat-rate escalator?

___ HEALTH CARE INSURANCE

- CHAMPUS
- Private insurance

___ UNCOVERED HEALTH CARE EXPENSES (UHCE)

- Portion paid by noncustodial parent:

  > all?
  > half?
  > other fraction?
  > excess over stated amount?

- Define UHCE or leave unspecified?
- Payment due when? To whom?

___ LIFE INSURANCE

- Extent of coverage?
- Which parents are insured?
- Transfer of ownership of policy?
- Choice of beneficiary:

  > other parent?
  > child or children?
  > trust?

___ DEPENDENCY EXEMPTION

- Transfer?
- Give the exemption away or trade it for increased child support?
- Permanent or annual transfer?
- Complete transfer, or transfer conditioned on faithful compliance with child support obligations?

___ COLLEGE EXPENSES

- Length of obligation?
- Items to be covered:

  > room and board?
  > books?
  > tuition?
  > fees?

- Conditioned on:

  > child's performance in school?
  > generally recognized degree?
  > accredited institution?

- Portion paid by noncustodial parent:

  > all?
  > half?
  > other fraction?
  > specific amount?

___ REDUCTION OF CHILD SUPPORT FOR VISITATION

___ TERMINATION OF CHILD SUPPORT

- Always include *death* or *emancipation* (by marriage, military service, etc.) or *child's moving away from custodial parent*
- Other qualifying events:

  > age of majority?
  > high school termination?
  > college termination?

The Federal Employees Liability Reform and Tort Compensation Act— Does It Provide Federal Employees With the Protection Congress Intended?

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Introduction

On 18 November 1988, President Ronald Reagan signed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA or Act).[1] The FELRTCA granted federal employees absolute immunity from civil liability for any negligent or wrongful acts they might commit while acting in the scopes of their employments.[2]

Before 1988, the common law had afforded federal employees similar protection from tort claims.[3] The courts that developed this doctrine reasoned that federal workers would not carry out their official duties willingly unless they were immune from personal liability.[4] Under this doctrine, an aggrieved party could receive compensation for an injury caused by a federal employee's negligent or wrongful conduct only by filing a claim against the United States under the Federal Tort Claims Act (FTCA).[5]

On 13 January 1988, however, the Supreme Court significantly changed the law governing the personal tort liabilities of federal employees. In *Westfall v. Erwin*,[6] the Court declared that the purpose of official immunity was not to protect an erring federal employee from personal liability, but to protect the employee's freedom to make decisions while performing his or her duties.[7] Reasoning that the threat of liability cannot inhibit an individual's decision-making ability unless the individual's conduct is discretionary,[8] the Court found no compelling need to protect nondiscretionary acts. Accordingly, it ruled that a federal employee's conduct must be discretionary, as well as within the scope of employment, for the employee to claim absolute immunity from state-law tort liability.[9]

The Court acknowledged that problems existed in this area of the law and invited Congress to provide legislative guidance on the issue of federal employee immunity.[10] In response, Congress declared that by eroding the common-law tort immunity previously available to federal employees, *Westfall* and similar judicial decisions had created an "immediate crisis".[11] The FELRTCA was Congress's solution to this problem.

Congress's primary purpose in enacting the FELRTCA was "to return federal employees to the status they held prior to the *Westfall* decision"—that is, a status of absolute tort immunity for activities the employees conduct within the scopes of their employments.[12] Accordingly, it designed the FELRTCA to protect federal employees from the threats of personal liability and protracted litigation.[13] Congress feared that "[t]he pros-

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[1] Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4563, 4564.

[2] H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946.

[3] *Id.*

[4] *Id.*

[5] Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.); *see* 28 U.S.C. §§ 1346(b), 2671 (1988). By waiving its sovereign immunity, the United States assumed responsibility to injured persons for common-law torts committed by its employees. This responsibility closely resembles the liability that a private employer must bear for torts that its employees commit within the scopes of their employments.

[6] 484 U.S. 292 (1988).

[7] *Id.* at 295.

[8] *Id.* at 296.

[9] *Id.*

[10] *Id.*

[11] Pub. L. No. 100-694, § 2(a)(4)-(6), 102 Stat. at 4563.

[12] H.R. Rep. No. 700, *supra* note 2, *reprinted in* 1988 U.S.C.C.A.N. at 5947.

[13] Pub. L. No. 100-694, § 2(a)(5)-(6), 102 Stat. at 4563. Congress asserted that, after *Westfall*, federal employees would be liable personally for acts they commit in the scopes of their employments. H.R. Rep. No. 700, *supra* note 2, *reprinted in* 1988 U.S.C.C.A.N. at 5946. Congress also feared that an action brought against a federal employee no longer would be resolved through summary judgment or dismissal early in the case. *Id.* It noted that this would increase litigation costs, the time needed to resolve the issue of "discretion," and the uncertainty experienced by the individual employee being sued. *See id.* Congress believed that summary judgments and dismissals no longer would be available because the determination of whether an employee exercised governmental "discretion" always would be factual. *See id.*

pect of such liability seriously [would] undermine the morale and well being of Federal employees," and would impede the effective operations of government agencies.[14]

At first glance, the FELRTCA appears to offer federal employees broad protection from common-law tort liability. It not only immunizes a federal employee for the actions he or she takes in the scope of employment, but also allows the Attorney General to determine whether the employee's alleged misconduct actually did occur in the scope of employment.[15] If the Attorney General certifies that the employee acted in the scope of employment, the United States will be substituted for the employee, and the case will be removed from state court to federal court.[16]

Unfortunately, Congress failed to draft precise provisions to govern this process. The protection that the FELRTCA should have provided federal employees has been limited severely by inexact judicial interpretations and by a major misunderstanding among Department of Justice (DOJ) officials about the effects of certification. This article will provide an overview of the FELRTCA, will examine the controversy concerning scope of employment certifications, and will discuss the ways that different interpretations of the certification process affect federal employees.

Overview of the FELRTCA

The FELRTCA provides that the sole remedy for a plaintiff seeking to recover damages for an injury resulting from the negligent or wrongful act of a federal employee acting in the scope of his or her employment is to file suit against the United States under the FTCA.[17] The FELRTCA recognizes only two exceptions to this rule: A federal employee who (1) has violated an individual's constitutional rights,[18] or (2) has violated a federal statute that expressly authorizes an aggrieved party to bring a civil action against the employee, is not entitled to the Act's protections.[19]

The FELRTCA allows a federal employee who is sued in his or her individual capacity in a state or federal court to ask the Attorney General to certify that the employee "was acting within the scope of his [or her] employment at the time of the incident out of which the claim arose."[20] Upon certification, a suit filed in state court "shall be removed . . . to the [federal] district court . . . for the district in which the action . . . is pending."[21] Once in federal court, the suit is "transmogrified"[22] into an action against the United States under the FTCA[23] and the United States is substituted as defendant in place of the employee.[24]

If the Attorney General refuses to certify that a federal employee acted in the scope of his or her employment, the employee may petition the court to reverse the Attorney General's decision.[25] Moreover, if the plaintiff filed suit against the employee in a state court, the employee may remove the case to federal district court.[26] If the district court reverses the Attorney General's decision, the claim against the employee will be dismissed and the case will proceed exclusively against the United States.[27] If the court upholds the Attorney General's decision, the case must be remanded to the state court.[28]

Once certified, the case proceeds against the United States, subject to all the "limitations and exceptions" applicable to the FTCA.[29] Substitution of the United States for a federal employee as party defendant frequently will prevent adjudication

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[14] Pub. L. No. 100-694, § 2(a)(6), 102 Stat. at 4563.

[15] 28 U.S.C.A. § 2679(c) (West Supp. 1992).

[16] *Id.* § 2679(d).

[17] *Id.* § 2679(b)(1).

[18] *Id.* § 2679(b)(2)(A); *cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (a victim may seek personal redress from a federal employee who violates the victim's constitutional rights).

[19] 28 U.S.C.A. § 2679(b)(2)(B) (West Supp. 1992).

[20] *Id.* § 2679(c).

[21] Id. § 2679(d)(2).

[22] Egan v. United States, 732 F. Supp. 1248, 1251 (E.D.N.Y. 1990).

[23] 28 U.S.C.A. § 2679(d)(4) (West Supp. 1992).

[24] *Id.* § 2679(d)(1).

[25] *Id.* § 2679(d)(3).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* § 2679(d)(4).

of the plaintiff's case because the plaintiff previously will not have exhausted the FTCA's administrative remedies. Moreover, if the plaintiff's claims are not actionable against the United States, substitution could destroy the plaintiff's case completely.[30]

In *United States v. Smith*,[31] the Supreme Court settled the question of whether the FELRTCA immunizes federal employees from suit when an FTCA exception prevents recovery against the United States. Smith sued an Army doctor in federal district court, alleging that the doctor had committed malpractice when delivering Smith's baby at a military hospital in Italy.[32] The district court substituted the United States for the doctor, then dismissed the suit against the United States because the FTCA does not apply to foreign actions.[33] The Ninth Circuit reversed, holding that the FELRTCA allows a district court to substitute the United States for a defendant federal employee only if the FTCA provides the plaintiff with a remedy against the United States.[34] The Supreme Court reversed the Ninth Circuit. It held that the FELRTCA immunizes government employees even when exceptions under the FTCA leave plaintiffs with no judicial remedies against the United States.[35]

This decision focused the attentions of plaintiffs, counsel, and the courts on provisions in the FELRTCA discussing the scope of the Attorney General's power to certify a defendant's employment status. *Smith* essentially permitted the DOJ to deny a plaintiff a cause of action in tort simply by issuing a certification. This revealed that the crucial issues in an FELRTCA case are whether the Attorney General—or his or her lawfully appointed delegate—properly effected a certification and whether a plaintiff may contest this certification in court.

Scope of Employment Certification

The FELRTCA provides that whenever a federal employee is sued for an act he or she allegedly committed while working, the Attorney General or his delegate shall certify whether the employee was acting within the scope of his or her employment.[36] At present, if a United States attorney certifies that the employee was acting within the scope of employment, the case "shall" be removed from state court to a federal court,[37] and the United States "shall" be substituted for the employee as the party defendant.[38]

The DOJ initially contended that the judiciary could not review an FELRTCA certification.[39] Many plaintiffs' attorneys—and some judges—hotly disputed this interpretation of the Act. Plaintiffs facing the prospect of being left without

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[30] *See, e.g.*, 28 U.S.C. § 2680(h) (1988) (barring FTCA claims for assault, battery, libel, slander, and malicious prosecution); *id.* § 2680(k) (barring any claim arising in a foreign country).

[31] 111 S. Ct. 1180 (1991).

[32] *Id.* at 1183.

[33] *Id.*

[34] Smith v. Marshall, 885 F.2d 650, 652 (9th Cir. 1989), *rev'd sub nom.* United States v. Smith, 111 S. Ct. 1180 (1991). The district court initially granted the Government's motion to substitute the United States for the doctor pursuant to the Gonzalez Act. *See Smith*, 111 S. Ct. at 1183; *cf.* 10 U.S.C. § 1089 (1988) (in a suit against military medical personnel for an employment-related tort, the court must substitute the United States as the defendant and the suit must proceed under the FTCA). After the distict court announced its decision, Congress enacted the FELRTCA. In responding to Smith's appeal to the Ninth Circuit, the Government abandoned the Gonzales Act and argued its case solely under the FELRTCA. *See Smith*, 111 S. Ct. at 1183. Nevertheless, in reviewing Smith's appeal, the Ninth Circuit considered both acts. It finally held that neither act absolved the doctor of personal liability. *See Smith*, 885 F.2d at 652.

The Government did not mention the Gonzales Act in its petition for certiorari. *See Smith*, 111 S. Ct. at 1184. After deciding that the FELRTCA immunized the doctor, the Supreme Court dismissed the Gonzales Act issue as irrelevant. *See id.* at 1184 n.6.

[35] *Smith*, 111 S. Ct. at 1185.

[36] 28 U.S.C.A. § 2679(c) (West Supp. 1992). The Attorney General has delegated certification authority to the United States attorney for each federal district. *See* 28 C.F.R. § 15.3 (1991); *see also* Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 743 n.2 (9th Cir. 1991).

[37] 28 U.S.C.A. § 2679(d)(2) (West Supp. 1992). Section 2679(d)(2) provides,

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his [or her] office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Id.

[38] *See id.* § 2679(d)(1). Section 2679(d)(1) provides,

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his [or her] office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

Id.

[39] Memorandum, John R. Bolton, Assistant Attorney General, Civil Division, Department of Justice (Nov. 22, 1988) (on file with the Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army). The FELRTCA, however, allows an employee who is denied certification by the Attorney General to appeal this decision to the federal district court. *See* 28 U.S.C.A. § 2679(d)(3) (West Supp. 1992). The Act contains no corresponding language specifically allowing a *plaintiff* to appeal the Attorney General's certification decision. *See id.* § 2679(d)(1)-(2).

remedies if the United States was substituted for defendant employees naturally argued that these certifications are reviewable by the district courts.

Language of the Statute

Courts in several jurisdictions have held that Congress clearly intended to preclude the courts from reviewing the Attorney General's certifications.[40] Emphasizing that the FELRTCA provides that "the United States *shall* be substituted as the party defendant" if the Attorney General certifies that a defendant employee acted within the scope of his or her employment,[41] they have asserted that the Act's plain language denies federal judges the discretion to review certifications.[42] These courts do not deny that their strict interpretations of the FELRTCA occasionally yield harsh results by depriving an injured person of relief,[43] but they aver that these hardships cannot be avoided if the courts are to "protect [federal] employees from the distractions and burdens of litigation based upon their employment activities."[44]

In most jurisdictions, however, courts have concluded that the language of the statute suggests that Congress intended to allow the district courts to review scope of employment certifications.[45] In *Brown v. Armstrong*, for example, the Eighth Circuit compared 28 U.S.C. § 2679(d)(1) with 28 U.S.C. § 2679(d)(2) and concluded that a certification was reviewable.[46] The latter statutory provision, which discusses the effect of certification on removal, concludes, "[T]his certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal."[47] The former, which addresses the effect of certification on substitution, contains no comparable language.[48] From this difference in wording, the Eighth Circuit inferred that the Act bars judicial review of a certification on the issue of removal, but not on the issue of substitution.[49]

Comparing the FELRTCA With the Driver's Act

The FELRTCA's operative provisions replaced the provisions of the Driver's Act.[50] The Driver's Act served essentially the same purpose as the FELRTCA, but its coverage was limited to federal employees, acting within the scopes of their employments, who damaged property or caused personal injuries while operating motor vehicles.[51] The Driver's Act expressly permitted a federal court to remand a suit to an appropriate state court whenever the federal court determined that the defendant had not acted in the scope of federal employment.[52]

Unlike the Driver's Act, the FELRTCA has no remand provisions.[53] Courts and commentators have drawn three conflicting conclusions from Congress's silence on this issue. One group interprets Congress's omission of the remand provisions as a sign that Congress intended to repeal the one provision in the Driver's Act that expressly authorized judicial review of an employment certification issued by the Attorney General.[54] A second group claims that Congress intended to repeal only the provision of the Driver's Act that permitted a federal judge to review a certification when deciding whether to remand a case to a state court.[55] The third group contends that Congress's silence on the remand issue shows that the

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[40] Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989); Egan v. United States, 732 F. Supp. 1248 (E.D.N.Y. 1990).

[41] *E.g., Aviles*, 887 F.2d at 1048-49.

[42] *See Mitchell*, 896 F.2d at 136 (quoting 28 U.S.C.A. § 2679(d)(2) (West Supp. 1992)).

[43] *Id.; see also Egan*, 732 F. Supp. at 1252.

[44] *Mitchell*, 896 F.2d at 136.

[45] Brown v. Armstrong, 949 F.2d 1007 1011 n.5 (8th Cir. 1991).

[46] *Id.* at 1011.

[47] *See* 28 U.S.C.A. § 2679(d)(2) (West Supp. 1992) (emphasis added).

[48] *See id.* § 2679(d)(1).

[49] *Brown*, 949 F.2d at 1011; *see also* Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 744 (9th Cir. 1991); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1540 (11th Cir.), *reh'g denied*, 925 F.2d 1477 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 62 (1991).

[50] *See* 28 U.S.C. § 2679 (1982) (amended 1988).

[51] *See id.* § 2679(b).

[52] *See* Petrousky v. United States, 728 F. Supp. 890, 891 (N.D.N.Y. 1990).

[53] *But cf.* 28 U.S.C.A. § 2679(d)(3) (West Supp. 1992) (allowing a federal employee to appeal the Attorney General's refusal to certify that the employee was acting in the scope of his or her employment).

[54] *See* Egan v. United States, 732 F. Supp. 1248, 1249 (E.D.N.Y. 1990); 28 U.S.C. § 2679(d) (1982) (amended 1988).

[55] *See* Nasuti v. Scannell, 906 F.2d 802, 809 (1st Cir. 1990).

legislators did not want to disturb the existing judicial practice of freely reviewing certifications.[56]

Legislative History

Courts that found the FELRTCA's certification provisions ambiguous soon looked to the Act's legislative history for evidence of congressional intent.[57] During the congressional hearings on the FELRTCA, the Act's sponsor, Representative Barney Frank, stated, "I mean [this bill] is not going to void the [certification] litigation . . . . [T]o me the certification is a weapon against the employee, not against the plaintiff, because the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification."[58] Several courts have asserted that this statement and other comments that Representative Frank made during the hearing[59] show that Congress never intended the FELRTCA to prohibit district courts from reviewing scope of employment certifications.[60]

The courts that found the Attorney General's certification was not reviewable, however, gave little weight to the words the Fifth Circuit scornfully characterized as "isolated language . . . scattered throughout [the Act's] legislative history."[61] Instead, they chose to examine the FELRTCA more expansively.[62] Concluding that the Act's fundamental purpose is to protect federal employees from the burdens of litigation,[63] these courts found proof in the FELRTCA's plain language that the Attorney General's certifications were conclusive.[64]

Due Process and Separation of Powers

In addition to analyses based on the Act's language and legislative history, jurists and advocates have proffered four other arguments to support judicial review of FELRTCA certifications. First, plaintiffs contend that they have a constitutionally recognized property right in their lawsuits—or, more specifically, in the damages they seek to recover through litigation.[65] To forbid a plaintiff to appeal a scope of employment certification effectively would allow the federal government to deprive the plaintiff of this property right without due process.[66] Significantly, no provision in the FELRTCA requires the Attorney General to conduct an open hearing before deciding whether to certify that a federal employee was acting in the scope of employment.[67] This raises due process concerns because it permits the Attorney General arbitrarily to

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[56] *See* Melo v. Hafer, 912 F.2d 628, 642 (3d Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 358 (1991); Petrousky, 728 F. Supp. at 891-92.

[57] Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir.) ("Congress gave the certification conclusiveness with respect to one aspect of the proceedings. But we do not infer from this language that Congress meant to insulate the certification from all judicial review."), *cert. denied*, 112 S. Ct. 200 (1991); Arbour v. Jenkins, 903 F.2d 416, 421 (6th Cir. 1990).

[58] *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358 H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128 (1988) [hereinafter *Hearing*] (statement of Rep. Frank), *cited* in S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1541 (11th Cir.), *reh'g denied*, 925 F.2d 1477 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 62 (1991); *see also Arbour*, 903 F.2d at 421; *Melo*, 912 F.2d at 642.

[59] For example, in a colloquy with Lois Williams— the Director of Litigation of the National Treasury Employees Union—Representative Frank stated,

> Essentially the judge is deciding the case. One of the issues for the judge is going to be to decide [certification] . . . . So the plaintiff might object to the argument and the Government might certify. But that would not be binding on the plaintiff. The plaintiff would, I assume, have the right to go into court and say, "Baloney, it was not within the scope of employment . . ."

See Hearing, supra note 58, at 197. Williams responded, "Yes. In fact, that is the way it frequently has arisen in the past." *See id.*

[60] *See* Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 744 (9th Cir. 1991); *Hamrick*, 931 F.2d at 1211; *S.J. & W. Ranch, Inc.*, 913 F.2d at 1541; *Melo*, 912 F.2d at 642; *Arbour*, 903 F.2d at 421.

