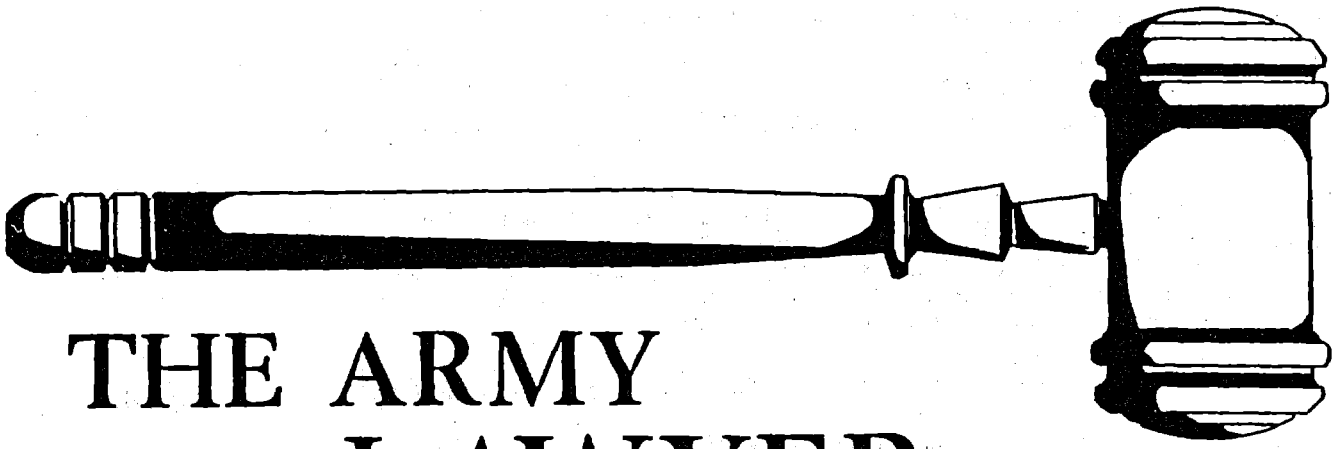

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Editor
Captain Matthew E. Winter

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZA (27)

10 OCT 1999

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Model Claims Office Program - Policy Memorandum 89-5

1. The claims program is an integral part of our Regimental mission of providing total legal services to the Army and its soldiers, and must never become a low priority activity. It is your duty, as the ultimate supervisor of your claims office, to devote the proper resources and management attention to this important mission.

2. The Management Study of the Army Claims System conducted in 1987 showed a need for establishing definitive standards for field claims office operations. In approving the Study report, the U.S. Army Claims Service (USARCS) was directed to develop model claims office standards. Enclosed are the results of months of discussion and hard work by the USARCS leadership.

3. The Program focuses on you as the major program evaluator; it is your office to manage and this Program is designed to give you a tool for successful management. In creating a set of Army-wide standards, it also provides you with a basis for obtaining needed resources to accomplish the claims mission. After a transition period, offices which have excelled in their performance of the claims mission will be recognized for meeting the goals represented by these standards. This is a competition with the standards, not with other offices. An office which falls short of the standards is not a substandard office unless it is not trying to meet the standards.

4. I challenge each of you to participate in this Program with the same vigor and professionalism you bring to all your important legal duties.

William K. Suter

Encls

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

Commanders, Staff Judge Advocates, and the Army Client

Colonel Dennis F. Coupe
Director, National Security Legal Issues,
U.S. Army War College

Introduction

On June 3, 1987, after two years of staffing by Army and joint service legal representatives, The Judge Advocate General of the Army approved the "Rules of Professional Conduct for Lawyers." [1] The new ethical rules became effective on October 1, 1987, and were published on December 31, 1987, as a Department of the Army Pamphlet. [2] These rules were the first set of consolidated ethical requirements, guidelines, and commentary drafted specifically for Army lawyers and for civilian lawyers who appear in Army legal proceedings. [3]

Since the origins of the Judge Advocate General's Corps in the Continental Army of 1775, military and civilian lawyers appearing in military proceedings followed the ethical rules of the civilian bar. Uniformed lawyers were bound by the ethical standards of their respective states, notwithstanding the military nature of the proceedings. The absence of formal ethical standards for practice before courts-martial or other military legal proceedings was at least partly attributable to the involvement of non-lawyers in lower levels of courts-martial prior to enactment of the Uniform Code of Military Justice in 1950. [4] Indeed, non-lawyer counsel continued to appear in lower levels of courts-martial until promulgation of the 1969 Manual for Courts-Martial. [5]

In the past twenty years, military legal proceedings have grown increasingly complex with respect to both procedural and substantive requirements. The practice of military law expanded from the major areas of military justice, international law, administrative law, claims, contracts, and legal assistance, to a multitude of specialized requirements, including labor relations, environmental law, copyright and patent law, tort litigation, and information law. With this dramatic growth the use of non-lawyer counsel has diminished and the relationship between staff judge advocates (SJA's) and military commanders has become more significant. Command decisions are more likely than ever before to involve legal issues, either directly or indirectly. This broader SJA-command relationship has highlighted the need for clear professional conduct rules to ensure that no misunderstandings exist concerning the limits of the relationship.

This article focuses on one of the new ethical rules, Rule 1.13, "Army as Client." The provisions of this rule identify the Army as the primary client of command lawyers and staff judge advocates. Duties to protect confidential communications of the client are extended first and foremost to the Army, and only derivatively to commanders and other authorized representatives of the Army.

Before considering the terms and implications of Rule 1.13 in more detail, it will be useful to review the drafters' general intent in promulgating the Rules, as well as the basic ethical considerations of public service for both military officers and lawyers that led the drafters to emphasize the paramount duty to the institutional client and to the law.

Drafters' Intent

Prior to issuance of the Rules, the only published ethical guidelines for military and civilian lawyers in Army legal proceedings were the general ethical rules of individual state or federal licensing authorities, [6] and the various laws, regulations, Executive Orders, and opinions addressing ethically-related behavior in particular types of activity. [7] State ethical codes are quite similar to

---

[1] 52 Fed. Reg. 122 (1987).

[2] Dep't of Army, Pam 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter R.P.C.].

[3] The Rules define "lawyer" as "a member of the bar . . . who practices law under the disciplinary jurisdiction of The Judge Advocate General. This includes judge advocates . . . and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial." The Rules define "tribunal" as including "all fact-finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law." The "Army" is the immediate subagency of the Department of Defense, an Executive agency. This in no respect limits the ultimate duty to the Constitution, the law, and the three branches of the Federal Government. R.P.C. Definitions.

[4] 64 Stat. 120 (May 5, 1950).

[5] Manual for Courts-Martial, United States, 1969 (Rev. ed.).

[6] The Army, Navy, and Marine Corps agreed on the desirability of promulgating ethical rules with specific guidance for military lawyers. The Navy/Marine Corps guidance, however, is less comprehensive, includes no commentary, and is inapplicable to civilian lawyers. The Air Force is studying the need for ethical rules tailored to their service practice. The courts of military review will apply the rules promulgated by the TJAG of the particular service involved, per Rule 9, 22 M.J. CXXX. The Court of Military Appeals continues to apply the ABA Model Code of Professional Responsibility, per Rule of Court 12(a), 4 M.J. XCV,CI (1977). It is hoped that the Army Rules will provide the basis for a more uniform approach among the services and the court.

[7] *See, e.g.*, the "conflict of interest" provisions of 18 U.S.C. §§ 201-209 and the "Ethics in Government" requirements of 5 U.S.C.A. App-I, §§ 201-209 (1978 & 1979). The primary Army authority for investigation of ethical allegations against lawyers is Army Reg. 27-1, Legal Services: Judge Advocate Legal Service, para. 5-3 (1 Aug. 1984) [hereinafter AR 27-1]. *See also* Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (16 Jan. 1989) [hereinafter AR 27-10]; Army Reg. 600-50, Standards of Conduct, App. D (28 Jan. 1988) [hereinafter AR 600-50]. The Federal Ethical Considerations (F.E.C.) of the Federal Bar Association (FBA) are an excellent source of guidance for the federal sector attorney, but are not adapted to military practice. The Army Office of The Judge Advocate General also issues an annual "Reference Guide to Prohibited Activities of Military and Former Military Personnel," as a tool for judge advocates researching statutory requirements related to common ethical problems.

the American Bar Association's (ABA) ethical guidelines. After the ABA drafted a revised model for ethical rules in 1983, some states adopted the new ABA Model Rules, some elected to retain the older ABA Model Code, and others preferred to continue studying the newer Rules for possible adoption. [8] Military lawyers practicing in an Army proceeding were confronted with conflicting state ethical codes. The ABA's guidelines and the state ethical rules do not address specific conditions of military practice. The 1983 ABA ethical revisions provided the impetus for a joint service effort to review the new ABA Model Rules and to adapt them to legal practice in the armed services. [9]

The overriding intent in developing the Army Rules was to clarify the high, but sometimes confusing ethical standards applicable to Army practice. Although designed to be autonomous, the Rules rest heavily upon the framework of the ABA Model Rules. The more relevant and more specific ethical guidance in the Army Rules provides a better basis for self-assessment and clearer notice of the standards that The Judge Advocate General will apply in the exercise of his express and implied administrative and disciplinary powers under the Uniform Code of Military Justice, [10] Rule for Court-Martial 109, [11] Army Regulation 27-1, [12] and the Rules of Professional Conduct themselves. [13]

The Preamble to the Army Rules describes the role of a lawyer as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility" for the improvement of justice by virtue of his or her license to practice law. [14] Such responsibilities—to clients, to the courts, to the law, and to the improvement of justice—are "usually harmonious." [15] As commissioned military officers, uniformed lawyers have additional obligations to their oaths of office and to their military supervisors. This role is compatible with a lawyer's role, except in the rare circumstance where a conflict occurs between the military obligations and a lawyer's duties. A key aspect of the Rules is the guidance provided on the dovetailing professional obligations of uniformed legal officers, both as lawyers obligated to the ethical standards of their licensing jurisdictions and as military officers obligated to obey the law.

The Preamble and Scope of the Rules recognize that lawyers who practice in military proceedings, especially military lawyers who represent the United States Government, can encounter ethical situations unknown to private practitioners. Probably the most common examples arise from the multifaceted responsibilities of commanders of major units and activities. Commanders at these and higher levels often act as quasi-judicial officials for military justice purposes and as decisionmaking Army representatives for a variety of administrative actions. Identifying the commander's role becomes critical to both the command legal advisor and the commander, so that problems such as unlawful command influence may be avoided.

Before examining Rule 1.13's approach to the problems of the command legal advisor, it would be useful to review the broader ethical environment, that of professional military officership. Rule 1.13's position is that the ethical obligations of military lawyers in advising their commanders are logical and necessary extensions of the same ethical obligations that apply to all military officers.

The Common Ethical Responsibilities

One might ask why, with an abundance of rules, standards, customs, and laws already guiding military officers in their conduct, it is necessary to promulgate yet another such rule. The short answer is that the SJA-commander relationship is a close one, combining professional and personal factors. As such, a potential exists for misunderstandings. Command lawyers must know precisely how to deal with unlawful command actions. With role clarification comes additional protection for the government, additional deterrence for the potential lawbreaker, and additional assistance for staff judge advocates representing the Army through its

---

[8] *See* Model Rules of Professional Conduct (1983). As of January 1, 1989, 31 states had adopted modified versions of the 1983 Model Rules of Professional Conduct. Most other states were still following the older ABA Code, but considering adoption of some version of the 1983 ABA Rules.

[9] Colonel William Fulton (U.S. Army, Retired), the Clerk of Court for the U.S. Army Court of Military Review, first proposed the possibility of joint service modification of the 1983 ABA Rules to military practice in Army channels in 1984. The Army working group representative and primary drafter was Major Thomas Leclair. The author of this article supervised the Army drafting and joint service coordination.

[10] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ]. Article 6 provides the fundamental authority of The Judge Advocate General (TJAG) to supervise the administration of military justice, including assignment and direct communication powers. The other articles add to TJAG's powers and responsibilities, either directly or by implication. For example, article 38 describes court-martial representation by "civilian defense counsel," article 42 refers collectively to "defense counsel," and article 27 describes detail and certification of counsel. The Military Justice Act of 1984 did not substantially affect these articles.

[11] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 109 [hereinafter R.C.M.]. R.C.M. 109(a), building on the UCMJ powers of the Judge Advocate Generals, provides authority to "govern the professional supervision and discipline" of military lawyers and "other lawyers who practice in proceedings governed by the Code and this Manual." The Army Rules of Professional Conduct refer to lawyers before "tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial." R.P.C. Definition. This distinction between "proceedings" and "tribunals" is probably without great significance, as both would encompass, for example, article 32, UCMJ, and similar hearings. *But see* O'Hare, *Dealing With Client Perjury Under the Army Rules of Professional Conduct*, The Army Lawyer, Nov. 1987, at 34-35. F.E.C. 4-4 of the FBA notes: "In respects not applicable to the private practitioner, the federal lawyer is under an obligation to the public."

[12] AR 27-1 describes the procedures for investigation of allegations of professional impropriety and for imposing discipline, when appropriate.

[13] *See* R.P.C. Rule 5.1, "Responsibilities of The Judge Advocate General and Supervisory Lawyers"; R.P.C. Rule 8.5. "Jurisdiction."

[14] R.P.C. Preamble.

[15] *Id.*

agents. A fuller answer requires a review of the ethical responsibilities common to soldiers, lawyers, and civilians.

Ethical issues are at the core of the human condition, ever confronting us in our lesser or greater roles. [16] To be involved with society is to grapple with the difficult ethical choices of an imperfect world. In their most basic terms, the choices are about doing the right thing for the right reason, about coming to understand that serving the public good ultimately serves self-interests, about perceiving and objectively assessing the effects of our actions, and about trying to leave our world a bit better than when we came into it.

The extent to which laws and codes can change ethical attitudes is a much discussed subject. What is beyond serious dispute is that ethical thought and careful formulation of ethical standards can have a salutary effect on action. [17] The process of developing and studying what is and what is not acceptable increases ethical awareness and sensitivity. Rules, sanctions for violations, and effective enforcement procedures tend to reduce the incidence of misconduct, whether due to heightened ethical consciousness or to pragmatic concern for self-preservation.

As an institution, the military exhibits sound ethics. Professional ethics are among the most critical aspects of Army leadership. Military leaders live in a closely structured, somewhat cloistered environment. Their concern for morality, self-sacrifice, and the justness of their cause has an ecclesiastical quality. Shortfalls in moral character are generally career terminators.

Knowing that strong ethical values are indispensable to the teamwork and trust needed to lead effectively, senior military leaders regularly speak and write about the importance of integrity, selflessness, and moral courage. Even our obligation to be competent has an ethical dimension. [18] Emphasis on ethical behavior continues throughout an officer's military career. The courts have acknowledged the special trust, confidence, and responsibility of military officers. [19] A comprehensive review of what has been written about the ethics of officership would take years of study. In 1987 alone, the Army issued three new publications on leadership and related ethical matters. [20]

Virtually all experienced Army officers recognize the wisdom of civilian control of our government, the Madisonian division of powers, and the need for checks and balances among the three branches of government. Most soldiers are comfortable with both their commitment to the Army and their oath to support the Constitution, notwithstanding the perceptions of some military commentators that there is inadequate appreciation of constitutional principles. [21] On balance, soldiers are driven by a conviction and principle rising above self, bonding them to an institution that puts great value on ethical behavior.

The structure of military life affords military leaders greater insulation from certain ethical pressures that can be more acute in private life. Military leaders are not directly answerable to an electorate or balance sheet. They are result oriented, to be sure, but their fixed salaries and retirement benefits remove them from some of the income associated stresses of more conventional occupations. The institutional concern for ethical behavior and a plethora of standards of conduct, service policies, procedures, orders, regulations, laws, and an officer's oath to the Constitution—all designed to protect against abuse of powers—stake out a well-marked trail around many ethical pitfalls. The law channels professional choices for the military to a greater degree than for many in the private sector. Even in combat, rules of engagement shape military decisions. Finally, it should be remembered that the basic military mission carries with it a higher obligation for ethical accountability. In the midst of democracy, military leaders are entrusted with an autocratic power to direct, to judge, to punish, to restrict liberty, and, if necessary, to send others to their deaths. Military leaders at the higher levels have the potential to influence decisions that affect our very survival as a nation.

Distinguishing military duties from conventional private ones is not meant to imply that military ethical pressures are any less intense. On the contrary, the consequences of ethical failings by military leaders are usually more serious. Mission goals can make a commander as keyed to production as any salesman trying to meet a monthly quota. General Cavazos (U.S. Army, Retired) often speaks about the personal honor and the periodic "halo polishing" necessary to preserve ethical

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[16] *See generally* Frankena, Ethics (2d ed. 1973), at IX-XI.

[17] *See, e.g.*, Ehrlich, *Common Issues of Professional Responsibility*, 1 The Geo. J. of Legal Ethics 3 (1987). Ehrlich points out that 41 professional societies have developed ethical rules, and he notes benefits from comparative analysis. John A. Rohr observes: "Although one might quarrel with certain self-serving aspects of the codes of ethics developed by the medical and legal professions, there is little doubt that it is the high sense of *professional definition* among physicians and lawyers that accounts for the relatively clear ethical standards of their profession." J. Rohr, Ethics for Bureaucrats 10 (1978) (emphasis added). Dean Derek C. Bok is quoted in R. Gabriel, To Serve With Honor 9 (1982): "Most men . . . will profit from instruction that helps them become more alert to ethical issues, and to apply their moral values more carefully and vigorously to the ethical dilemmas they encounter in their professional lives."

[18] *See* Sorley, *Competence As an Ethical Imperative*, Army, Aug. 1982, at 42. Sorley argues persuasively that competence is a virtue that subsumes many others.

[19] *See, e.g.*, United States v. Means, 10 M.J. 162 (C.M.A. 1981). Chief Judge Everett notes: "In light of the unique special position of honor and trust enjoyed by an officer . . . it is quite understandable why the President determined that an officer should only be sentenced to confinement by the highest military tribunal." *Id.* at 167.

[20] Dept. of Army, Field Manual 22-103, Leadership and Command at Senior Levels; Dept. of Army, Pam. 600-80, Executive Leadership (1982); and the Army Rules of Professional Conduct for Lawyers.

[21] *See* R. Gabriel, *supra* note 17, at 119-29.

sensitivities, the need to look at the ramifications of decisions, and the need for a consistency in applying ethical norms to daily decisions. [22] Vice Admiral Stockdale (U.S. Navy, Retired) believes that "[e]very significant decision a senior leader makes is a moral one, with implications for the commitment of money, time and/or lives." [23] General Art Brown (U.S. Army, Retired), regularly urged officers to recall that their treatment of subordinates, even in apparently routine matters, can have long-term, unforeseeable consequences, far beyond what a leader may intend. [24]

Most military officers reach an easy consensus on common ethical standards of behavior. The trick is applying the agreed-upon theoretical standards to subtle, real-world scenarios, where rights and wrongs are not always neatly discernible, choices are limited to degrees of imperfection, and reasonable compromises are sometimes the only way to participate meaningfully. Notwithstanding the general agreement of all military officers on basic ethical norms, opinions often vary on how these officers should apply those norms in practical decision-making. To the extent that there is controversy on the application of ethical norms among senior leaders, the case is strengthened for more ethical study and the formulation of well-considered guidelines that reflect realistic standards of ethical behavior. With these thoughts in mind, the need for ethical standards designed specifically for legal practice in the military is more apparent.

Rule 1.13: The SJA-Command-Army Relationship

The attorney-client privilege encourages full and free communication between an attorney and a client by requiring the attorney to keep in confidence information relating to the representation. An attorney may not disclose such information except as authorized by applicable rules of professional conduct. Typically, disclosures are authorized to avert certain crimes or frauds on the court and as appropriate for proper representation. Hence, identifying the client, whether it is an organization or an individual agent of the organization, is crucial to attachment of the privilege.

Rule 1.13 provides that Army lawyers, other than those who are specifically assigned to individual defense or legal assistance duties, represent the Department of the Army "acting through its authorized officials." "Authorized officials" include "commanders of armies, corps and divisions," and the heads of other Army activities, such as installation commanders. [25] Rule 1.13 further provides that the confidential lawyer-client relationship that exists between a command lawyer and the Army client may extend to commanders, so long as the commander acts lawfully on behalf of the Army and the matters discussed with the command lawyer relate to official Army business. [26]

If it becomes apparent to a staff judge advocate that a commander is presently engaged in, has engaged in, or intends to engage in illegal command action or illegal action in a situation reasonably imputable to the Army, the staff judge advocate must proceed "in the best interests of the Army." Measures that SJA's should consider when facing these unusual situations include: 1) advising the commander of the potential illegality and the conflict with Army interests; 2) asking the commander to reconsider; 3) requesting permission to seek a separate legal opinion or decision on the matter; and 4) referring the matter to the legal authority in the next higher command. [27]

Private sector ethical codes do not contain provisions that are identical to Rule 1.13. [28] The Rule is based on the well-established, fundamental notion that the true client of command lawyers is the Army, in the first instance, and ultimately the United States Government. Three related tenets are involved in Rule 1.13: 1) the sworn duty of all Army officers to support the Constitution and the system of laws and government expressed therein; 2) the extension of our constitutional allegiance to the U.S. Army, through the Department of Defense; and 3) the recognition that our ultimate loyalties to the Constitution, public service, and our at-large governmental employer must prevail over any conflicting personal interests that may arise.