[61] Mitchell v. Carlson, 896 F.2d 128, 136 (5th Cir. 1990).

[62] *See, e.g.*, Egan v. United States, 732 F. Supp. 1248, 1252 (E.D.N.Y. 1990) ("[t]he court must construe the text of the statute, taking into account the setting in which it passed, and in which it is interpreted").

[63] *Mitchell*, 896 F.2d at 136 ("the very purpose of the FELRTCA [is] to protect employees from the distractions and burden of litigation based upon their employment activities").

[64] *See supra* notes 40-44 and accompanying text.

[65] McHugh v. University of Vermont, 758 F. Supp. 945, 947 (D. Vt. 1991); Petrousky v. United States, 728 F. Supp. 890, 891 (N.D.N.Y. 1990).

[66] *Petrousky*, 728 F. Supp. at 892.

[67] *See* Wang v. United States, 947 F.2d 1400, 1401-02 (9th Cir. 1991). In *Wang*, the Attorney General refused to certify that the defendant was acting in the scope of his employment. *Id.* at 1401. The defendant petitioned the district court to review the Attorney General's decision. *See id.; cf.* 28 U.S.C.A. § 2679(d)(3) (West Supp. 1992). The district court conducted a hearing on the issue, but refused to allow the plaintiffs to participate. *See Wang*, 947 F.2d at 1401. The district court determined that the defendant had acted in the scope of his employment and substituted the United States for the defendant. *Id.* The plaintiffs appealed. The Ninth Circuit ruled that, absent unusual circumstances, a court must provide a plaintiff with a fair opportunity to participate in an evidentiary hearing in which the court decides whether a defendant acted within the scope of federal employment. *Id.* at 1402.

deprive a plaintiff of a property right—the cause of action against a specific defendant—without allowing the plaintiff a meaningful opportunity to be heard.[68] In some cases, the Supreme Court's ruling in *Smith* could exacerbate this problem by completely depriving the plaintiff of remedies.

Second, precluding judicial review of a scope of employment certification raises separation of powers issues. The substitution of the United States for a defendant employee may deprive a federal court of subject matter jurisdiction over the action.[69] To empower the Attorney General and his or her delegates to resolve substitution issues conclusively by making FELRTCA certifications arguably would permit the executive branch to dictate the extent of the judicial branch's subject matter jurisdiction.[70]

Third, the Attorney General and the United States attorneys are interested parties. After any of these attorneys invokes the FELRTCA to certify a case, the DOJ assumes responsibility for defending the case.[71] At best, granting an agent of the executive branch final authority to decide scope of employment issues creates an appearance of bias; at worst, it allows an interested party to decide the outcome of a case.[72]

Finally, the law of the state in which the cause of action arises determines whether a federal employee's actions fall within the scope of his or her employment.[73] Because this determination involves a question of law as well as fact, many courts maintain that this decision belongs to the judicial branch.[74]

Department of Justice Reverses Position

When the FELRTCA first was enacted, the DOJ staunchly maintained that the Attorney General's certification was conclusive.[75] Justice Department attorneys advocated this position in a number of federal cases with varying degrees of success.

On 18 August 1989, the DOJ abruptly changed its position.[76] The Attorney General directed United States attorneys to abandon their arguments that the Attorney General's certification was not subject to judicial review.[77] The DOJ now maintains that a scope of employment certification is conclusive only for purposes of removing a case to federal court.[78] Federal courts may review certifications to determine whether the United States should be substituted for defendant federal employees.

This sudden policy change—which in some instances caused the United States to reverse its position in the middle of a case[79]—seems to have resulted from a major miscommunication within the DOJ. Before Congress enacted the FELRTCA, Deputy Assistant Attorney General Robert Willmore appeared before a House subcommittee and stated that plaintiffs would be able to challenge FELRTCA scope of employment certifications in court.[80] These comments presumably induced the DOJ to change its position on the certification issue. Acknowledging that the certification provisions in the FELRTCA are not clear, the DOJ decided to assume that Congress enacted the statute in the belief that judicial review would be available.[81]

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[68] S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1541 (11th Cir.), *reh'g denied*, 925 F.2d 1477 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 62 (1991).

[69] For example, the FTCA contains an exception to libel and interference with contract rights and similar claims. *See* 28 U.S.C. § 2680(h) (1988).

[70] *S.J. & W. Ranch, Inc.*, 913 F.2d at 1541-42.

[71] 28 U.S.C.A. § 2679(c) (West Supp. 1992).

[72] *See* McHugh v. University of Vermont, 758 F. Supp. 945, 950 (D. Vt. 1991).

[73] Johnson v. Carter, 939 F.2d 180, 183 (4th Cir. 1991) (vacated on other grounds, Oct. 9, 1991).

[74] *See, e.g., S.J. & W. Ranch, Inc.*, 913 F.2d at 1542.

[75] Memorandum, *supra* note 39; *see also* Memorandum, John J. Farley, III, Director, Torts Branch, Civil Division, Department of Justice (Dec. 8, 1988) (on file with the Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army); Memorandum, John J. Farley, III, Director, Torts Branch, Civil Division, Department of Justice (Dec. 28, 1988) (on file with the Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army).

[76] Memorandum, Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, Department of Justice (Aug. 18, 1989) (on file with the Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army).

[77] *Id.*

[78] *Id.* at 2.

[79] *See* Brown v. Armstrong, 949 F.2d 1007, 1011 (8th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209, 1210 (7th Cir.), *cert. denied*, 112 S. Ct. 200 (1991); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1539 n.1 (11th Cir.), *reh'g denied*, 925 F.2d 1477 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 62 (1991); Melo v. Hafer, 912 F.2d 628, 639 (3d Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 358 (1991); Arbour v. Jenkins, 903 F.2d 416, 421 (6th Cir. 1990).

[80] During the hearing, Representative Frank asked, "Well, but the plaintiff can still contest the certification, could he not?" *Hearing supra* note 58, at 128. Assistant Attorney General Willmore replied:

"Yes." *Id.* As the hearing continued, Willmore added, "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably a Federal District Court." *Id.* at 133.

[81] Memorandum, *supra* note 76, at 1.

Conceding this issue did not merely embarrass the DOJ. It also opened a pandora's box of issues for federal employees facing litigation for incidents occurring in conjunction with their jobs. The federal courts have not agreed on a common standard that should be applied in reviewing FELRTCA certifications, nor have the courts decided consistently whether a case may be remanded to a state court if the Attorney General has certified that the federal employee was acting within the scope of employment.

Reviewing the Attorney General's Certification

The Justice Department now argues that scope of employment certifications are entitled to "great deference."[82] It further maintains that even when a federal court overrules a certification, the case must remain in the federal court for adjudication.[83] The courts, however, are divided on what—if any—deference should be given to the Attorney General's certification. Moreover, no court specifically has agreed with the DOJ that the certification is conclusive for purposes of removal.

The Fourth Circuit, in a decision it since has vacated for other reasons, adopted a liberal standard of review for scope of employment certifications. In *Johnson v. Carter*,[84] the Fourth Circuit held that a scope of employment determination necessarily involves questions of law and fact.[85] If the facts are not disputed, the determination is simply a question of law that a trial court may review de novo.[86] On the other hand, if the parties' disagreement extends to a factual dispute over the scope of the defendant's employment, the court should leave the Attorney General's factual findings undisturbed unless these findings are "clearly erroneous."[87]

In *Brown v. Armstrong*,[88] the Eighth Circuit acknowledged that Congress had enacted the FELRTCA to protect a federal employee from the fear and burden of defending suits that challenge his or her official conduct.[89] Accordingly, the Eighth Circuit ruled that a trial court must accept a certification from the Attorney General or a United States attorney as prima facie evidence that a federal employee was acting within the scope of employment when the employee committed the act giving rise to the plaintiff's cause of action.[90] If the plaintiff disputes the certification, the court must resolve this issue before trial, holding an evidentiary hearing if it otherwise cannot resolve a factual dispute.[91]

In *S.J. & W. Ranch, Inc. v. United States*,[92] the Government told the Eleventh Circuit that the Attorney General's certification was entitled to "substantial deference" because the executive branch defines the missions of federal employers and the responsibilities of federal employees.[93] The Eleventh Circuit disagreed. It held that deferring to the Attorney General's certification would not further the FELRTCA's policy of ensuring that the federal courts review suits involving federal employees.[94] It also remarked that the Attorney General had no special expertise in applying the laws of the fifty states to determine whether federal employees were acting in the scopes of their employments.[95] The Eleventh Circuit conceded that a district court may treat a certification as prima facie evidence that a defendant employee was acting in the scope of his or her employment if the plaintiff does not challenge a certification.[96] The appellate court, however, emphasized that the district court must conduct a de novo review in which the plaintiff bears the burden of disproving the certification if the certification is challenged.[97] The Third, Seventh, and Ninth Circuits have taken similar positions.[98]

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[82] *Id.* at 1-2.

[83] *Id.*

[84] 939 F.2d 180 (4th Cir. 1991).

[85] *Id.* at 183.

[86] *Id.*

[87] *Id.*

[88] 949 F.2d 1007 (8th Cir. 1991).

[89] *Id.* at 1011.

[90] *Id.*

[91] *See id.* At this pretrial hearing, the plaintiff bears the burden of rebutting the certification with specific facts. *Id.* The Eighth Circuit is the only circuit that specifically requires a district court to conduct an evidentiary hearing to resolve a factual dispute over certification.

[92] S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir.), reh'g denied, 925 F.2d 1477 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 62 (1991).

[93] *Id.* at 1543.

[94] *Id.*

[95] *Id.*; *see also* Nadler v. Mann, 951 F.2d 301, 304 (11th Cir. 1992).

[96] *S.J. & W. Ranch, Inc.*, 913 F.2d at 1543.

[97] *Id.*

[98] Melo v. Hafer, 912 F.2d 628, 642 (3d Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 358 (1991); Donio v. United States, 746 F. Supp. 500, 504 (D.N.J. 1991); Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir.), *cert. denied*, 112 S. Ct. 200 (1991); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 744-45 (9th Cir. 1991).

Jurisdictions in Which the Courts Fail to Provide Federal Employees With FELRTCA Protection

Occasionally, a trial court will find that it cannot determine whether a federal employee was acting in the scope of his or her employment without also deciding the merits of the case. Faced with this dilemma, some courts have balked. Declining to consider the employment issue carefully, they summarily have remanded these difficult cases to the state courts. In the First and Second Circuits, and in the District of Colombia, this excess of judicial caution has undermined the FELRTCA by improperly abandoning federal employees to the mercies of tort plaintiffs.

The First Circuit Court of Appeals first considered a case in which a certification dispute impinged upon issues of ultimate cause in *Nasuti v. Scannell.*[99] Nasuti, an employee of the National Park Service, was injured while riding in the back of a truck driven by Scannell, a fellow employee. Nasuti filed suit in state court, claiming that Scannell's conduct in driving the truck had amounted to a battery. The Attorney General certified that Scannell was acting within the scope of his employment when he inadvertently injured Nasuti.[100] The case was removed to a federal district court.[101] Finding that it could not decide whether the defendant had acted in the scope of his employment without also deciding the merits of the case, the district court tried to remand the case to the state court.[102] The First Circuit overturned the district court's remand order. The appellate court observed that the FELRTCA protects federal employees by giving federal courts exclusive jurisdiction over actions commenced against federal employees if these cases are certified by the Attorney General. Once certified, a case may be remanded to a state court only if the district court decides that the certification was improper.[103] *Nasuti*, however, may offer federal employees little protection because the First Circuit failed to specify the standard of review that a district court should apply when reviewing a scope of an employment certification.

The FELRTCA cannot protect federal employees from personal litigation if the federal courts refuse to review scope of employment certifications properly. A decision of the District Court for the District of Massachusetts illustrates this principle clearly. In *Wood v. United States,*[104] a secretary filed a sexual harassment suit against an Army officer for whom she once had worked.[105] In her complaint, the plaintiff claimed that the defendant repeatedly had asked her to enter into a sexual relationship with him. When she refused his advances, he allegedly forced her to quit her job. The officer denied these allegations.

The United States Attorney for the District of Massachusetts certified that the Army officer had acted in the scope of his employment and the district court substituted the United States as the party defendant. The plaintiff petitioned the court to overturn the certification.[106] The United States opposed her motion. Arguing that the plaintiff had the burden of proving that the officer had not acted in the scope of his employment, the Government asked the court to conduct an evidentiary hearing to determine whether the allegations in the plaintiff's complaint were true.[107] The court denied the Government's request, ruling that to require the plaintiff to prove the allegations in her complaint at a pretrial hearing would defeat the purpose of the trial. The district court concluded that the plaintiff's complaint alone determined whether the certification was proper. Accordingly, the court overturned the certification and reinstated the Army officer as the defendant upon finding that the complaint alleged acts outside the scope of the officer's employment.[108]

The First Circuit Court of Appeals affirmed the district court's decision.[109] It observed that if the Army officer wanted to contest the plaintiff's allegations, he would have to do so at a trial on the merits.[110]

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[99] 906 F.2d 802 (1st Cir. 1990).

[100] *Id.* at 805.

[101] *Id.*

[102] *Id.* at 805-06.

[103] *Id.* at 808.

[104] 760 F. Supp. 952 (D. Mass. 1991), *aff'd*, 956 F.2d 7 (1st Cir. 1992).

[105] *Id.* at 953.

[106] *Id.* at 954.

[107] *Id.* at 955.

[108] *Id.*

[109] Wood v. United States, 956 F.2d 7 (1st Cir. 1992).

[110] *Id.* at 12. The court said that it would require a separate pretrial evidentiary hearing only in those "rare circumstances where there is a factual dispute which would decide the scope of employment issue, as the crux of the certification dispute, even though it is incidentally coextensive with the merits of the case." *Id.* The court's opinion neglects to explain why the court concluded that the Army officer's complete denial of the plaintiff's allegations did not meet this standard.

The District Court for the District of Vermont reached a similar conclusion in *McHugh v. University of Vermont.*[111] McHugh alleged that she had been harassed while working for the University of Vermont in the Military Studies Department. She claimed that her coworker, an Army major, had harassed her about her gender and her religion. When she complained to her supervisor—another Army officer—she was fired.[112] The Attorney General certified that the major had acted in the scope of his employment. Responding to a motion to substitute the United States as the defendant,[113] the district court conducted a de novo review of the Attorney General's certification.[114] The court concluded that Federal Rule of Civil Procedure 12(b)(6) compelled it to accept the plaintiff's allegations as true and to view them in the light most favorable to the plaintiff.[115] Applying this standard, the court decided that the defendant had acted outside the scope of his employment and refused to dismiss the suit against him.[116]

In *Kimbro v. United States,*[117] the District Court for the District of Columbia refused to accept a United States attorney's certification or to decide itself whether the defendant had acted outside the scope of her employment. Kimbro filed suit in the Superior Court of the District of Columbia. She claimed that the defendant had assaulted her at work—a charge the defendant denied. The case was removed to district court after the United States Attorney for the District of Columbia certified that the defendant had acted in the scope of her employment.[118] Claiming that the scope of employment issue was a question of fact that a jury would have to resolve, the district court remanded the case.[119]

How Should a Court Apply the FELRTCA's Certification Procedures?

Substitution

The FELRTCA has two clear purposes. It should protect a federal employee from personal liability[120] and it should shield the employee from the burdens of personal tort litigation.[121] Nevertheless, the need to protect federal employees must be balanced against the need to provide injured persons with a fair opportunity to seek redress for their injuries.

Representative Frank and Assistant Attorney General Willmore predicted that the FELRTCA would allow the courts to review scope of employment certifications.[122] Two circuit courts of appeal[123] and one district court,[124] however, continue to hold that the plain language of the FELRTCA precludes judicial review of certifications. In these jurisdictions, federal employees are fully protected from litigation, but plaintiffs are left feeling they have been denied opportunities to be heard.

A court should not ignore the perception that, by refusing to review a certification, it is denying a plaintiff due process; nor should it ignore the perception that the certification process creates a conflict of interest for the DOJ. In light of the Supreme Court's decision in *Smith,*[125] the plaintiff's stake in a certification decision is too great to deny judicial review of the certification.

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[111] 758 F. Supp. 945 (D. Vt. 1991).

[112] *Id.* at 948.

[113] *Id.* at 950.

[114] *Id.* at 950-51.

[115] *Id.* at 947. *But see* Donio v. United States, 746 F. Supp. 500 (D.N.J. 1990) (interpreting plaintiff's motion to review certification as a motion to dismiss for lack of subject matter jurisdiction). *In Donio,* the court observed that, unlike a motion to dismiss for failure to state a claim, a motion to dismiss for lack of jurisdiction does not afford a presumption of truthfulness to the plaintiff's complaint. *Id.* at 504. Accordingly, the trial court could draw its own conclusions about the merits of the certification. *See id. Compare* Fed. R. Civ. P. 12(b)(6) *with* Fed. R. Civ. P. 12(b)(1).

[116] *McHugh,* 758 F. Supp. at 948.

[117] Kimbro v. United States, 767 F. Supp. 6 (D.D.C. 1991).

[118] *Id.* at 8.

[119] *Id.* at 10.

[120] Pub. L. No. 100-694, § 2(b), 102 Stat. at 4563.

[121] *Id.* § 2(a)(5)-(6), 102 Stat. at 4563; H.R. Rep. No. 700, *supra* note 2, *reprinted in* 1988 U.S.C.C.A.N. at 5946.

[122] *Hearing, supra* note 58, at 128, 133.

[123] Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989).

[124] Egan v. United States, 732 F. Supp. 1248 (E.D.N.Y. 1990).

[125] 111 S. Ct. 1180 (1988) (holding that the FELRTCA and the FTCA immunize a federal employee, even when an exception in the FTCA precludes recovery from the Government and leaves the plaintiff with no remedy).

Removal

The rulings in *Wood*,[126] *McHugh*,[127] and *Kimbro*[128] are wrong; they cannot be supported by the FELRTCA's language or history. The FELRTCA unequivocally states that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of *removal*."[129] Moreover, when Congress deleted the remand provision from the old Driver's Act, it clearly implied that suits involving federal employees should be adjudicated in federal courts. Once the DOJ decides that an employee acted in the scope of his or her employment, the case must not be remanded to a state court.

Contesting Certification

A court must decide complaints against a scope of employment certification before trial. To permit the plaintiff to have the certification issue decided by a jury or during a trial could defeat the purpose of the FELRTCA. A defendant employee should not be compelled to undergo the anxiety and burden of defending a lawsuit that challenges conduct which evidently occurred within the scope of the defendant's employment. The plaintiff also should bear the burden of proving a certification is unsubstantiated. If a plaintiff can defeat a certification merely by complaining about it, the certification will have little meaning.

A court should review a certification under the standards the Fourth Circuit described in *Johnson v. Carter*,[130] in compliance with the procedures the Eighth Circuit envisioned in *Brown v. Armstrong*.[131] Determining the accuracy of a certification involves questions of fact and law. If the facts are not disputed, the issue is solely a question of law that the trial court can review de novo. When facts are disputed, the court should defer to the Attorney General's certification, overturning a certification only if it is clearly erroneous.[132] This approach will allow the court to protect the plaintiff's rights without subjecting the federal employee to the burden of unnecessary litigation.

Congress enacted the FELRTCA to return federal employees to the status they held before the Supreme Court decided *Westfall*.[133] Accordingly, a court should review the Attorney General's certification before beginning the trial on the merits and should conduct an evidentiary hearing if this is necessary to settle factual disputes.[134]

Conclusion

As one court said, one "cannot help but wonder if the Government threw out the bath water with the baby [sic] when it agreed that the [Attorney General's] certification was reviewable."[135] The DOJ lost control of a significant portion of federal tort litigation when it reversed its position on the reviewability of the Attorney General's certifications. The circuit courts of appeal remain split on whether the certifications may be reviewed. The courts that agree that a certification is reviewable do not agree on the standards and procedures that should be used for review. At present, too many difficult issues surround the certification process for the courts to settle this area of the law consistently. The big loser is the federal employee—who, in the majority of jurisdictions, no longer is shielded from personal litigation to the extent that the Congress originally intended. To cure these problems, Congress must amend the FELRTCA to clarify the Act's certification provisions.[136]

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[126] 760 F. Supp. 952 (D. Mass. 1991).

[127] 758 F. Supp. 945 (D. Vt. 1991).

[128] 767 F. Supp. 6 (D.D.C. 1991).

[129] 28 U.S.C.A. § 2679(d)(2) (West Supp. 1992) (emphasis added).

[130] 939 F.2d 180 (4th Cir. 1991).

[131] 949 F.2d 1007 (8th Cir. 1991).

[132] *Johnson*, 939 F.2d at 183.

[133] *See* H.R. Rep. No. 700, *supra* note 2, *reprinted in* 1988 U.S.C.C.A.N. at 5946-47.

[134] *Id.*

[135] Petrousky v. United States, 728 F. Supp. 890, 892 (N.D.N.Y. 1990).

[136] Returning this matter to Congress could trigger a legislative movement to overrule *United States v. Smith*. Admittedly, one might surmise from the language of the initial House report on the FELRTCA that Congress knew that a plaintiff denied recovery from federal employees under the FELRTCA also might be barred from asserting a cause of action against the United States under the FTCA. *See* H.R. Rep. N. 700, *supra* note 2, *reprinted in* 1988 U.S.C.C.A.N. at 5951. Nevertheless, Congress might not have understood the potential impact of this portion of the FELRTCA.

DAD Notes

Absence from Place of Duty Terminated by Return to Barracks

In *United States v. Coleman*,[1] the Army Court of Military Review questioned the factual sufficiency of an accused's conviction on two specifications of absence without leave (AWOL).[2] The Army court noted that the accused evidently had remained in his barracks—just across the street from the building in which he normally worked—for most of the period during which he allegedly was absent.[3] The court concluded that the accused's first absence ended sooner than the Government had alleged and ruled that the second absence never occurred at all.[4]

In a drinking bout with his friends on a Thursday night, Coleman apparently consumed enough alcohol to prevent him from reporting for duty the following day. He subsequently pleaded guilty to unauthorized absence from his place of duty from Friday, 2 November 1990, until morning formation on Monday, 5 November. During the providence inquiry, however, the accused stated that he had returned to his barracks on Saturday and had remained there throughout the weekend. This barracks, he added, was located "across the street from where he worked."[5] Coleman's unit, a rear detachment preparing for deployment to Southwest Asia, was not working that weekend and the only person then on duty was the charge of quarters.

The military judge "expressed concern that the offense [actually] was a one-day absence from the accused's place of duty."[6] Nevertheless, he accepted Coleman's plea, relying upon the trial counsel's assertion that Coleman's return had not terminated the unauthorized absence because Coleman had failed to report to anyone in authority.[7]

In the second specification, the Government alleged that Coleman was AWOL from 16 November until 27 November. During these eleven days, Coleman's unit had been "a picture of confusion."[8] Many members of the unit, including Coleman, "were being sent [overseas] for duty in Saudi Arabia."[9] Moreover, Coleman apparently "was . . . subject to two chains of command, neither of which seemed to know what the other was doing."[10] Coleman spent most of this period in his barracks, having been relieved of guard duty to prepare for deployment.[11] His superiors evidently knew he was there.[12] Despite this evidence, and contrary to the accused's plea, the military judge found Coleman guilty as charged.

The Army court began its analysis by noting that military appellate courts have applied two different definitions of "place of duty" to the offenses of AWOL and failure to repair (FTR).[13] Remarking on the trial counsel's contention that the accused had to report to an authority figure to terminate his

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[1] 34 M.J. 1020 (A.C.M.R. 1992).

[2] *See* Uniform Code of Military Justice art. 86(3), 10 U.S.C. § 886(3) (1988) [hereinafter UCMJ].

[3] *See Coleman*, 34 M.J. at 1021.

[4] *Id.* at 1022.

[5] *Id.* at 1021.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1022.

[9] *Id.*

[10] *Id.*

[11] *See id.*

[12] *Id.*

[13] *See id.* at 1021-22.

absence, the court asserted that the drafters of the first specification had confused the specific definition of place of duty inherent in an FTR offense with the broader definition that applies to AWOL.[14]

The court then concentrated on the accused's presence in his barracks during the alleged AWOL periods. It noted that, in the second specification, the Government had averred that the accused was absent from his place of duty—that is, his unit—for eleven days.[15] Government appellate counsel later characterized the accused's return to his barracks as a casual presence that did not terminate the accused's absence from his place of duty. The court disagreed. Contrasting Coleman's actions with actions taken by soldiers in other cases, the court found that the accused's presence "in his assigned barracks [was] more than [a] casual presence."[16]

Applying this rationale to its examination of the second specification, the court noted that, during his alleged unauthorized absence, the accused actually remained in his barracks with his superiors' knowledge. The court also commented on the Government's use of very general terms to describe the accused's place of duty when it drafted the second specification[17] and on the proximity of the barracks to the unit. With these factors in mind, the court concluded that it was "not convinced beyond a reasonable doubt of [Coleman's] guilt of [the second] offense."[18]

A defense counsel should examine the circumstances of a client's alleged unauthorized absence carefully. An offense may never have occurred or it may have ended earlier than the Government wishes to admit. *Coleman* reveals that, in some situations, a soldier's "absence" actually may have been prolonged by the failures of his superiors to maintain accountability of their troops. Captain Turney.

Jurisdiction and Article 90 Violations—"When the Convening Authority Gets Too Close"

In its recent decision in *United States v. Byers*,[19] the Army Court of Military Review discussed the circumstances under which a convening authority becomes an "accuser,"[20] bereft of authority to convene a general court-martial.[21] It found that when an accused is charged with willful disobedience of a superior commissioned officer[22] for violating the convening authority's own order, the convening authority may not refer this charge to a general court-martial.[23]

Sergeant First Class Henry Byers was convicted of willful disobedience of a superior commissioned officer and wrongful use of cocaine. The willful disobedience charge arose from Byers' violation of an order in which Lieutenant General Richard Graves revoked Byers' driving privileges on Fort Hood for two years. After Byers received this order, military police apprehended him for committing two minor traffic offenses on Fort Hood while driving his personal vehicle. Byers subsequently was charged with willfully disobeying the order and General Graves referred the charge to a general court-martial.

In its decision, the Army court focused on the nature of willful disobedience. It noted that the offense connotes an "intentional defiance of authority, and necessarily an affront to the power and prestige of the source of the order."[24] Although the court acknowledged that General Graves did not act from improper motives in convening the court-martial, it emphasized that "an officer who seeks to enforce his [or her] own order by convening a court-martial for an offense charged under article 90 is so closely connected to the offense that a reasonable person could conclude that he [or she] has a personal interest in the matter."[25] Accordingly, the court con-

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[14] *Id.* The Army court compared United States v. Brown, 24 C.M.R. 585, 591 (A.F.B.R. 1957) (applied to an unauthorized absence, "[p]lace of duty" is a "generic term designed to cover the broader concept of a general place of duty as might be contained within . . . 'command,' 'quarters,' 'station,' 'base' or 'post' ") with United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975) (place of duty must be specific, not general, when an accused is charged with FTR). *See Coleman*, 34 M.J. at 1021-22.

[15] In pertinent part, the specification alleged that the accused did "absent himself from his place of duty at which he was required to be, to wit: Detachment C, 1st Cavalry Division (Rear) (Provisional), located at Fort Hood, Texas." *See Coleman*, 34 M.J. at 1022.

[16] *Id.* (citing United States v. Acemoglu, 45 C.M.R. 335 (C.M.A. 1972); United States v. Jackson, 2 C.M.R. 96 (C.M.A. 1952); United States v. Nixon, 29 M.J. 505 (A.C.M.R. 1989); United States v. Coglin, 10 M.J. 670 (A.C.M.R. 1981); United States v. Baughman, 8 M.J. 545 (C.G.C.M.R. 1979)).

[17] *See id.*

[18] *Id.*

[19] 34 M.J. 923 (A.C.M.R. 1992).

[20] *See generally* UCMJ art. 1(9).

[21] A general court-martial may be convened by nine designated federal officials and by commanders in certain designated positions; however, if "any . . . commanding officer [empowered to convene general courts-martial] is an accuser, the court shall be convened by superior competent authority." UCMJ art. 22.

[22] *See id.* art. 90.

[23] *See Byers*, 34 M.J. at 924 & n.1.

[24] *Id.* (citing United States v. Teel, 15 C.M.R. 39 (C.M.A. 1954)).

[25] *Id.*

cluded that General Graves was an "accuser" within the meaning of Uniform Code of Military Justice (UCMJ) article 1(9) and ruled that his discretionary authority under UCMJ article 22(a) to convene a general court-martial was withdrawn by operation of law.[26]

The Army court stressed that a court-martial is a creature of statute. "'[A]s a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction.'"[27] Because General Graves lacked statutory authority to convene Byers' court-martial, the court-martial itself lacked jurisdiction to try Byers. Accordingly, the Army court declared the proceeding void in its entirety.

Although the Army court suggested that the Government could avoid the issue presented in *Byers* simply by charging an accused with a violation of UCMJ article 92 instead of article 90,[28] many trial counsel may be reluctant to abandon the more serious article. Even so, a defense counsel should not hesitate to remind a stubborn trial counsel of the outcome in *Byers*. Under appropriate circumstances, mentioning this decision before trial could result in reduced punishment for the client and might induce the chain of command to dispose of the case at a lower level. Captain Toole.

Contract Appeals Division Note

Litigation That Might Be Avoided: Deductions for Nonperformance[29]

You are quietly working in your office when you receive a call from your contracting officer (KO). She asks you to look at the lawn in front of your building, then call her back. Intrigued by her request, you step out of the building to admire the yard. You then call the KO, tell her what a beautiful day it is outside, and comment on how well the lawn in front of the headquarters building is being maintained. Much to your surprise, the KO responds angrily that the lawn around the headquarters building is the only lawn that the contractor has bothered to maintain. You advise the KO to calm down and to come over to your office.

A few minutes later, the KO rushes into your office, pushing a cart laden with 500 pounds of paper. You quickly learn that the lawn surrounding the headquarters is the only patch of grass on the installation that the contractor has maintained in accordance with the contract. The rest of the post is a mess. Some areas the contractor has neglected to mow regularly; others he has not trimmed or edged in months.

The KO is tired of paying the full contract price for work that is only half completed. She is reluctant, however, to withhold deductions from the contractor because she fears the contractor will respond by appealing to the Armed Services Board of Contract Appeals (ASBCA). She has heard that the Government frequently loses such appeals.

The KO is very frustrated. She wants help. The cart she brought in contains all the inspection records her office has maintained during contract performance. She asks you to review the contract and the records to determine whether the government safely can withhold any deductions. As she leaves, she turns and says, "I don't mind going to the Board, but I don't want to go if we are going to lose."

Alone in your office, surrounded by the documents the KO brought over, you stare out your window and wonder how to handle this matter. You remember the last service contract from which the post took deductions. The government not only lost the appeal, but also had to pay a sum in accumulated interest payment that was larger than the deductions themselves. You do not want to see that happen again. How can you ensure that the government will take no deductions that cannot be defended?

Before deducting any sum from payments due to a contractor, you must review the contract. In particular, you must ensure that it contains a payments clause[30] and one of the

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[26] *Id.* In reaching this decision, the Army court relied on United States v. Reed, 2 M.J. 64, 68 (C.M.A. 1976), in which the Court of Military Appeals first established the "close connection" test for determining whether a convening authority is an accuser under UCMJ art. 1(9). *See Byers*, 34 M.J. at 924.

[27] *Byers*, 34 M.J. at 924 (quoting McClaughry v. Deming, 186 U.S. 49, 62 (1902).

[28] *See id.* at 924 n.1. (remarking that *Teel*, 15 C.M.R. at 39, implied that the disqualification "issue could have been avoided in the case at bar by charging the appellant under Article 92").

[29] This note is part of a series of commentaries discussing ways to avoid contract litigation. In this series, the trial attorneys of the Contract Appeals Division have drawn on their experiences and have shared their thoughts on avoiding litigation and on developing facts to improve the government's litigation posture.

[30] *See* Fed. Acquisition Reg. 52.232-1 (1 Apr. 1984) [hereinafter FAR]. The payments clause set forth in this section provides, in pertinent part, "The Government shall pay the Contractor on the 30th day (or, if applicable, on the early payment discount day) after receipt of a proper invoice, the price stipulated in this contract for supplies of services rendered and accepted, less any deductions provided in this contract." *Id.*

several inspection clauses listed in the Federal Acquisition Regulation.[31]

The government first should invoke the inspection of services clause in an attempt to compel the contractor to perform in conformity with contract specifications.[32] Any work the contractor performs to conform its original work to the contract specifications is done at no additional cost to the government.

Occasionally, defective performance under a services contract cannot be corrected. Assume, for example, that a contractor has agreed to remove snow from the installation's roads and sidewalks. If the snow melts before the contractor performs, the contractor cannot perform the contract. Similarly, a contractor cannot satisfy a contract if contract specifications require the contractor to perform specific tasks within specific time frames and the contractor fails to do so. For example, if the contract requires the contractor to mow all the grass on the installation twice monthly, the contractor cannot remedy the failure to mow after the month has passed. If correction is impossible, the KO may direct the contractor to ensure that its future performance will conform to contract requirements or may reduce contract payments to reflect the reduced value of the services the contractor actually has performed.[33]

Learning the law is simple; the next tasks you face—applying the law to the specific facts of the case and establishing a record that will support the KO's actions—are not. At this point, the mound of records in the shopping cart the KO trundled into your office becomes important.

When the government deducts money under an inspection of services clause, it bears the burden of proving both its entitlement to take the money and the accuracy of its deductions.[34] The government's inspection reports are prima facie evidence of the correctness of its deductions. Once they are introduced, the contractor must show error in the reports,[35] in the inspections, or in the results of the inspections[36] if it is to

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[31] See generally FAR 52.246-2 (inspection-of-supplies clause for fixed-price contracts); FAR 52.246-3 (inspection-of-supplies clause for cost-reimbursement contracts), FAR 52.246-4 (inspection-of-services clause for fixed-price contracts); FAR 52.246-5 (inspection-of-services clause for cost-reimbursement contracts).

Federal Acquisition Regulation 52.246-2 states, in pertinent part,

> If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

FAR 52.246-2(h).

Federal Acquisition Regulation 52.246-3 states, in pertinent part,

> At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, the Government may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph (h) below, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

FAR 52.246-3(f).

Federal Acquisition Regulation 52.246-4 states, in pertinent part,

> (c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.
>
> (d) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

See FAR 52.246-4(c) to (d); *see also* FAR 52.246-5(c) to (d) (applying virtually identical provisions to inspections of services under cost-reimbursement contracts).

[32] Other FAR clauses and reserved common-law rights also may empower the government to reduce a contract price or fee.

[33] Each of the FAR's two inspection of services clauses permits a KO to reprocure the service, charging the contractor for any costs the government may incur that relate directly to performance, or to terminate the contract for default. For an interesting discussion on terminations, see Bruce W. McLaughlin, *The Evolution of Darwin: A Contracting Officer's Primer for Default Terminations*, 19 Pub. Cont. L.J. 191 (Winter 1990).

[34] Kee Serv. Co., ASBCA No. 28,966, 86-3 BCA ¶ 19,242; Exquisite Serv. Co., ASBCA No. 21,058, 77-2 BCA ¶ 12,799.

[35] Sunnybrook Contractors, GSBCA No. 7628, 87-1 BCA ¶ 19,410; *accord* Orlando Williams, ASBCA Nos. 26,099 & 26,872, 84-1 BCA ¶ 16,983, at 84,599.

[36] Willamette Timber Sys., Inc., AGBCA No. 80-178-1, 84-1 BCA ¶ 17,364.

prevail. The ASBCA will not accept a contractor's allegations without specific supporting evidence or other substantiation.[37]

The maintenance of complete, accurate inspection reports is extremely important to the government. Because the government's case likely will depend upon the completeness of the inspection reports, you must ensure that the records are sufficient to justify any deductions the government may take.

If you advise the KO that she may deduct a penalty for work the contractor failed to perform or performed inadequately, the KO must decide the amount that she must deduct. In *Orlando Williams*,[38] the ASBCA held that "deductions [must] be proportionate to the unperformed or deficient work and that [the government must pay] the contractor . . . for satisfactory services." In essence, if the contractor did half the work, the government may deduct only half the payment. Partial nonperformance does not justify a complete deduction[39] and the government's method of determining the deductions must be reasonable.[40]

After determining the necessity and the amount of the deduction, the KO should inform the contractor of the proposed deduction. Neither statute, nor regulation, requires the KO to notify the contractor before taking a deduction; however, a KO normally should alert the contractor to the reason for, and the amount of, the deduction. Moreover, the KO should afford the contractor a reasonable opportunity to rebut the deductions. This course of action not only may forestall needless friction between the contractor and the government, but also may benefit the government by narrowing the issues and allowing the KO to see what defenses the contractor likely will assert if it appeals the deductions to the ASBCA.

If the contractor convincingly rebuts any element of the proposed deductions, the KO should reduce the deductions accordingly. This will demonstrate to the Board that the government treated the contractor reasonably.[41]

In summary, before taking any deductions from a contractor, the KO should take the following steps to ensure that the deductions are upheld on appeal:

- Review the contract to ensure that it includes a clause allowing the government to deduct money from the contract price for nonconforming work or goods;
- Consider the observations of the contract administration and technical personnel who are familiar with the contractor's performance; and
- Evaluate the attendant documentary evidence—including any rebuttals submitted by the contractor—to arrive at a final deduction.

This course of action will not dissuade every contractor from bringing an appeal. Nevertheless, it will increase the likelihood that the government will prevail in an appeal before the ASBCA. Major Lara.

Clerk of Court Note

Court-Martial Processing Times

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

General Courts-Martial

	FY 92/2d Q	FY 92/1st Q
Records received by Clerk of Court	312	265
Days from charging or restraint to sentence	49	52
Days from sentence to action	78	75
Days from action to dispatch	10	7
Days from dispatch to receipt by the Clerk	11	10

BCD Special Courts-Martial

	FY 92/2d Q	FY 92/1st Q
Records received by Clerk of Court	80	78
Days from charging or restraint to sentence	41	46
Days from sentence to action	60	63
Days from action to dispatch	6	6
Days from dispatch to receipt by the Clerk	9	9

[37] Interstate Reforesters, AGBCA No. 84-177-3, 84-2 BCA ¶ 17,504.

[38] ASBCA Nos. 26,099 & 26,872, 84-1 BCA ¶ 16,983, at 84,599.

[39] Clarkies, Inc., ASBCA No. 22,784, 81-2 BCA ¶ 15,313, at 75,832.

[40] Kleen-Rite Corp., ENG BCA 4530, 84-2 BCA ¶ 17,455.

[41] *See* Maintenance Eng'rs, ASBCA Nos. 39,465 & 39,700, slip op. at 9 (14 Feb. 1990).