The significance of Rule 1.13 lies more in what the Rule says about the tripartite, SJA-commander-Army relationship than in the guidance the Rule provides on how to cope with aberrational [29] cases of intentionally illegal conduct by senior commanders. Regarding the lawyer-client relationship, the Rule states:

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[22] *E.g.*, Speech to USAC&GSC Resident Class of 1988 and USAWC Class of 1989 (by permission).

[23] R. Gabriel, *supra* note 17, at 9. For a comprehensive legal and comparative analysis of military necessity contrasted to "normal" exercise of liberties, see Hirshorn, *The Separate Military Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 2 (1964).

[24] *E.g.*, Speech to USAWC Class of 1988 (by permission).

[25] R.P.C. Rule 1.13(a).

[26] Disclosures or nondisclosures of confidences may be analyzed from at least four perspectives: 1) what evidence rules or court orders require as a matter of discovery for a fair trial of an accused; 2) what ethical rules require to preserve the confidences of clients; 3) what is required by the Freedom of Information and Privacy Acts; and 4) what is morally required by personal expectation or commitment. Distinguishing disclosure issues according to each of these categories is helpful to analysis of particular questions. Discovery and ethical disclosure obligations are summarized in Dept. of Army, Pam 27-173, Trial Procedure, paras. 30-5 and 30-6 (15 Feb. 1987) [hereinafter DA Pam 27-173]. Representing multiple clients with conflicting interests is prohibited by the ABA Code of Professional Responsibility, Canon 5 (1980).

[27] R.P.C. Rule 1.13(b)(1)-(4).

[28] ABA Model Rule 1.13(b) "Organization as Client" and Federal Ethical Consideration 4-1 of Cannon 4, FBA Rules, were models for Army Rule 1.13, but do not reflect unique aspects of the SJA-commander relationship.

[29] In an unpublished report, "Legal Operations in the European Theater During World War II," by LTC Joseph W. Riley, U.S. Army, JAGC, it is interesting to note that problems between SJA's and commanders are considered virtually nonexistent. *See* "Legal Questions Arising in the Theater of Operations," Study No. 87 (unpub. 1947) (on file in the Army Library, Headquarters, Department of Army).

> When a judge advocate or other Army lawyer is . . . designated to provide legal services to the head [commander] of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head [commander] of the organization as to matters within the scope of the official business of the organization. The head [commander] of the organization *may not invoke the lawyer-client privilege or the rule of confidentiality* for the [commander's] own benefit but may invoke either for the benefit of the Army. In so invoking . . . on behalf of the Army, the [commander] is subject to being overruled by higher authority in the Army. [30]

The Comment to Rule 1.13 elaborates on the relationship:

> The Army and its commands, units, and activities are legal entities, but cannot act except through their authorized officers . . . .
>
> . . . [A] judge advocate . . . normally represents the *Army acting through its officers* . . . . It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists . . . . [31]

The Comment goes on to say that official lawyer-commander communications are protected by confidentiality (Rule 1.6), but the comment contains the following words of caution: "This does not mean, however, that the officer . . . is a *client of the lawyer. It is the Army, and not the officer . . . which benefits from Rule 1.6 confidentiality.*" [32]

Prior to promulgation of Rule 1.13 and the Army Rules of Professional Conduct for Lawyers, there was no clear statutory, regulatory, or ethical guidance defining the nature of SJA-commander-Army relationships in terms of client loyalty and privilege from disclosure. [33] Few problems arose, because a high degree of professionalism has always characterized relationships between SJA's and senior commanders. Occasionally, however, confusion arose from unclear distinctions between personal and institutional loyalties, and between a right to *privacy* for personal disclosures of secrets and protected lawyer-client *privileges*. Ambiguous language in a now rescinded Department of Army Pamphlet [34] contributed to the mistaken notion among some that a staff judge advocate's loyalty to a commander ought to be an all-or-nothing commitment.

As critical as personal loyalty is, the proposition that loyalty to a person is an absolute requirement that ought to prevail over loyalty to the law has been so thoroughly rejected that it bears little discussion. [35] In his book, *Limits of Loyalty*, A. C. Wedemeyer describes the predicament facing many senior German officers in World War II:

> Colonel General Beck . . . General Rommel and thousands of other patriotic Germans in the military service were . . . torn between loyalties to those in power and their innate loyalties to principles of decency and justice. . . . [T]here was a duty, in Rommel's view . . . of loyalty to the nation which now came into conflict with the duty to the commander. [36]

General George Marshall went a step further: "[A]n officer's ultimate, commanding loyalty at all times is to his country and not to his service or superiors." [37] Similarly, the Code of Ethics for Government Service in the current Army Regulation 600-50 states: "Any person in Government service should—*a*. Put loyalty . . . to country above loyalty to persons . . . [and] *b*. Uphold the Constitution, laws, and regulations of the United States . . . ever conscious that public office is a public trust." [38] The courts have recognized these same principles as applicable to military officers. [39] Of course, limits exist on the duties and loyalties of lawyers to their clients, whether personal or institutional. Representation

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[30] R.P.C. Rule 1.13(a). DA Pam 27-173 discusses the SJA-commanding general relationship prior to the Rules at para. 30-3. In United States v. Albright, 26 C.M.R. 408 (C.M.A. 1958), the roles of the SJA were alternatively described as "advisor" on legal matters, "chief spokesman" for the commander, "legal conduit," and wearer of "judicial robes" when reviewing criminal charges and records of trial.

[31] R.P.C. Rule 1.13 comment.

[32] *Id.*

[33] *See* Gaydos, *The SJA as the Commander's Lawyer: A Realistic Proposal*, The Army Lawyer, Aug. 1983, at 14.

[34] Dept. of Army, Pam 27-5, Staff Judge Advocate Handbook, para. 19b (July 1963): "He [the commander] does want a legal advisor whose loyalty is unquestioned." *Id.*

[35] *See, e.g.*, J. Sorley, *Duty, Honor, Country: Practice and Precept*, in M. Wakin, War, Morality, and the Military Profession 114 (2d ed. 1986). ("The essence is loyalty . . . to ideals that transcend self.") *Accord*, Philip Flammer, *Conflicting Loyalties and the American Military Ethic*, in M. Wakin, *supra*, at 165: ("[T]he military ethic calls for ultimate loyalty to cause and principles higher than self . . . loyalty demands a firm will to justice and truth.") Wakin himself observes, "It is no longer the case that extreme value is placed on personal loyalty to a commander; that aspect of military honor is transferred to the oath of office which requires allegiance to the Constitution." M. Wakin, *supra*, at 185.

[36] A.C. Wedemeyer, Limits of Loyalty 125 (1980).

[37] R. Gabriel, *supra* note 17.

[38] Army Reg. 600-50, Standards of Conduct, App. D (28 Jan. 1988).

[39] *See, e.g.*, United States v. Scott, 21 M.J. 345 (C.M.A. 1986). Commenting on article 133, UCMJ ("conduct unbecoming"), Judge Cox states in his concurring opinion: "It [article 133] focuses on the fact that an accused is 'an officer' and that his conduct has brought discredit upon all officers and, thus, upon the honor, integrity, and good character inherent in that important, unique status." *Id.* at 351 (Cox, J., concurring).

of any client must be zealous, but within ethical and legal bounds. [40]

The occasional confusion over the attorney-client privilege and the appropriate object of a command lawyer's loyalty made it apparent that ethical "rules of engagement" for lawyers needed to be precisely defined. Implicit in Rule 1.13 is the requirement that both commanders and their staff judge advocates, as representatives of the Army, obey their fiduciary duties to the law and honor their oaths to the Constitution. So long as this duty is met and there is the recognition that public office equates to a public trust that the offices will be exercised lawfully, commanders are entitled to expect both confidentiality and loyalty from their lawyers. Whether the Army extends that confidence to commanders as "quasi-clients" [41] of the command lawyer or simply as protection for matters conveyed in the expectation of privacy, SJA's have an ethical duty not to disclose confidential communications to those who have no legitimate right to know. Clear rules and bilateral understanding of those rules at the outset leave no room for the development of misunderstandings about confidentiality.

The drafters of Rule 1.13 understood well that commanders must have the support of their lawyers and must be free to discuss with their staff judge advocates any aspect of official business fully, frankly, and with the assurance of confidentiality, except as to those higher authorities who have a legitimate right to disclosure. The Comment to the Rule states: "When the officers . . . make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." [42] Nevertheless, legal advice from SJA's is usually followed by a personal perspective on the wisdom of the decision under consideration, to include possible alternatives. Thus, Rule 1.13 changes nothing of substance. The Rule merely clarifies an area of potential misunderstanding and provides a structure for addressing representational conflicts. A well-intentioned commander should not hesitate to discuss any command option, power, or duty with the SJA. Providing advice on such matters is the SJA's primary job. Subject to the narrow exceptions required by law and the ethical rules, as described above, no third party disclosures of a commander's private communications are appropriate. Only a clearly intended or actually illegal act imputable to the Army, or a violation of a legal obligation to the Army may be disclosed under Rule 1.13. Only those who insist upon proceeding against these interests lose their derivative protections from disclosure.

Rule 1.13 also notes that SJA's, when facing a situation where a commander is engaged in illegal action, may refer the matter to, or ask for guidance from, higher authority in the technical chain. This provision merely reflects a procedure that already exists in article 6(b), UCMJ.

The same basic principle that governs SJA-commander relationships also applies to subordinate command representatives and other command lawyers. If subordinate commanders insist upon illegal action and cannot otherwise be deterred, the situation should be brought to the attention of the higher commander or supervising command lawyer.

The Army Rules integrate, cross-reference and extend the provisions of Rule 1.13 in several of the other rules, wherever appropriate to clarify the nature of the ethical duty described. The Comment in Rule 1.4, "Communication," requires that appropriate Army officials be kept informed of legal developments on behalf of the Army client. The Comment to Rule 1.6, "Confidentiality of Information," notes that lawyers who represent the Army may inquire within the Army to clarify the possible need for withdrawal from representation of local officials where doubt exists about contemplated criminal conduct. Rule 1.7, "Conflict of Interest," includes the following in its Comment:

> Loyalty is an essential element in the lawyer's relationship to a client. . . .
>
> . . . [L]oyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. . . .
>
> A client including an organization (see Rule 1.13b), may consent to representation notwithstanding a conflict. [43]

Similarly, Rule 5.4, "Professional Independence of a Lawyer," requires a lawyer to exercise individual profes-

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[40] Model Code of Professional Responsibility, Canon 7 (1980); ABA Model Rules of Professional Conduct 1.6 and 3.3. *See also* Nix v. Whiteside, 106 S. Ct. 988 (1986); Patterson, *An Inquiry Into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 Geo. J. Legal Ethics 43, 67-84 (1987). Prof. Patterson makes a persuasive case that the ABA Model Rules on confidentiality (1.6) represent an unsuccessful attempt "to create an island of refuge in the legal sea of integrity and to establish a pirate's cove of confidentiality." *Id.* at 81. For this and other reasons, the Army Rules impose a clearer duty upon attorneys to disclose future crime under Rules 1.6, 1.13, and 3.3, than exists under the ABA Model Rules. Patterson also makes a compelling argument that the conduct of a client is "the ultimate source of ethical issues for a lawyer." *Id.* at 83. According to Patterson, unless there is ethical association with the legal actions of a client, "the administration of law becomes a sporting contest . . . with lawyers manufacturing rights for clients that do not exist and erasing duties that do." *Id. But see* Wasserstrom, *Lawyers as Professionals*, 5 Hum. Rights L. Rev. 1 (1975), for a contrary view. The question of how to deal with client perjury under Rules is addressed in O'Hare, *supra* note 11.

[41] The term "quasi-client" is attributed to G.C. Hazard, Jr., in *Ethics in the Practice of Law*, J. Hum. Rights, Fall 1978, at 44. Prof. Hazard also provides a useful model for analysis of the SJA-Commander-Army relationship in *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15 (1987). The term "derivative client" also has been used.

[42] R.P.C. Rule 1.13 comment.

[43] R.P.C. Rule 1.7 comment.

sional judgment in representing a client, free of competing influences and loyalties. Lastly, the Comment to Rule 8.5, "Jurisdiction," applies the Rules to the separate roles of lawyers, whether serving the Army as an institutional client, or serving individual clients as authorized by the Army.

Rule 1.13 recognizes that judge advocates and other Army lawyers are both commissioned officers and "officers of the court," with complementing, but not identical, ethical obligations in each capacity. Rule 1.13's approach is partially analogous to American Bar Association and Federal Bar Association guidance on duties of civilian attorneys to their corporate or institutional employers. [44] Rule 1.13 also follows the evidentiary privilege rationale of Military Rule of Evidence 502, [45] "lawyer-client privilege," by recognizing that the client can be a public entity and may therefore be entitled to claim the privilege of nondisclosure of confidential communications of its representatives.

Conclusion

The Book of Timothy reminds us that laws are not made for the righteous. Yet even for the righteous, the full ethical dimension of decisionmaking is not always obvious. The best of us sometimes fail to realize all the consequences of decisions. All of us can benefit from wise counsel. Well-considered laws and codes of behavior alert us to ethical issues that we may not otherwise perceive and inform us of societal preferences for resolving conflicting and sometimes ambiguous choices in an increasingly complex world. Wise rules of ethical behavior are beneficial norms, serving as a departure point for subjective and objective analysis, stimulating ethical discussion and thought, and conforming behavior to desirable ends. [46]

The greatest value of Rule 1.13 is its clarification of official roles and of legal relationships that are occasionally misunderstood. The words of the great German philosopher, Immanuel Kant, echoing similar thoughts of Socrates over two millennia earlier, seem particularly appropriate to the development of the Army Rules and the clarification of the Army-SJA-commander relationship: "We should strive to develop good laws and obey them, not because the laws are perfect, but because it is our duty and otherwise there is but chaos." [47]

Official duties should be performed lawfully, in a manner that will withstand public scrutiny, even if that scrutiny never occurs. The dictates of law, our oath, and applicable ethical rules must be observed as self-evident and necessary conditions of public service. Keeping the Army's interests in mind strengthens rather than detracts from the commander's entitlement to special care, loyalty, and protection from illegality or unwarranted disclosure. By setting the ground rules out clearly, Rule 1.13 fortifies an already sound relationship among SJA's, commanders, and the Army client.

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[44] *See supra* notes 5 and 18.

[45] MCM, 1984, Mil. R. Evid. 502.

[46] "Our central problem is . . . an obtuseness in refusing to see basic choices among incompatible ends [when we are] unable to agree on normal or prudential norms." L. Leebman, *Legislating Morality in the Proposed CIA Charter*, in Public Duties: The Moral Obligations of Government Officials 248 (1981). The editors of the *Georgetown Journal of Legal Ethics* note: "The need for considered reflection about the ethical issues lawyers confront in daily practice is great." R.B. Stewart, in *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 8, 28 (1985), notes the "astonishing capacity for rationalization" that exists when professional environments are left "morally ambiguous."

[47] I. Kant, In Critique of Practical Reason (1788) summarized in 4 *The Encyclopedia of Philosophy* 317-22 (1967). *See* W.B. Gallie, Philosopher of Peace and War 36-58 (1978).

"Aces Over Eights"—Pathological Gambling as a Criminal Defense

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Introduction

Gambling [1] permeates our society. [2] Society sanctions gambling and relies upon games of chance to increase commercial sales and to fill the public coffers. [3] Fast food restaurants entice customers with game cards; legalized state lotteries and pari-mutuel betting are becoming increasingly common; [4] and church bingo is a long-established, time-honored practice. [5] Forty-seven states have some form of legalized gambling. [6]

Estimates vary, but almost sixty percent of Americans gamble to some degree, [7] and ninety-six percent of all Americans have gambled at least once in their lives. [8] For at least three percent of the adult population, however, a dysfunctional gambling pattern generates serious financial or criminal problems.

The overpowering urge to win and the willingness to take irrational risks to do so have existed since ancient times. Loaded dice have been found in Egyptian tombs, and early gamblers reportedly wagered their fingers, toes, limbs, and wives. [9] Parysatis, Queen of Persia, once threw dice for the life of a slave and, upon winning, ordered him tortured to death. [10]

This urge to win may develop into an all-consuming passion in which gambling becomes "not only the most important thing in . . . life, [but] the only thing." [11] The intensity of such a passion raises issues of cognitive and volitional shortcomings for purposes of criminal responsibility in gambling-related misconduct. This article will discuss compulsive gambling, [12] review the associated caselaw, and address the use of "pathological gambling" as a criminal defense.

Pathological Gambling

Although no single definitive etiological theory of compulsive gambling exists, [13] this impulsive control disorder is recognized as a "chronic and progressive failure to resist impulses to gamble" [14] and is exemplified by "gambling behavior that compromises, disrupts, or damages personal, family or vocational pursuits." [15] The urge to gamble intensifies during periods of stress. [16] Money becomes both the cause of and the panacea for the gambler's troubles. [17] The resultant financial and social difficulties increase the gambler's stress level, often causing an increase in the gambling behavior. [18]

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[1] "Gambling" is rooted in the Anglo-Saxon word "gamenian," meaning to sport or play. Barker & Miller, *Aversion Therapy for Compulsive Gambling*, 146 J. Nervous & Mental Disease 285, 292 (1968).

[2] J. Coleman, J. Butcher & R. Carson, Abnormal Psychology and Modern Life 361 (6th ed. 1980).

[3] In 1989 state lotteries will generate more than seven billion dollars in revenues. *America's Gambling Fever: Everyone Wants a Piece of the Action — But Is It Good for Us?*, Business Week, April 24, 1989, at 112, 114, col. 1. Recently, Iowa passed legislation legalizing riverboat gambling, with five percent of all profits going directly to the state. *Iowa Hopes to Hit Jackpot With Riverboat Gambling*, Dallas Morning News, May 7, 1989, at 10, col. 1-2.

[4] Increasing in popularity, pari-mutuel betting is legal in 43 states. *America's Gambling Fever: Everybody Wants a Piece of the Action — But Is It Good for Us?*, *supra* note 3, at 115, col. 1. State lotteries are available in 33 states. *Id.* at 118, col. 1. In 1988 over 17 billion dollars were wagered on lotteries — a 229.7 percent increase since 1983. *Id.* at 114, col. 1.

[5] Smith, *America Taken Over by a Gambling Fever*, Dallas Times Herald, December 27, 1988, at 11, col. 4. Legal in 46 states and no longer a church basement affair, charity bingo is increasingly seeing the use of professional bingo promoters as the game grosses millions of dollars a year. *America's Gambling Fever: Everybody Wants a Piece of the Action—But Is It Good for Us?*, *supra* note 3, at 115, col. 1.

[6] Williams, *For Some Bettors, State Lotteries Are a Chance for Disaster*, New York Times, July 24, 1988, at 1, 17, col. 3-4. These forms of legalized gambling include casinos, off-track betting, lotteries and pari-mutuels. *Id.*

[7] Cunnien, *Pathological Gambling as an Insanity Defense*, 3 Behav. Sci. & L. 85, 86 (1985).

[8] Williams, *supra* note 6, at 17, col. 3.

[9] J. Coleman, J. Butcher & R. Carson, *supra* note 2, at 361.

[10] Barker & Miller, *supra* note 1, at 292-93. Other notable gamblers include Henry VIII, Dostoevski, and Richard Minster. A 17th century criminal, Minster reputedly won 50,000 guineas in one night and then lost it all on one throw of the dice. *Id.*

[11] R. Custer & H. Milt, When Luck Runs Out 34 (1985).

[12] The terms pathological and compulsive will be used synonymously.

[13] Cunnien, *supra* note 7, at 87.

[14] American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 324 (3d ed. Rev. 1987) [hereinafter DSM III-R].

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

As the downward behavioral spiral continues, the typical pathological gambler often finds it necessary to lie to finance the gaming pursuits. [19] Common complications arising from this pattern of behavior include substance abuse, suicide, association with illegal groups, civil court actions, and criminal convictions for typically nonviolent property crimes. [20]

Pathological gambling has also been compared to alcohol, sex, tobacco, or work addictions, because of the similar characteristic personality attributes and the parallel treatment considerations. [21] Such an addiction theory seems possible if one views these types of addictions as psychologically motivated. [22] As with other addicts, the pathological gambler is "driven by an overpowering and uncontrollable impulse to gamble. The impulse persists and progresses in intensity and urgency, . . . until, ultimately, it invades, undermines and often destroys everything that is meaningful in [the gambler's] life." [23] The gambler is pathologically optimistic about winning, does not learn from failures, cannot stop once winning, risks more than he or she can afford, and seeks a logically inexplicable pain and pleasure thrill that eventually replaces all other interests. [24]

As of 1974 there were an estimated 1.1 million compulsive gamblers in the United States alone; [25] the current estimate is 5 million. [26] Although the military maintains no data on the number of compulsive gamblers within its ranks, [27] defense department health officials estimate that as many as 105,000 of the 2.1 million service personnel are compulsive gamblers. [28] Teenagers—the military's traditional recruitment pool—have shown a marked interest in gambling. A 1987 study of New Jersey teenagers by Henry R. Lesieur of St. John's University revealed that eighty-six percent of his teenage subject group had gambled within the last year and thirty-two percent had gambled at least once a week. [29]

Although there are compulsive gamblers of almost every age, sex, and profession, [30] the Council on Compulsive Gambling of New Jersey profiled the "typical" problematic gambler as a 34-year-old married male with children. [31] Alcohol and drug abuse often accompany the disorder. [32] Most compulsive gamblers begin this activity before their fourteenth birthday. [33]

Although inpatient treatment for pathological gambling in the United States began in 1972, few treatment centers presently exist. [34] The Army and the Air Force policies are to treat pathological gamblers at on-post mental health clinics, which also treat other obsessive-compulsive disorders such as alcohol and drug dependence, smoking, and overeating. [35] Naval test programs to treat pathological gamblers in California are being cancelled because they are not cost-effective. [36]

While military health officials believe that current medical and family counseling services are adequate for disorder treatment, [37] critics argue that the military focuses primarily on alcohol and drug abuse, dealing

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[19] *Id.*

[20] *Id.*

[21] J. Coleman, J. Butcher & R. Carson, *supra* note 2, at 87.

[22] *See* R. Custer & H. Milt, *supra* note 11, at 39.

[23] *Id.* at 35.

[24] E. Bergler, The Psychology of Gambling 7 (1985).

[25] Cunnien, *supra* note 7, at 86. In 1987 New Jersey had an estimated 400,000 compulsive gamblers. *2 Casinos Post Compulsive-Gambler Hot Line*, New York Times, August 9, 1987, at 36, col. 2. A survey of four New Jersey high schools revealed that 49% of 15-year-olds, 63% of 16-year-olds, 71% of 17-year-olds, 76% of 18-year-olds, and 88% of 19-year-olds reported having gambled. *For Compulsive Gamblers, Inside Help*, New York Times, May 12, 1987, at B1, B8, col. 2.

[26] *Gambling Addiction Becomes More Widespread*, Temple Daily Telegraph (Temple, Texas), July 9, 1989, at 4C, col. 3.

[27] Young, *Military Said To Ignore Compulsive Gambling*, Army Times, June 1, 1987, at 31.

[28] *Counseling Urged for Gamblers in Uniform*, Army Times, April 18, 1988, at 6, col. 1. The military's estimate is based on national figures for pathological gambling by white males under the age of 30. Defense health officials believe this group generally fits military demographics. *Id.*

[29] *America's Gambling Fever: Everybody Wants a Piece of the Action—But Is It Good for Us?*, *supra* note 3, at 120, col. 3. In 1987 Atlantic City casinos turned away over 200,000 minors and escorted another 35,000 from their gaming floors. *Id.*

[30] Based on its calls to its "hot line," the Council on Compulsive Gambling of New Jersey found that of those who identified themselves by profession, 15% were salesman, 7% were professionals, and only 5% were associated with the gaming industry. *Profile of Typical Gambler Developed*, New York Times, December 6, 1987, at 8, col. 5.

[31] *Id.*

[32] *Id.*

[33] *For Compulsive Gamblers, Inside Help*, *supra* note 25, at B8, col. 2.

[34] McCormick, Russo, Ramirez, & Taber, *Affective Disorders Among Pathological Gamblers Seeking Treatment*, 141 Am. J. Psychiatry 215, 217 (1984).

[35] *Counseling Urged for Gamblers in Uniform*, *supra* note 28, at 6, col. 2.

[36] *Id.*

[37] *Id.*

with the problematic gamblers and their associated misconduct through the military justice system. [38]

Insanity and the Threshold Requirement for a Mental Disorder

Within the judicial system, legal "insanity" means a "mental disease or defect of such nature and degree as to meet the legal requirements for acquittal of the offense charged in the jurisdiction." [39] Insanity serves as a criminal defense because it negates "mens rea," an element of any criminal offense. [40]

To determine whether a defendant was legally insane at the time he or she committed a crime, most courts look to one of three insanity tests: 1) the *M'Naghten* rule; [41] 2) some version of the American Law Institute (ALI) Model Code definition of insanity; [42] and 3) the irresistible impulse addition to the *M'Naghten* rule. [43] To establish legal insanity, the *M'Naghten* rule requires proof that, at the time of the crime, the accused was suffering from a disease of the mind so "as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." [44] With the passage of the Insanity Defense Reform Act of 1984, [45] the federal court system requires that the mental disease or defect be "severe." [46] The military court system has also adopted the severity requirement. [47]

The ALI definition went beyond *M'Naghten* and inquired whether the individuals understood the criminality of their acts and whether they were able to conform their conduct to the law. [48] The irresistible impulse standard classifies individuals legally insane if they knew what they were doing and that it was wrong, but their conduct was beyond their control because of the presence of a mental disease or defect. [49]

A threshold question in any insanity defense analysis is whether the particular mental problem qualifies as a mental disease or defect under that jurisdiction's insanity statute. Once this hurdle is crossed, the various insanity tests then inquire into the impairment of cognition or volitional control as a result of the mental illness to make the determination as to "legal" insanity. [50] Despite the importance of the term, there exists no universally accepted legal [51] or medical definition of mental disease. [52] To compound the problem, the courts insist that the term, as used for tests of criminal responsibility, is a legal rather than medical term, yet the courts seek medical and psychiatric opinions to determine the existence and effect of the mental condition. [53]

The most widely relied upon source of information for legal determinations of the mental illness issue is the American Psychiatric Association's *Diagnostic and Statistical Manual Of Mental Disorders*. [54] This reliance continues despite the manual's cautionary language to the contrary. [55] Pathological gambling is included in the

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[38] *Military Said to Ignore Compulsive Gambling*, *supra* note 27, at 31, col. 2.

[39] R. Perkins & R. Boyce, Criminal Law 985 (3d ed. 1982).

[40] *Id*; *see* Ellis v. Jacob, 26 M.J. 90, 91 (C.M.A. 1988) ("offenses . . . generally contain at least one *mens rea* element"); State v. Daniels, 106 Ariz. 497, 478 P.2d 522, 527 (1970) ("mental capacity to commit a crime is a material part of the total guilt for there can be no crime without mens rea").

[41] *See* M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). The *M'Naghten* standard essentially requires that the individual's cognitive and volitional abilities be rendered ineffective. Both the federal and military court systems have substantially returned to the *M'Naghten* insanity standard. *See* Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (Supp. V 1987) (federal); S. Res. 2638, 99th Cong., 2d Sess., 132 Cong. Rec. 10, 170 (1986) (military). 18 U.S.C. § 20 was redesignated as 18 U.S.C. § 17 by Pub. L. No. 99-646, § 39(a), 100 Stat. 3599 (1986).

[42] *See* Model Penal Code § 4.01 (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.").

[43] *See* Thompson v. Commonwealth, 193 Va. 704, 70 S.E.2d 284 (1952). Under the irresistible impulse standard defendants are considered legally insane if they appreciated their actions and knew that they were wrong, but their conduct was beyond their control due to the presence of a mental disease or disorder. Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415, 424 (1988) (citing S. Rep. No. 225, 98th Cong., 2d Sess. 223-24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3405-06).

[44] *M'Naghten*, 10 Cl. & Fin. at 210, 8 Eng. Rep. at 722.

[45] 18 U.S.C. § 20 (Supp. V 1987).

[46] *Id.*

[47] *See* Uniform Code of Military Justice art. 50a, 10 U.S.C. § 850a (Supp. V 1987) [hereinafter UCMJ].

[48] Note, *supra* note 43, at 424.

[49] *Id.*

[50] Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. Legal Med. 1 (1984).

[51] *Id.*

[52] Fingarette, *The Concept of Mental Disease in Criminal Insanity Tests*, 33 U. Chi. L. Rev. 229, 232 (1966).

[53] Slovenko, *supra* note 50, at 4.

[54] *Id.* at 5.

[55] DSM III-R states that "no definition adequately specifies precise boundaries for the concept 'mental disorder.' " DSM III-R, *supra* note 14, at xxii. The manual also cautions that DSM III-R's purpose is psychiatric, not legal. *Id.* at xxix.

current edition of the manual (DSM III-R) [56] and also appears in the World Health Organization's *International Classification of Diseases*. [57]

Case History

Although pathological gambling is generally accepted as a form of mental "illness," few courts have specifically held that it is a "disease or disorder" sufficient to raise the issue of legal insanity. In a Connecticut case, *State v. Lafferty*, [58] the accused was charged with two counts of larceny for embezzling $309,000. [59] The Superior Court recognized compulsive gambling as a mental disease or defect for purposes of an insanity defense [60] and entered judgment on a jury verdict of not guilty by reason of insanity. The court relied on the volitional prong of Connecticut's ALI insanity test. [61] The precedential value of this decision was all but destroyed, however, when Connecticut subsequently passed legislation declaring that compulsive gambling did not constitute a mental disease or defect for purposes of an insanity defense. [62]

The second successful case involved an insanity acquittal for forgery. In *State v. Campanaro* [63] the accused was acquitted of the charge of writing bad checks after psychiatric testimony indicated that he could not distinguish right from wrong under New Jersey's version of the *M'Naghten* rule. [64] This decision came under scholarly criticism, however, as commentators expressed concern that the acquittal for a volitional control disorder under a cognitive insanity standard was overly expansive and suggested that the court incorrectly decided the issue. [65]

The bulk of the remaining cases within the federal system where defendants have been unsuccessful in applying the insanity defense to compulsive gambling have dealt with crimes committed in pursuit of money to finance gambling habits. [66] As a rule, the courts' decisions have not turned on whether compulsive gambling constitutes a mental disease or defect for purposes of insanity. Instead, the courts have focused on causation, holding that there has been no proof of a causal connection between compulsive gambling and the accused's inability to resist the impulse to obtain gambling money through criminal acts. [67]

To illustrate, in the most recent federal appellate decision discussing the issue, *United States v. Shorter*, [68] the United States Court of Appeals for the District of Columbia Circuit noted that the lower court had concluded that the disorder "may be 'recognized' as a disorder by the courts." [69] Nevertheless, in its subsequent review the appellate court bypassed the trial court determination completely and conducted a causation analysis, holding that the "[c]ausal link between pathological gambling and failure to pay taxes was not

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[56] *Id.* at 324-25.

[57] DSM III-R, *supra* note 14, at xxv. As used in DSM III-R, the term "mental disorder" refers to the categories that are contained in the mental disorders chapter of the *International Classification of Diseases*. *Id.*

[58] No. 44359 (Connecticut Superior Court, June 5, 1981), *reviewed on other grounds*, 192 Conn. 571, 472 A.2d 1275 (1984).

[59] *Id.*

[60] Note, *Beating the Odds: Compulsive Gambling as an Insanity Defense*, 14 Conn. L. Rev. 341, 342 (1982).

[61] Cunnien, *supra* note 7, at 90.

[62] *Id.* at 91.

[63] Nos. 632-79, 1309-79, 1317-79, 514-80, & 707-80 (Superior Court of New Jersey Crim. Div., Union County, 1980), *cited in* Cunnien, *supra* note 7, at 101.

[64] Cunnien, *supra* note 7, at 90.

[65] *Id.*

[66] United States v. Shorter, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 108 S. Ct 71 (1987) (tax evasion); United States v. Carmel, 801 F.2d 997 (7th Cir. 1986) (mail and wire fraud); United States v. Buchbinder, 796 F.2d 549 (4th Cir. 1985) (interstate transportation of stolen motor vehicle and forged securities); United States v. Davis, 772 F.2d 1339 (7th Cir.), *cert. denied*, 474 U.S. 1036 (1985) (forged and converted government checks); United States v. Gould, 741 F.2d 45 (4th Cir. 1984) (bank robbery); United States v. Torniero, 735 F.2d 725 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985) (interstate transportation of stolen goods); United States v. Lewellyn, 723 F.2d 615 (8th Cir. 1983) (embezzlement, making false statements, and mail fraud); Iachino v. United States, 437 F.2d 92 (5th Cir. 1971) (tax evasion). *See also* Steel v. State, 97 Wisc. 2d 72, 294 N.W.2d 2 (1980) (unsuccessful use of defense to negate requisite intent in murder trial under ALI standard); People v. Baade, 194 N.Y.L.J. 12 (1985) (A Suffolk County court held that pathological gambling disorder was not a recognized insanity defense in New York).

[67] D. McCord, *Syndromes, Profiles, and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases* 87 (unpublished manuscript) (available at the Marshall-Wythe School of Law, College of William and Mary).

[68] 809 F.2d 54 (D.C. Cir.), *cert. denied*, 108 S. Ct. 71 (1987).

[69] *Id.* at 54. Given the legislative intent behind the requirement of a "severe" mental disease or defect in insanity defenses—to exclude voluntary alcohol and drug abuse, neuroses, and nonpsychotic behavior disorders—one would expect the federal courts to exclude compulsive gambling as the requisite mental disease or defect. For a discussion of the legislative intent underlying the "severity" requirement, see Insanity Defense Reform Act of 1983, Pub. L. No. 98-473, 1984 U.S. Code Cong. & Admin. News 3411.

generally accepted by mental health professionals." [70] The United States Court of Appeals for the Fourth Circuit held in *United States v. Gillis* [71] that there was "nothing to lead us to conclude that there is substantial acceptance in the relevant discipline that compulsive gambling disorder causes some persons to be unable to resist buying cars with bad checks and then transporting the cars and the paper over state lines." [72] Finally, in *United States v. Davis* [73] the court noted that an expert could "not explain why a compulsion . . . to gamble translates . . . into an uncontrollable impulse to obtain money illegally with which to gamble." [74]

Thus far, only one case dealing with pathological gambling as a criminal defense has received judicial review within the military's appellate system. In *United States v. Baasel* [75] an Air Force major was convicted of writing bad checks, making fraudulent claims against the United States, conduct unbecoming an officer and a gentleman, and failure to pay just debts. [76] Relying upon federal precedent, [77] the military judge limited the expert's testimony to the diagnosis and treatment of pathological gambling as it affected the accused's ability to form the specific intent to commit the offenses charged. The judge excluded any testimony about the accused's ability to commit general intent crimes. [78] Viewing the issue in terms of relevance, the Air Force Court of Military Review upheld the trial court's limitation on expert testimony, determining that there was not a substantial acceptance within the professional mental health community of pathological gambling as a mental disease or defect that causes an inability to conform one's conduct to the requirements of the law. [79]

Future Utility of the Defense

The greatest obstacle to the successful use of compulsive gambling as an insanity defense appears to be the causal link between the disorder and the criminal misconduct. Assuming the accused can prove the existence of a mental disorder under the applicable insanity statute, the accused must then show a causal connection between the disorder and the crime, regardless of the particular insanity test used. [80] As previously discussed, the case history indicates that the courts believe this causal link remains unproven and, absent empirical data establishing such a nexus, the success of future compulsive gambling insanity defenses appears uncertain at best.

A different result may occur, however, if the criminal misconduct is the act of gambling itself. For example, the military punishes both gambling with subordinates and gambling in violation of a lawful regulation. [81] Although a causal link between pathological gambling and the act of gambling would appear easier to prove, within the federal and military court systems the defense counsel would still be required to establish that the disorder was "severe" in order to satisfy the applicable statutory requirements. [82]

At least with regard to specific intent crimes, the use of a compulsive gambling defense remains an area open for aggressive advocacy. Despite the Manual for Courts-

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[70] 809 F.2d at 55. This lack of causal link was relied on by the court to exclude expert testimony of pathological gambling under the *Frye* test of admissibility for expert testimony in areas of novel scientific evidence. *Id.* at 59-61. In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the court held that the scientific principle upon which the deduction is made must "be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014. The court in *Shorter* found no such general acceptance among the relevant scientific community of psychologists and psychiatrists. *Shorter*, 809 F.2d at 60-61. For a discussion of the applicability of the *Frye* standard of admissibility of novel scientific evidence in military courts-martial, see Sullivan, *Novel Scientific Evidence's Admissibility at Courts-Martial*, The Army Lawyer, Oct. 1986, at 24.

[71] 733 F.2d 549 (4th Cir. 1985).

[72] *Id.* at 558.

[73] 772 F.2d 1339 (7th Cir. 1985).

[74] *Id.* at 1344. *See* McCord, *supra* note 66, at 76-77 n.190.

[75] 22 M.J. 505 (A.F.C.M.R. 1986).

[76] UCMJ arts. 123a, 132, 133, and 134.

[77] The Air Force Court of Military Review looked primarily to United States v. Lewellyn, 723 F.2d 615 (8th Cir. 1983), in which the district court excluded the expert testimony of the same two witnesses attempting to testify at Major Baasel's court-martial. *Baasel*, 22 M.J. at 508.

[78] *Baasel*, 22 M.J. at 508.

[79] *Id.* at 509.

[80] *See* Cunnien, *supra* note 7, at 95.

[81] Article 134 of the Uniform Code of Military Justice specifically prohibits gambling between a noncommissioned officer and a lower ranking service member and dictates a maximum punishment of three months of confinement and forfeiture of two-thirds pay per month for three months. Any service member may be punished under article 92, UCMJ, for gambling in violation of service regulations, facing a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *See* Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-7 (28 Jan. 1988) ("DA personnel will not participate in any gambling activity, while on Government-owned, controlled, or leased property or otherwise while on duty for the Government.").

[82] *See* UCMJ art. 50a; 18 U.S.C. § 17 (Supp. V 1987).

Martial rule to the contrary,[83] the United States Court of Military Appeals has held that psychiatric evidence and testimony is admissible to negate the element of specific intent.[84] Testimony of pathological gambling was held admissible for such a purpose in *United States v. Baasel*.[85]

A defense counsel's most efficacious use of evidence or testimony relating to the accused's status as a pathological gambler lies in the disorder's potential for sentence reduction. The Rules for Courts-Martial specifically allow evidence of matters in extenuation to explain the circumstances surrounding the crime, regardless of whether such evidence serves as a legal justification for the criminal conduct.[86]

In the military services, administrative separation proceedings are fertile ground for the use of unorthodox defenses such as pathological gambling. Rules of evidence are generally not applicable at such proceedings.[87] Consequently, evidence such as expert testimony, which would be inadmissible in courts-martial, could be admissible before an administrative board. The expert witness need not even appear at an administrative separation board; the defense can submit *any* previous statement of a witness, regardless of his or her availability to testify.[88]

Conclusion

Within the federal and military court systems, pathological gambling has generally failed as both an insanity defense and as a defense to general intent crimes. The disorder remains untested as a defense to charges of illegal gambling per se, but it may serve as a defense to specific intent crimes and as a complete defense in non-*M'Naghten* jurisdictions.[89] Additionally, pathological gambling evidence may provide a powerful tool for the creative defense advocate during sentencing proceedings and administrative separation boards. Despite its limitations, pathological gambling provides fertile ground for defense advocates to better serve their clients.

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[83] Rule For Courts-Martial 916(k)(2) states:
A mental condition not amounting to a lack of mental responsibility . . . is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.
Manual For Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(2) [hereinafter R.C.M.].

[84] Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); *see also* United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988).

[85] 22 M.J. 505, 508-09 (A.F.C.M.R. 1986).

[86] *See* R.C.M. 1001(c)(1)(A); *see also* United States v. Bono, 26 M.J. 240 (C.M.A. 1988) (evidence regarding the accused's mental condition was admissible on sentencing).

[87] *See* Army Reg. 15-6, Procedure for Investigating Officers and Boards of Officers, para. 3-6 (11 June 1988) [hereinafter AR 15-6] ("not bound by rules of evidence for trials by courts-martial or for court proceedings generally").

[88] AR 15-6, para. 3-7 c.(5).

[89] Prior to the military's return to a *M'Naghten* standard of legal insanity, it had adopted the ALI insanity definition in United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DNA Fingerprinting: A Guide for Defense Counsel

Mr. Jonathan Greenberg,
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It has been called "the single greatest advance in the 'search for truth'. . . since the advent of cross-examination."[2] Others have said that it "could revolutionize law enforcement" by identifying criminal suspects "with virtual certainty."[3] These ambitious proclamations are illustrative of the interest and enthusiasm generated by the new forensic identification technique known as deoxyribonucleic acid (DNA) typing or "DNA fingerprinting," which uses minute traces of biological material (skin, blood, semen) to produce a

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[1] Mr. Greenberg, a first-year law student at the University of Maryland, Baltimore, prepared this article while serving as a summer intern.

[2] People v. Wesley, 140 Misc. 2d 306, 533 N.Y.S.2d 643, 644 (Albany County 1988).

[3] Moss, *DNA - The New Fingerprints*, A.B.A.J., May 1988, at 66.

genetic marker that theoretically is unique to a particular individual. [4] While there is a substantial and growing body of scientific evidence supporting these claims, defense lawyers need not despair when confronted with what is purported to be incontrovertible evidence linking a suspect with the scene of the crime. This article will suggest a number of issues that a well-prepared defense counsel can use to his or her advantage when preparing for a case involving DNA evidence.