An alternative solution to the problem described in this note might be to incorporate language into the contract to encourage superior performance by offering a special incentive, such as an award fee. The use of an award fee provides motivation for excellence in areas such as quality, timeliness, and cost-effective management. *See* FAR 16.305; FAR 16.404-2. The award fee is determined unilaterally by the KO or a designated award fee determining officer and is not subject to the FAR's dispute clause. *See* FAR 16.404-2(a). Traditionally, award clauses are associated with cost-reimbursement contracts. Defense Federal Acquisition Regulation Supplement 216.470, however, permits the use of award fees in firm, fixed-price contracts when (1) the government seeks to motivate contractors by rewarding them for outstanding contract performances in areas that cannot be measured objectively; and (2) normal incentives cannot be used. For example, logistics support, quality, timeliness, ingenuity, and cost-effectiveness are areas under the control of management that may be susceptible only to subjective measurement and evaluation.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

If It's New, It's "New Matter"

Rule for Courts-Martial (R.C.M.) 1106(f)[1] requires a staff judge advocate (SJA) to serve his or her posttrial recommendation on the defense counsel[2] and on the accused.[3] This rule allows the accused and the counsel to note, and to comment on, errors in the recommendation. Specifically, R.C.M. 1106(f)(4) states, "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."[4]

If the accused or the defense counsel comments on a legal error in the recommendation by filing a timely R.C.M. 1106(f)(4) submission,[5] the SJA must respond to this allegation in an addendum to the original recommendation.[6] If this addendum contains "new matter," it must be served on the accused and the defense counsel.[7]

Rule for Courts-Martial 1106(f)(7) does not define the term "new matter." The discussion accompanying the rule, however, provides three examples of new matter: new appellate decisions, matter from outside the record of trial, and issues not previously discussed.[8]

In *United States v. Komorous*,[9] the Air Force Court of Military Review observed that a very fine line exists between what is, and what is not, new matter.[10] The court added, "[S]taff judge advocates are easily lured into commenting on a defense submission, often by controverting its facts. That is a reasonable response for a staff judge advocate, but it requires a second service."[11] These words of caution should not be ignored. If an SJA includes new matter in the addendum, the addendum must be served on the defense counsel and on the accused.[12]

In *United States v. Norment*,[13] a general court-martial found the accused guilty of three specifications of indecent assault and one specification of wrongful solicitation of adultery.[14] The members sentenced Norment to a bad-conduct discharge, confinement for six months, total forfeitures, and reduction to the lowest enlisted grade.[15]

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(f) [hereinafter R.C.M.].

[2] The Court of Military Appeals established the requirement that SJAs serve their posttrial recommendations on defense counsel in United States v. Goode, 1 M.J. 3 (C.M.A. 1975). President Ronald Reagan codified this requirement in R.C.M. 1106(f)(1) when he promulgated the Manual for Courts-Martial in 1984. *See generally* R.C.M. 1106(f)(1) *amended by* C4, 15 Nov. 1990.

[3] President George Bush introduced the requirement that an SJA must serve the posttrial recommendation on both the accused and the defense counsel when he promulgated change 4 to the *Manual for Courts-Martial*. *See* R.C.M. 1106(f)(1) (C4, 15 Nov. 1990).

[4] R.C.M. 1106(f)(4).

[5] Although R.C.M. 1106(d)(4) provides that an SJA needs to respond to allegations of legal error only when they are "raised in matters submitted under R.C.M. 1105 or when deemed appropriate by the staff judge advocate," the Court of Military Appeals has ruled that an SJA must respond to *all* allegations of legal error raised in *any* timely defense submission, including a petition for clemency under R.C.M. 1105 and a response to a posttrial recommendation under R.C.M. 1106(f)(4). *See* United States v. Hill, 27 M.J. 293 (C.M.A. 1988).

[6] *See* R.C.M. 1106(d)(4).

[7] Currently, R.C.M. 1106(f)(7) states only that an addendum that contains new matter must be served on "counsel for the accused." Nevertheless, a careful SJA will reason that, if R.C.M. 1106(f)(1) dictates that the original recommendation must be served on both the defense counsel and the accused, the addendum also should be served on the counsel and the accused.

[8] R.C.M. 1106(f)(7) discussion.

[9] 33 M.J. 907 (A.F.C.M.R. 1991).

[10] *Id.* at 910.

[11] *Id.*

[12] In *Komorous*, the Air Force court provided an excellent list of case law analyzing what is, and what is not, "new matter." *See id.* at 910-11 nn. 7-9.

[13] 34 M.J. 224 (C.M.A. 1992).

[14] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1988) [hereinafter UCMJ].

[15] *Norment*, 34 M.J. at 224.

The SJA served the posttrial recommendation[16] on Norment's German defense counsel on 23 May 1990. After receiving two extensions, the defense counsel filed an R.C.M. 1106(f)(4) response on 19 June.[17] In this response, the defense counsel argued that the principal Government witnesses should not be believed. The attorney also "raised two [other] important matters."[18] First, the defense counsel alleged that several members of the court either slept or "were not attentive" during the defense counsel's presentation of evidence.[19] Second, the defense counsel claimed that, during a recess in the trial, a member of the court, the military judge, and the lead trial counsel drove away together in the same automobile.[20]

The defense counsel attached three signed statements supporting these allegations to the R.C.M. 1106(f)(4) submission.[21] All three statements substantiated the allegation of members sleeping during the trial. One statement supported the allegation that the judge, the trial counsel, and one member drove away together during a recess in the proceedings.[22]

On 22 June, the SJA signed the addendum to the posttrial recommendation. In response to the defense allegations, the SJA stated:

> I have examined the allegation of legal error raised by the accused in matters submitted under R.C.M. 1106. I disagree with the accused's assertion that legal error occurred during the trial. *I have inquired into the allegations of court member misconduct and judicial-prosecutor-court member collusion, and have determined that there is no basis in fact to the allegations.* Accordingly, it is my opinion that corrective action on the findings or sentence is not necessary.[23]

The same day, the convening authority approved the trial results. No evidence in the record of trial suggests that the SJA served the addendum on the defense or that the defense was afforded an opportunity to respond to the addendum. On appeal, the Court of Military Appeals considered whether the SJA's addendum to the recommendation contained "new matter" that would require service on the defense.

The Government asserted that the SJA had complied with R.C.M. 1106(f)(7). It also claimed that, even if the SJA should have served the addendum on the accused and the defense attorney, the accused had suffered no actual prejudice from the SJA's failure to do so. The Court of Military Appeals rejected the first argument and refused to consider the second.

The court first remarked on the SJA's claim to "have inquired into the allegations." This language, it found, implied that the SJA had conducted an "extra-record"[24] inquiry. The results of this independent investigation was "matter from outside the record of trial"—that is, new matter.[25] Accordingly, the SJA's failure to serve the addendum on the defense

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[16] A recommendation was required because the accused was found guilty of an offense by a general court-martial. *See* R.C.M. 1106(a).

[17] Rule for Courts-Martial 1106(f)(5) allows the counsel for the accused 10 days from the service of the record of trial under R.C.M. 1104(b), or from the service of the posttrial recommendation, whichever occurs later, to comment on the recommendation. The convening authority may extend this time period "for up to 20 additional days" if the defense counsel establishes "good cause." R.C.M. 1106(f)(5).

[18] *Norment*, 34 M.J. at 225.

[19] In the first allegation, Norment's attorney asserted,

> It appears that some members of the Court were not attentive, at least for a considerable period of time during the trial, and gave all the appearance of having fallen asleep, particularly at the time when the Defense presented their [sic] matters to the Court. . . . This fact should preclude the approval of the findings and sentence.

Id.

[20] In the second allegation, Norment's attorney asserted,

> The defense learned subsequent to the trial that during a recess in the trial, a member of the Court, presumably Colonel Cimbal [Colonel Cimral, according to the convening order], was seen to drive in the same automobile with not only the judge but also a member of the prosecution, namely the lead trial counsel, Captain Mieth. . . . At least the appearance of evil, if not evil itself has been manifested by such action. Appearance of evil should, however, be avoided as evil itself.

Id.

[21] The three service members who made these statements were "Staff Sergeant Joel L. Hardy, who 'was the guard for [Staff Sergeant] Norment during his court-martial'; Staff Sergeant Stephanie A. Norment, [Norment's] wife; and Sergeant Steven L. Myers, [Norment's friend, who] apparently [was] a spectator at the trial." *Id.*

[22] *See id.* at 226.

[23] *Id.* (emphasis added by the court).

[24] *Id.* at 226-27.

[25] *Id.* at 227 (citing R.C.M. 1107(f)(7) discussion).

amounted to error.[26] The court flatly refused to test this error for prejudice, stating that it would not "hide [its] judicial head[] in the sand"[27] by holding that the lack of service was not prejudicial.[28]

The court also observed that the SJA had failed to identify in the addendum "the extent of [his] . . . 'inquiry'"[29] and had neglected to reveal "his sources or the content of any information that he [had] uncovered."[30] The court noted that, unless an accused's allegations "obviously [are] fanciful, which these apparently were not,"[31] an SJA's recommendation should provide the convening authority with sufficient information upon which to decide whether a posttrial session is needed.[32]

The court remanded the case to The Judge Advocate General. It remarked that, in doing so, it sought to "give the convening authority [an] opportunity" to order a hearing under Uniform Code of Military Justice (UCMJ) article 39(a).[33] The court evidently believed that such a hearing would be necessary to investigate the defense allegations fully.

This case joins a growing collection of decisions in which the Court of Military Appeals has found errors in the posttrial processing of courts-martial and has remanded the cases without testing the errors for prejudice.[34] As long ago as 1988,[35] the court wrote, "Since it is very difficult to determine how a convening authority would have exercised his [or her] broad discretion if the staff judge advocate had complied with R.C.M. 1106, a remand will usually be in order."[36]

Staff judge advocates must be intimately familiar with R.C.M. 1106 and must comply meticulously with its requirements. As the Air Force Court of Military Review warned in *United States v. Haynes*,[37] "[T]he dividing line between what is and is not 'matter from outside the record of trial' can be wafer thin. If there is any doubt whatsoever, the staff judge advocate should err on the side of caution . . . ."[38] In short, an SJA should conclude that, if any information affecting the SJA's addendum comes from outside the record, it is new.[39] If it is new, it is new matter. Major Cuculic.

United States v. Wooten: No Fourth Amendment Protection for Bank Records

In *United States v. Wooten*, the Court of Military Appeals declined to apply the exclusionary rule to the Government's seizure of an accused's bank records, even though the Government may have obtained these records illegally.[40] The court acknowledged that the Government may have overstepped the limits that the Right to Financial Privacy Act[41] (RFPA)

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[26] *Id.*

[27] *Id.* at 227.

[28] *See id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* The court declared, "Claims of inattentive court members and improper influence of a court member, buttressed by detailed eyewitness accounts, are not issues to be whimsically dismissed." *Id.* at 227 n.2 (citing Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 606(b) [hereinafter Mil. R. Evid.]; United States v. West, 27 M.J. 223 (C.M.A. 1988); United States v. Witherspoon 16 M.J. 252 (C.M.A. 1983)).

[32] *See* UCMJ art. 39(a); R.C.M. 1102(b)(2). Rule for Courts-Martial 1102 provides, "An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). The military judge can order a posttrial article 39(a) session from adjournment until the authentication of the record of trial. R.C.M. 1102(d). After authentication, the convening authority can order a posttrial article 39(a) session until he or she acts on the case. *See id.*

[33] *See Norment*, 34 M.J. at 227.

[34] *See* United States v. Clear, 34 M.J. 129 (C.M.A. 1992); United States v. Craig, 28 M.J. 321 (C.M.A. 1989).

[35] United States v. Hill, 27 M.J. 293 (C.M.A. 1988).

[36] *Id.* at 296.

[37] 28 M.J. 881 (A.F.C.M.R. 1989).

[38] *Id.* at 882 (citations omitted).

[39] *See, e.g.*, United States v. Cassell, 33 M.J. 448 (C.M.A. 1991). In *Cassell*, the SJA relied upon material from outside the record in deciding to recommend against clemency, but failed to include this adverse information in the posttrial recommendation or in the addendum. *Id.* at 449. Consequently, the accused never was afforded a meaningful opportunity to respond to the recommendation. *Id.* at 450.

[40] 34 M.J. 141 (C.M.A. 1992).

[41] 12 U.S.C. §§ 3401-3422 (1988).

imposes on governmental access to a citizen's bank records, but it held that this apparent violation of the Act did not mandate the suppression of the records.

A general court-martial tried Specialist La-Dell Wooten for making worthless checks with the intent to defraud. The trial counsel obtained evidence against Wooten by serving subpoenas duces tecum[42] on the victimized banks. At trial, the defense counsel moved to suppress the documents the trial counsel had obtained from the banks. He argued that, in issuing the subpoenas, the Government had violated the RFPA, UCMJ article 46,[43] R.C.M. 703,[44] and Army Regulation (AR) 190-6.[45]

Citing *United States v. Bennett*,[46] the defense counsel claimed that a civilian cannot be compelled to bring documents from the United States to a court-martial that has been convened overseas.[47] Noting that Wooten was being tried in Germany, the defense attorney maintained that the subpoenas duces tecum were without legal effect and, consequently, that the Government violated the RFPA by using "unlawful" subpoenas to obtain the accused's bank records.

Wooten made no Fourth Amendment objection to the bank records at trial. On appeal, however, he "expanded upon his argument at trial in an attempt to find some legal authority for his desired remedy of suppression."[48] In particular, the accused claimed that his checks and financial statements were protected by the Fourth Amendment and that the Government's unauthorized seizure of these documents required their exclusion from evidence.

Chief Judge Sullivan and Judge Cox rejected Wooten's arguments. They found no basis for applying the exclusionary rule.

The Fourth Amendment Issue

Chief Judge Sullivan, the author of the court's opinion,[49] noted that a search or seizure must violate an accused's objectively reasonable expectation of privacy to be found unreasonable under the Fourth Amendment.[50] Finding that Wooten had no reasonable expectation of privacy in his bank records,[51] the Chief Judge ruled that the Government's seizure of these records did not trigger the Fourth Amendment.[52] Accordingly, he declined to apply the exclusionary rule on Fourth Amendment grounds.[53]

Chief Judge Sullivan offered several explanations for this ruling. First, he pointed out that the defense counsel "expressly disavowed" the Fourth Amendment at trial as a basis for suppressing the evidence.[54] This disavowal, he implied, constituted waiver.[55] Second, the Chief Judge noted

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[42] Provisions of UCMJ article 46 and R.C.M. 703(e)(2) empower a trial counsel to issue subpoenas. A subpoena duces tecum "is the process by which a court requires the production at the trial of documents, papers, or chattels material to the issue." *Wooten*, 34 M.J. at 144 n.1 (quoting Vaughan v. Broadfoot, 149 S.E.2d 37, 40 (N.C. 1966); *see also* Fed. R. Crim. P. 17 (governing subpoenas for witnesses and evidence at trial in United States district courts).

[43] UCMJ Article 46 provides,

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-material cases to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

[44] R.C.M. 703 (implementing UCMJ article 46 and providing for the "production of witnesses and evidence").

[45] Army Reg. 190-6, Military Police: Obtaining Information from Financial Institutions (15 Jan. 1982).

[46] 12 M.J. 463 (C.M.A. 1982).

[47] *Wooten*, 34 M.J. at 146. In *Bennett*, the Court of Military Appeals held that although a court-martial may compel the appearance of a nonmilitary witness when the court-martial and the witness are located in the United States, a subpoena cannot be enforced against an American citizen in the United States who refuses to appear at a court-martial convened outside of the United States. *See Bennett*, 12 M.J. at 470-71.

[48] *Wooten*, 34 M.J. at 147.

[49] Chief Judge Sullivan and Judge Cox participated in the decision. *See id.* at 141. Judge Cox filed a separate opinion concurring in part and in the result. *See id.* at 149 (Cox, J. concurring).

[50] *See id.* at 147.

[51] *Id.* at 147-48.

[52] *Id.* at 147.

[53] *Id.* ("[we] reject [the] appellant's Fourth Amendment argument").

[54] *Id.*

[55] *See id.* (citing Mil. R. Evid. 311(e)(3); United States v. Hilton, 27 M.J. 323, 326 (C.M.A. 1987) ("the mere failure to object even on constitutional grounds might foreclose appellate review")).

that "the absence of . . . [a lawful] subpoena [is] not critical on the Fourth Amendment issue."[56] To support this assertion, he cited *United States v. Miller*,[57] a 1976 decision in which "the Supreme Court held that a customer has no reasonable expectation of privacy in bank records and negotiable instruments . . . held by the bank."[58] Third, the Chief Judge declined to find that an accused ever could have a reasonable expectation of privacy in bank records when "the bank 'is itself a victim of the [accused's] suspected wrongdoing.'"[59] Finally, the Chief Judge pointed to the trial counsel's use of subpoenas to obtain the bank records.[60] He did not explain why the existence of the subpoenas was important to his Fourth Amendment analysis, but merely commented that they made *Wooten* "analogous" to *Miller*.[61]

Violation of the RFPA

Chief Judge Sullivan considered Wooten's argument that the bank records should have been suppressed because the Government had obtained them in violation of the RFPA; however, he did not decide this question explicitly. His analysis suggests that he found the issue irrelevant because the facts in *Wooten* made the remedy of suppression inappropriate.

The RFPA provides that "no Government authority may have access to . . . information contained in the financial records of any customer from a financial institution."[62] Access is permitted, however, if "such financial records are disclosed in response to a judicial subpena"[63]—that is, a "subpena . . . authorized by law."[64] The defense argued that, because *Bennett* denied the trial counsel the authority to issue subpoenas to witnesses in the United States, the Government obtained access to the accused's checks and financial statements "through illegal use of compulsory process."[65]

The accused characterized the Government's alleged abuse of the subpoena power as a violation of "military due process,"[66] denouncing it as "outrageous government conduct"[67] and "a deliberate flouting"[68] of law and regulation. Chief Judge Sullivan, however, concluded that the record was devoid of any evidence of "deliberate government misconduct."[69] He added that the RFPA states that a party aggrieved by government action may seek a civil remedy for an unauthorized examination of his or her bank records.[70] Although Wooten was stationed overseas, he could file a suit against the United States "in an appropriate district court"[71] for any violation of his rights under the Act. Consequently, "a court-ordered remedy of a more drastic nature would be inappropriate, and the remedy of exclusion of the challenged evidence as supervisory punishment would not be warranted."[72]

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[56] *Id.*

[57] 425 U.S. 435 (1976).

[58] *Wooten*, 34 M.J. at 147 (citing *Miller*, 425 U.S. at 441 n.2). Wooten attempted to distinguish *Miller*, arguing that because the Supreme Court in that case "stressed the necessity for the Government to acquire records through 'existing legal process,'" the Court implicitly required the Government to use "a legal subpoena" to obtain those records. *See* Appellant's Final Brief at 5, United States v. Wooten, 34 M.J. 141 (C.M.A. 1992) (citing *Miller*, 425 U.S. at 439); *see also Wooten*, 34 M.J. at 147. Unimpressed by this argument, Chief Judge Sullivan responded, "While the Supreme Court recognized a difference [between] the defective subpoena situation in *Miller* and the absence of any subpoena . . ., it further suggested that this distinction was not critical on the Fourth Amendment issue." *Wooten*, 34 M.J. at 147 (citations omitted).

[59] *Wooten*, 34 M.J. at 147 (citing Burroughs v. Superior Court, 529 P.2d 590, 594 (Cal. 1974); *accord id.* at 149 (Cox, J. concurring).

[60] *Id.* at 147. Wooten neither conceded, nor denied the "Government's representation that a subpoena duces tecum was actually used in this case . . . . Instead, [his] defense counsel only asserted that he had not seen these subpoenas and that, in any event, they were unauthorized . . . ." *Id.*

[61] *Id.* at 148. In analyzing Wooten's other claim of error, Chief Judge Sullivan noted that, even if the subpoenas were defective, the trial counsel's decision to issue them arguably demonstrated the Government's desire to seize the records lawfully. *See id.*; *cf. Miller*, 425 U.S. at 439 (Government seizure of bank records pursuant to subpoena that may have been procedurally defective).

[62] 12 U.S.C. § 3402 (1988).

[63] *Id.*

[64] *Id.* § 3407(1).

[65] *Wooten*, 34 M.J. at 143.

[66] *See id.* at 148; *see also* United States v. Clay, 1 C.M.R. 74, 77 (C.M.A. 1951).

[67] *See Wooten*, 34 M.J. at 147; *see also* United States v. Payner, 447 U.S. 727 (1980).

[68] *Wooten*, 34 M.J. at 148.

[69] *Id.*

[70] *Id.* (citing 12 U.S.C. § 3410 (1988)); *see also id.* at 146-47 & nn. 7-8 (explaining that "Congress intended these civil remedies to be the only remedies for a breach of this Federal statute"). *See generally* 12 U.S.C. § 3417(a)-(b), (d) (1988) (outlining "the only authorized remedies and sanctions for violations" of the Act).

[71] *Wooten*, 34 M.J. at 148.

[72] *Id.* at 149.