First, it might be instructive to discuss one avenue of attack that would probably not be profitable—attacking the overall admissibility of DNA evidence based upon the test established in *United States v. Gipson*. [5] In *Gipson* the Court of Military Appeals adopted the relevancy test and rejected the "general acceptance in the scientific community test" that had been the standard of admissibility since *Frye v. United States*. [6] The *Gipson* test requires a showing that the scientific evidence is legally relevant and, if the evidence is presented via expert testimony, that the testimony is helpful. [7] As articles and court cases have shown, it appears that the scientific community generally accepts the basic techniques and assumptions involved in DNA testing. [8] It is significant that the test has not been successfully challenged by defense counsel in any of the court cases to date, including appellate decisions. [9] Moreover, the overall admissibility of DNA evidence might soon become unchallengeable as a matter of law, because at least one state has already enacted laws that make DNA fingerprints admissible in court, [10] and other states are poised to take actions that could promote a great expansion of DNA testing in the future. California's Attorney General, for example, has endorsed the creation of a statewide database of DNA fingerprint files. [11]

While the general theory behind DNA evidence thus appears to be unchallengeable in court, there does exist one crucial issue that strikes at the heart of the DNA controversy: the reliability of the test. Initial reports on the subject tended to use the astronomically high accuracy ratings claimed by the three private laboratories that have conducted DNA tests to date. [12] Cellmark Diagnostics of Germantown, Md., for example, claimed in its brochures that the odds of an incorrect match based upon DNA prints were 30 billion to one. Lifecodes Corp., based in New York, boasted of results that were inaccurate only once in every billion or so tests. Yet, in *People v. Wesley*, the court found that the procedures used by Lifecodes mandated accuracy ratings of 84 to 140 million to one, representing a ten-fold drop in accuracy—and this from a court that had enthusiastically accepted nearly all of the claims made by Lifecodes' expert witnesses. [13]

The figures drop even more dramatically in a number of recent instances. In *King v. Tanner* the Lifecodes Corp. only rated the accuracy of its test to 99.993% certainty. [14] In other words, there was the possibility of error nearly once in every 10,000 tests. In an article in the A.B.A. Journal, Debra Moss refers to a Lifecodes claim—curious in light of early claims measured in the billions—of "at least 99 percent certainty" for its DNA tests. [15] At this point, error would appear to be possible once in every 100 tests.

Even more significant are the well-publicized results of a blind test conducted recently by the California Associ-

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[4] This article will not provide a detailed discussion of the DNA fingerprinting process. A number of informative articles provide an excellent introduction to the mechanics of DNA fingerprinting. *See, e.g.*, Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va. L. Rev. 45 (1989); Long, *The DNA "Fingerprint": A Guide to Admissibility*, The Army Lawyer, October, 1988, at 36; Sharpe, *The DNA Print Identification Test: A New and Valuable Tool in the Investigation of Violent Crime*, The Detective, Spring 1989, at 5; Moss, *supra* note 3. *See also ABA Meeting Features Program on 'DNA Fingerprinting,'* 45 Crim. L. Rep. (BNA) 2392 (1989).

[5] 24 M.J. 246 (C.M.A. 1987).

[6] 293 F. 1013 (D.C. Cir. 1923).

[7] *Gipson*, 24 M.J. at 251.

[8] *Wesley*, 533 N.Y.S.2d 643, represents the most comprehensive trial court analysis and endorsement of DNA testing to date. The *Wesley* court's enthusiastic support for the DNA test, based upon the principles enunciated in *Frye*, is reiterated in a small but growing number of trial court endorsements of the test, both in criminal and paternity cases. *See, e.g.*, People v. Castro, 143 Misc. 2d 276, 540 N.Y.S.2d 143 (N.Y. Sup. Ct. 1989); King v. Tanner, 142 Misc. 2d 1004, 539 N.Y.S.2d 617 (N.Y. Sup. Ct. 1989); *In re* Adoption of Baby Girl S, 140 Misc. 2d 299, 532 N.Y.S.2d 634 (Sur. Ct. 1988).

[9] As of July 1989, the only two reported appellate decisions on point came out in favor of DNA testing. *See* Cobey v. State, 80 Md. App. 31 (Md. Ct. Spec. App. 1989); Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988). Furthermore, in Kofford v. Flora, 744 P.2d 1343 (Utah 1987), the Supreme Court of Utah set forth a 95% certainty standard for *Frye* tests—a standard that DNA testing should easily satisfy. *See also* State v. Apanovitch, 514 N.E.2d 394, 406 n.4 (Ohio 1987) (an apparent endorsement of DNA testing by the Supreme Court of Ohio). To date no military appellate court has considered the subject.

[10] *See* Cobey v. State, 80 Md. App. 31, 559 A.2d 391 (Md. Ct. Spec. App. 1989).

[11] *See* Crim. Just. Newsl., March 1, 1989, at 1.

[12] The three corporations are Cellmark Diagnostics, Lifecodes, and the Cetus Corporation. While all of the companies base their tests upon the same genetic theories, their laboratory methods differ in ways that can significantly affect their accuracy ratings. The Cetus test, for example, requires a smaller sample of DNA but may be especially prone to inaccuracies. Until the F.B.I. began testing early in 1989, these three corporations monopolized all DNA fingerprint testing in the United States.

[13] 533 N.Y.S.2d at 659.

[14] 539 N.Y.S.2d at 619.

[15] *See* Moss, *supra* note 3, at 67.

ation of Crime Lab Directors (CACLD).[16] All three private laboratories that engage in DNA fingerprinting were given 50 control samples to match with known donors. Two of the companies (Cetus and Cellmark) were wrong on one of their 50 matches. The third company, Lifecodes, was more cautious and only responded to 37 of the inquiries, but was correct on all 37.

The CACLD study, which so far contains the only published data on DNA testing accuracy, is significant for a number of reasons. It represents the most verifiable, and at the same time the least encouraging, study on DNA accuracy. From the "one in billions" claims that were universally accepted as recently as 1988, we are now down to an accuracy rating of approximately one error in 50—a 2% margin of error. While one might say that 98% accuracy is impressive enough, to the extent that it constitutes a significant improvement over blood typing analysis, even this figure might be overly inflated when we keep in mind that the three laboratories were given time to prepare for the CACLD study. If the laboratories are sloppy 2% of the time when they are being closely scrutinized, this does not bode well for DNA accuracy ratings under more routine conditions.

The results of the CACLD study are also significant for debunking the myth—perpetuated in the brochures put out by companies like Lifecodes—that "false matches" are impossible under DNA analysis. The study showed conclusively that sloppy laboratory procedures *could* wind up putting an innocent man behind bars or even contributing towards a wrongful execution. Indeed, a recent article in *The Washington Post* documents a number of cases where inaccurate DNA testing could have prejudiced innocent defendants.[17]

In preparing for a case involving DNA tests, the defense should thus pay very careful attention to any exorbitant accuracy claims that the prosecution may try to enter into evidence, assuming that there has been a positive match between the accused and the DNA sample taken from the scene of the crime. If the prosecution witness repeats the "one in billions" claims that have been circulating (highly likely, since this is supposedly the most impressive aspect of DNA analysis), then the defense should vigorously cross-examine that witness on the reliability of those accuracy figures. In doing so, a defense lawyer should keep in mind the following four dimensions to the accuracy controversy: 1) statistical assumptions; 2) laboratory procedures; 3) the subjective element in DNA analysis; and 4) the possibility of biased statistical results for commercial gain.

Statistical Assumptions

While it is a generally accepted fact that all human beings (with the exception of identical twins) have unique DNA sequences, it does not necessarily follow that the *particular* DNA sequence analyzed by the "fingerprinting" method will also be unique. We simply do not have large enough statistical pools to prove the uniqueness of any particular segment of DNA. Gene pool studies done by companies like Lifecodes have used, at most, a few hundred subjects. To arrive at statistics like the "one in 30 billion" claim, DNA researchers simply extrapolated from their findings of genetic uniqueness within relatively small groups. In doing so, they apparently assumed that individual DNA variations are statistically independent. The logic used in formulating the statistical assessment is flawed. One example of the flawed logic is to describe it as a series of coin tosses, where the outcome of the first toss does not necessarily affect the second. Similarly, the DNA testing of one group might not affect the second, depending on the race of the individuals used.[18]

There is statistical significance in another assumption made by some DNA researchers. When testing DNA in the laboratory, researchers naturally use "clean" DNA molecules from a fixed source such as a fresh blood sample. The DNA recovered from the scene of a crime, however, may be degraded because of environmental conditions or may be mixed in with various other fluids and contaminants. It is far from clear that the statistical accuracy of laboratory conditions should be extrapolated to the much messier conditions that may exist at the scene of a crime.[19]

Many scientists are uncomfortable with the broad assumptions noted above, particularly in light of our uncertain knowledge about DNA and the severe consequences that may result from an incorrect match. Defense counsel would thus be well-advised to emphasize the uncertainties and assumptions associated with DNA accuracy statistics.

Laboratory Procedures

While the general procedures used in DNA fingerprint analysis are not controversial, it does not follow that the *particular* laboratory protocol followed by a company is beyond reproach. Indeed, the two false matches uncovered in the CACLD study were blamed on sloppy laboratory work. DNA analysis is a highly technical field that involves many separate stages of work. Defense counsel should examine every single stage of the laboratory process for possible errors, paying particular attention to the possibility of cross-contamination between

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[16] *See generally* Crim. Just. Newsl., April 3, 1989, at 3; Thompson, *Misprint*, The New Republic, April 3, 1989, at 14.

[17] *A Smudge on DNA Fingerprinting?*, The Washington Post, June 26, 1989, at A3.

[18] Thompson, *supra* note 16, at 14. Indeed, gene pool studies among relatively homogenous groups have shown that intermarriage can cause startling similarities in the gene structure. Yet genetic variations due to race, habitat, and other factors are usually ignored in the statistical methods utilized by companies like Lifecodes. *Id.*

[19] *See* Thompson & Ford, *supra* note 4, at 66, 67; Moss, *supra* note 4, at 67.

the suspect's sample and evidentiary samples found at the scene of the crime. [20] Such an error could greatly multiply the chances of a false match.

The Subjective Element

The results of the most common DNA fingerprint test resemble the striped bars of the Universal Product Code found on most items in stores. Analysts declare a match when the bars found in the suspect's DNA match the bars found in the evidentiary DNA. Because degradation or contamination may cause a considerable amount of variation in the quality of the DNA examined, exact matches are rare. Furthermore, imprecisions inherent in the gels used to sort DNA particles may cause some of the bars to shift. [21] In these circumstances, analysts are often forced to guess at the presence of a match, based simply upon a hunch that samples with slight variations could not possibly be from different people. [22] It is precisely this dilemma that probably accounts for Lifecodes' decision to announce results for only 37 of the 50 samples used in the CACLD study. In the absence of any universal standards for what constitutes a match, defense counsel would be well-advised to question expert witnesses if there are *any* variations between a suspect's DNA and the evidentiary DNA.

Possible Commercial Bias

The problems noted above, by themselves, would be severe enough to give any jury pause before blindly accepting any claims that DNA tests are infallible. But there is the additional possibility that some scientific claims—as well as paid "expert witnesses"—might be more motivated by the possibilities of commercial gain than a detached interest in scientific truth. As noted above, three private companies have dominated the DNA testing market in this country for the past several years. These companies clearly have a substantial commercial interest in seeing DNA tests proliferate throughout the legal community. Cellmark Diagnostics, for example, charges $350 for a complete test and up to $1000 a day for expert witnesses. It stands to reason that there may be a connection between these financial interests and the initial claims of the DNA test's infallibility.

The commercial element also intrudes into the realm of laboratory procedure. Both Cellmark Diagnostics and Lifecodes have been extremely secretive about their laboratory work, citing the need to protect trade secrets. [23] While these companies undoubtedly have legitimate commercial interests to protect, it is impossible to say how much this secrecy is also indicative of a fundamental uncertainty regarding the accuracy of the tests themselves. At any rate, with the recent expansion of the FBI and state governments into the field, the issue of commercial bias may eventually become moot. [24] At the present time, however, DNA testing's domination by private companies suggests that defense lawyers should examine this issue thoroughly.

Conclusion

It would be premature to say that the recent controversy over DNA testing accuracy is sufficient to make the procedure itself challengeable under the *Gipson* test. Even 98% accuracy, after all, is impressive when compared to the tests that presently are admissible in court. [25] Furthermore, the technology involved in DNA fingerprinting has widespread scientific approval and is certain to be the wave of the future. Nevertheless, current DNA technology is far from being the infallible investigative tool that initial reports assumed it to be. More DNA research and many more trials are required before we can obtain an accurate picture of the test's true probative value. Until then, defense counsel should conduct a thorough inquiry into all aspects of DNA results that they encounter at trial.

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[20] *See* Thompson & Ford, *supra* note 4, at 94-96. There are also significant risks associated with the newer test adopted by the Cetus Corporation. *Id.* at 96-99.

[21] *See* Thompson & Ford, *supra* note 4, at 69, 70.

[22] There is no industry-wide standard for deciding when a match is a match. *See supra* note 13.

[23] *See* Thompson & Ford, *supra* note 4, at 58, 59.

[24] The military plans to have its own DNA testing facilities ready in 1990. Sharpe, *supra* note 4, at 10.

[25] Blood tests, for example, have been accepted by courts, yet they usually offer no more than a 90% probability of identification. *See* Kofford v. Flora, 744 P.2d 1343, 1350 (Utah 1987).

Defense Guide to *Batson*

In *Batson v. Kentucky* [1] the Supreme Court held that a criminal defendant could establish a prima facie case of racial discrimination violative of equal protection based solely on the prosecutor's use of peremptory challenges to strike members of the accused's race from the jury venire. The Court further held that, after the defendant established a prima facie case, the burden then shifted to the prosecution to give a race-neutral explanation for the challenge. In *United States v. Santiago-Davila* [2] the Court of Military Appeals applied the rule of *Batson* to the military, finding that the trial counsel had not stated for the record the reasons for his challenge of the only Puerto Rican and one of the two Hispanic panel members. The court also held that Puerto Ricans were a cognizable racial group. [3]

In *United States v. Moore* [4] the Court of Military Appeals went one step further and adopted for all the military services a per se rule of discrimination whenever the trial counsel peremptorily challenges a panel member who is of the same cognizable racial group as the accused. [5] This rule relieves trial defense counsel of the burden of establishing a prima facie case. The court found that a per se rule is necessitated by the nearly impossible task of demonstrating discrimination in the military justice system where the trial counsel has only one peremptory challenge. [6] The per se rule recognizes that even one peremptory challenge may be a panel selection device by which one may discriminate. [7] Therefore, whenever the defense counsel makes a timely *Batson* objection, the burden automatically shifts to the government, and trial counsel must state his or her reasons, on the record, for the peremptory challenge of any panel member who is of the same cognizable racial group as the accused.

Defense counsel representing an accused who is a member of a cognizable racial group must be prepared prior to trial to encounter a *Batson* scenario. Defense counsel must know the client's specific racial group, if it is not clearly obvious, as well as that of individual panel members. Examination of an Officer Record Brief (ORB) or a DA Form 2A of each panel member and the accused will provide counsel with the necessary information. After a potentially improper challenge by the prosecution, trial defense counsel must object and request a hearing outside the presence of the members before the challenged member is excused by the military judge. [8] Defense counsel should request that the trial counsel be required to explain the challenge on the record. It should be anticipated that most trial counsel will attempt to give some sort of racially-neutral explanation. Therefore, trial defense counsel must take all steps necessary to demonstrate on the record why the peremptory challenge has a discriminatory basis. [9] Defense counsel should be prepared to offer evidence and argument on each of the following points: 1) the particular susceptibility of the case to racial discrimination (e.g., the race of the accused, witnesses, or victim, and any bearing this could have on the case); 2) the trial counsel's demeanor; 3) any pattern of discriminatory practices by the trial counsel in question; [10] and 4) any disparate treatment of similarly situated court members not of the cognizable racial group. Evidence may be available in the form of Officer Record Briefs, DA Forms 2A, DA Forms 2-1, Inspector General complaints, equal opportunity complaints, and other similar materials. Trial defense counsel should request to question the trial counsel directly or through the military judge in every case. [11] Defense counsel may argue that: 1) trial counsel's stated rationale does not relate to the facts of the particular case; 2) a similarly situated member not of the cognizable racial group was not challenged; 3) trial counsel's out-of-court experiences are a pretext for discriminatory practice (if supported by evidence); 4) there was little or no examination of the challenged member during voir dire; and 5) trial counsel did not challenge the panel member for cause. Lastly, if the military judge fails to enter findings on the record, defense counsel should ask for the military judge's formal findings regarding the sufficiency of the trial counsel's proffered reasons.

The Court of Military Appeals has given defense counsel a potentially powerful weapon to be used to secure a fair trial—the per se rule. Trial defense counsel should strive to ensure that the effectiveness of this weapon is not negated by unchallenged, pro forma rationalizations offered by trial counsel as a basis for the peremptory challenge. Captain W. Renn Gade.

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[1] 476 U.S. 79 (1986).

[2] 26 M.J. 380 (C.M.A. 1988), *reh'g ordered*, 28 M.J. 362 (C.M.A. 1989) (summary disposition).

[3] Along with Blacks and Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders would also be considered cognizable racial groups. 26 M.J. at 390-91.

[4] 28 M.J. 366 (C.M.A. 1989).

[5] The per se rule was originally developed by the Army Court of Military Review sitting en banc for trial practice in the Army. United States v. Moore, 26 M.J. 692 (A.C.M.R. 1988). The Court of Military Appeals in *Moore* adopted that per se rule for everyone.

[6] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(g).

[7] *See Batson*, 476 U.S. at 96.

[8] United States v. Shelby, 26 M.J. 921 (N.M.C.M.R. 1988).

[9] *See* State v. Butler, 731 S.W.2d. 265 (Mo. Ct. App. 1987).

[10] As previously noted, this is more difficult to prove in the military justice context, and is of less importance since the creation of the per se rule.

[11] This is a matter within the discretion of the military judge. *See Moore*, 28 M.J. at 366.

Mental Responsibility: A Dynamic Issue

The Army Court of Military Review recently set aside the findings and dismissed all charges against an appellant because of lack of mental responsibility. [12] The mental disease in question was schizophrenia. The soldier's offenses included disobedience and disrespect. Among other things, he had answered non-responsively to his company commander and had mumbled and spoken incoherently in an apparently different language. The issue of mental responsibility was raised at trial, but at that time the soldier was diagnosed as having a "mixed personality disorder of a schizoid type." [13] This was not considered sufficient to rise to the level of a mental disease, and thus, did not negate mental responsibility. Post-trial, however, his mental condition was again evaluated, and this time schizophrenia was found. Why the different diagnosis?

Schizophrenia is, in part, a retrospective diagnosis. One of its features is a duration of at least six months. The essential features of this disorder include the presence of certain characteristic psychotic symptoms during the active phase of the illness. [14]

Delusions and hallucinations (including tactile hallucinations such as tingling or burning sensations) are obvious signs of serious mental illness. Less obvious symptoms include disturbances in the form of thought. Examples of this include rapid shifts from one topic to an unrelated topic, with no apparent awareness that the subjects are unconnected. Poverty in the content of speech is another example, wherein the person speaks at length but reveals little information. This is characterized by overly vague expressions or exaggerated abstract reasoning. There may also be a pattern of deterioration in some area of the individual's life. This could be seen in the neglect of personal hygiene or as a distinct personality difference. Listen for descriptions such as, "He's like a different person," or "He's not the same anymore." Work performance or interpersonal relations may also suffer. [15] In its prodromal (beginning) stage, schizophrenia is frequently misdiagnosed as a mixed personality disorder. Personality disorders generally do not rise to the level of lack of mental responsibility, while schizophrenia may.

It is important that every effort be made to gather information regarding an accused's mental status prior to and contemporaneous with the offenses. Certain symptoms that have occurred in the past could be significant, partly because of their chronic nature. Such mental evaluations can then be used by counsel to prepare for trial and to deal with their clients and their client's ability to understand the trial process.

The need for observation and evaluation does not end at trial. The client involved in the *Carraway* case spoke with appellate defense counsel in conversations in which he often made up words or phrases because he found the English language "inefficient." He also used "word salad," jumbling phrases and unrelated words into undecipherable sentences. When asked why he presented no defense at his court-martial, he replied that his "mouth was not plugged into his brain," and the "sixth person" spoke for him on the witness stand. Consequently, appellate defense counsel requested a psychiatric evaluation. Because aberrant behavior had also been noted at the confinement facility, two psychiatric evaluations had already been completed. Pursuant to an appellate defense request, the Army Court of Military Review ordered a sanity board. The diagnosis was chronic schizophrenia, and the court therefore dismissed all charges because of the lack of mental responsibility.

Trial defense counsel should be vigilant in this area. Consider the client's mental status as a continuing issue, even while the client is in post-trial confinement. [16] The mental status of a client is a dynamic factor, capable of improvement *or* deterioration. Even when a client has been found legally mentally responsible, the issue should not end if defense counsel continue to note aberrant behavior. Captain Jeannine C. Hinman.

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[12] United States v. Carraway, ACMR 8801077 (A.C.M.R. 30 June 1989) (unpub.).

[13] *Id.*

[14] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Chapter 3 (3d ed. Rev. 1987). This source is greatly relied upon by physicians, although clinical psychologists generally do not use this source. Because clinical psychologists do not possess medical degrees, they are not qualified to diagnose medical conditions. Defense counsel should strive to have psychiatrists examine their clients.

[15] *Id.*

[16] *See* United States v. Lilly, 25 M.J. 403 (C.M.A. 1988).

Clerk of Court Notes

Preparing a Record of Trial

Recently, in the case of *United States v. Rickman*, ACMR 8801069, decided 31 August 1989, the Army Court of Military Review commented, "It is unfortunate that a general court-martial record of trial could be forwarded for appellate review missing the staff judge advocate's pretrial advice and proof of service of the record on the accused. In this regard, we would recommend that the contents of a general court-martial record be checked against the matters listed in R.C.M. 1003(b)(3)." (In addition, the inside back cover for each record of trial lists the required contents in the order in which they should be bound into the record.) To highlight the necessity for completeness and accuracy in trial documentation, the Court drew upon a laudatory comment by an Army Board of Review in *United States v. Easter*, 40 C.M.R. 731, 733 (A.B.R.), *aff'd*, 41 C.M.R. 68 (C.M.R. 1969), quoting the Board of Review as follows:

> [W]e wish to again emphasize the importance of administrative correctness and completeness in preparation for, conduct of, and post-trial review of all cases. The personnel of a staff judge advocate's administration section can and should take pride in their work. Without their careful attention to the myriad details involved in processing a case, . . . untold hours may be wasted in needless appellate processing, and the cause of justice thwarted, merely because of an administrative oversight. . . . With only the record before our appellate agencies, there must be the highest degree of accuracy in its compilation. For this we look to our legal administrative personnel.

Post-Trial Correspondence

When a GCM jurisdiction receives correspondence concerning a case (typically, a petition for clemency) and forwards it to the Clerk of Court, USA Judiciary, after the record of trial already has been sent for appellate review, the Clerk must have the answer to two questions:

First, did the convening authority consider the correspondence before taking action? The answer to this question dictates whether we can make the correspondence part of the record (if "yes") or can only turn it over to counsel for consideration (if "no").

Second, has the correspondence been acknowledged and, if so, what was the writer told? The answer to this question tells us whether we must communicate with the writer and what we must say.

Failure to reveal the answer to those questions makes added work for the Clerk of Court, and possibly for the SJA if we must ask for the further information we need.

Government Appellate Division Note

Is a Pretrial Agreement Sentence Limitation a Reasonable Indication of the Fairness of an Adjudged Sentence? [1]

Major Kathryn F. Forrester
Government Appellate Division, USALSA

Once an appellate court finds error in the trial proceedings, how does the appellate court determine if the accused suffered prejudice? In resolving this issue, military appellate courts continue to rely upon the holding of the Court of Military Appeals in *United States v. Hendon*. [2] In *Hendon* the court established that appellate courts may compare adjudged sentences with pretrial agreements to determine if an accused suffered prejudice at the trial court. [3] The Court of Military Appeals stated, "Absent evidence to the contrary, accused's own sentence proposal is a reasonable indication of its probable fairness to him." [4] Judge Cook, who authored the opinion, qualified this by stating:

> Of course, the sentence factors that may be taken into account in connection with a pretrial plea agreement may be different from those before the court-martial. . . . Also, a court-martial can legally, and we may perhaps judicially notice that, in

[1] This note is published in response to DAD Note, *The Hendon Rule*, The Army Lawyer, May 1989, at 20.

[2] 6 M.J. 171 (C.M.A. 1979).

[3] *Id.* at 175.

[4] *Id.*

practice, does, adjudge a sentence less than that provided in the pretrial agreement. [5]

Judge Perry concurred in the result, but stated:

> I expressly dissociate myself from that portion of the lead opinion which, in actuality, tests the appellant's contentions for prejudice by comparing the adjudged sentence against the offer of the appellant in the negotiations with the convening authority for a pretrial agreement. To me, this linkage is irrelevant as well as inappropriate in this inquiry. [6]

Chief Judge Fletcher, who concurred in part and dissented in part, stated he felt that the requirement that court members vote on proposed sentences, beginning with the lightest, [7] had been violated. Additionally, he stated that he considered the announced sentence prejudicial on its face and that he would overrule the Army Court of Military Review's affirmance. [8]

A recent Defense Appellate Division note relies upon the fact that *Hendon* is not an opinion of the court and upon language in *United States v. Kinman* [9] to suggest that trial defense counsel should include specific language in an offer to plead guilty to indicate that the sentence limitation in the pretrial agreement is not a barometer of the fairness of the sentence proposal, but only a ceiling negotiated during the pretrial agreement process. Alternatively, the note suggests that trial defense counsel should make such an argument at trial. Trial counsel should oppose attempts to include such language in offers to plead guilty and should rebut such arguments at trial.

In *Kinman* the Court of Military Appeals held that an accused may still be prejudiced if he or she receives a sentence less than that recited in the pretrial agreement. The court specifically stated that

> [s]ince the sentence set forth in the pretrial agreement is not inevitably the sentence that the court-martial imposes, some possibility exists that, even though at trial an appellant receives a sentence which is no more than that recited in the pretrial agreement, he still has been prejudiced by some type of trial error. [10]

The court continued, however, and stated the long standing rule that "the test for prejudice is whether the sentence adjudged was 'no greater than that which would have been imposed if the prejudicial error had not been committed.' " [11]

Further, the Court of Military Appeals has addressed the question of whether a pretrial agreement is a reasonable indication of the fairness of the accused's sentence in two other cases both prior to and after *Hendon*. In *United States v. Johnson*, [12] an opinion of the court authored by Chief Judge Quinn, the court stated that the adjudged sentence, a bad-conduct discharge and confinement for five years, "accords with the accused's own assessment of what he considered a fair and acceptable sentence, as expressed in his pretrial offer to plead guilty." [13] The court affirmed the sentence. In *United States v. Cross* [14] the court reiterated the holding of *Hendon*: "We have stated in the past that the limitations contained in a pretrial agreement are some indication of an accused's evaluation of the fairness to him of a given punishment." [15]

The courts of military review have also adhered to the principle of *Hendon*. In *United States v. Prater* [16] the Army court affirmed the sentence adjudged by the military judge, which was less than the pretrial agreement, and stated that the sentence was appropriate without further reduction. [17] In *United States v. Vogan* [18] the Army court stated: "Reassessing the sentence on the basis of the error noted and the entire record, to include the terms of the appellant's pretrial agreement, we are satisfied that the appellant suffered no prejudice." [19] In *United States v. Rivera* [20] the Army court affirmed the appellant's sentence to a dismissal, because it did not exceed the terms of a pretrial

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[5] *Id.* (citations omitted).

[6] *Id.*

[7] Uniform Code of Military Justice, 10 U.S.C. § 825(b)(2), (3) (1982) [hereinafter UCMJ]; Manual for Courts-Martial, United States, 1969 (Rev. ed), para. 76*b*(2) [hereinafter MCM, 1969].

[8] *Hendon*, 6 M.J. at 175.

[9] United States v. Kinman, 25 M.J. 99 (C.M.A. 1987).

[10] *Id.* at 101 (citation omitted).

[11] *Id.* (quoting *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985); *United States v. Sales*, 22 M.J. 305, 307 n.3 (C.M.A. 1986)).

[12] 41 C.M.R. 49 (C.M.A. 1969).

[13] *Id.* at 51.

[14] 21 M.J. 87 (C.M.A. 1985) (summary disposition).

[15] *Id.* at 88 (citations omitted).

[16] 28 M.J. 818 (A.C.M.R. 1989).

[17] *Id.* at 821.

[18] 27 M.J. 882, 884 (A.C.M.R. 1989).

[19] *Id.* at 884.

[20] 26 M.J. 638 (A.C.M.R.), *petition denied*, 27 M.J. 459 (C.M.A. 1988).

agreement, which provided that the convening authority could approve any sentence adjudged except confinement in excess of three years. [21] In *United States v. Schwarz* [22] the Army court found no prejudice in a situation in which the adjudged sentence was substantially reduced pursuant to the appellant's pretrial agreement, even though there was error at trial in failure to hold two offenses, drunk driving and negligent destruction of government property, multiplicious for findings. [23] In *United States v. Barnum* [24] the Army court found no prejudice when the convening authority reduced the appellant's sentence pursuant to his pretrial agreement, even though the court dismissed findings of guilty of one specification of larceny by check. In *United States v. Poole* [25] the Army court stated that "appellant and his counsel gauged the quality of the evidence against them and determined appellant could not avoid a discharge, forfeiture of all pay and allowances, and at least substantial confinement." [26] The court affirmed a sentence of a bad conduct discharge, confinement for fourteen months, and total forfeitures, a sentence almost identical to that of his pretrial agreement, even though the military judge had erred to appellant's prejudice in advising him that he faced a dishonorable discharge and twenty-one years of confinement. The court stated that "as far as appellant was concerned, the maximum confinement based upon provident pleas of guilty was only three years." [27] The Court of Military Appeals, in affirming *Poole*, stated that the Army court's "meaningful reassessment" of affirming the legally imposable bad-conduct discharge rather than the adjudged dishonorable discharge (which was also provided for in the pretrial agreement) had cured any error and ordered no further sentence relief. [28] In *United States v. Henderson* [29] the Army court again found no prejudice when the sentence was less severe than the terms of appellant's pretrial agreement. In *United States v. McPhaul* [30] the Army court again reiterated that "a lesser sentence than that negotiated by appellant militates against the view that it resulted from an improper argument substantially prejudicing appellant's rights." [31] In *United States v. Davis* [32] the Army court further supported the *Hendon* rule, stating that "'[i]t is a well-established and sound provision of law that '[a]bsent evidence to the contrary, accused's own sentence proposal is a reasonable indication of its probable fairness to him.' " [33] In *United States v. Rogers* [34] the Army court found no prejudice when the adjudged sentence was less than that provided for in the pretrial agreement, even though the military judge did not comply with Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1010. [35] In *United States v. Scantland* [36] the Army court affirmed the adjudged sentence when the appellant's "approved sentence to confinement is in accordance with a pretrial agreement between him and the convening authority." [37] In *United States v. Sherrod* [38] the Navy-Marine court affirmed the adjudged sentence when it was less than the pretrial agreement terms, holding that it "is certainly within the limits of what the appellant, with the aid of two capable counsel, concluded to be a fair sentence." [39]

In certain situations, the courts of military review have granted relief even though the adjudged sentence was less than that provided for in the pretrial agreement, but only after testing for any prejudice to the accused as a result of trial errors. In *United States v. Gilbert* [40] the Army court reassessed appellant's sentence despite the fact that it was within the confines of his pretrial agreement because of improper inquiry into uncharged

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[21] *Id.* at 643.

[22] 24 M.J. 823 (A.C.M.R. 1987), *petition denied*, 26 M.J. 61 (C.M.A. 1988).

[23] *Id.* at 827.

[24] 24 M.J. 729 (A.C.M.R. 1987).

[25] 24 M.J. 539 (A.C.M.R. 1987), *aff'd*, 26 M.J. 272 (C.M.A. 1988).

[26] *Id.* at 543.

[27] *Id.* (footnote omitted).

[28] *Poole*, 26 M.J. at 272.

[29] 23 M.J. 860 (A.C.M.R. 1987).

[30] 22 M.J. 808 (A.C.M.R. 1986).

[31] *Id.* at 816.

[32] 20 M.J. 980 (A.C.M.R.), *petition denied*, 21 M.J. 315 (C.M.A. 1985).

[33] *Id.* at 981 n.1 (quoting United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979), citing United States v. Johnson, 41 C.M.R. 49, 50 (C.M.A. 1969)).

[34] 20 M.J. 847 (A.C.M.R. 1985), *aff'd*, 21 M.J. 435 (C.M.A. 1986).

[35] *Id.* at 850.

[36] 14 M.J. 531 (A.C.M.R. 1982).

[37] *Id.* at 533.

[38] 13 M.J. 662 (N.M.C.M.R. 1982).

[39] *Id.* at 663 (citations omitted).

[40] 25 M.J. 802 (A.C.M.R. 1988).

misconduct. [41] In *United States v. Neil* [42] the Army court reassessed the adjudged sentence despite the fact that the sentence was less than that provided for in the pretrial agreement because the trial counsel argued that uncharged offenses should be considered by the military judge in determining the sentence and the judge announced that he would impose a sentence considering those offenses. [43]

Accordingly, while *Hendon* was not an opinion of the full Court of Military Appeals and while *Kinman* may express a slight withdrawal from a straight-forward application of the *Hendon* rule, trial counsel should not allow language that the sentence limitation in the pretrial agreement is not a reasonable indication of the fairness of the sentence to be included in offers to plead guilty or in arguments at trial. The role of the trial counsel is to represent zealously the interests of the government during all aspects of the trial, including the sentencing phase post-trial aspects of the case. While trial defense counsel of course can argue in post-trial petitions for clemency that additional sentence relief should be granted, even though the pretrial agreement sentence limitation was not exceeded, such arguments are properly made at that stage, not before or during trial.

[41] *Id.* at 803.

[42] 25 M.J. 798 (A.C.M.R. 1988).

[43] *Id.* at 801.

Contract Appeals Division Note

Chief Trial Attorney, Contract Appeals Division, Publishes Litigation Support Procedures

As a result of issues raised by the Acquisition Legal Services Study, and at the direction of the General Counsel of the Army and The Judge Advocate General, the Army Chief Trial Attorney recently promulgated policies and procedures that 1) restate existing local counsel litigation support responsibilities for contract appeals docketed with the Armed Services Board of Contract Appeals (ASBCA); 2) clarify the relationship between Contract Appeals Division (CAD) and installation and activity legal offices; and 3) establish procedures for designation of local counsel as an attorney of record. The basic thrust of the procedures is to renew emphasis on litigation team concepts and to establish a more active role for local counsel.

The procedures first reiterate existing litigation support responsibilities as contained in AFARS, AR 27-1, and AR 27-40. To that extent, there are no significant changes in litigation support procedures; local commands are only required to provide litigation support that should have been, and usually was, provided pursuant to the cited regulations.

Similarly, the procedures do not change the interrelationship between CAD, installation and activity legal offices, contracting offices, and other acquisition personnel. The Chief Trial Attorney and trial attorneys under his direct supervision remain primarily responsible for all aspects of contract disputes appealed to the ASBCA. The Chief Trial Attorney remains the primary legal advisor on all matters related to appeals.

There are, however, some changes in the traditional relationship between CAD and local counsel. The procedures re-emphasize the litigation team concept, under which local counsel can play a more active role in ASBCA litigation. While "teaming" has always been an objective in the litigation of contract disputes, too often local counsel have played a passive role and CAD trial attorneys have not encouraged active local counsel participation. The new procedures specifically require local counsel to be teamed with the assigned CAD trial attorney on each appeal. Further, on purely a voluntary basis, local counsel and the CAD trial attorney may agree that the local counsel will perform some of the trial attorney responsibilities, such as interviewing and deposing witnesses; preparing written discovery, hearing exhibits, and briefs; and participating at hearings.

Finally, the procedures establish a formal framework for "designation" of local counsel as an attorney of record in appropriate cases. Designation is the ultimate teaming arrangement. While functions will vary in cases where designation occurs, the local counsel acts as co-counsel with the assigned CAD trial attorney during the appeal and takes part in all of the trial attorney functions, to include participation at hearings and the preparation of documentation for a record submission. Although a CAD trial attorney may act as mentor or advisor throughout the appeal, the CAD attorney remains primarily responsible for the litigation. In addition to the above, the basic framework of designation contains the following:

1) The Chief Trial Attorney will determine whether designation is appropriate on a case-by-case basis, considering a variety of factors including local counsel capability and the nature of the case;

2) Designation involves a substantial time commitment and operates as an informal detail of local counsel to the Chief Trial Attorney for the appeal;

3) Both local counsel and the local SJA or Chief Counsel must agree to the designation;

4) Local counsel is listed as an attorney-of-record with the ASBCA on the appeal; and

5) Once designation occurs, local counsel shall not be released from responsibilities unless the Chief Trial Attorney and Chief Counsel or SJA so agree or unless the Chief Trial Attorney determines that local counsel cannot adequately perform trial attorney responsibilities.

The procedures, and especially those concerning designation and renewed emphasis on team work, provide the opportunity for an incremental increase in the quality of the way we, at all levels of the contract appeals process, represent the Army's - and the taxpayer's - interests in contract litigation. They allow us to work smarter, to maximize resource use, and to ensure effective two-way communication between client and trial counsel. LTC Clifford D. Brooks.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Uncharged Misconduct

Uncharged misconduct is inadmissible to prove one's criminal propensity. [1] Such extrinsic offense evidence may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [2] The use of uncharged misconduct for these "other" purposes has become one of the most heavily litigated evidentiary areas. The resulting case law and commentary show the confusion engendered by the lack of a good working model for determining whether uncharged misconduct is being used for a proper purpose.

The Court of Military Appeals has provided general guidelines for evaluating uncharged misconduct. [3] The military judge must first consider whether the evidence tends to prove that the accused committed a prior crime or wrong. If so, and if the evidence is sufficient for a court member to reasonably conclude that the accused committed the uncharged misconduct, [4] the military judge must then consider whether the evidence is offered for a permissible purpose. Finally, the military judge must examine whether the probative value of the evidence on a material issue is substantially outweighed by the danger of unfair prejudice. [5]

In the recent case of *United States v. Duncan* [6] the Navy-Marine Corps Court of Military Review provided a much needed framework for analyzing permissible and prohibited purposes for the use of uncharged misconduct.

A general court-martial convicted the accused of strangling his fiancee, a charge the accused denied. At trial, uncharged misconduct, in the form of testimony from both the accused's former wife and a former lover, was admitted over defense objection. The former lover detailed the accused's plan to kill the wife in a scuba "accident" and then marry the lover. The accused's wife testified about the failed scuba "accident" and the accused's resulting request for a divorce.

The trial court found the testimony by the former wife and the lover to be "relevant to show the probable existence of a motive for the accused to kill the victim and that he could harbor the specific intent to perform such a crime."

In determining whether uncharged misconduct may be used to prove one's conduct, the court in *Duncan* provided a simple framework worded in three different ways:

1. In reasoning from the extrinsic evidence to the conduct presently charged, is there a need to infer the individual's character as an intermediate step? [7] Alternatively,

2. "Does the challenged evidence require the fact-finder to infer from behavior on one occasion something about the nature or character of the actor and then to infer from that how the person probably behaved on another occasion?" [8] Or,

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[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid. 404(b)].

[2] *Id.*

[3] United States v. White, 23 M.J. 84 (C.M.A. 1986).

[4] Huddleston v. United States, 485 U.S. 681 (1988); United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1988).

[5] United States v. Brooks, 22 M.J. 441, 444 (C.M.A. 1986); Mil. R. Evid. 403.

[6] 28 M.J. 946 (N.M.C.M.R. 1989)

[7] *Id.* at 950.

[8] *Id.*

3. "Is the sole connection between the events that the fact-finder believes that a certain type of person would act the same way both times? [9]

If the answer is "yes" to any of these questions, the evidence is being offered to prove criminal propensity and is inadmissible.

The appellate court properly found that reasoning from Duncan's intent to murder his wife to his later intent to murder his fiancee required an inference of the accused's murderous character. Therefore, the uncharged misconduct should not have been admitted.

An accused's general propensity for violence and an accused's propensity to commit crime have both been deemed unfairly prejudicial to an accused, and uncharged misconduct tending to show such propensities is therefore inadmissible. Nevertheless, when acts of misconduct tend to be related other than through an individual's general character for crime, commission of the acts of misconduct by a particular person may be considered in deciding whether the same person committed the crime.

The proponent of uncharged misconduct must provide a very specific explanation of how certain uncharged misconduct is admissible. Counsel on both sides must be prepared to argue the relevance of the evidence to material issues, the need for the evidence, and aspects to consider in balancing unfair prejudice and probative value. The first step, however, is to decide whether recourse must be made to a prohibited purpose in reasoning from the uncharged to the charged offense. The *Duncan* opinion has given the advocate and military judge a simple but valuable framework for properly confronting that crucial obstacle. MAJ Warner.

Urinalysis Testing

Command directives at various levels have attempted to provide guidance on the collection and processing of urine samples. Where deviations from such guidance have arisen, zealous counsel have attempted to exclude evidence of "positive" samples in resulting proceedings. Nevertheless, such attempts have generally failed, because not every administrative regulation gives rise to rights that may be enforced in a criminal trial by the exclusionary rule. [10]

Examples of noncompliance with regulations where urinalysis test results were admitted include: 1) Having a test completed by a non-certified laboratory; [11] 2) Testing, without approval, more than a certain percentage of a unit; [12] 3) Failure to affix the sample container's label and seal in the proper sequence and failure of the observer to initial the chain of custody forms; [13] 4) Absence of an observer to actually view the giving of urine; [14] and 5) Too many people in the rest room, improper initialling sequence, completion of the label before affixing to the bottle, supervisors leaving their station to take senior staff samples, more than one bottle on the recording table at one time, and samples not delivered to the lab on the day of collection. [15]

The courts have pointed out that non-compliance generally goes to the weight of the evidence, not its admissibility. [16] Nevertheless, if the deviations, considered along with all the other factors, undermine one's confidence in the test results, the evidence could lack sufficient reliability to be considered by the finders of fact. [17] Further, if counsel can demonstrate that the deviations rise to the level of due process denial [18] or that a directive that established an important safeguard to one's privacy had been violated, [19] exclusion of the evidence may be an appropriate sanction.

Violation of urine collection guidance does not render a resulting sample inadmissible as a matter of law, but prudent counsel will closely consider the procedures used in their particular jurisdiction. Disregard for procedures in a urinalysis case could cause reasonable doubt in the fact finder's mind. Counsel should consider a recent approach taken at Fort Hood. Those being tested are first given a copy of the required procedures. Those tested are then required to either confirm that the required procedures were followed or specify those procedures not followed. When the soldier being tested identifies an actual deviation, a second sample can then be obtained correctly, as soon as possible. MAJ Warner.