The Chief Judge also suggested in three footnotes[73] that, even if the accused had offered proof that the Government *intentionally* had violated the RFPA, UCMJ article 46, or R.C.M. 703, the Court of Military Appeals would have declined to use "an exclusionary-rule type remedy" to correct this misconduct.[74] Chief Judge Sullivan noted that "Congress intended [the] civil remedies [described in the RFPA] as the exclusive remedies for a breach of this federal statute."[75] Similarly, adequate administrative measures are available to discipline members of the Army who violate the Act, R.C.M. 703, or AR 190-6.[76] In sum, an accused apparently receives no evidentiary benefit from a Government violation of the RFPA.

In his concurring opinion, Judge Cox agreed with the Chief Judge that the Fourth Amendment was not triggered by the seizure of the accused's records. He disagreed emphatically, however, with the Chief Judge's suggestion that the trial counsel may have acted improperly in issuing the subpoenas duces tecum. Judge Cox asserted that the trial counsel's actions were "perfectly legal,"[77] adding that the actual basis of the accused's appeal on this issue was the claim that the subpoenas "could [not] be *enforced* in the manner intended by counsel."[78] Because the banks the accused victimized never declined to honor the subpoenas issued to them, the question of whether the court-martial could compel them to comply with the subpoenas was irrelevant. Consequently, Judge Cox found no violation of UCMJ article 46, R.C.M. 703, or the RFPA. He concluded by remarking that, even if the lawfulness of the subpoenas were in issue, "the right [to privacy under the Act] . . . is the witness', [sic] not the accused's."[79] This remark suggests that Judge Cox likely would have denied an accused the standing to raise this issue at court-martial.

Wooten is important to practitioners because it reflects a continuing trend by the Court of Military Appeals to begin its analyses of Fourth Amendment issues by asking if the amendment protects or "covers" the place or thing affected by a search or seizure. Only if the court finds this "coverage" will it apply Fourth Amendment principles in rendering a decision. This approach contrasts with methodologies adopted by courts that look for probable cause in deciding whether a search or seizure was conducted "reasonably" or apply the Fourth Amendment whenever a government official conducts a search and seizure. *Wooten* also is important because it exemplifies the Court of Military Appeals's refusal to apply an exclusionary rule to correct Government misconduct when a trial counsel gathers evidence by abusing the subpoena power.

Trial counsel and defense counsel can look to *Wooten* for guidance when faced with similar situations. For example, the rationale in *Wooten* evidently would apply to a subpoena duces tecum issued to obtain an accused soldier's tax records presently held by the Internal Revenue Service.

Chief Judge Sullivan and Judge Cox substantially agreed in *Wooten;* however, they were the only judges of the Court of Military Appeals to consider the case. Participation by Judges Crawford, Gierke, or Wiss might have altered the result. Major Borch.

Contract Law Notes

Inspection of Government Contracts

Government inspectors help to ensure that the government purchases only goods and services that comply with the requirements set forth in government contracts. Installation contract attorneys informally supervise and assist government inspectors in the performances of their assigned contract inspection duties.

Inspired by the many Contract Disputes Act[80] (CDA) actions that the author observed while assigned to the Contract Appeals Division, United States Army Litigation Center, this note identifies several mistakes that inspectors commonly make. It suggests that installation contract attorneys can help inspectors to avoid these mistakes.

Most government contracts contain a clause permitting the government to inspect a contractor's work before, during, or after performance of the contract.[81] This inspection clause—

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[73] *Id.* at 148 nn.9-11.

[74] *Id.* at 148 n.10.

[75] *See id.* at 147.

[76] *See id.* at 148 n.9.

[77] *Id.* at 149 (Cox, J. concurring).

[78] *Id.* (emphasis added).

[79] *Id.*

[80] *See* Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1978). The CDA permits government contractors to appeal certain final decisions issued by contracting officers to the Claims Court or to one of several boards of contract appeals. *See id.* §§ 605-606, 609.

[81] *See generally* Fed. Acquisition Reg. subpt. 46.3 (1 Apr. 1984) [hereinafter FAR].

in conjunction with the government's contractual right to receive the performance specified in the contract—delineates the government's right to inspect a contractor's work during contract performance and before final acceptance.[82] The Federal Acquisition Regulation (FAR) directs contracting officers to incorporate one of several standard inspection clauses into most contracts.[83] In choosing which clause to adopt, a contracting officer must consider the contract type[84] and the nature of the "item" to be procured.[85]

The inspection clause, the contracting officer's guidance, and quality assurance provisions in the contract define an inspector's duties. The inspector's *performance* of these duties, however, frequently will determine whether the government will succeed or fail if it must litigate a contract dispute. Unfortunately, many inspectors harm the government's litigation posture by failing to maintain complete, accurate inspection logs.

A government inspector often will use a single inspection log to record notes pertaining to several ongoing contracts. Each day, the inspector enters comments in this log as he or she moves from one contract to the next. Frequently, the inspector will record notes chronologically, without attempting to separate comments that relate to different contracts. When the log is full, the inspector probably will destroy or discard it. Only rarely will an inspector give a completed logbook to a contracting officer to place in a contract file.

On the other hand, government contractors normally maintain copies of their daily contract inspection records and logs until after the parties have resolved all outstanding claims. Indeed, many contracts require contractors to prepare, maintain, and submit to the government daily reports identifying employees and equipment on hand, work performed, changes to the contract, delays caused by the government, and other significant matters arising under, or relating to, the contract.[86] Predictably, contractors' reports often are shaped by the contractors' perspectives and may reflect unfairly upon the government. Nevertheless, when a contractor's records are before a judge and the government's inspection records are not, the contractor's evidence may damage the government's position significantly.

Too often, a contractor's reports are the only available recorded recollection pertaining to a claim. Because claims often relate to events that occurred long before a claim was filed, the value to the court of recorded recollection may be significant. Unfortunately, government inspectors often lose or discard their notes long before contractors file their claims. Moreover, even when a government inspector saves a log, a factfinder may have difficulty determining which of the log's many entries relates to the contract at issue if the log is crammed with cryptic comments that relate to several contracts. Consequently, the government frequently has difficulty defending its positions.

Fortunately, the government can avoid these problems. Inspectors can—and should—maintain separate inspection logs for each assigned contract. Moreover, they should write legibly, to ensure the accurate interpretation of their comments in years to come, and should ensure that the original or a copy of each inspection log is placed in the contracting officer's contract files after the completion of the contract. By taking these simple measures, inspectors can strengthen the government's position significantly.

Government inspectors rarely prepare or maintain inspection records with the concern and anticipation of litigation that typifies contractors. This is not surprising; most inspectors focus on getting the job done—not on preparing for litigation. Even so, this focus on performance, rather than on potential litigation, well may cause the government to pay unnecessary costs.

For example, in a firm-fixed-price contract for the renovation of an underground water system, a government inspector may feel little concern about the contractor's wasteful use of manpower and equipment. Because the inspector thinks that the government's potential costs under the contract are limited by the firm-fixed-price clause, the inspector may fail to document instances when the contractor delays performance or allocates resources inefficiently. The failure to record this information ultimately may cause problems. If the contractor eventually requests an adjustment for alleged additional work or government-caused delays, the government may lack evidence to prove that the contractor's own activities caused the work or delays. Moreover, should the contractor convince a judge or a contract appeals board that it is entitled to an equitable adjustment,[87] the government's liability will be measured not on a fixed-price basis, but on a cost-reimbursement basis.[88] Conceivably, the contractor might recover the *actual*

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[82] *See, e.g.*, FAR 52.246-2 (inspection of supplies— fixed-price).

[83] *See, e.g.*, FAR subpt. 46.3 (contract clauses).

[84] Contract "types" include fixed-price, cost-reimbursement, time-and-materials, and labor-hour contracts.

[85] The "nature of the item procured" may refer to supplies, services, construction, transportation, or research and development.

[86] *See, e.g.*, FAR 52.246-2 (inspection of supplies— fixed-price).

[87] *See* Globe Constr. Co., ASBCA No. 21,069, 78-2 BCA ¶ 13,337 (party claiming the benefit of the adjustment has the burden of proof).

[88] *See* Celesco Indus., Inc., ASBCA No. 22,251, 79-1 BCA ¶ 13,604. Generally, an adjustment entitles the contractor to the difference between the reasonable cost of performing the work as originally required and the reasonable cost of performing the work as changed. An equitable adjustment also entitles the contractor to profits.

cost of performance, profit, overhead, and interest—the firm-fixed price of the contract will *not* limit the contractor's total recovery. If the government's records are incomplete, illegible, or missing, the contractor's records may constitute the only written evidence of the costs that the contractor incurred.

Obviously, experienced contractors know that the reports that they prepare may form the bases for subsequent claims. Accordingly, many contractors prepare their reports carefully. A government inspector must be equally conscientious. The inspector must recognize that his or her own notes and reports may constitute important evidence, whether they are used to defend against a contractor's claims or to assert an affirmative claim on behalf of the government.

Government inspectors may not recognize the relative values of different types of evidence. Admitting written inspection records into evidence to contradict an appellant's evidence often is helpful when the government litigates a contract dispute; however, admitting properly authenticated photographs or videotapes supporting the government's position could be even more useful. For example, consider the evidentiary impact of photographs or videos showing a contractor's bulldozers operating at a construction site on the very day that an alleged government-caused delay purportedly prevented the contractor from working. This evidence could undermine the contractor's credibility concerning this issue and all other issues in the case.

Many government inspectors, however, are unaware of the potential value of evidence and of the requirements for admitting various types of evidence. Contract attorneys, who know the elements of evidentiary foundations and understand the potential impacts of different types of evidence, should train inspectors so that they also are aware of these concepts.

An installation attorney can help to ensure that government inspectors protect the government's interests by performing their duties properly. Working closely with contracting officers, engineers, and commanders, the attorney can discover and eliminate problems early in the contracting process. Knowledgeable in contract law and the rules of evidence; familiar with the terms of the installation's contracts; and coactive with commanders, contracting officers, and government inspectors; the installation attorney readily can train inspectors to prepare for litigation. By training others to anticipate and to avoid problems, an installation attorney can protect the government's contractual rights and support the government in contract litigation. Major Killham.

Book Review: *Dictionary of Contract Law Terminology*

The George Washington University Press recently published a new reference book that government contract law attorneys will find useful in their daily practices. *The Government Contracts Reference Book (Reference Book)*,[89] written by Professor Ralph C. Nash, Jr., and Mr. Steven L. Schooner, is a comprehensive lexicon of government contract terminology. The *Reference Book*'s clear, concise text will make it useful to attorneys and to other professionals involved in any phase of government contracting.

The subtitle to *The Government Contracts Reference Book*, "A Comprehensive Guide to the Language of Procurement," describes the book accurately. The *Reference Book* defines government contract terminology in exhaustive detail—from "abstract of bids" to "Wunderlich Act," the authors explain more than one thousand terms used in government contracting. In addition to the narrative definitions, the *Reference Book* includes a helpful appendix of acronyms and a bibliography of the reference materials that are cited throughout the book.

The authors briefly discuss each term, providing appropriate regulatory and statutory references when necessary. Occasionally, a definition will refer the reader to other scholarly sources.[90] The book also identifies differences in usage between various executive agencies. The narrative definitions are sufficiently detailed to allow a novice to use the book.

The *Reference Book* employs a straightforward method for handling terms comprising more than one word. The authors spell out numbers and delete spaces between individual words in phrases. For example, a reader may find the phrase "8(a) Program" by looking for "eightaprogram." Generally, the book does not use abbreviations to identify defined terms. Accordingly, "RFP" may be found by looking under "request for proposals." At first glance, these indexing conventions may appear strange; however, they quickly become easy to use, allowing ready access to pertinent definitions.

Of necessity, the book contains many cross-references. For example, "abstract of bids" is cross-referenced with "abstract of offers." This practice eliminates the need to repeat definitions. It also may lead to a certain amount of page-flipping if the reader initially fails to choose the "main term" as the subject of the search. For example, the term "sold in substantial quantities to the general public" is defined under the term "commerciality," with further reference to the terms "established catalogue or market price" and "certified cost and pricing data."

Professor Nash and Mr. Schooner deserve high praise for undertaking a project of this magnitude.[91] Comprehensively researched and cogently written, *The Government Contracts Reference Book* belongs in every government contract practitioner's library. It is a very valuable addition to the existing reference material on government contract law. Lieutenant Colonel Dorsey.

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[89] Ralph C. Nash, Jr., & Steven L. Schooner, The Government Contracts Reference Book (1992) (paperback, 445 pages).

[90] The book most frequently refers readers to *Briefing Papers*, published by Federal Publications, Inc., and to articles published in the *Public Contract Law Journal*.

[91] The authors' work is not yet complete. Recognizing that the dynamic language of government contracts will continue to evolve, Nash and Schooner plan to update and expand the *Reference Book* as needed.

International Law Note

Examination of Operational Law Issues Prompts Production of Article Disputing the Need for a "New World Order"

A paper entitled "The United States of America, Champion of the Rule of Law or the New World Order?," prepared under the auspices of the Center for Law and Military Operations (CLAMO) by Major Jeffrey F. Addicott,[92] was published this spring in the *Florida Journal of International Law*.[93] The publication of this piece reflected CLAMO's goal of promoting discussions of operational law issues.

In his paper, Major Addicott criticized the "New World Order" as a political anachronism and argued for renewed support for a "Rule of Law." Contrasting the two dogmas, he observed that the concept of a new world order is being used to promote a particular political agenda, while the rule of law is associated directly with legal standards of behavior recognized and practiced between states throughout the community of nations. Major Addicott contended that the United States must sponsor the rule of law vigorously to aid in the world's fight against unlawful aggression.

The Center for Law and Military Operations was established to examine current and potential legal issues attendant to military operations. It does so by organizing or facilitating professional exchanges, such as symposia and consultations; by writing, reviewing, editing, and publishing reports, treatises, articles, and other written materials; and by providing military attorneys with access to a well-stocked operational law library. Judge advocates are encouraged to submit scholarly papers to CLAMO. The Center will extend every effort to assist in their publication. Major Johnson.

Legal Assistance Items

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

Consumer Law Note

The Federal Trade Commission Used Car Rule or "Why Isn't the Buyers' Guide in the Window?"

The Federal Trade Commission's (FTC's) Used Car Rule does not require used car dealers to give warranties on used cars. It does provide, however, that any dealer who misleads a potential buyer about the availability of a warranty, the scope of a warranty's coverage, or the lack of a warranty on a used car commits an unlawfully deceptive act or practice.[94] The rule expressly requires a dealer to post a "Buyers' Guide" in the window of every used car that he or she offers for sale to consumers. This guide must disclose whether the car is offered "as is" or with a warranty.

The Used Car Rule seems simple enough for dealers to follow—it even contains a sample buyers' guide. Many dealers, however, continue to flout the rule by failing to post the guides. Does the FTC actually prosecute used car dealers for breaking the rule? Yes, it does.

The FTC recently settled two cases with used car dealers who had failed to post buyers' guides. Pursuant to settlement agreements, the FTC obtained civil penalties of $7500 and $5000 respectively against dealers in Oklahoma and Chicago.[95] These agreements should interest legal assistance attorneys (LAAs) because many legal assistance clients purchase used cars that later develop critical mechanical problems.

An LAA assisting a client with a used car problem should ask the client whether the dealer had posted a buyers' guide in the window of the car the client purchased and whether guides were evident on other cars on the dealer's lot. If the guide was absent, the attorney has leverage in negotiating with the dealer and may resolve the client's problem favorably.

Notice to a violator should be sufficient to ensure his or her compliance with the FTC rule; if it does not, the attorney

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[92]Major Addicott was the senior instructor of the International Law Division, TJAGSA, when he wrote the paper. He presently is assigned to the International Affairs Division, Office of The Judge Advocate General, Washington, D.C.

[93]*See* Jeffrey F. Addicott, *The United States of America, Champion of the Rule of Law or the New World Order?*, 6 Fla. J. Int'l L. 63 (1990).

[94]16 C.F.R. pt. 455 (1991).

[95]*See* Federal Trade Comm'n, *Oklahoma Car Dealership Agrees to Settle FTC Charges and Pay $7,500 Civil Penalty*, FTC News Notes, Apr. 6, 1992, at 1 [hereinafter *Oklahoma Dealership*]; Federal Trade Comm'n, *Auto Dealer Agrees to Settle Charges of Violating Used Car Rule*, FTC News Notes, Apr. 20, 1992, at 1 [hereinafter *Auto Dealer*]. In consent decrees filed in federal courts, both dealers agreed to pay civil penalties to the FTC for failing to post buyers' guides in the windows of their used cars. *See Oklahoma Dealership, supra*, at 1; *Auto Dealer, supra*, at 1. Legal assistance attorneys may request complete texts of these cases by writing to the following address: Federal Trade Commission, Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue N.W., Washington, D.C. 20580.

should notify the FTC. Repeated client complaints against dealers also should be forwarded to the local Armed Forces Disciplinary Control Board. Major Hostetter.

Family Law Note

Using a Court's Lack of Jurisdiction to Defeat a Former Spouse's Claim to the Military Pension of a Soldier or a Retiree

A court that has jurisdiction to grant a soldier or a military retiree a divorce and to divide his or her marital property often can order the soldier or retiree to use his or her military retired pay to satisfy child support or alimony obligations. The same court, however, may lack jurisdiction to divide the soldier's or retiree's military retired pay as marital property.

The Uniformed Services Former Spouses' Protection Act (USFSPA)[96] provides that state law shall determine whether a court may exercise jurisdiction over a soldier or a retiree to divide his or her disposable military retired pay to satisfy child support or alimony payments.[97] The USFSPA also states that state courts may divide military pensions as marital or community property in accordance with state law.[98] The states, however, may not endow their courts with unlimited authority to divide military retired pay. In an apparent attempt to limit forum shopping by the estranged spouses of soldiers and retirees, Congress severely restricted the ability of state courts to divide disposable military retired pay as marital property.

A court must have in personam jurisdiction over a soldier or a retiree to divide his or her military retired pay as marital or community property.[99] This jurisdiction must be based on one of the following: (1) the domicile[100] of the soldier or retiree in the state or territory in which the action is brought;[101] (2) his or her residence in the state or territory, if the soldier or retiree resides there "other than because of military assignment";[102] or (3) his or her consent to the jurisdiction of the court.[103] A client who is sued for divorce can use these requirements to great advantage, particularly if the client is a soldier on active duty.

A court generally will consider a soldier's domicile to be his or her home of record, unless the soldier has evinced an intent to establish domicile elsewhere.[104] Accordingly, when a soldier is not stationed in the state identified as his or her home of record or in the state in which the soldier clearly intends to make his or her domicile, a court normally cannot assert personal jurisdiction over the soldier without the soldier's consent.[105]

Everyone has a domicile. Therefore, at least one state invariably will have jurisdiction to divide a soldier's or

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[96] Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982) (codified as amended in scattered sections of 10 U.S.C.); *see* 10 U.S.C. § 1408 (1988) (governing the division of military disposable retired pay as marital property and the direct payment of disposable military retired pay to satisfy alimony or child support obligations).

[97] *Id.* § 1408(c)(4). Almost invariably, a court also must find sufficient "minimum contacts" linking a nonresident party to the forum state to satisfy due process requirements before it may assert personal jurisdiction over that party. *See* Burnham v. Superior Court, 495 U.S. 604, 617-18 (1990); Hanson v. Denckla, 357 U.S. 235, 250-51 (1957); International Shoe v. Washington, 326 U.S. 310, 316 (1945). *But cf. Burnham*, 495 U.S. at 620-21 (minimum contact is *not* a prerequisite to the exercise of personal jurisdiction over a nonresident party if, pursuant to state law, process is served on the party while he or she is present in the forum state).

[98] Currently, all states except Alabama recognize that military pensions can be divided as marital or community property by court order. *See generally* TJAGSA Practice Note, *State-by-State Analysis of the Divisibility of Military Retired Pay*, The Army Lawyer, May 1992, at 37. Some states, however, allow trial courts to divide only pensions that have vested. *See, e.g.*, Durham v. Durham, 708 S.W.2d 618 (Ark. 1986) (military retired pay is not divisible unless the pension vests before the marriage dissolves); Boyd v. Boyd, 323 N.W.2d 553 (Mich. Ct. App. 1982) (only vested pensions are divisible).

[99] *See* 10 U.S.C. § 1408(c)(4) (1988).

[100] The USFSPA does not define the term "domicile." The common law, however, generally recognizes that "domicile" is not synonymous with "residence." *See* Restatement (Second) of Conflict of Laws § 18 (1971). The determinative factor in resolving an issue of domicile is whether the subject intended to make a particular place "his [or her] house for the time at least." *See id.*

[101] 10 U.S.C. § 1408(c)(4)(B) (1988).

[102] *Id.* § 1408(c)(4)(A).

[103] *Id.* § 1408(c)(4)(C).

[104] A soldier usually will express the intent to establish domicile by paying local and state income taxes, paying state or local personal property taxes, registering to vote in a particular state, and obtaining state driver and vehicle licenses. *See* Restatement (Second) of Conflict of Laws § 18 (1971).

[105] See, e.g., Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987) (finding trial court lacked jurisdiction to partition military retired pay of a former domiciliary despite existence of adequate "minimum contacts"); Mortenson v. Mortenson, 409 N.W.2d 20 (Minn. Ct. App. 1987) (finding that the USFSPA preempted the state long-arm statute); Petters v. Petters, 560 So. 2d 722 (Miss. 1990) (same).

As stated above, a court also can establish its jurisdiction to divide a military pension by finding that the soldier or retiree established residence in the state and that he or she did so not because he or she was assigned there, but for other reasons. Clearly, this provision would ensnare most retirees because they rarely—if ever—take up residences in particular locations pursuant to military orders.

retiree's pension as marital or community property. That state, however, may not be the state in which the estranged spouse of a soldier or retiree would prefer to file for divorce; indeed, he or she actually may have tactical or logistical reasons to *avoid* filing suit there. At a minimum, this may provide the soldier or retiree with a valuable bargaining chip that he or she can use to obtain concessions from the estranged spouse.

Preserving the USFSPA's jurisdictional protection requires careful planning. Many soldiers and retirees involved in divorce actions unwittingly appear through their civilian counsel, thereby "granting" jurisdiction to courts that otherwise would have been ineligible to divide their pensions as marital property. A court well may construe a soldier's general appearance in a divorce action as "implied consent."[106] Unless the soldier appears "specially"[107] or refuses to answer the petition for divorce and property division—thereby inviting a default judgment[108]—the court may find that he or she consented to the court's exercise of in personam jurisdiction. This finding would permit the court to divide the soldier's military pension as marital property even if the court was not located in the soldier's state of domicile.[109]

Legal assistance attorneys can minimize these occurrences by impressing on their clients—and on their clients' civilian counsel—the significance of the USFSPA's jurisdictional protection. Doing so may protect soldiers from needlessly having to divide what may be their greatest assets—their military pensions. Major Connor.

Tax Note

State Taxation of Military Retired Pay[110]

Many retiring soldiers consult LAAs to discover whether particular states will tax their retirement incomes. Currently, only a few states exempt military retired pay from state taxation.[111]

In *Davis v. Michigan Department of the Treasury*,[112] the Supreme Court invoked the doctrine of intergovernmental immunity to invalidate Michigan's practice of taxing federal service retirees at a higher rate than retired state employees. Following *Davis*, federal service retirees have contested disparate income tax schemes in several other states. Recently, the Supreme Court reaffirmed *Davis*, ruling unanimously in *Barker v. Kansas*[113] that military retired pay does not differ significantly from the benefits that Kansas pays to retired state and local government employees. The Supreme Court characterized military retirement benefits as "deferred pay for past services," similar to a state employee's retired pay.[114] Accordingly, the state's practice of taxing military retired pay—but not pay received by a retired state or local government employee—was impermissible.

Ultimately, *Barker* should force Kansas and other states to change their tax laws. Given the current trend among the states to ferret out new revenue sources, more states may decide to impose equal taxes on all retirees.

[106] *See e.g.*, Gowins v. Gowins, 466 So. 2d 32 (La. 1985) (holding that a nondomiciliary Air Force officer's active participation in a divorce action constituted implied consent to the court's division of his military pension); Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988). *Contra Hattis*, 242 Cal. Rptr. at 410; *Mortenson*, 409 N.W.2d at 20; Flora v. Flora, 603 A.2d 723 (R.I. 1992).

[107] *See, e.g.*, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) (nonresident service member did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues). Some jurisdictions forbid a party to appear specially or severely limit the scope of issues that can be addressed through a special appearance. *See generally* 5 Am. Jur 2d *Appearance* §§ 27, 35 (1962).

[108] Although declining to answer a petition is a drastic tactic, it should not be dismissed out of hand, particularly when the client faces a suit in a jurisdiction in which a party may not appear specially. To decide whether to advise a client not to answer a petition for divorce and property division, an attorney must analyze the costs and benefits of filing the answer. The attorney must consider not only the client's interest in the military pension, but also his or her other marital assets. Moreover, he or she should determine whether the parties will contest child custody or support and whether the client's spouse is seeking an award of alimony.

A court generally will determine child support pursuant to state-specific guidelines. Assuming that child custody or support is not at issue, the parties have no other substantial marital assets to divide, and the client's spouse is not seeking an award of alimony, the LAA should advise the client to consider defaulting if the client likely will qualify for a military pension and the court lacks the requisite jurisdictional basis to divide the pension as marital property.

[109] *See, e.g., Gowins*, 466 So. 2d at 32; *Kildea*, 420 N.W.2d at 391.

[110] This note updates TJAGSA Practice Note, *State Taxation of Military Retired Pay* The Army Lawyer, Sept. 1990, at 43.

[111] Only Alabama, Hawaii, Illinois, Kentucky, Louisiana, Michigan, New York, and Pennsylvania currently refrain from taxing military retired pay. *See* Edward S Gryczynski, *Income Tax 1992*, The Retired Officer, Feb. 1992, at 45. The following jurisdictions exempt disability retired pay from state taxation (although the tax all other pay): Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Idaho, Indiana, Iowa, Kansas, Maine Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma Oregon, Puerto Rico, Rhode Island, Utah, Vermont, Virginia, West Virginia, Wisconsin. *Id.* at 48. The following nine states have no state income tax: Alaska Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. *Id.*

[112] 489 U.S. 803 (1989).

[113] 112 S. Ct. 1619 (1992).

[114] *Id.* at 1625.

Will Kansas refund the taxes it collected from military retirees before the *Barker* decision? Does *Davis* apply retroactively, so that states must refund the income taxes they collected on military retirement pays before the Court decided *Davis*? The refund issue remains unsettled. Cases are pending in several jurisdictions[115] and the Supreme Court recently granted certiorari in a Virginia case[116] that could lead to a definitive resolution of the retroactivity issue. In the meantime, LAAs should encourage clients to contact specific state taxing authorities for status updates and refund application procedures. Major Hancock.

Nonresident Instruction Note

Implementation of the Revised Judge Advocate Officer Advanced Course Curriculum

The Judge Advocate General's School (TJAGSA) will implement a revised curriculum for the Judge Advocate Officer Advanced Course (JAOAC) on 1 October 1992. This change will affect all students currently enrolled in the course.

The previous course curriculum (old JAOAC) was configured as a 366-hour correspondence course, consisting of 145 hours of military-subject subcourses and 221 hours of legal-subject subcourses. No resident training was required; however, each summer TJAGSA offered resident instruction that could be substituted for one of three legal-subject phases of the old JAOAC.

The revised curriculum (new JAOAC) will consist of two phases:

> (1) Phase I consists of 120 hours of correspondence subcourses that each student must complete before attending Phase II, a two-week resident phase at TJAGSA. Phase I includes eighteen hours of military-subject subcourses and 102 hours of legal-subject subcourses.
>
> (2) Phase II, the ***required*** resident phase, will be offered once each year, beginning in June 1993. This resident instruction, which will build upon the information covered in Phase I, will consist of approximately twenty-two hours of military-subject instruction and sixty-two hours of legal-subject instruction.

In anticipation of the new JAOAC, all officers enrolled or re-enrolled in the advanced course since 1 October 1991 were enrolled in a transition curriculum known as "interim JAOAC." Interim JAOAC students have not been issued military-subject subcourses. They have been issued the legal-subject subcourses from the old JAOAC.

The Judge Advocate General's School will implement the new JAOAC on 1 October 1992. All officers enrolling or re-enrolling after that date will be enrolled in the new JAOAC. Students currently enrolled in the old or the interim JAOAC will be offered the following options:

> (1) Officers who will be considered by the March 1993 Judge Advocate Majors' Promotion Board will be allowed to complete the old JAOAC. Each student successfully must complete the 221 hours of legal-subject subcourses and also must complete either the 145 hours of military-subject subcourses or phase I of the Combined Arms and Services Staff School. **ALL SUBCOURSES MUST BE RECEIVED AT TJAGSA BY 1 FEBRUARY 1993 TO ENSURE THAT COURSE RESULTS WILL BE AVAILABLE TO THE PROMOTION BOARD.** Any student who fails to complete the old JAOAC by 1 March 1993 will be converted to the new JAOAC, receiving appropriate equivalent credit for the subcourses that he or she already has completed.
>
> (2) All other officers will be converted to the new JAOAC on 1 October 1992 and will receive appropriate equivalent credit for the subcourses that they have completed. Any student who wishes to complete the old JAOAC, rather than the new JAOAC, must submit a written request for an exception to policy, supported by documentation justifying the request.

Students enrolled in the old JAOAC must complete at least seventy-five credit hours per enrollment year to maintain enrollment. Students enrolled in the new JAOAC will have to complete sixty credit hours per enrollment year.

A student converting to the new JAOAC will receive equivalent credit for any successfully completed courses or subcourses that contain essentially the same instruction as new JAOAC courses. The Judge Advocate General's School will grant a student credit only for courses that he or she has completed during the four years preceding his or her completion of Phase I of the new JAOAC. No equivalent credit will be awarded for Phase II of the new JAOAC.

Requests for exception to the JAOAC conversion and equivalent credit policies may be addressed *through the student's chain of command* to the Chief, Nonresident Instruction Division, TJAGSA. Each JAOAC student will receive written notification of individual course conversion and completion requirements before 1 October 1992.

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[115]Litigation on the tax refund issue is pending in Alabama, Arizona, Arkansas, Georgia, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Virginia, and Wisconsin. *See* Edward S. Gryczynski, *Davis v. Michigan: State-by-State Listing*, The Retired Officer, Feb. 1992, at 51, for an excellent summary of the status of litigation in each state. For additional information on state income taxes, LAAs should consult the Air Force's *All States Income Tax Guide*, which the Legal Assistance Branch distributed in February 1992 as part of Legal Assistance Mailout 921. *See generally* Air Force Judge Advocate General's School, U.S. Air Force, Preventive Law Programs: All State Income Tax Guide (Jan. 1992).

[116]Harper v. Virginia Dep't of Taxation, No. 91794, 1992 WL 102958 (U.S. May 18, 1992). The Virginia Supreme Court ruled that the *Davis* decision applied only prospectively and, consequently, held that Virginia did not have to refund the tax it previously had collected on military retired pay. *See* Harper v. Virginia Dep' of Taxation, 410 S.E.2d 629 (Va. 1991).

Claims Report

United States Army Claims Service

Tort Claims Note

Requirement for a Sum Certain

One problem claims offices frequently experience is the receipt of a tort claim that seeks a specific sum for property damage, but claims an indefinite amount for personal injuries. The amount a party claims for personal injuries often will be "undetermined" or "ongoing." Sometimes a claim will list an amount, but will qualify it, using language such as "in excess of" or "presently."

Under the Federal Tort Claims Act (FTCA),[1] a tort claim against the United States is barred forever unless it is presented to the appropriate federal agency within two years after it accrues.[2] Federal regulations further provide that a tort claim must state a specific dollar amount, or "sum certain,"[3] and must provide the agency with sufficient information to investigate, evaluate, and consider the claim with a view toward settlement. The sum certain establishes a limitation on the amount the claimant may receive as damages from the United States if he or she later reduces the claim to judgment.[4] Use of language that modifies or qualifies the sum claimed arguably defeats this goal, raising the possibility that the claimant actually may fail to meet the jurisdictional requirements of the FTCA.

The Department of Justice holds that claimants must comply strictly with the sum certain requirement, asserting that a claim which is qualified by a term such as "in excess of" fails to state a sum certain. Federal courts in several jurisdictions agree. For example, in *Bradley v. United States ex rel. Veterans' Administration*,[5] the Tenth Circuit declined to hold that a personal injury claim for damages "in excess of $100,000" satisfied the sum certain requirement.[6] Notably, the agency counsel notified Bradley of the sum certain deficiency immediately after Bradley submitted the deficient claim, so that Bradley's subsequent amendment of the claim after the two-year statute of limitations ran was of no consequence.[7]

Courts in other jurisdictions, however, have rejected the Justice Department's argument. They have concluded that, if a claim conveys enough information to permit a federal agency to initiate its own investigation and assess damages, any qualifying language that appears in the claim should be treated as surplusage. In *Corte-Real v. United States*,[8] for instance, the claimant quantified his damages attributable to personal injury as "*$100,000 plus* because still treating [sic] and out of work,"[9] but also listed an unqualified "$100,000" for total damages.[10] The court held that this claim satisfied the sum certain requirement, albeit only in the amount of $100,000.[11]

When a claims office receives a claim that clearly fails to state a sum certain, a claims attorney immediately should notify the claimant or the claimant's counsel that the purported claim fails to satisfy the jurisdictional requirements of the FTCA. The attorney also should point out that the statute of limitations will continue to run while the claimant is correcting this defect. A claims attorney normally may provide

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[1] Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.).

[2] 28 U.S.C. § 2401 (1988).

[3] 28 C.F.R. § 14.2 (1992).

[4] 28 U.S.C. § 2675(b) (1988). Damages awarded in an action brought under the FTCA may exceed the sum certain specified in the original claim only if "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim . . . or upon allegation and proof of intervening facts, relating to the amount of the claim." *Id.*

[5] 951 F.2d 268 (10th Cir. 1991).

[6] *Id.* at 271; *see also* Montoya v. United States, 841 F.2d 102 (5th Cir. 1988) (claim that neither specifically identified the nature of the claimant's personal injuries, nor attempted to quantify the financial impact of those injuries, failed to state a sum certain); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971) (a form in which the claimant failed to specify the amount of his claim did not fulfill the FTCA's requirements for the timely presentation of a claim); Robinson v. United States, 342 F. Supp. 381 (E.D. Pa. 1972) (claimant's failure to quantify claim denied the agency adequate information to evaluate the claim).

[7] *Bradley*, 951 F.2d at 270-71; *see also Montoya*, 841 F.2d at 104 (commenting on the claimant's failure to respond for more than one year after the agency notified her that her claim failed to state a sum certain and lacked supporting documentation).

[8] 949 F.2d 484 (1st Cir. 1991).

[9] *Id.* at 485 (emphasis added).

[10] *Id.*

[11] *Id.* at 486-87; *see also* Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981); Martinez v. United States, 728 F.2d 694 (5th Cir. 1984); Adams v. United States Dep't of Housing and Urban Dev., 807 F.2d 318 (2d Cir. 1986).

this notice in the claim acknowledgment letter; however, this notification is insufficient when the statute of limitations is about to run. In such a case, the attorney should notify the claimant by telephone, then should place a memorandum for record in the claims file to document the discussion.

Promptly notifying a claimant of deficiencies in his or her claim places the United States in an ideal position. If the claimant files suit without correcting the defects and resubmitting the claim, the Government may move to dismiss the case for failure to file an administrative claim.[12] Captain Bodensteiner.

Personnel Claims Note

Change in Installation Packing and Containerization Liability

The Military Traffic Management Command (MTMC) has informed the United States Army Claims Service (USARCS) that the Defense Federal Acquisition Regulation Supplement liability clause that governs installation packing and containerization contracts[13] has been revised. Starting in calendar year 1993, contracting officers must insert the revised clause in contracts. Claims judge advocates should check to ensure that they do so.

The revised clause states that the contractor's liability on Schedule III, *Intra-City and Intra-Area Shipments* (local shipments), is either the full cost of satisfactory repair or the current replacement value of the article—less depreciation—up to a maximum liability of $1.25 per pound times the net weight of the shipment. For Schedule I, *Outbound Services* (origin direct-procurement method), and Schedule II, *Inbound Services* (destination direct-procurement method), the contractor's liability remains as follows:

(1) *$0.60 per pound* times the weight of the article for non-negligent damage; and

(2) the full cost of satisfactory repairs, or the current replacement value of the item, for negligent damage.

The Claims Service is trying to persuade the MTMC to increase carrier liability for property damaged in other types of shipments. The MTMC has acknowledged the need to study the feasibility of increasing carrier liability—at least for Code 4 shipments. The Claims Service will advise field offices of developments in this area as they occur.

Carrier recovery continues to be a vital part of the claims system. Given the effect of the builddown of the United States Army, Europe, diligent carrier recovery efforts well may represent the difference between paying soldier claims and running out of claims funds. The Claims Service will continue to publish guidance in future issues of *The Army Lawyer* to improve the carrier recovery system.

One step that a field office can take to enhance carrier recovery efforts is to calculate recovery amounts without delay. The Claims Service strongly recommends calculating these sums during adjudication, while the information concerning the damaged items is fresh in the mind of the adjudicator. Field offices also must resolve carrier recovery backlogs and must increase the percentages of expended claims funds that are recovered and reused to pay claims. Colonel Bush.

Management Note

Internal Controls Review

In fiscal year 1992, all command claims services, area claims offices, and claims processing offices will have to complete internal control review checklists for claims.[14] These organizations are considered assessable units for purposes of internal controls. The claims checklist may be found in Department of the Army Circular 11-90-1.[15]

These checklists are part of the Internal Management Controls Program (IMC Program), which requires all agencies to establish and maintain systems of accounting and internal control.[16] These systems are intended to help prevent fraud, waste, abuse, and mismanagement in government operations. Under the IMC Program, managers must provide a method of reasonable assurance that property, funds, and other assets are safeguarded; that obligations and costs comply with applicable law; and that revenues and expenditures that apply to agency operations are recorded and justified.

The claims checklist is designed to meet the requirements of the IMC Program. Although assessable units need to ans-

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[12] *See* 28 U.S.C. § 2675(a) (1988). Section 2675 provides, *inter alia*,

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government . . . unless the claimant shall have first presented the claim to the appropriate Federal agency . . . .

Id.

[13] *See* Defense Federal Acquisition Regulation Supplement 252.247-7016 (1 Apr. 1984) (contractor liability for loss, and damage).

[14] *See* Dep't of Army, Circular 11-89-3, Army Programs: Army Management Control Plan, at 10 (31 Dec. 1989).

[15] Dep't of Army, Circular 11-90-1, Army Programs: Internal Control Review Checklists (9 Apr. 1990).

[16] *See* Army Reg. 11-2, Army Programs: Internal Control Systems (4 Dec. 1987).

wer the questions contained in the checklist only at the end of the fiscal year, each claims office should consult the checklist regularly to ensure it is conducting its daily operations in accordance with these controls. Lieutenant Colonel Thomson.

Commander's Corner

For the past year, USARCS has been preaching "fairness" in claims adjudication. The obligation of claims adjudicators and claims judge advocates is to settle meritorious claims fairly, not to act in an adversarial manner to deny as much as possible. In any system, though, major changes often lead to overreactions and we all must guard against letting "fairness" lead to sloppy and inaccurate adjudications.

A review of claims received recently at USARCS shows a tendency toward payment without adequate evidence or justification in the file. As you may know, the carrier industry has accused us of running a "giveaway" program and will seek statutory relief if it can support that argument. Additionally, carrier recovery is crucial to our claims budget and improperly documented claims files give carriers a legitimate basis to deny liability.

What does USARCS expect of field adjudicators? The fairness that should drive the system applies to all parties—the claimant, the government, and the carrier. Fairness to the claimant does not mean "no substantiation"; it means reasonable substantiation that the item claimed actually was tendered for shipment and reasonable evidence of replacement or repair cost. Substantiation of ownership may be provided by inventory entries, photos, videos, or witness statements. Cost substantiation may come from repair firms, catalogues (often maintained at the claims office), or receipts. In small claims or unusual situations, discussions with the claimant may be enough, but those discussions must be documented accurately in the chronology sheets.