Contract Law Note

Deteriorated Business Relations Justify A Termination for Convenience

A recent decision by the United States Claims Court on a motion for summary judgment concerns the issue

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[9] *Id.*

[10] *See* United States v. Whipple, 28 M.J. 314 (C.M.A. 1989) (citing United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465 (1979); United States v. McGraner, 13 M.J. 408, 415-16 (C.M.A. 1982)).

[11] United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984).

[12] United States v. Hilbert, 22 M.J. 526 (N.M.C.M.R. 1986).

[13] United States v. Pollard, 27 M.J. 376 (C.M.A. 1989).

[14] United States v. Whipple, 28 M.J. 314 (C.M.A. 1989).

[15] Andrews v. Webb, 685 F. Supp 579 (E.D. Va. 1988).

[16] *See, e.g., Scholz*, 19 M.J. 837.

[17] *Hilbert*, 22 M.J. 526; *Pollard*, 27 M.J. 376.

[18] *Andrews*, 685 F. Supp. 579.

[19] *Hilbert*, 22 M.J. 526.

of whether a contract may be terminated because of discourteous conduct.[20] The court held that ruined business relations, coupled with inadequate performance, were sufficient evidence of changed circumstances to support a termination for the convenience of the government.[21]

In May 1985, the contractor was awarded a two-year contract to provide real estate management services for properties acquired by the United States Department of Housing and Urban Development (HUD) through foreclosure. Two weeks after performance began, HUD issued the contractor the first of several notices of unsatisfactory performance. HUD charged, among other things, that the contractor was inadequately supervising subcontractors, insufficiently documentating the personal property left by previous owners, and filing reports in an untimely manner.[22] The contractor was advised that its contract might be terminated.[23]

The contractor responded to the charges of unsatisfactory performance in February 1986. In a letter to the contracting officer's supervisor, the contractor described the contracting officer as an "arrogant jerk," "a bully," "a running sore of malcontent," and an individual who "won't change, without the pain and suffering he apparently needs."[24] After receiving the contractor's letter and the contracting officer's request to terminate the contract for the convenience of the government,[25] the supervisor reviewed the contract documents and, in an effort to resolve the problems, met separately with the contracting officer and the contractor. As a result of these meetings, the supervisor concluded that the business relationship between the parties was irreconcilable. He advised the contracting officer that he concurred in the decision to terminate the contract. The contract was terminated for convenience effective March 10, 1986. The contractor filed suit alleging that the termination decision was arbitrary and capricious and taken in bad faith (thereby entitling it to anticipatory profits).[26]

The court noted that the government may invoke the termination for convenience clause only when the circumstances of the bargain or the expectations of the parties have changed.[27] The court held that the deterioration in the business relationship changed the bargain *and* the expectations of the parties.[28] This was evident by the disparaging epithets used by the contractor and the lack of communication and cooperation between the parties.[29] The court also held that the contractor's unsatisfactory performance was further evidence of a change in the bargain and the expectations of the parties.[30] Accordingly, the court decided that the termination for convenience decision was not arbitrary, capricious, or in bad faith.

Practitioners should not read this decision too broadly. Disagreements and displeasure with the contractor may not be sufficient to sustain a termination for default or convenience.[31] The effect that the ruined business relations had on this contractor's willingness to improve its performance was critical to the holding. The court approved of, and gave substantial weight to, the efforts taken by the government to resolve the problems under this contract. These efforts included issuing notices to the contractor, affording the contractor an opportunity to improve its unsatisfactory performance, and arranging meetings with the contracting officer and the contractor. These measures, concluded the court, demonstrated that the contractor was treated fairly and reasonably.

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[20] Douglas R. Embrey v. United States, No. 444-88C (Cl. Ct. Jul. 17, 1989), 8 FPD ¶ 95.

[21] The court denied the government's motion to dismiss for failure to properly certify a claim. The contractor's claim for $600,000 was based on $34 per month, per property. The claim included, in addition to the properties managed prior to the termination, an estimated number of the properties the contractor would have managed for the remainder of the contract term. The contractor admitted that its claim was over-estimated. The court held that the claim was properly certified, because the underlying information needed to certify with precision was within the contracting officer's possession.

[22] *Embrey*, slip. op. at 2. HUD also complained of under-staffing of offices, non-payment of utilities and homeowner's association dues and unauthorized winterization of 28 properties.

[23] *Id.* These notices were provided in August and October 1985. The contractor was granted a total of 90 days to improve its performance.

[24] *Id.*

[25] The contract contained Federal Acquisition Regulation (FAR) clause 52.249-4 that provided for termination of the contract, in whole or in part, when it is in the government's interest.

[26] Before the Claims Court, the contractor also alleged that the termination resulted from its refusal to participate in illegal activity. The contractor alleged that the contracting officer requested it to falsify government forms, reports, inspections, and vouchers. It also contended that it was asked to file false reports against subcontractors. Although requested by the court, the contractor did not provide any evidence to substantiate its allegations. *Embrey*, slip. op. at 3.

[27] Torncello v. United States, 231 Cl. Ct. 20 (1982).

[28] *Embrey*, slip. op. at 8.

[29] *Id.* In holding that the circumstances of the bargain and the expectations of the parties were changed, the court apparently decided that the government is entitled to a minimal standard of courteous conduct and cooperation as part of its bargain and expectations. The court did not, however, set forth the parameters which it considered in arriving at its conclusion. It simply stated that the total deterioration of the business relationship and lack of cooperation constituted changed circumstances.

[30] *Id.*

[31] *See* Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987) (although citing inadequate performance, the government terminated the contract because it no longer wished to do business with the contractor; therefore, the termination for default was converted to a termination for convenience).

If business relationships are deteriorating between your command or agency and a contractor, document the efforts taken to restore a courteous and effective working alliance between the individuals responsible for the contract. The contracting officer and his or her legal counsel would also be prudent to document the effect that the disruptive discourse is having on contract performance. LTC Aguirre.

Legal Assistance Items

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

Estate Planning Note

Making Bequests of Personal Property

Some of the most difficult will drafting problems facing legal assistance attorneys involve making bequests of tangible personal property. A recurring challenge is to find a way for clients to make binding gifts of their personal property and yet retain the freedom to change these gifts without going through the formalities of revising their wills.

Fortunately, an effective solution to this drafting challenge exists if the client is domiciled in a state that has adopted the Uniform Probate Code (UPC). [32] A novel provision in the UPC permits testators to make binding gifts of tangible personal property items in a writing separate from their wills. [33]

The UPC personal property memorandum must comply with four basic requirements. [34] First, the memorandum cannot change specific dispositions made in the will. Second, the memo may distribute items of tangible personal property only and may not give money, evidence of indebtedness, documents of title, securities, or property used in a trade or business. [35] Third, the memo must describe the items with reasonable certainty. Finally, the memo must either be in the handwriting of the testator or signed by the testator.

Testators desiring to take advantage of the UPC personal property memo state that they will leave such a document in their wills. [36] A clause that might be used for this purpose is as follows:

> I give and bequeath all my personal and household effects of every kind [37] in such a manner as may be specified by me in any memorandum or memoranda signed by me directing the disposition of all or any part of this property. Any memorandum found later than 90 days after my death, however, shall be void. Any property given to a beneficiary who is not living at the time of my death and for whom no alternate beneficiary has been specified shall pass to my issue surviving me, per stirpes and not pursuant to any anti-lapse statute. If no memorandum is found within 90 days of my death, or if my memoranda or memorandum does not completely dispose of all of my personal property and household effects, then I give and bequeath all of such property, or the part not disposed of by the memoranda, to my issue surviving me, per stirpes.

An unusual feature of the UPC personal property memo is that it need not be in existence at the time the will is signed. In fact, the testator may leave more than one memo and these memos may be changed at any time after they have been prepared.

Although this affords testators maximum flexibility in controlling their bequests, it could result in ambiguous or inconsistent gifts. Thus, attorneys should counsel clients to combine their gifts in one memo and ensure that all of its dispositions are clear and consistent. [38] Testators should keep the personal property memorandum with their wills and review them every time the will is changed or reviewed.

Although the UPC memo is relatively simple and straightforward, there are some potential problems. The UPC does not address, for example, what happens if the property given in a memo is not owned by the testator at death. Because the memo is not technically a will, the special rules on ademption to cover this contingency may not apply. It is also not clear whether "anti-lapse" laws

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[32] The following states have adopted the Uniform Probate Code: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Utah, and Washington.

[33] Unif. Probate Code, 8 U.L.A. 2-513 (1979).

[34] A recent article discussing these requirements in depth is Moses, *Mountains, Molehills and Separate Memos Under the UPC*, Probate & Property Journal (September/October 1989) at 35.

[35] The definition of the kinds of property that can be given under a personal property memo may differ from state to state.

[36] Testators who include such a provision in their wills, however, should be careful to actually leave such a memorandum. For an example of the problems that can arise from the failure to leave such a memorandum after making reference to one in the will, see Matter of Schmidt's Estate, 638 P.2d 809 (Colo. 1981).

[37] The will should define the terms "personal property" and "household effects." For example, these terms could be defined to include but not be limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, clothing, vehicles, boats, and all policies of property insurance associated with such property.

[38] Some of the problems that could result from making multiple memos are addressed in Averill, *Uniform Probate in a Nutshell* (2d ed. 1978), at 93-94.

would apply when an intended beneficiary has not survived the testator. One approach to resolve this potential problem is simply to name alternate beneficiaries for the dispositions made in the memo. The UPC memo is relatively new; therefore, attorneys should watch for case law addressing these and other potential problems.

Testators in states that have not adopted the UPC have three basic alternatives available to distribute their personal property. The safest approach is to make specific provision for all items of personal property in the will. This approach, however, can be quite cumbersome and will require redrafting the will to change beneficiaries or to remove property that has been sold or destroyed.

One way to handle this problem is to leave only particularly valuable items by will and then give the remaining personal property to one beneficiary, such as a spouse or the executor. The testator can then prepare a nonbinding letter or memorandum asking this beneficiary to give the property to certain persons. The problem with this approach is that litigation may result if the beneficiary or executor does not make the distribution described in the letter.

This approach is perhaps most appropriate when it is relatively clear that the beneficiary will follow the testator's wishes. Even in these cases, however, testators should insert a statement in their wills clarifying that the beneficiary or executor has the complete discretion to make the specified gifts and that the failure to follow the list will not give rise to any claim against either the beneficiary or the estate.

The final solution for persons who do not reside in UPC states is to use the doctrine of incorporation by reference. Under this doctrine, which is recognized in most states, [39] a separate list or letter is used to make binding gifts of personal property. The separate writing must exist at the time the will is executed, and the will itself must refer to the writing.

Drafters should rarely rely on the doctrine of incorporation by reference as a technique for making gifts of personal property. Unlike the UPC personal property memo, there is no flexibility in altering the separate writing after the will has been executed. Moreover, this approach has generated litigation and offers few advantages to merely making dispositions in the will itself. MAJ Ingold.

Tax Notes

Inform IRS of Address Changes

Thousands of soldiers who move every year will give notice of their new address to the postmaster, friends, and creditors, but few will even think about notifying the Internal Revenue Service (IRS). A flurry of recent Tax Court cases indicates that these soldiers could be making a serious mistake by ignoring the IRS.

Unless they anticipate a refund, most taxpayers don't expect to be contacted by the IRS. The IRS, however, may write to a taxpayer to request additional information, set up interview dates for an audit, or propose adjustments to an income tax return. The failure to respond to these communications could lead to deficiency notices, and if these are ignored, the IRS could assess additional taxes.

The IRS is required to send deficiency notices to the taxpayer's "last known address." [40] A notice is considered valid when mailed to the last known address, even if the Postal Service returns it to the IRS as undeliverable. [41] After the date of mailing, a taxpayer has 90 days to respond to a statutory notice of deficiency. The timely filing of a petition by the taxpayer is a jurisdictional requirement that neither the parties nor the courts can waive. [42] It is critical, therefore, for taxpayers to always keep the IRS aware of address changes.

A recent case held that a taxpayer is required to provide the IRS with clear and concise notification of a new address if it is different from the address shown on the most recent income tax return. [43] The taxpayer does not, however, satisfy this burden by showing a new address on some correspondence or on a request for an extension. [44] Rather, the taxpayer should send a specific notice advising the IRS of the new change.

The instructions for the 1040 indicate how a taxpayer should inform the IRS of address changes. Taxpayers should notify the District Director where they filed their last tax return of any address change. A post card or letter containing the taxpayer's name, new address, and taxpayer identification number will be sufficient to put the IRS on notice of the change. It is good practice to mail this correspondence return receipt requested to prove that notice of the new address was properly given.

While the IRS is not required to "hunt down" taxpayers, [45] courts will attribute to the IRS information

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[39] Louisiana, New Jersey, and New York do not afford general recognition to the doctrine of incorporation by reference. *See generally* Atkinson, *The Law of Wills*, § 80.

[40] I.R.C. § 6212(b) (West Supp. 1989); McCormick v. Commissioner, 55 T.C. 138 (1970).

[41] Monge v. Commissioner, 93 T.C. 4 (1989).

[42] Eaddy v. Commissioner, 88 T.C. 1063 (1987).

[43] Abeles v. Commissioner, 91 T.C. 1019 (1988).

[44] Monge v. Commissioner, 93 T.C. 4 (1989); Abeles v. Commissioner, 91 T.C. 1019 (1988). The IRS may, however, rely on an address listed on information returns (Form 1099's) filed by a bank and an employer if these forms were filed after the taxpayer's federal income tax return. Blair v. Commissioner, 57 T.C.M. (CCH) 1396 (1989).

[45] Sierra Vista, Inc. v. Commissioner, 62 T.C. 367 (1974), *aff'd*, 538 F.2d 334 (9th Cir. 1976).

that they know or should know about a taxpayer's last known address. [46] Thus, an address will be considered to be available to the IRS if it could be obtained by a computer generation of a taxpayer's identification number. [47] Moreover, an IRS agent will be held responsible for knowing the address used by other agents in the district for communicating with the taxpayer. [48]

Taxpayers should expect a time lag before their notice of a new address is posted on IRS computer files. The Tax Court has held that, during this period, notice mailed by the IRS to the old address is valid, even if the IRS confirms receipt of the address change notification. [49] MAJ Ingold.

Recent Tax Court Decision Gives Relief To Separated Spouses in Community Property States

A potentially harsh tax rule requires spouses residing in community property states [50] to pay federal income taxes on one-half of all community property realized during the tax year, even if a separate return is filed. [51] According to a recent Tax Court decision, however, spouses from community property states do not have to report one-half of the other spouse's income if a separation order dissolving the marital community has been issued. [52]

In *Abrams v. Commissioner* a Texas couple lived together until June 1984. They filed for a petition for divorce and, on September 11, 1984, a district court issued temporary orders. The orders mandated, *inter alia*, that the husband pay the wife child support and enjoined the parties from taking 26 specific actions, such as communicating by telephone and entering the residence of the other party.

The major issue in the case was whether the wife should have reported one-half of all income earned by her and her husband during 1984, including that period after the date of the order. The Tax Court, after examining the nature of the order, concluded that it effectively dissolved the community of marriage. Accordingly, the court held that income earned by the husband after the date of the order was separate property and is taxable entirely to him.

The result reached in *Abrams* will not apply in every case involving a separation of spouses in a community property state. The court made clear that it is necessary to look at the nature of the separation instrument itself and all the other facts and circumstances to determine if there is a complete breakdown of the marital community.

Even if the facts do not show a severance of the marital relationship, separated spouses may turn to section 66(a) [53] of the code for relief. This section relaxes the rules for reporting the income of another spouse if the spouses are separated for the entire year, file separate returns, and do not make meaningful contributions to each other's support. [54] MAJ Ingold.

Consumer Law Note

Truth in Lending

Several recent changes to the Truth in Lending Act [55] become mandatory requirements for lenders during fall 1989. These changes are found in the Fair Credit and Charge Card Disclosure Act of 1988 [56] and in the Home Equity Loan Consumer Protection Act of 1988. [57]

Credit Card and Charge Card Disclosures. The Fair Credit and Charge Card Disclosure Act (FCCCDA) requires disclosure of key items of information in applications and solicitations for *open-end* credit and charge card accounts. These disclosure requirements force credit and charge card issuers to provide comprehensive information to consumers, thereby leading to more informed use of credit. The new rules vary and provide separate disclosure requirements for direct mail applications and solicitations, telephone solicitations, and applications and solicitations available to the general public through distribution in magazines and catalogs ("take-ones"). The FCCCDA also requires card issuers to make required disclosures at the time cards are renewed.

The FCCCDA departs significantly from past truth in lending laws through a preemption provision. The FCCCDA application, solicitation, and renewal disclosure provisions supersede any provision of state law

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[46] Abeles v. Commissioner, 91 T.C. 1019 (1988).

[47] *Id.*

[48] Pyo v. Commissioner, 83 T.C. 626 (1975).

[49] Ward v. Commissioner, 92 T.C. 60 (1988).

[50] The states treated as community property states by the IRS are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, North Carolina, Oregon, Texas, Washington, West Virginia, and Wisconsin.

[51] United States v. Mitchell, 403 U.S. 190 (1971).

[52] Abrams v. Commissioner, 57 T.C.M. (CCH) 1433 (1989).

[53] I.R.C. § 66 (West Supp. 1989).

[54] I.R.C. § 66(a) (West Supp. 1989). Spouses who have not been separated for an entire year may be able to take advantage of I.R.C. § 66(c). This section provides that an individual need not include the community income of a spouse if the individual did not know of, or have reason to know of, the community property income of the other spouse and that, under all of the circumstances, it would be inequitable to include this income in the individual's gross income.

[55] 15 U.S.C. §§ 1601-1667 (1982).

[56] Pub. L. No. 100-583, 102 Stat. 2960 (to be codified at 15 U.S.C. §§ 1610, 1637, 1640, 1647).

[57] Pub. L. No. 100-709, 102 Stat. 4725 (to be codified at 15 U.S.C. §§ 1637, 1665, 1647).

concerning disclosure in connection with any credit or charge card application or solicitation. Usually, truth in lending legislation has supplemented state law in the area, rather than supplanted it. The FCCCDA, however, has a few exceptions to preemption. States may use their fair trade practices laws to enforce the disclosure requirements of the FCCCDA. Preemption is not applicable to state retail installment sales acts or to substantive, rather than procedural, consumer protection laws. Additionally, the FCCCDA does not preempt state anti-discrimination laws.

The Federal Reserve Board has amended Regulation Z [58] to implement the FCCCDA changes. [59] Compliance with all new requirements was optional until 31 August 1989. Beginning 31 August, all disclosure requirements are mandatory, with the exception of requirements for applications and solicitations available to the general public; disclosure requirements for these "take-ones" become mandatory 29 November 1989.

The changes to Regulation Z also differentiate between disclosures for credit cards and disclosures for charge cards. As defined by Regulation Z, credit cards are used to obtain credit that is subject to a finance charge. Charge cards, on the other hand, have no finance charge, but the lender ordinarily imposes a transaction fee for each use of the card. Depending upon the type of card involved, the issuer has specific disclosures to make.

Home Equity Loans. The Home Equity Loan Consumer Protection Act (HELCPA) requires creditors to provide comprehensive disclosures to consumers at the time they apply for home equity lines of credit. Like the FCCCDA, the HELCPA applies to open-end consumer credit. The HELCPA, however, specifically applies to loans secured by consumers' principal dwellings. Although creditors first had the option of complying with the HELCPA on 7 June 1989, beginning 7 November 1989, compliance will be mandatory.

Unlike the previous Truth in Lending Act definitions, the HELCPA defines "principal dwelling" as including second homes or vacation homes. This new definition of "principal dwelling" may be confusing, because it applies only to the *disclosure* requirements of the HELCPA. [60] For purposes of *rescission* of a home equity loan, the previous rules under the Truth in Lending Act and Regulation Z are still effective. [61] The definition of "principal dwelling" in a rescission action continues to exclude second homes and vacation homes. Accordingly, consumers may rescind only those home equity loans that are secured by their principal dwelling place.

The HELCPA has a number of disclosures that a creditor must make, and the disclosures vary depending upon whether the home equity plan is based on a fixed interest or variable interest loan. Creditors must make several general disclosures in all home equity loans. They must advise a consumer that credit is secured by the consumer's dwelling and that default may result in loss of the dwelling. Creditors must give the conditions to which the credit plan is subject. Finally, creditors must notify a consumer if the creditor will have the right to accelerate an outstanding balance, prohibit additional extensions of credit, or reduce the plan's credit limit.

The HELCPA has some substantive advertising rules as well. Any advertisement that refers to a periodic payment amount for an open-end credit plan must include full disclosure of all information specified in Regulation Z, including loan fees and an estimate of the aggregate of all other fees. The HELCPA prohibits advertising "free money" in connection with home equity loans. Advertisements mentioning the deductibility of interest for tax purposes must not be misleading. If an advertisement mentions minimum monthly payments for a loan plan that has a balloon payment, the advertisement must disclose the existence of the balloon provision.

Attorneys who have questions about a creditor's compliance with Truth in Lending Act provisions such as the FCCCDA or the HELCPA should look first to Regulation Z for a comprehensive discussion and lists of the various disclosure requirements. The Federal Reserve Board has wide discretion in implementing the provisions of the Truth in Lending Act. Because Regulation Z is so comprehensive, researchers should not rely exclusively on the statute for guidance. MAJ Pottorff.

[58] 12 C.F.R. § 226 (1988).

[59] Credit and Charge Card Disclosures, 54 Fed. Reg. 13681 (Apr. 6, 1989).