The object of our claims system is to be reasonable and fair to all parties to the claim. Claimants, if treated with courtesy and compassion, will understand the need for reasonable support for their claims. Carriers, if provided with reasonable documentation, will respond fairly in most cases.

I ask all of you, therefore, to reexamine your methods of doing business to ensure that our claims system is fair to our claimants and that it establishes our proper stewardship of claims funds while maximizing carrier recovery. Colonel Fowler.

Labor and Employment Law Notes

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

Labor Relations Notes

Home Addresses Revisited—Again

On March 18, 1992, the Court of Appeals for the Ninth Circuit ruled that the disclosure of bargaining unit employees' home addresses to an exclusive representative promotes the public interest by fostering federal employee collective bargaining.[1] Decisions on this issue continue to add up on both sides of the fence, with the courts of appeals for the Fourth and Ninth Circuits holding in favor of release of addresses and the appeals courts of the First and Second Circuits and the District of Columbia ruling against release. The continuing split of authority in the courts of appeals well may prompt the Supreme Court to review this issue. Until then, labor counselors should present a united front and should refuse to release home addresses. Call the Labor and Employment Law Office, Office of The Judge Advocate General, at (703) 695-9300 or DSN 225-9300 if you face this issue.

District of Columbia Court of Appeals Holds That Two Federal Labor Relations Authority Decisions Lack "Any Coherent or Rational Explanation"

In a recent decision,[2] the Court of Appeals for the District of Columbia blasted the Federal Labor Relations Authority (FLRA or Authority) for its approach to mid-term bargaining over matters already covered by labor agreements. The appellate court considered the FLRA's decisions in two actions that the court had consolidated on appeal. In each case, a federal

[1] Federal Labor Relations Auth. v. Department of the Navy, 958 F.2d 1490 (9th Cir. 1992).

[2] Marine Corps Logistics Base, Albany, Ga., v. Federal Labor Relations Auth., 962 F.2d 48 (D.C. Cir. 1992).

agency had denied a labor union's request for impact and implementation bargaining, contending that existing contract provisions fully covered the issues in question. In both cases, the FLRA agreed that the government had complied with the contracts and acknowledged that these contracts contained provisions substantially relating to the matters in question. It ruled, however, that the unions had not consciously waived their rights to bargain on "the full universe" of ideas that might arise.[3] Reviewing these decisions, the Court of Appeals for the District of Columbia commented on the distinct difference between a "waiver" of bargaining rights on an issue and having an issue "covered by" an express agreement between the parties. The court explained, "A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right . . . ."[4]

The FLRA's test melded these two concepts, essentially providing that every issue is negotiable, absent a clear, unmistakable waiver of bargaining rights. The court reversed both FLRA decisions, declaring that the Authority's approach in deciding these cases lacked "any coherent or rational explanation."[5] The court emphasized that when a "contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, . . . the contract will control and the 'clear and unmistakable' intent standard [by which a claim of waiver must be evaluated] is irrelevant."[6]

Equal Employment Opportunity Notes

Criminal Conduct Obviates Rehabilitation Act Protection

A postal employee who was dismissed for possessing and distributing heroin appealed his removal, alleging that the agency had subjected him to handicap discrimination based on his drug addiction. In *Taub v. Frank*,[7] the Court of Appeals for the First Circuit affirmed a grant of summary judgment for the agency. The court ruled that the Postal Service had "not discharged [Taub] . . . 'solely by reason of his handicap' . . . nor [sic] even for mere possession of heroin, but . . . for [unlawfully] possessing heroin for distribution."[8] Taub's criminal misconduct removed him from the protection of the Rehabilitation Act.[9]

Equal Employment Opportunity Commission Awards Prejudgment Interest on Title VII Back-Pay Awards

In *Sullivan v. Department of Justice*,[10] the Equal Employment Opportunity Commission (EEOC) granted an employee's request to reopen an earlier decision and to reconsider whether the employee was entitled to interest on her back-pay award. The EEOC noted that in *Brown v. Department of the Army*,[11] the Court of Appeals for the District of Columbia definitively interpreted the Back Pay Act[12] as a waiver of sovereign immunity for the payment of prejudgment interest in Title VII cases.[13] Following the court's rationale that waiver applies only when a reduction in an employee's compensation results from an unwarranted or unjustified personnel action, the EEOC held that it will award interest on back pay only if it finds that the employee was a victim of discrimination.

Retroactive Application of the Civil Rights Act of 1991

The issue of whether a court may apply the Civil Rights Act of 1991[14] retroactively continues to be a fertile source of liti-

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[3] American Fed'n of Gov't Employees, Local 1482, 39 F.L.R.A. 1126 (1991), *rev'd sub nom.* Marine Corps Logistics Base, Albany, Ga., v. Federal Labor Relations Auth., 962 F.2d 48 (D.C. Cir. 1992); American Fed'n of Gov't Employees, 39 F.L.R.A. 1060 (1991), *rev'd sub nom.* Marine Corps Logistics Base, Albany, Ga., v. Federal Labor Relations Auth., 962 F.2d 48 (D.C. Cir. 1992).

[4] *Marine Corps Logistics Base, Albany, Ga.*, 962 F.2d at 48.

[5] *Id.*

[6] *Id.*

[7] 957 F.2d 8 (1st Cir. 1992).

[8] *Id.* at 11 (quoting Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504(a), 87 Stat. 355, 354 (codified as amended at 29 U.S.C. § 7949(a) (1988)); *see also* Scofield v. Department of the Treasury, 53 M.S.P.R. 179 (1992). In *Scofield*, the Merit Systems Protection Board (MSPB) held that the Bureau of Alcohol, Tobacco, and Firearms properly removed a special agent for the off-duty misconduct of assaulting his girlfriend. *See id.* at 188-89. The MSPB found that even though the agent was an alcoholic—and, therefore, was handicapped—he was not entitled to accommodation as a "qualified" handicapped individual because the offense struck at the essence of the employee's position and the agency's law enforcement mission. *Id.* at 186 & n.3.

[9] *See Taub*, 957 F.2d at 11.

[10] EEOC No. 05901185 (Equal Employment Opportunity Comm'n 1992).

[11] 918 F.2d 214 (D.C. Cir. 1990), *cert. denied.*, 112 S. Ct. 57 (1991).

[12] *See* 5 U.S.C. § 5596 (1988).

[13] *See* 5 U.S.C. § 5596 (1988). *See generally* 42 U.S.C.A. §§ 2000e-1 to 2000e-16 (West 1981 & Supp. 1992).

[14] Pub. L. No. 102-166, 105 Stat. 1071.

gation.[15] In *Fray v. Omaha World Herald Co.*,[16] the Eighth Circuit ably summarized the Act's confusing legislative history and compiled an extensive list of decisions approving and denying retroactive applications of the Act.[17]

Civilian Personnel Law Notes

Specific Intent Needed for a Charge of Impeding an Investigation: The MSPB Reviews Army Regulation 380-380

In *Wolak v. Department of the Army*,[18] the agency charged an employee with a number of offenses—among them, providing false statements and impeding an investigation. The Merit Systems Protection Board (MSPB or Board) interpreted this charge as a single specification with two separate elements. Noting that an agency must prove all the elements of a charge before it may punish an employee, the MSPB found that the employee's false oral statement—which the employee later corrected by providing the agency with an accurate written statement—actually did not impair the agency's investigation.[19] Accordingly, the Board overturned the agency action.[20]

Wolak is notable for its review of an Army regulation. The agency charged Wolak with misuse of government property, asserting that he wrongfully had accessed and executed a computer program that he did not need to perform his duties. After reviewing Army Regulations 380-19 and 380-380[21] the MSPB accepted Wolak's argument that "a computer accredited in a 'dedicated security mode' is designed to function so that all users of that system have authorized access to the data upon which no restrictions have been placed."[22] Under this system, the MSPB noted, "users [were] presumed to have access unless permissions [were] denied."[23] In the instant case, the policy letter with which the agency had implemented the regulation was, at most, "an admonition not to willfully access and manipulate data that [was] unrelated to one's job duties."[24] Noting that Wolak was an accredited user of the system, that he apparently had accessed the program while looking for another program that related directly to his duties, and that he had executed the improper program inadvertently, the MSPB concluded that his use of the program was not a misuse of government property.[25]

Intentional Misrepresentation and Reckless Disregard for the Truth

In *Walcott v. United States Postal Service*,[26] the MSPB considered whether the intent required for offenses involving misrepresentation and false claims could be inferred from the circumstances surrounding the appellant's actions. The Postal Service removed Walcott from his position as a postmaster in the Virgin Islands, claiming that he (1) had failed to reimburse the agency for travel advances he had received; (2) had filed false claims for travel reimbursements and travel advances; (3) had failed to separate an employee when directed to do so; and (4) had failed to maintain office finances according to Postal Service policy. The Board sustained all but one of the charges and upheld the appellant's removal.[27]

Addressing the allegation that the appellant had filed false claims, the MSPB ruled that, to sustain the specifications of this charge, the agency would have to prove by a preponder-

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[15] *See generally* Michael J. Davidson, *The Civil Rights Act of 1991*, The Army Lawyer, Mar. 1992, at 3, 8-11 (analyzing the Act's potential for retroactive application).

[16] 960 F.2d 1370 (8th Cir. 1992).

[17] *See id.* at 1373-78.

[18] 53 M.S.P.R. 251 (1992).

[19] *Id.* at 259-60.

[20] *Id.* at 260.

[21] Army Reg. 380-19, Security: Information Systems Security (1 Aug. 1990); Army Reg. 380-380, Security: Automation Security (8 Mar. 1985). Army Regulation 380-19 superceded AR 380-380 on 4 September 1990—after the agency authorized Wolak to use its computers, but before Wolak allegedly committed the offenses. *See Wolak*, 53 M.S.P.R. at 254 n.4. Finding "no substantive difference between the two regulations," the MSPB declined to decide which regulation to apply. *Id.*

[22] *Wolak*, 53 M.S.P.R. at 256.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 52 M.S.P.R. 277 (1992).

[27] The MSPB dismissed the third charge, finding insufficient evidence to substantiate the Postal Service's allegation that the appellant failed to discharge the employee. *Id.* at 284.

ance of the evidence that the appellant knowingly had supplied incorrect information with the specific intent of defrauding, deceiving, or misleading the agency.[28] The Board added, however, that an agency may infer this wrongful intent when an employee makes a misrepresentation with reckless disregard for the truth or with a conscious purpose to avoid learning the truth.[29]

Responding to each of the specifications of the second charge, Walcott admitted that the claims he had filed were inaccurate.[30] He asserted, however, that these inaccuracies resulted from inadvertent errors.[31] Observing that Walcott frequently travelled on government business and that he repeatedly failed to consult appropriate documents before filing his claims, the MSPB ruled that his claim of inadvertent error was not credible.[32] Citing *Bryant v. Department of Justice*,[33] the MSPB held that the appellant's reckless disregard for the truth—or his conscious purpose to avoid learning the truth—satisfied the deceptive intent element of falsification.[34]

Labor counselors occasionally will not be able to produce overt evidence of an employee's specific intent to defraud or deceive the government. Accordingly, a labor counselor should be prepared to present evidence showing that the employee should have known that his or her conduct was fraudulent. The counselor should consider the employee's experience and seniority and the frequency with which the employee performs duties associated with the misconduct. This data may show that the employee's apparent misconduct actually involved a reckless disregard for the truth or a conscious purpose to avoid learning the truth, allowing the counselor to prove the employee's deceptive or fraudulent intent.

Thirty-Five Dollar Marijuana Deal Warrants Removal

In *Ingram v. Department of the Air Force*,[35] the agency removed an employee for "(1) possessing [a trace amount of] marijuana on government premises; (2) transacting a purchase of[,] and payment [of thirty-five dollars] for[,] marijuana on base from an Air Force employee; and (3) transfer of marijuana off base."[36] The employee appealed. The administrative judge (AJ) sustained only the second charge. She dismissed the first charge because the appellant had possessed only a minute quantity of marijuana and the third charge because she found no "nexus between the offense and the efficiency of the service."[37] The AJ then mitigated the appellant's removal to a sixty-day suspension.

On review, the Board sustained all three charges. It noted that no recognized de minimis rule excuses the unlawful possession of illegal drugs and found a nexus between the transfer and the appellant's employment in the appellant's on-duty negotiations with a coworker on the installation before purchasing the marijuana.[38]

Minor Theft May Warrant Removal

In two recent decisions involving removals for thefts of government property of de minimis values, the MSPB made what appear to be inconsistent rulings. In *Underwood v. Department of Defense*,[39] the agency discharged a WG-5 material handler for attempting to steal two jars of cinnamon. The employee appealed, claiming discrimination based on her alleged handicap—alcoholism—and protesting the severity of the penalty. The AJ ruled that the employee failed to prove that she was handicapped, but agreed that the penalty was too severe and mitigated the removal to a ninety-day suspension.

On review, the MSPB reversed the AJ's decision and upheld the removal.[40] It noted that "the de minimus nature of a theft may be a significant mitigating factor where an employee otherwise has a satisfactory work and disciplinary record,"[41] but opined that mitigation is inappropriate when the employee's record is unsatisfactory and the stolen item was

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[28] *Id.* at 282.

[29] *Id.*

[30] *Id.* at 283.

[31] *Id.*

[32] *Id.*

[33] 39 M.S.P.R. 632 (1989).

[34] *Walcott*, 53 M.S.P.R. at 283-84.

[35] 53 M.S.P.R. 101 (1992).

[36] *Id.* at 103.

[37] *Id.*

[38] *See id.* at 105.

[39] 53 M.S.P.R. 355 (1992).

[40] *Id.* at 361.

[41] *Id.* at 358 (citing Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984); Kelly v. Department of Health & Human Servs., 46 M.S.P.R. 358 (1990); Mallery v. United States Postal Serv., 41 M.S.P.R. 288 (1988)).

within the employee's control and custody.[42] In the instant case, the MSPB found that the employee's "performance problems and the seriousness of the offense in light of her control . . . over the stolen items" outweighed her fifteen years of federal service and the inconsequential value of the cinnamon.[43] Finding "no basis on which to disturb the agency's choice of penalty," the MSPB upheld the employee's removal.[44]

In *Ubogy v. Department of the Army*,[45] the agency removed a WG-5 warehouse worker from his position at an installation commissary. The agency claimed that Ubogy stole and consumed food from the commissary's salvage cage on several occasions over a two-month period. The appellant appealed, claiming harmful error and discrimination; the latter allegedly based on his religion—Judaism—and his handicap—cerebral palsy. The AJ found that the appellant failed to show harmful error or to establish a prima facie case on his discrimination claims. She concluded, however, that removal was too harsh a penalty and mitigated the removal to a sixty-day suspension. The AJ acknowledged that the agency had notified the appellant that "grazing" was prohibited, that the appellant had control over the items he ate, that the appellant had shown no remorse and did not equate his actions with theft, and that the agency had suspended the appellant twice before—once for absence without leave and once for stealing a bag of candy.[46] She emphasized, however, that the appellant had spent more than thirteen years in federal service, that his misconduct had been impulsive and mindless, and that the agency failed to prove that the items the appellant stole had any value.[47]

The MSPB denied the agency's petition for review for failure to show compliance with interim relief regulations.[48] It also denied the appellant's cross-petition, holding that it constituted mere disagreement with the findings.[49]

The apparent inconsistency between *Underwood* and *Ubogy* best can be understood by reading *Ubogy* closely. In *Ubogy*, the MSPB never addressed the appropriate penalty because the agency failed to plead interim relief.[50]

Agencies Must Plead Interim Relief in Petitions for Review

As the MSPB has cleared its backlog, it again has reminded practitioners that an agency *must* plead interim relief in every petition for review. A petitioning agency either must submit evidence that it has complied with an interim relief order or must show that it has determined that placing the employee in the workplace would be unduly disruptive.[51] In *Ubogy v. Department of the Army*[52] and *Grady v. Department of the Army*,[53] the Board dismissed agency petitions because the agencies failed to comply with the Board's interim relief regulations.[54] These decisions demonstrate that a labor counselor must check the rules of the particular forum in the *Code of Federal Regulations* and the *Federal Register* whenever he or she appears before a third-party adjudicator or submits an appellate brief.

Share This Information with the Rest of the Team

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

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[42] *Id.*

[43] *Id.* at 361.

[44] *Id.*

[45] 53 M.S.P.R. 342 (1992).

[46] *Id.* at 344.

[47] *Id.* at 344-45. Ubogy evidently took and ate snacks that had been removed from the commissary shelves because their wrappings were damaged or torn. These snacks apparently were replaced by the vendor without charge to the agency. *Id.* at 345.

[48] *Id.* at 345-46.

[49] *Id.* at 346 (citing Weaver v. Department of the Navy, 2 M.S.P.R. 129 (1980), *petition for review denied per curiam*, 669 F.2d 613 (9th Cir. 1982)).

[50] *See id.*

[51] *See* 5 C.F.R. § 1201.1155(b)(1)-(2), (4) (1992).

[52] 53 M.S.P.R. at 342.

[53] 53 M.S.P.R. 225 (1992).

[54] *See Ubogy*, 53 M.S.P.R. at 345-46; *Grady*, 53 M.S.P.R. at 226-27. In their strict applications of the interim relief requirement, *Ubogy and Grady* reaffirm a position to which the MSPB has adhered consistently over the past year. *See* Brooks v. Department of Veterans' Affairs, 53 M.S.P.R. 93 (1992); Edwards v. Department of the Army, 52 M.S.P.R. 536 (1992); Brown v. United States Postal Serv., 52 M.S.P.R. 124 (1992); Baughman v. Department of the Army, 49 M.S.P.R. 415 (1991); Wallace v. United States Postal Serv., 48 M.S.P.R. 270 (1991).

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The following case summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers[1] to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion. To stress education and to protect privacy, neither the identities of the offices, nor the names of the subjects will be published. Mr. Eveland.

Case Summaries

Army Rule 1.1
(Competence)
Army Rule 1.4
(Communication)
Army Rule 2.1
(Advisor)

A trial defense counsel's failure to advise his convicted clients that waiving their appellate rights would be against their best interests resulted in substandard representation, but did not amount to an ethical violation.

An abnormally high rate of waivers of appellate review[2] among one trial defense counsel's (TDC's) convicted clients prompted his superiors to assert that the TDC's legal advice fell short of professional standards.[3] Responding to these allegations, the TDC rationalized that his clients' elections to waive their appellate rights were "not influenced by anything [he] said or did not say."

The allegations came to light when the Clerk of Court for the Army Court of Military Review noticed that eight out of twelve waivers of appellate representation involved the TDC. The Chief, Trial Defense Service (TDS), appointed a preliminary screening official (PSO), who confirmed that during a six-month period, eight of the TDC's clients waived their appellate rights immediately after their convictions.[4]

Only one of the eight clients told the PSO that he knew what he was doing when he waived his appellate rights. Several other clients had no idea what was happening. "I was numb from the Court-Martial," one declared. "I did not understand the appellate form. I would not have waived my appellate counsel rights if I had understood." Another client stated, "I just wanted to get it over. Since then, I have had time to think about it and would like help to get my conviction thrown out." A third client said that he was told that his case could be tried again unless he waived appellate rights. Another client claimed that he first realized that an appellate process existed when he saw other confined soldiers taking calls from their appellate lawyers. He also recalled being told that he had no reason to appeal because everything had proceeded "as expected" at his court-martial. Yet another client regretted not understanding that a different attorney would review the entire case.

The TDC explained to the PSO that when one of his clients was convicted, he immediately would tell the client to read an appellate rights advisement form. The TDC then would answer his client's questions until "a light bulb of understanding lit [the client's] face." The TDC added that once the client "said he [or she] understood [his or her] rights and the consequences, [the client] would select one of the options . . . and [would] sign the document. I would then ask [the client] if this is [sic] what he [or she] wanted to do, advising [the client] of the consequences of [the] choice and what he [or she] was giving up . . . ."

The TDC stated that his approach to appellate rights advisements derived from training that he had received from his senior defense counsel (SDC). The SDC was unable to recall

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[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26].

[2] *See* Uniform Code of Military Justice art. 61, 10 U.S.C. § 861 (1988) (governing waiver or withdrawal of review); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1110(f).

[3] In 1977 the Court of Military Appeals announced,

> [I]n all critical choices governing the conduct of [a criminal] case, the accused must be the final arbiter and [the] defense counsel must accede to his [or her] wishes. . . . . Notwithstanding, the defense counsel also has a professional obligation to safeguard the interest of his [or her] client. These two ethical mandates are facilely reconciled. While the defense counsel demurs to [the] client for the ultimate decision, he [or she] still fulfills his [or her] ethical duties by carefully and fully advising [the] client on the matter, even to the point of urging upon [the] client what [the attorney] perceives to be the best course under all the circumstances.

United States v. Lameard, 3 M.J. 76, 81–82 (C.M.A. 1977) (citations omitted). In reaching this decision, the court relied on the American Bar Association Model Code of Professional Responsibility, which then governed the professional conduct of Army attorneys. *See id.*

[4] The TDC's clients waived their appellate rights before the Court of Military Appeals ruled in United States v. Hernandez, 33 M.J. 145, 147 (C.M.A. 1991), that waivers signed prior to a convening authority's final action have no legal effect.

any specific discussions about advising a client who wanted to waive appellate rights, but essentially substantiated the TDC's statement about what he had been taught.

The PSO decided that the appellate rights advice the TDC provided to his clients was deficient, even though the TDC sincerely believed in his counseling methodology. The PSO noted that the TDC's explanation contained an implicit admission that the TDC never advised clients *against* waiving their appellate rights. The deficiencies in the TDC's assistance arose from his failure to distinguish between technically accurate legal advice and advice in the client's *best interest*.[5]

The TDC's supervisory judge advocate agreed with the PSO that the TDC had committed no per se violations of the Army Rules of Professional Conduct and approved the PSO's recommendations to counsel the TDC. The supervisor also agreed to amend the TDS standard operating procedure to require each defense counsel to contact not only the SDC, but also the regional defense counsel, before allowing a client to waive or withdraw appellate rights. Mr. Eveland.

Army Rule 1.1
(Competence)
Army Rule 2.3
(Evaluation for Use by Third Persons)

A supervisory attorney who issued a legal opinion without reviewing available documentary evidence, then informed only one of two parties to a property dispute when he reversed this opinion, exercised poor judgment, but did not commit an ethical violation.

A soldier asked the Army to ship his estranged wife's property to his new duty station. The Army previously had stored property belonging to both spouses in one location pursuant to a government contract. The wife consulted a legal assistance attorney (LAA) to ask whether the Army could ship the property against her wishes. The wife had visited the warehouse earlier and had invoked her authority under a power of attorney to separate her individual property from her husband's property. She then had attempted to make her own bailment contract with the civilian warehouseman.

The wife's LAA advised her that the Army lawfully could not ship her personal goods to her husband without her consent. He then promised to discuss the matter with the transportation officer (TO) to confirm his opinion. When the LAA discussed the matter with the TO, the TO said that he would seek an administrative law opinion from the attorney in charge of the legal office—that is, the LAA's supervisor.[6]

The TO visited the supervisory attorney. The attorney declined to review the TO's file independently, relying instead on the oral statements of the TO and the TO's assistant. The supervisory attorney also called the soldier and the soldier's attorney on several occasions to advise them of the developing situation. Unfortunately, the supervisor was less open with the LAA, who expressly had to ask the supervisory attorney for an opinion. The supervisor's answer was not precise, but it ultimately left the LAA with the impression that the wife's property would not be shipped to the husband.

Shortly thereafter, while the LAA was away at a three-day conference, the transportation office clerk informed the supervisory attorney that the wife had not entered into a formal contract with the warehouseman and that her personal property was still in the government's area of the warehouse. The supervisory attorney told the clerk that, in light of that information, the Army lawfully could ship the wife's property to the husband's duty station. The attorney, however, neglected to repeat this opinion to the LAA.

When the wife went to the warehouse to claim her personal items, she discovered that they had been shipped to her husband. Her subsequent inspector general (IG) complaint against the supervisory attorney, the LAA, and numerous other Army attorneys eventually was provided to the Executive, Office of The Judge Advocate General. The Executive reviewed the wife's complaint. After determining that the IG investigation had resolved most of her allegations, he directed the appointment of a PSO to examine the conduct of the LAA[7] and the supervisory attorney.

The PSO criticized the supervisor for failing to inform the LAA and his client of the change in opinion—that is, that the Army actually could ship the wife's property to her husband. This error was aggravated by the appearance of partiality that arose when the supervisor repeatedly apprised the husband and his attorney of the status of the property. The PSO also condemned the supervisory attorney's poor judgment in declining to review the documents or to check the transportation clerk's information before rendering an opinion. The PSO, however, found no indication that the supervisory attorney had violated any ethical rule.

The PSO recommended that the supervisory attorney be admonished to review all facts before providing legal opinions and to keep all the parties informed when representing the government in a disputed matter.[8] The Judge Advocate General approved the PSO's findings and recommendations and directed the supervisory attorney's staff judge advocate to take necessary action. Mr. Eveland.

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[5] *See* DA Pam. 27-26, rule 2.1 comment (a client is entitled to a lawyer's honest assessment of the case; mere technical advice may be inadequate); *id.* rule 1.4(b) (an attorney should explain matters in sufficient detail to permit the client to make an informed decision).

[6] In small offices, in which conflicts of legal views between superiors and subordinates easily can arise, attorneys carefully must maintain a proper ethical climate. In the instant case, the PSO noted that the LAA could not talk freely to his supervisory attorney because the LAA had to maintain the wife's confidences.

[7] The PSO found that the LAA handled a difficult client and a difficult contested case in a professional manner.

[8] *See generally* DA Pam. 27-26, rule 2.3 comment (evaluation of information for use by third persons).

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Reserve Component Quotas for Resident Graduate Course

The Commandant, The Judge Advocate General's School, has announced that two student quotas in the 42d Judge Advocate Officer Graduate Course have been set aside for Reserve Component judge advocates. The forty-two-week, graduate-level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 2 August 1993 to 13 May 1994. Successful graduates will be awarded the degree of Master of Laws in Military Law. Any Reserve Component Judge Advocate General's Corps (JAGC) captain or major who will have at least four years of JAGC experience by 2 August 1993 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may *not* apply to attend the resident course. Each application packet must include the following materials:

1. Personal data: The applicant's full name (including the applicant's preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

2. Military experience: A chronological list of the applicant's Reserve Component and active duty assignments.

3. Awards and decorations: A list of the applicant's awards and decorations.

4. Military and civilian education: A list of the schools the applicant has attended and the degrees the applicant has obtained, along with dates of completion for each course of instruction and any honors the applicant has received. The applicant also must include his or her law school transcript.

5. Civilian experience: The applicant should include a resume describing his or her legal experience.

6. Statement of purpose: In one or two paragraphs, the applicant should state why he or she wants to attend the resident graduate course.

7. Letter of recommendation:

a. If the applicant is assigned to a United States Army Reserve (USAR) Troop Program Unit, he or she should include a letter of recommendation from his or her military law center commander or staff judge advocate.

b. If the applicant is a member of the Army National Guard (ARNG) he or she should include a letter of recommendation from his or her staff judge advocate.

c. If the applicant is a USAR individual mobilization augmentee (IMA), he or she should include a letter of recommendation from his or her staff judge advocate or proponent office.

8. Department of Army Form 1058 (for USAR applicants) or National Guard Bureau Form 64 (for ARNG applicants): The applicant must fill out the appropriate form and include it in the application packet.

Each applicant should forward his or her packet through appropriate channels, as described below:

1. If assigned to the ARNG, the applicant should forward the packet through the state chain of command to ARNG Operating Activity Center, ATTN: NGB-ARO-ME, Building E6814, Edgewood Area, Aberdeen Proving Ground, MD 21010-5420.

2. If assigned to a USAR Troop Program Unit in the continental United States, the applicant should forward the packet through the chain of command of his or her Major United States Army Reserve Command to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200

3. If assigned to a USAR Control Group (IMA/Reinforcement) the applicant should send the packet to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

An application will not be considered unless it is received at the appropriate address not later than 15 December 1992.

Individuals selected to attend the course will be notified on or about 1 February 1993. An officer selected for attendance at the graduate course must be funded by the Army Reserve Personnel Center, the ARNG of his or her home state, or the Active Guard Reserve Management Directorate.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA

is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1992

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys' Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers' Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

8-11 September: 1992 USAREUR Administrative Law CLE (5F-F24E).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

5-9 October: TJAG's Annual CLE Workshop (5F-JAG).

13-16 October: 1992 USAREUR Criminal Law CLE (5F-F35E).

13 October-18 December: 129th Basic Course (5-27-C20).

19-23 October: 114th Senior Officers' Legal Orientation (5F-F1).

26-30 October: 31st Legal Assistance Course (5F-F23).

26-30 October: 52d Law of War Workshop (5F-F42).

2-6 November: 10th Federal Litigation Course (5F-F29).

2-6 November: 29th Criminal Trial Advocacy Course (5F-F32).

16-20 November: 35th Fiscal Law Course (5F-F12).

30 November-1 December: 1st Basic Procurement Course (5F-F36).

30 November-4 December: 14th Operational Law Seminar (5F-F47).

7-11 December: 42d Federal Labor Relations Course (5F-F22).

1993

4-6 January: 1993 USAREUR Tax CLE (5F-F28E).

4-8 January: 115th Senior Officers' Legal Orientation (5F-F1).

6-9 January: 1993 USAREUR Legal Assistance CLE (5F-F23E).

11-15 January: 1993 Government Contract Law Symposium (5F-F11).

11-15 January: 1993 MACOM Tax CLE (5F-F28P).

19 January-26 March: 130th Basic Course (5-27-C20).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 July-24 September: 131st Basic Course (5-27-C20).

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

2 August 93-13 May 1994: 42d Graduate Course (5-27-C22).

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

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

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

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

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

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

3. Civilian Sponsored CLE Courses

October 1992

3-9: AAJE, No Reversals—Correct Rulings: Evidence In Action, Portsmouth, NH.

5: GWU, Preparing and Negotiating Government Contract Claims, Washington, D.C.

8-9: NWU, 31st Annual Corporate Counsel Institute, Chicago, IL.

14-15: GWU, Procurement Research Workshop, Washington, D.C.

16: GWU, Suspension and Debarment, Washington, D.C.

19-23: ESI, Operating Practices in Contract Administration, Denver, CO.

19-23: GWU, Administration of Government Contracts, Washington, D.C.

20-23: ESI, Competitive Proposals Contracting, Washington, D.C.

21-22: ESI, Claims and Disputes, Washington, D.C.

23: ESI, Protests, Washington, D.C.

26-30: ESI, The Winning Proposal, Washington, D.C.

26-30: ESI, Accounting for Costs on Government Contracts, Washington, D.C.

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

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-six states currently have mandatory continuing legal education (CLE) requirements. In these MCLE states, all *active* attorneys must attend approved CLE programs for a specified number of hours each year or over a period of years. Additionally, bar members must report periodically either their compliance, or reasons for exemptions from compliance, with their CLE requirements. Due to the variety of MCLE programs, JAGC Personnel Policies, para. 7-11*c* (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most MCLE jurisdictions.

Listed below are jurisdictions that have adopted some form of MCLE. This list includes a brief description of each state's requirement, the address of the local official to whom attorneys must report, and the state's CLE reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	CLE Requirements
*Alabama	MCLE Commission Alabama State Bar	-Twelve hours per year. -Active duty military attorneys are exempt but

State	Local Official	CLE Requirements
	415 Dexter Ave. Montgomery, AL 36104 205-269-1515	must declare their exemptions. -Reporting date: 31 December.
Arizona	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-Fifteen hours each year, including two hours of professional responsibility. -Reporting date: 15 July.
*Arkansas	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-Twelve hours per year. -Reporting date: 30 June.
*Colorado	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-Forty-five hours—including two hours of legal ethics—during a three-year period. -Newly admitted attorneys also must complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Any time within three-year period.
California	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the federal government are exempt. -Reporting date: 1 February.
*Delaware	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.
*Florida	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military attorneys are exempt but must declare their exemptions during reporting period. -Reporting date: Assigned month every three years.
*Georgia	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-Twelve hours per year, including one hour of legal ethics, one hour of professionalism and three hours of trial practice (trial attorneys only). -Reporting date: 31 January.
*Idaho	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701-0898 208-342-8959	-Thirty hours during three-year period. -Reporting date: Every third year after year of admission.
*Indiana	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 317-232-1943	-Thirty-six hours within a three-year period (minimum six hours per year). -New admittees by examination are given three-year grace period, beginning 1 January before admission. -Reporting date: 31 December.
*Iowa	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.
*Kansas	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 913-357-6510	-Twelve hours each year. -Reporting date: 1 July.

State	Local Official	CLE Requirements
*Kentucky	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
*Louisiana	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military attorneys are exempt but must declare their exemptions. -Reporting date: 31 January.
Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-Thirty or thirty-six hours (depending on whether the attorney was admitted in the first or the second half of the fiscal year) within three years of becoming an active member of the bar. An attorney must complete six or twelve CLE hours the first year, twelve hours in the second year and twelve hours in the third year. Courses must be taken in the sequence identified by the CLE Commission. -Reporting date: 31 March
*Minnesota	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-Forty-five hours during three-year period. -Reporting date: 30 August.
*Mississippi	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-Twelve hours per year. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 1 August.
*Missouri	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year, including three hours of legal ethics every three years. -New admittees must complete three CLE hours of professionalism, legal/judicial ethics, or malpractice in twelve months. -Reporting date: 31 July.
*Montana	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-Fifteen hours per year. -Reporting date: 1 March.
*Nevada	Executive Director Board of CLE 295 Holcomb Avenue Suite 5-A Reno, NV 89502 702-329-4443	-Ten hours per year. -Reporting date: 1 March.
*New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: 30 days after completing each CLE program.
*North Carolina	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year including two hours of legal ethics. Each attorney must complete a special three-hour block of ethics once every three years. -New attorneys must complete nine hours of practical skills in each of their first three years of practice. -Service members on active duty are exempt, but must declare their exemptions. -Reporting date: 28 February.

State	Local Official	CLE Requirements
*North Dakota	North Dakota CLE Commission P.O. Box 2136 Bismarck, ND 58502 701-255-1404	-Forty-five hours during three-year period. -Reporting date: the reporting period ends on 30 June; affidavit must be received by 31 July.
*Ohio	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle—including instruction on substance abuse. -Active duty military attorneys are exempt, but must pay filing fees. -Reporting date: every two years by 31 January.
*Oklahoma	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year, including one hour of legal ethics. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 15 February.
*Oregon	MCLE Administrator Oregon State Bar 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 503-620-0222-ext. 368	-Forty-five hours during three-year period, including six hours of legal ethics. New admittees must complete fifteen CLE hours in their first year in practice—ten hours must be in practical skills and two must be in ethics. -Reporting date: Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter every three years.
Pennsylvania	Pennsylvania CLE Board c/o Administrative Office of Pennsylvania Courts 5035 Ritter Road Suite 700 Mechanicsburg, PA 17055 717-795-2119	-Active attorneys must complete a minimum of five hours on ethics and professionalism each year. Up to ten hours may be carried forward and applied against the minimum requirement for either of the two succeeding years.
*South Carolina	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Twelve hours per year, including six hours ethics/professional responsibility every three years in addition to the annual MCLE requirement. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 15 January.
*Tennessee	Executive Director Commission on CLE 214 2d Ave. Suite 104 Nashville, TN 37201 615-242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.
*Texas	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth, annually.
*Utah	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: 31 December biennially.
*Vermont	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-Twenty hours during two-year period, including two hours of legal ethics. -Reporting date: 15 July.
*Virginia	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-Twelve hours per year, including two hours of ethics. -Reporting date: 30 June (annual license renewal).

State	Local Official	CLE Requirements
*Washington	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; $50 1st year; $150 2d year; $250 3d year, etc.).
*West Virginia	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-Twenty-four hours every two years; at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
*Wisconsin	Director Board of Attorneys' Professional Competence 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours during two-year period. -Reporting date: 20 January biennially.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

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

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and are mailed only to those DTIC users whose organizations have facility clearances. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203	Government Contract Law Deskbook, vol. 1/JA-505-1-91 (332 pgs).

AD A239204 Government Contract Law Deskbook, vol. 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

*AD A248421 Real Property Guide—Legal Assistance/ JA-261-92 (308 pgs).

AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

*AD A246325 Soldiers' and Sailors' Civil Relief Act/ JA-260(92) (156 pgs).

AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

*AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A245381 Tax Information Series/JA 269/92 (264 pgs).

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A240047 Defensive Federal Litigation/JA-200(91) (838 pgs).

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A239554 Government Information Practices/ JA-235(91) (324 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/ JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers' Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel & Defense Counsel Handbook/ JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Guard & Reserve Affairs

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

The following CID publication also is available through DTIC:

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

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

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

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

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

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

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.
>
> Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

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

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern

Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 15-6	Boards, Commissions, and Committees, Interim Change I01	15 Apr 92
AR 600-13	Army Policy for the Assignment of Female Soldiers	27 Mar 92
AR 621-108	Military Personnel Requirements for Civilian Education	3 Mar 92
AR 690-400	Civilian Personnel Employee Performance and Utilization, Interim Change I04	3 Apr 92
AR 690-950	Career Management, Interim Change I02	31 Mar 92
DA Pam. 55-22	Civilian Travel and Transportation	Jan 92
JFTR	Joint Federal Travel Regulation, Uniformed Services, C65	1 May 92
UPDATE 6	Personnel Evaluations	31 Mar 92

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

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

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

(b) From the Conference Menu, select the Automation Conference by entering [12].

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

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

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

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

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

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

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

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

(b) Enter the name of the file you want to download from subparagraph c below.

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

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

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

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

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

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

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

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

c. *TJAGSA Publications Available Through the LAAWS BBS.*

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

FILE NAME	UPLOADED	DESCRIPTION
121CAC.ZIP	June 1990	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1991
505-2.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1991
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
ALAW.ZIP	June 1990	*The Army Lawyer* and *Military Law Review* Database (ENABLE 2.15). Updated through 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
JA200A.ZIP	March 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	March 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	March 1992	Law of Federal Employment
JA211.ZIP	March 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235.ZIP	March 1992	Government Information Practices

FILE NAME	UPLOADED	DESCRIPTION
JA240PT1.ZIP	May 1990	Claims—Programmed Text, vol. 1
JA240PT2.ZIP	May 1990	Claims—Programmed Text, vol. 2
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	May 1990	Soldiers' and Sailors' Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA263A.ZIP	May 1990	Legal Assistance Family Law
JA265A.ZIP	May 1990	Legal Assistance Consumer Law Guide (1/3)
JA265B.ZIP	May 1990	Legal Assistance Consumer Law Guide (2/3)
JA265C.ZIP	May 1990	Legal Assistance Consumer Law Guide (3/3)
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA273.ZIP	March 1992	Legal Assistance Living Wills Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA296A.ZIP	May 1990	Administrative and Civil Law Handbook (1/6)
JA296B.ZIP	May 1990	Administrative and Civil Law Handbook (2/6)
JA296C.ZIP	May 1990	Administrative and Civil Law handbook (3/6)
JA296D.ZIP	May 1990	Administrative and Civil Law Handbook (4/6)
JA296F.ARC	April 1990	Administrative and Civil Law Handbook (6/6)
JA301.ZIP	October 1991	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	October 1991	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	October 1991	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	October 1991	Nonjudicial Punishment —Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	October 1991	Crimes and Defenses Handbook (**DOWNLOAD ON HARD DRIVE ONLY.**)
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individua mobilization augmentees (IMAs) having bona fide militar needs for these publications, may request computer diskette containing the publications listed above from the appropriat proponent academic division (Administrative and Civil Law Criminal Law; Contract Law; International Law; or Doctrin Developments, and Literature) at The Judge Advocate General

School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. TJAGSA Information Management Items.

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

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

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

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Chief of Staff

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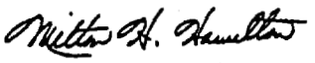

MILTON H. HAMILTON
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