[60] Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, § 2, 102 Stat. 4725.

[61] *See* Home Equity Disclosure and Substantive Rules, 54 Fed. Reg. 24,670, 24,672 (June 9, 1989).

Claims Report

United States Army Claims Service

The Sum Certain Requirement and Final Actions on Tort Claims

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Sum Certain

Although the sum certain requirement is not set forth in the statutes [1] that permit tort claims against the U.S. Army, it is a requirement of Army Regulation (AR) 27-20, the Army's implementing regulation, [2] and is an essential element [3] of a claim. Moreover, if a sum certain is not included in a claim, the failure to satisfy this requirement has jurisdictional consequences. Unless the claim includes a sum certain specified by the claimant or the claimant's legal representative, the claims settlement or approval authority [4] lacks jurisdiction to take action on the claim. [5] The correct processing of any claim that fails to include a sum certain requires the claims officer to consider the following issues.

The requirement for the claimant to specify a sum certain must be satisfied within the two-year statute of limitations. [6] When a claim is received that does not include a sum certain, the claims judge advocate or claims attorney must inform the claimant in writing of the requirements that it be a sum certain and that it be provided within the statute of limitations period. [7] In any case in which the running of the statute of limitations is imminent, the claimant or the claimant's attorney should be telephonically contacted and instructed to immediately file a proper claim with the nearest Army activity (e.g., recruiting station, reserve armory, military attache). These instructions should be confirmed in writing and a copy should be retained for office records.

Proper presentment of a claim triggers the beginning of the six-month period in which the agency may attempt administrative settlement of the claim. A claim may be amended at any time prior to final administrative action or the filing of suit under the Federal Tort Claims Act (FTCA), [8] in which case the six-month period starts over again. [9] A claim must be properly presented, however, before it is amenable to amendment. Thus, where a claim has been presented without a sum certain, specification of the sum certain in response to a deficiency notice from the agency does not constitute an amendment of the claim. The six months during which the claimant may not file suit commences when a sum certain is presented in a timely manner. [10]

The sum certain requirement is jurisdictional and must be met prior to final administrative action. Therefore, a claim filed on Standard Form 95 that states: 1) that the amount is to be determined later; 2) that the damages are continuing; or 3) that the amount of personal injury will be determined later, should be rejected in writing, with a copy retained for claims office records.

The problem case is the claim that is presented at the very end of the limitation period and the lack of a clearly stated sum certain is discovered after the statute of limitations has run. Prior to denying a claim on the basis that no sum certain was presented within the statute of limitations, all documents furnished by the claimant should be carefully examined to determine if a sum has been stated or if any attachments, such as bills or invoices, contain a sum certain. Federal case law generally supports the view that writings, furnished to the agency prior to the end of the statute of limitations period, which specify dollar damages related to the claim are sufficient notice to the agency for the purposes of

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[1] There is no such requirement in any of the five basic claim statutes. *See* 28 U.S.C. § 2672 (1982) (Federal Tort Claims Act); 10 U.S.C. § 2733 (1982) (Military Claims Act); 32 U.S.C. § 715 (1982) (National Guard Claims Act); 10 U.S.C. § 2737 (1982) ("Non-Scope Act"); 10 U.S.C. § 2734 (1982) (Foreign Claims Act).

[2] Army Reg. 27-20, Legal Services: Claims, para. 2-10d(1)(a), Glossary (15 Feb. 1989) [hereinafter AR 27-20]. *See also* 28 C.F.R. § 14.2.

[3] AR 27-20, Glossary.

[4] A claims settlement authority is one who can take final action on a claim; that is approve, deny, or make a final offer. A claims approval authority can only approve a claim but cannot deny the claim or make a final offer. Such approval is subject to the execution of a settlement agreement where the claim is for personal injury, death, or less than the full amount claimed is approved. *See* AR 27-20, para. 2-21a, Glossary.

[5] Federal courts have uniformly upheld the sum certain requirement, with one exception. Collins v. United States, 626 F. Supp. 536 (W.D. Pa. 1985) (requirement is a mere formality). Claimant's use of qualifying words, e.g., "approximately $1,000," will not make their demand for a sum certain defective but the claim will be limited to that amount. *See* cases listed in the FTCA Handbook, I-B1 and Appendix E, in the USARCS Claim Manual.

[6] *See supra* note 1.

[7] AR 27-20, para. 4-9e(4).

[8] AR 27-20, para. 10f(4); 28 C.F.R. § 14.2(b)(4).

[9] 28 C.F.R. § 14.1(c).

[10] 28 U.S.C. § 2675(a) (1982).

the sum certain requirement. [11] If a sum appears in writing (previous oral presentation of an amount is insufficient) in the documents submitted by the claimant, the claimant should be informed that the claim will be treated as a demand for that amount. Adoption of this amount as the "sum certain" establishes the claim as timely and properly presented. This demand amount will also establish who within the Army has jurisdiction to act on the claim. The claimant may, however, prior to final action or filing suit, amend the amount claimed. Only if no sum certain can be discovered should a claim be denied as indicated above.

Final Action

Claims settlement authorities' monetary level of jurisdiction to take final action is specified in AR 27-20 [12] and is directly related to the sum certain in any particular claim. In the absence of the claimant's agreement to a lesser sum certain, claims settlement authorities have no authority to take final action on any claim in which the sum certain exceeds their monetary authority to take final action. For example, where the claimed amount is "$10,000 plus continuing medical bills" and there is no agreement by the claimant that the claim ultimately will not exceed $15,000, final action may not be taken by an area claims office; the claim should be forwarded to the next higher settlement authority for action. In most cases, this will be USARCS.

The term "final action" as used herein means a final offer or denial. Obviously, where a claimant agrees to an amount within the approval jurisdiction on a claim properly and timely presented, no problem should arise concerning the right of the claimant to bring suit or appeal after proper final action has been taken. Not only must a settlement authority take final action only on claims within his or her monetary jurisdiction, but also the claimant must be informed of what further remedies are afforded or the final action is a nullity.

Under the FTCA, this means that the claimant must be informed of his or her right, by certified or registered mail, to bring suit in an appropriate federal district court not later than six months from the date of mailing the final action. [13] The claimant should be informed that reconsideration may be requested in lieu of filing suit, provided the request is received not later than six months from the date of mailing of the notice. [14] This is not a statutory requirement, but is designed to give the claimant every opportunity to prove the claim and avoid a suit. Filing a request for reconsideration restarts the six-month period in which the claimant may not file suit. [15] Upon receipt of such a request, the recipient should inform the claimant in writing that the requirement to file suit within six months is lifted. The settlement authority should reinvestigate, where indicated, and, if warranted, reconsider the final offer or denial. If reconsideration is not warranted, the file should be forwarded to Commander, USARCS, with a statement as to why reconsideration should not be granted. If USARCS concurs, the claimant is so advised and again informed that any suit must be brought not later than six months. [16] An untimely failure to file suit or request reconsideration deprives both the federal agency and the courts of jurisdiction and the claim can not be considered further. [17]

Under the MCA, there is no judicial remedy afforded by statute, but there is a right of appeal. [18] Failure to notify the claimant in writing of appellate rights and procedures would invalidate a final action. Upon receipt of an appeal, the settlement authority should reinvestigate, where indicated, and, if warranted, grant the appeal and attempt to settle on the claim if within his or her monetary jurisdiction. If the appeal is not granted, the claim should be forwarded to higher authority for action with a statement detailing the reasons for denying the appeal. [19] In MCA claims, it is important that final action be taken, where indicated, by the area claims office or command claims service on all claims for a claimed amount within their monetary jurisdiction prior to forwarding the claim to USARCS for action. This will avoid sending appeals on small claims to The Judge Advocate General for action.

The decision on a final offer or a denial is required to be the personal decision of the settlement authority and cannot be delegated. [20] This should be evidenced by the signature of the settlement authority either on the notice to the claimant or the action. The notice to the claimant should contain an adequate explanation as to the reasons for the final action unless an explanation has been furnished orally. The content of the explanation should be sufficient to permit the claimant to decide whether to request reconsideration or to appeal and furnish a

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[11] *See* FTCA Handbook I-B, e-f, USARCS Claims Manual.

[12] Generally, area claims offices have settlement authority of $15,000 and chiefs of Command Claim Services have settlement authority of $25,000 (AR 27-20, para. 3-14a(4)(5); 4-12a(1)(d) and (2); 612(c)(3). *See also* AR 27-20, para. 10-15, for Foreign Claims Act claims settlement authority of foreign claims commissions.

[13] 28 U.S.C. § 2675(a) (1982), as implemented by 28 C.F.R. § 14.9 and AR 27-20, para. 4-9i; Boyd v. United States, 482 F. Supp. 1126 (W.D. Pa. 1980).

[14] AR 27-20, para. 4-12a(d)(3).

[15] 28 C.F.R. § 14.9(b).

[16] AR 27-20, para. 4-14.

[17] *See* FTCA Handbook II A1 and 2.

[18] 10 U.S.C. § 2733(a) (1982), as implemented by AR 27-20, para. 3-16.

[19] AR 27-20, para. 3-17.

[20] AR 27-20, para. 1-5f.

credible basis for doing so. [21] Adherence to the procedures discussed in this article should help avoid jurisdictional problems and assist in the timely and more economical disposition of claims.

[21] AR 27-20, para. 2-26.

Claims Notes

Personnel Claims Notes

Importation of African Elephant Ivory

The U.S. Army Claims Service recently received a message from the Military Traffic Management Command regarding the importation of African elephant ivory into the United States. In accordance with the provisions of paragraph 11-5h, Army Regulation 27-20, claims for ivory imported in violation of the terms of the policy stated in the message will not be paid. Payment of claims for lost or damaged African elephant ivory that is imported in conformity with one of the exceptions to the policy may be paid under the normal rules for the evaluation, adjudication, and settlement of personnel claims. The text of the message follows:

"071920Z Aug 1989
FM Cdr, MTMC Falls Church VA //MTPP-QO//

Subject: Information Message - Import Ban on African Elephant Ivory

1. The U.S. Department of the Interior has established a ban on the importation of African elephant ivory from all countries worldwide effective 9 Jun 89. This policy implements the African Elephant Conservation Act.

2. This ban has several exceptions:

A. Legally taken sport elephant trophies, with proper export documentation from the country of origin, may be imported into the U.S.

B. Shipments of ivory consigned to a carrier for transportation on or before 9 Jun 89, will be allowed to be imported into the U.S.

C. DOD members who legally possessed ivory and shipped it overseas as part of a personal property shipment prior to 9 Jun 89, may import it back to the U.S. without any restriction. There is no expiration date to this policy. This policy also applies to ivory shipped overseas after 9 Jun 89. However, members shipping ivory overseas after 9 Jun 89, must complete customs form 4457 (Registration for Personal Effects Taken Abroad) prior to export. This form must be presented to Customs upon importing the ivory back to the U.S.

3. Ivory purchased overseas prior to 9 Jun 89, that does not meet any of the exceptions described above, may not be imported into the U.S.

4. African elephant ivory banned under this law will be subject to seizure upon entering the U.S. Violators may also be subject to a $5000 penalty.

5. HQMTMC POC is Mr. Don Dette (AV) 289-1710, (703) 756-1710, HQDA POC is Mr. John Pierce, (AV) 224-4081, (202) 694-4081."

COL Gravelle.

Recording "Notice Applicable" and "PCR Deducted" in the Personnel Claims Management Program

In reviewing the U.S. Army Claims Service database, we note that a number of claims offices are not entering in the computerized record whether notice is applicable to a particular personnel claim, or whether lost potential carrier recovery was deducted. USARCS uses the information entered in these two fields to compile statistical reports to gauge the effectiveness of the Personnel Claims system as a whole and to point the way toward improvements. At present, we cannot use these reports because of the omitted data.

Briefly, as indicated on pages 22-23 of the Revised Documentation for Personnel Claims Management Program (May 1989, with change 1), whenever the claimant was required to provide timely notice to a carrier or insurer, the "Notice Appl" field should be marked "yes." Similarly, whenever the claims office deducts lost potential carrier recovery on a claim, the "PCR Ded" field should be marked "yes" and the amount entered in the "Amt Deducted" field. Claims personnel are requested to review their procedures to ensure that this data is being accurately entered. Mr. Frezza.

Personnel Claims Recovery Notes

Timely Notice Requirements on Multiple Deliveries of Household Goods

Occasionally, more than one delivery is made on a shipment of household goods. For each partial delivery made on a shipment, exceptions are noted on the DD Form 1840, Joint Statement of Loss or Damage at Delivery, for items delivered at that time. For loss or damage discovered after a partial delivery, DD Form 1840/1840R, Notice of Loss, must be turned into the claims office within 70 days of that partial delivery.

Although more than one DD Form 1840R can be completed and dispatched, a claimant may turn in a single DD Form 1840R listing later discovered damage for several partial deliveries. There is no timely notice on an item, however, if the DD Form 1840R is not dispatched within 75 days of the date *that* item was delivered.

Often, a claimant will turn in a single DD Form 1840R more than 70 days after the first partial delivery, listing damage to items delivered on two or more occasions. There is no timely notice on the items received in the first partial delivery, and deduction of lost potential carrier recovery on these items is appropriate. Ms. Brunk.

When Carriers Base Liability on the Weight of a Bundle

On shipments where liability is based on the Joint Military-Industry Table of Weights, a frequent dispute arises as to the use of the "bundle" weights. Items suitable to be packed in bundles and listed as such on the inventory are brooms, rakes, shovels, fishing poles, etc. Inventories frequently reflect such odd items as a vacuum cleaner, suitcase, chair, and television as packed in bundles. As liability based on bundle weight is much lower than liability based on an appropriate item or carton weight, carriers offer to pay liability based on bundle weights, contending that the inventory describes the item as packed in a bundle.

The following is a suggested response that can be used to rebut carriers who argue for inappropriate bundle weights.

> The items listed on the inventory as being part of a bundle were not suitable items to be included in a bundle. Only items such as brooms, rakes, shovels, fishing poles and similar items are to be packed in bundles. Accordingly, you have been charged the correct item weight, or the weight of an appropriate-sized carton, and your offer is unacceptable.

Ms. Schultz.

Management Notes

New Claims Offices

The Staff Judge Advocate, 32d Army Air Defense Command (AADCOM), has opened two branch offices. Effective 1 October 1989, these offices have been designated as claims processing offices with approval authority and assigned the following office codes.

32d AADCOM, Babenhausen..... E07
32d AADCOM, Eifel..... E08

These offices will operate under the supervision of the 32d AADCOM area claims office. COL Lane.

Enhanced Automation Programs

In May 1989, an enhanced version of the Personnel Claims Data Management Program (Version 3.0) and a revised documentation booklet were mailed to claims offices.

In August 1989, an update to the Personnel Claims Data Management Program (Version 3.10) and selected revised pages to the documentation were sent to claims offices. At the same time, an enhanced Tort & Special Claims Data Management Program (Version 3.00) and a revised documentation booklet were also distributed.

The enhanced programs contain a number of new features, including faster cursor moves, a calendar, a calculator, and error checks. The tort program also contains some changes in category codes and transaction codes. The new documentation provides more guidance on data entry, with the goal of having better data uniformity and integrity. The new documentation must be read carefully by all users of the programs.

Any office that did not receive the new programs and booklets should contact the USARCS Information Management Section, Mr. William Valenta, AV 923-2031. COL Lane.

Labor and Employment Law Notes

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

Personnel Law Developments

Civilian Employee Drug Testing

On 29 August 1989, the Court of Appeals for the D.C. Circuit assessed the constitutionality of the Army's civilian drug abuse testing program. *National Federation of Federal Employees v. Cheney*, 1989 WL 99472 (D.C. Cir.).

In 1986 the Army instituted a random testing program for approximately 9,000 employees in designated positions. The designated positions are in the aviation, security (guard and police), nuclear and chemical surety (personnel reliability program), and alcohol and drug abuse prevention and control program (ADAPCP) career fields.

In applying an analysis similar to that laid out by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner v. Railway Labor Executives Association*, 109 S. Ct. 1402 (1989), the court determined that random, mandatory urinalysis is constitutional for employees who occupy aviation, police/guard, and ADAPCP direct service positions. The court found the Army demonstrated a compelling safety interest in ensuring that its civilians who fly and service its aircraft are not impaired, noting that a single drug-related relapse by any covered em-

ployee could have irreversible and calamitous consequences. In assessing the safety and security interests justifying testing of civilians in law enforcement positions, the court noted the diminished expectations of privacy by virtue of their employment in a high-security, military context and concluded that mandatory, random urinalysis testing constitutes a modest additional privacy intrusion and cannot be deemed unreasonable. In upholding the testing of ADAPCP staff employees whose duties involve direct contact with clients, the court commented that such employees should reasonably expect to provide extraordinary assurances of trustworthiness and probity to ensure fidelity to their mission.

The court, however, was unable to determine the reasonableness of testing civilians who occupy chemical and nuclear surety positions within the personnel reliability program, because it appears that among the employees in the program are secretaries, engineering technicians, research biologists, and animal caretakers. It was not apparent to the court that all these employees have, as part of their assigned duties, access to highly dangerous chemical and nuclear material and sensitive information. Thus, the court concluded that it was not clear that compelling safety and security interests would be advanced by urinalysis testing. The court remanded the issue to the district court for additional evidence on the justification for including these people in the drug testing program.

Finally, the court ruled that random testing of drug testing laboratory workers and those in the specimen chain of custody is an unconstitutional search, because the employees' privacy expectations outweigh the Army's legitimate interests in detection of illegal drug use. The court determined that, absent either a clear, direct nexus between the duties of a laboratory technician or other employees in the chain of custody and the nature of the feared harm, or absent any compelling reason to expect that drug use will result in misplaced sympathies for their responsibilities, testing these employees lacks the necessary causal connection between the employees' duties and the feared harm.

A decision to seek certiori is pending. Because a stay has not been requested, Army activities have been directed to discontinue random testing of laboratory workers and other employees in the specimen chain of custody, unless that employee performs ADAPCP duties that subject him or her to testing (e.g., direct contact with clients).

MSPB Affirms Removal of Alcohol/Drug Addict

To prove an affirmative defense of handicap discrimination, an employee who is alcohol or drug addicted must prove not only the addiction, but also a causal connection between the addiction and the basis for the adverse action. In *Seibert v. Treasury Department*, 41 M.S.P.R. 133, 89 FMSR 5230 (1989), the employee was removed for theft of government funds. At the MSPB hearing he proved that he was addicted to alcohol and drugs, but the MSPB upheld the removal because he failed to prove the causal relationship of his addiction to the theft. The MSPB held that, in order to prove that he was a qualified handicapped individual entitled to accommodation, the employee must prove that he was so impaired by alcohol or drug intoxication at the time of his misconduct that he lacked control over his actions. General drug or alcohol dependency is not a defense to adverse action for willful acts of misconduct, even if the employee shows that he generally suffered impaired judgment due to his addiction.

Indefinite Suspensions

An employee may be indefinitely suspended based upon reasonable cause to believe that he has committed a crime for which a sentence of imprisonment may be imposed. The suspension will normally be based upon an indictment. The purpose of the suspension is to allow an examination into the misconduct and not to punish the employee. Although the suspension is for an indefinite time, its termination must be specified based upon some future event. The MSPB has upheld suspensions in effect until disposition of the criminal charges or until sufficient evidence becomes available either to return the employee to duty or to support an administrative action against the employee. An indefinite suspension proposal letter should specify all three conditions for termination of the indefinite suspension.

In *Lund v. DoD*, 41 M.S.P.R. 115, 89 FMSR 5226 (1989), the board reversed an indefinite suspension upon dismissal of an indictment, even though the government appealed the dismissal. The board found that the suspension was based solely on the indictment and that when the indictment was dismissed, there was nothing outstanding to support a belief that a crime had been committed. The dismissal disposed of the charges. In the decision, the board left open the question of whether the result would have been the same if the government had sought a stay of the dismissal.

In *Engdahl v. Navy*, 40 M.S.P.R. 660, 89 FMSR 5191 (1989), the board held that an indefinite suspension may continue through the notice period of a removal action if the agency acts promptly after the disposition of charges to bring the action. The notice of proposed suspension advised the employee of the possibility of further administrative action. The employee pleaded guilty and *nolo contendere* to the charges. The agency proposed removal sixteen days after the charges were resolved. The board found that the sixteen-day period was reasonable in view of the agency's explanation of the delay. The board distinguished the case from *Hernandez v. Department of Justice*, 35 M.S.P.R. 669 (Dec. 31, 1987) in which a 60 day period was held to be an unreasonable delay.

No MSPB Jurisdiction Over Temporary Promotions

Employees temporarily promoted to higher graded positions have no MSPB appeal rights for their return to their previous positions, even if the temporary promotion lasted several years. *Phipps v. HHS*, 767 F.2d 895 (Fed. Cir. 1985), and *Boswell v. Army*, 40 M.S.P.R. 521, 89 FMSR 5179 (1989).

Miscellaneous

The MSPB upheld the terms of a settlement agreement against an employee removed for inability to perform duties due to a medical condition. *Monahan v. U.S. Postal Service*, 41 M.S.P.R. 153, 89 FMSR 5236 (1989). In settlement of the initial appeal of the removal, the

agency agreed to reinstate the employee, provided that he would perform normal duties on a regular basis. If the employee was not able to perform his duties, the agency would reissue the decision letter. The employee waived the thirty-day notice period of the reissued letter, but retained his appeal rights. The employee performed full duties for five days before requiring sick leave. The employee provided a doctor's statement that he required light duty because of his condition. Rather than grant light duty, the agency reissued its removal decision letter. The MSPB rejected the employee's argument that he fulfilled his obligation under the settlement agreement by returning to duty for one full day. The MSPB interpreted the agreement as a requirement for performance of his full scope of duties on a regular, ongoing basis. The board also held that the employee did not prove his affirmative defense of handicap discrimination.

In *Lamb v. Navy*, 41 M.S.P.R. 79, 89 FMSR 5220 (1989), the MSPB declined to issue an order to enforce a previous final order. The agency removed the employee due to her unavailability for work due to a medical condition. The MSPB initially upheld the removal, but EEOC found handicap discrimination. The board concurred in EEOC's decision and ordered reinstatement with back pay. The agency cancelled the removal and attempted to accommodate the employee's handicap by assigning her to other positions but could not find a suitable position. The Navy declined to provide back pay to the employee, because she was not ready, willing, and able to work for that time period. The MSPB noted the agency's accommodation efforts and found that the employee did not show that her medical condition could be accommodated. As a reasonable accommodation, the agency is required to consider reassignment, but it is not required to create a position where none exists. Reasonable accommodation may require temporary assignment to light duty, but it does not establish an entitlement to permanent light duty if the employee's handicap is permanent. The MSPB found that the agency could not accommodate the handicap and that the employee was not entitled to back pay because she was not ready, willing, and able to work for that time period.

Exhaustion of Administrative Remedies

Assistance requests to the Office of Special Counsel for possible prohibited personnel practices must be made prior to judicial review according to the court in *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989). The employee unsuccessfully tried to get his position upgraded. The employee then applied for promotion, but was not selected. He filed an EEO complaint, which was decided in favor of the agency. In court, he challenged the classification decision. The court found that improper classification can violate merit system principles and that could be a prohibited personnel practice. OSC could have provided administrative remedies; therefore, judicial review was not appropriate. The court also rejected the employee's *Bivens*-type claim of a violation of constitutional rights, finding that he was limited to the scheme of statutory remedies under the Civil Service Reform Act.

Labor Law Developments

Mailing Addresses

In *FLRA v. Department of Treasury*, 1989 WL 104258 (D.C. Cir.), the court held that agencies may not provide lists of names and home mailing addresses of bargaining unit members to federal sector labor unions. While the court deferred to the FLRA's interpretation of 5 U.S.C. § 7114(b)(4), that disclosure is necessary for the collective bargaining process, the court found that disclosure violates the Privacy Act. Disclosure of information under section 7114(b)(4) is required to the extent not prohibited by law. The Privacy Act prohibits disclosure unless release of the information is required under the Freedom of Information Act or release is made pursuant to a routine use. Relying upon *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), the court found that employees' expectation of privacy outweighed the union's interest in disclosure. The court also found that OPM regulations do not establish a routine use that encompasses disclosure of mailing lists to unions.

Supervisor Bargaining Units

In *Department of Energy v. FLRA*, 880 F.2d 1163 (10th Cir. 1989), the court held that 5 U.S.C. § 7112 excludes supervisors from bargaining units, except as authorized by 5 U.S.C. § 7135 for units that have historically or traditionally represented supervisors. The court overturned an FLRA ruling that included foremen in a bargaining unit with non-supervisory prevailing rate employees. The court held that a section 7135 unit may be composed only of supervisors.

Contracting Out

Federal employees and unions lack standing to seek judicial review of agency decisions to contract out. *NFFE v. Cheney*, Civ. No. 88-5271, 27 GERR 1144, 1989 WL 98721 (D.C. Cir. August 25, 1989). Parties may bring suit only if they fall within the zone of interests that is protected by law or specific constitutional guarantees. The union based its challenge on its interest under OMB Circular A-76 to save federal jobs. Under the facts before the court, the operative laws were the Budget and Accounting Act of 1921, the 1979 Office of Federal Procurement Policy (OFPP) Amendments, and the 1987 Defense Authorization Act. The court found no authority under any of the statutes to permit challenges to contracting out decisions that are based solely on a desire to save federal jobs. The court noted that, if the union was primarily interested in the efficiency of government operations, rather than in saving jobs, it might have standing under the OFPP Act amendments.

NLRB Rules on Successorship in Contracting Out

In a case of first impression, the NLRB has apparently concluded that its successorship doctrine applies to employers to whom the Army contracts out in-house functions. Reversing the result, but not the conclusions of law of an administrative law judge in *Base Services, Inc. and NAGE*, 296 NLRB No. 23 (1989), the board decided that a contractor to whom base operations at Fort Leonard Wood were contracted out was not a

successor employer to a substantial and representative complement of bargaining unit employees, a majority of whom had been similarly employed by the Army as the predecessor employer. The board found, as a matter of fact, that the evidence did not establish that a majority of the contract employees had been employed in the prior NAGE federal unit. The board did not, however, disturb the judge's legal ruling that successorship can apply when the predecessor employer is the Federal Government, notwithstanding the fact that the Army is not an employer within the meaning of the National Labor Relations Act.

Contracting out will increasingly lead to federal employee unions seeking to continue representation of employees as they leave federal service and go to work for the contractor. One local may represent both federal and private employees on the same post, raising complex problems for the government in regulating union activities. Labor counselors should deal with these issues as they arise and not let them fester or ripen into past practices.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

CAS [3]

Beginning in FY87 The Judge Advocate General directed 100% participation by judge advocates in the Combined Arms and Services Staff School (CAS[3]). Upon selection for career status, all captains with date of rank of 1 October 1981 and later are automatically enrolled by PP&TO in Phase I, the non-resident portion of CAS[3]. Phase I materials are sent directly to the officer from the US Army Command and General Staff College, Fort Leavenworth, Kansas. Scheduling for Phase II, the nine-week resident portion, must be arranged through the PP&TO CAS[3] Manager (MAJ Kirby, AV 225-1353). CAS[3] must be completed prior to Graduate Course attendance. Because the JAGC is given limited course quotas, most judge advocates will not be able to attend CAS[3] during a PCS. Phase I enrollees should contact PP&TO at least six months prior to the desired Phase II class. The Phase II class schedule for the remainder of FY90 is as follows:

3-90	4 Jan - 7 Mar 90	7-90	17 May - 18 Jul 90
4-90	18 Jan - 20 Mar 90	8-90	4 Jun - 2 Aug 90
5-90	12 Mar - 11 May 90	9-90	7 Aug - 5 Oct 90
6-90	26 Mar - 25 May 90	10-90	7 Aug - 5 Oct 90

Assignments

Judge advocates who anticipate reassignment during summer 1990 should contact the Personnel, Plans, and Training Office by December 1989 to discuss assignment possibilities and preferences.

All assignments are made in the best interest of the Army. We try, consistent with this, to meet the professional development needs and personal preferences of each judge advocate. Officers should ensure that PP&TO is fully aware of any special circumstances, such as grounds for compassionate assignment.

Colonels should discuss their own assignments with the OTJAG Executive, COL Robert Murray, or they may contact the Chief, PP&TO, LTC John Cooke. Other field grade JA's and all members of the graduate class should discuss their assignments with LTC Bill McGowan. Company grade officers should talk with MAJ Pam Kirby. JAGC warrant officers should contact CW4 Joe Egozcue in the OTJAG Administrative Office. Officers in Europe also may discuss reassignment with the Executive, OJA, USAREUR, LTC Chuck Beardall; officers in Korea may discuss reassignment with the Chief, Criminal Law and Deputy (EUSA), LTC Tom LeClair. Officers in Europe or Korea should address questions concerning foreign service tour extensions or curtailments, or consecutive overseas tours to LTC Beardall or LTC LeClair, respectively.

Although the Army tour length in CONUS, Alaska, and Hawaii is four years, because of its size the JAG Corps retains the flexibility to move some officers in less than four years. This is necessary to fulfill the needs of the Army and to ensure the professional development of judge advocates. Consequently, the JAGC Personnel and Activity Directory ordinarily lists a departure date reflecting a three-year tour at CONUS, Alaska, and Hawaii installations. This reminds the officer and PP&TO that during the third year they should discuss whether the officer will be reassigned and, if so, where.

OBV judge advocates will ordinarily complete three years at their initial assignment (except in a short tour area), even if they apply and are selected for conditional voluntary indefinite (CVI) status. OBV judge advocates may volunteer for a short tour in Turkey, Panama, or Korea during their initial tour, however, without CVI status. Judge advocates who attain CVI status will ordinarily be reassigned after approximately three years on station. Judge advocates at CONUS installations who attain CVI status may request another CONUS assignment; most overseas vacancies are filled by volunteers. Although second tour assignments cannot be finalized before an officer is selected for CVI status, captains considering applying for CVI are encouraged to discuss assignment possibilities with PP&TO.

All JAGC officers are encouraged to call PP&TO when they have any questions about reassignment, tour length, or other personnel matters. Officers pending reassignment should provide PP&TO with their assignment preferences six to ten months in advance of likely PCS. This may be done telephonically, but it is normally advisable to follow up with a letter stating assignment preferences.

Graduate course assignments are made in December. Most field grade assignments are announced in late January or early February. Company grade assignments are generally made four to six months before the PCS.

Additional guidance concerning assignments is contained in Section VI, JAGC Personnel Policies Book.

Preparing for a Promotion Board

People often ask what they can do to prepare for a promotion board. Although most performance records have already been made, there are several actions you can take to ensure that the promotion board views your file and record of performance in the best light. The following are a few suggestions that may help you put your best foot forward and also ease your anxieties about preparing for a promotion board.

1. Make sure you know whether you are in the zone of consideration for the promotion board. There will be a message to the field from the US Total Army Personnel Command (PERSCOM) regarding the promotion zone about 90 days before the board date. This should give you sufficient time to properly prepare for the board. If you want more lead time, look at the JAGC Personnel and Activity Directory to see how close your name is to the preceding year's promotion zone in the date of rank Roster. This should give you a feel for whether you need to begin preparing for the board. If you have questions, call PP&TO at the number below.

2. Request a copy of your official military personnel file (OMPF) microfiche. This can be obtained at no cost by sending a written request to: Commander, US Total Army Personnel Command, ATTN: TAPC-MSR-S (Selection Board Processing Unit), 200 Stovall Street, Alexandria, VA 22332-0444. Make sure you provide your social security number, current mailing address, and sign the request. The OMPF microfiche, together with your officer record brief (ORB) and official photo, make up the required portions of your file that will be reviewed by the promotion board. As discussed later, you may want to supplement this with other documents. Review the microfiche to ensure it contains all your officer evaluation reports, awards, citations, letters of appreciation, and any other documents you feel should be properly filed in your OMPF. See AR 640-10 for a listing of documents filed in the OMPF.

3. Arrange to have an official military photo taken. AR 640-30 requires a new photo be taken every three years. Even if your last photo is within that period, when you are being considered for promotion it is a good idea to have a new photo taken for your file if there have been significant changes (such as an award, or change of organizations resulting in a new shoulder insignia) since your photo was taken. Make sure you have enough time for the photo to be processed and mailed. Some photo labs have long waiting times to get scheduled photo appointments. Plan on at least 3-4 weeks for a photo appointment.

PERSCOM no long places your official photo on your microfiche. The official photos are maintained in your career management file at PP&TO. We provide the hard copy photo to the promotion board. If you can specify the number of copies when you have your photo made, it is a good idea to get three (two copies for your career management file and one for your personal files). Of course, make sure the photo is one in which you present a good military appearance, with awards and insignia worn properly.

4. Review your officer record brief (ORB). You should receive a copy from your military personnel office (MILPO) between 60 and 90 days from the board date. If you have not received an ORB to review within 60 days of the board, request one from your MILPO. Review it carefully paying particular attention to your military education level (MEL), civilian education level (CEL) and schools attended, assignments, date of photo, date of last OER, date of rank, and height/weight and physical profile. Make sure all your corrections are legible and sign and date the form at the bottom. Make two copies of the ORB and send the original back through your MILPO to PERSCOM. You should keep one of the copies for your files and send the other copy to PP&TO for your career management file.

Items missing from your OMPF microfiche or not documented on your ORB should be sent through your MILPO to PERSCOM. It is always a good idea to send a copy of these items to PP&TO for your career management file. If you are running out of time and are afraid it may take too long to forward documents through your MILPO, send them directly to PP&TO, ATTN: Boards Officer, and we will make every effort to get them in your promotion file. If you have something that you feel should be brought to the attention of the promotion board, you may send a letter to the board president. This is a judgment call on your part as to whether you need to communicate directly with the board.

The boards officer in PP&TO reviews the files of all officers who are being considered by a promotion board to ensure they are as complete and up to date as possible. If he discovers omissions, he will notify you so corrective actions may be taken. Feel free to call PP&TO (AV 225-1353 or Com 202-695-1353) anytime if you have any questions about your file. There is also a full-time board recorder at PERSCOM who also screens the files before they go to the board. Although others will screen your file, it is incumbent on you to ensure that it is as complete and accurate as it can be.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

COL(P) Ritchie's IMA Tour Extended

Colonel (P) James E. Ritchie, the Assistant Judge Advocate General for Operations (IMA), has had his tour of duty extended by eighteen months at the request of The Judge Advocate General. His tour will now expire in September 1992, instead of March 1991.

Update to 1990 Academic Year On-Site Schedule

The following information updates the 1990 Academic Year Continuing Legal Education (On-Site) Training schedule published in the July edition of *The Army Lawyer*, at 56.

The Orlando on-site on February 10 and 11, 1990, will be held at the Hilton Hotel. The Hilton's address is 350 South North Lake Boulevard, Altamonte, Florida 32701. The on-site action officer is LTC Mike Gillette. He can be reached at 524 Woodview Drive, Longwood, FL 32779. His phone number is (407) 356-4490.

The address for LTC Ruland Gill, the Salt Lake City on-site action officer, is 79 South State Street, P.O. Box 11070, Salt Lake City, UT 84147.

The on-site action officer for the Washington, DC, on-site is CPT Joe Tauber. His address is 1912 Rollingwood Road, Catonsville, MD 21228. His phone number is (301) 625-5080.

The on-site action officer for the El Paso on-site is MAJ Bill Sims. His address is 6620 Los Altos, El Paso, TX 79912. He can be reached at (915) 833-3255.

MAJ Dale T. Vitale is the new Columbus, Ohio, on-site action officer. His address is 6459 Jessamine Court, Westerville, OH 43081-3716. He can be reached at (614) 644-3037 or (614) 890-7911.

The correct address for CPT Patricia Bennett, the Jackson, MS, on-site action officer is 167 Meadow Lane, Jackson, MS 39212.

The following changes in general officer representatives at on-sites have been made. BG Sherman will now attend the Columbus on-site. Colonel Ritchie will be the representative at the Salt Lake City and Nashville on-sites. Colonel Compere will now attend the Detroit and El Paso on-sites.

CLE News

1. Resident Course Quotas

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

2. TJAGSA CLE Course Schedule

1989

December 4-8: 6th Judge Advocate & Military Operations Seminar (5F-F47).

December 11-15: 36th Federal Labor Relations Course (5F-F22).

1990

January 8-12: 1990 Government Contract Law Symposium (5F-F11).

January 16-March 23: 121st Basic Course (5-27-C20).

January 29-February 2: 101st Senior Officer Legal Orientation Course (5F-F1).

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

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

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

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

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

March 26-30: 1st Law for Legal NCO's Course (512-71D/E/20/30).

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

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

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

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

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

April 18-20: 1st Center for Law & Military Operations

Symposium (5F-F48).

April 24-27: JA Reserve Component Workshop.

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

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

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

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

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

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

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

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

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

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

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

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

July 16-18: Professional Recruiting Training Seminar.

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

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

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

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

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

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

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

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

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

February 1990

1-2: PLI, Preparation of Annual Disclosure Documents, New York, NY.

1-3: ALIABA, Labor Relations and Employment Law for Corporate Counsel and GP, San Francisco, CA.

4-5: ALIABA, ABA Section of Taxation Advanced Study Session, Houston, TX.

4-6: NJC, Effective Judicial Communication, San Diego, CA.

4-8: NCDA, Criminal Investigators Course, New Orleans, LA.

4-9: NJC, Dispute Resolution, San Diego, CA.

5-9: ESI, Federal Contracting Basics, San Diego, CA.

7-9: ALIABA, Trial Evidence, Civil Practice and Litigation Techniques, San Juan, PR.

8-9: ALIABA, Accountants' Liability, Dallas, TX.

8-9: ALIABA, Corporate Mergers and Acquisitions, Salt Lake City, UT.

8-9: PLI, Franchising Business Strategies and Compliance, Los Angeles, CA.

8-9: PLI, Technology Licensing, San Francisco, CA.

11-16: NJC, Handling Capital Cases, San Diego, CA.

12-16: GCP, Administration of Government Contracts, Washington, DC.

15-16: PLI, Distribution and Marketing, San Francisco, CA.

15-16: PLI, Preparation of Annual Disclosure Documents, San Francisco, CA.

15-17: ALIABA, Environmental Law, Washington, DC.

16: NKU, Bankruptcy, Covington, KY.

18-21: NCDA, Child Abuse and Exploitation, San Francisco, CA.

21-23: ESI, Claims, Terminations, and Disputes, Washington, DC.

21-23: SLF, Institute on Oil and Gas Law and Taxation, Dallas, TX.

21-23: ALIABA, Tax and Business Planning, San Francisco, CA.

22-23: ALIABA, Financial Planning for Lawyers, Orlando, FL.

22-24: ALIABA, Advanced Estate Planning Techniques, Maui, HI.

22-March 4: NITA, Florida Regional Trial Advocacy Program, Fort Lauderdale, FL.

25-March 1: NCDA, Experienced Prosecutor Course, Hilton Head, SC.

25-March 2: NJC, Judicial Writing, Kirkwood Alpine Resort, CA.

26-March 2: ESI, Competitive Proposals Contracting, Washington, DC.

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

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	Reporting requirement temporarily suspended for 1989. Compliance fees and penalties for 1988 shall be paid.

Jurisdiction	Reporting Month
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	27 hours during 2 year-period
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1989 issue of *The Army Lawyer*.

5. ABA/YLD Representative

Captain Stephen Henley, Trial Counsel Assistance Program, USALSA, was selected as the JAG Corps ABA/YLD representative. Captain Henley replaces Major Rob Lloyd in the position.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

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

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

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

	Contract Law
*AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
*AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
	Legal Assistance
AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
*AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
*AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
*AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).

AD B094235	All States Law Summary, Vol II/ JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/ JAGS-ADA-88-2 (65 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
AD B100235	Government Information Practices/ JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B108016	Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B087845	Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

*AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B100212	Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
*AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).

Reserve Affairs

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

The following CID publication is also available through DTIC:

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

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

*Indicates new publication or revised edition.

2. Error in Volume 125, *Military Law Review*

Volume 125 of the *Military Law Review* contained a printing error that TJAGSA is attempting to correct. The text and footnotes of page 134 were omitted, and a duplicate copy of page 135's text and footnotes appeared there instead of the correct information. We plan to mail a corrected page to the recipients of Volume 125; if we cannot arrange that, we will publish a corrected page in the next *Military Law Review*.

3. Constitution Bicentennial Packet

The Judge Advocate General's School has prepared an updated resource packet to assist staff judge advocates in planning local celebrations of the bicentennial of the U.S. Constitution. The packet includes draft speeches suitable for presentation to lay and civilian audiences, samples of articles and pamphlets, and order forms for bicentennial materials. TJAGSA will forward the packet to SJA's upon request. To obtain a packet, SJA's should write to TJAGSA, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. Independent Enrollment in TJAGSA Nonresident Programs

TJAGSA correspondence subcourses are an often overlooked source of professional development. Attorneys and support personnel who do not meet the prerequisites for a particular course may be eligible to enroll in specific subcourses which relate to their duties. Subcourses may be used to train new staff members or to provide refresher training.

Because independent enrollment is limited to students whose assigned duties relate to the requested subcourse(s), enrollment applications (DA Form 145) must include a copy of the student's job description, OER support form, or other description of assigned duties. Detailed information on subcourse enrollment is contained in TJAGSA's Annual Bulletin and in DA Pam 351-20. Questions and enrollment applications should be directed to: Commandant, TJAGSA, ATTN: JAGS-ADN-C, Charlottesville, VA 22903-1781.

5. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 11-1	Command Logistics Review Program (CLRP)	6 Sep 89
AR 15-130	Army Clemency and Parole Board	9 Aug 89
AR 40-38	Clinical Investigation Program	1 Sep 89
AR 381-45	Investigative Records Repository	25 Aug 89
AR 600-3	The Army Personnel Proponent System	18 Sep 89
AR 672-74	Army Accident Prevention Awards Program	18 Sep 89
AR 690-600	Equal Employment Opportunity Discrimination Complaints	18 Sep 89
AR 702-17	Quality Improvement and Product Nonconformance Reduction	14 Jul 89
AR 725-1	Special Authorization and Procedures for Issues, Sales and Loans	25 Sep 89
AR 725-50	Requisitioning, Receipt, and Issue System	28 Aug 89
PAM 350-40	Army Modernization Training Plans for New and Displaced Equipment	17 Aug 89
PAM 351-20	Army Correspondence Course Program Catalog	17 Aug 89

*U.S. GOVERNMENT PRINTING OFFICE:1989-261-995:00010

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Matthew E. Winter, Captain, U.S. Army, Editor

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