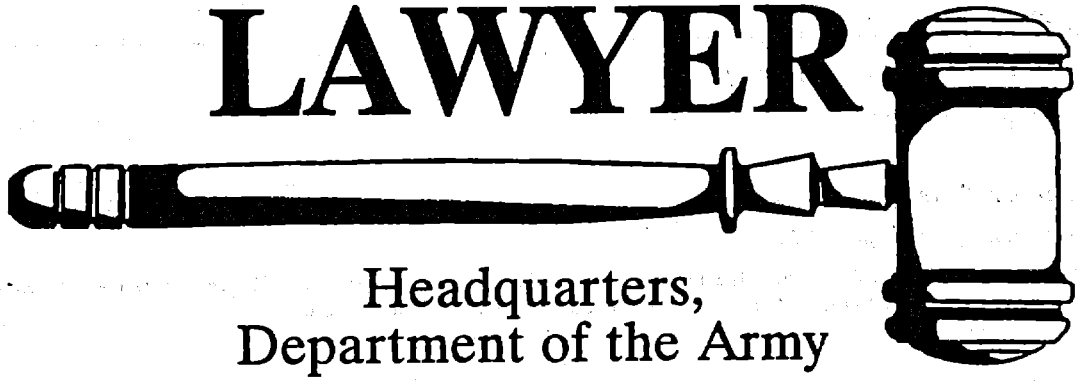
THE ARMY LAWYER



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Annual Review of Developments in Instructions

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Introduction

Colonel Herbert Green, who recently retired from the United States Army, annually provided an update on the subject of the military judge's instructions to court members.[1] In keeping with his tradition of providing meaningful insights to both military judges and counsel, this article will attempt to do the same by reviewing the more important aspects of instructional issues that have arisen within the military during the past calendar year.

Instructions on Offenses

More than three decades ago, the United States Court of Military Appeals (COMA) charged law officers (the predecessor to military judges) with the responsibility of giving complete instructions tailored to the facts of the case. The COMA reasoned that "an abstract statement of law may not suffice to insure intelligent determination of the questions posed."[2]

In *United States v. Williams*,[3] the Army Court of Military Review (ACMR) found error even though the military judge tailored his instructions to the evidence. One of the charges against Specialist Williams involved an aggravated assault by intentionally inflicting grievous bodily harm on a child (fractured ribs) by striking the child on the back and lower right leg.[4] The evidence established that the blows to the child's back were the cause of any fractured ribs, not the blows to the lower leg. The judge's instructions omitted any reference to the striking on the lower leg.[5] On appeal, the defense claimed this omission was error. The ACMR agreed, but found no plain error. Because the defense did not object at trial, the error was waived.[6]

Apparently, the ACMR neglected the requirement that instructions be tailored. Because the evidence established that the striking on the legs could not have caused the fractured ribs, the judge would have erred in instructing on it as a cause of the injury. The ACMR's characterization of the omission as instructional error was incorrect.[7]

In *United States v. Lopez*,[8] the accused was charged with distribution and conspiracy to distribute cocaine. The ACMR upheld the judge's failure to include, as part of the conspiracy instruction, that the accused must have known the nature of the substance.[9] The judge already had instructed the court members that the accused must know the nature of the substance with respect to the distribution offense.[10] The judge's

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[1] *See, e.g.*, Herbert Green, *Annual Review of Developments in Instructions*, ARMY LAW., Mar. 1993, at 3. The authors appreciate the use of Colonel Green's research notes and his handwritten draft for the beginning of this article, which he graciously permitted us to use. His notes have been adopted verbatim in places.

[2] United States v. Smith, 33 M.J. 3, 6 (C.M.A. 1963).

[3] 36 M.J. 785 (A.C.M.R. 1993).

[4] *Id.* at 789.

[5] *See* DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-110 (1 May 1982) [hereinafter BENCHBOOK]. When instructing on the lesser-included offense of an aggravated assault with a means likely to produce death or grievous bodily harm, the military judge properly instructed on both the striking on the back and on the lower leg. *Id.* para. 3-109.

[6] *Williams*, 36 M.J. at 789.

[7] Colonel Herbert Green was the trial judge in *Williams* and included this characterization of the appellate court decision in the materials provided to the authors. *See supra* note 1.

[8] 37 M.J. 702 (A.C.M.R. 1993).

[9] *See* BENCHBOOK, *supra* note 5, para. 3-3.

[10] Such an instruction is required under United States v. Mance, 26 M.J. 244 (C.M.A. 1988), *cert denied*, 488 U.S. 942 (1988). *See* United States v. Smith, 34 M.J. 200 (C.M.A. 1992); United States v. Crumley, 31 M.J. 21 (C.M.A. 1990); United States v. Brown, 26 M.J. 266 (C.M.A. 1988).

conspiracy instructions referred the members to his earlier instructions on distribution and informed the members that they could convict the accused only if they were convinced beyond reasonable doubt that the accused knew the substance he distributed was cocaine. While the ACMR held the instruction to be sufficient, the better practice is for the judge to expressly state all the elements of the underlying offense that comprises the object of the conspiracy.

In *United States v. Ayala*,[11] the government charged the accused with wrongfully importing explosives into the United States under Article 134 of the Uniform Code of Military Justice (UCMJ).[12] Both the trial counsel and military judge interpreted the charge as alleging a particular subsection of the applicable federal statute. Although the judge gave appropriate instructions for that subsection, the ACMR held that the specification alleged a different subsection of the same statute. Because the prosecution in effect proved an offense not charged, the conviction had to be set aside. *Ayala* demonstrates that any charge alleging a federal offense under article 134 must clearly set forth all the elements of the underlying statute.[13]

Lesser-Included Offense Instructions

Historically, military law has taken an expansive view of determining whether one offense is included in another.[14] In the past, a lesser-included offense existed when: (1) the lesser offense contained some, but not all, of the elements of the charged offense and had no additional elements; or (2) an offense included different elements but was substantially the same kind of offense as the charged offense and the evidence reasonably raised all the elements of the uncharged offense.

While the expanded definition of lesser-included offenses guided military courts, the federal civilian courts were divided in their definition of what constituted lesser-included offenses. In interpreting the applicable Federal Rule of Criminal Procedure[15] (which is virtually identical to the lesser-included statute in the military),[16] the federal civilian courts developed two different standards to determine lesser-included offenses.

One standard was the inherent relationship test. Under this test "one offense is included in another when the facts as alleged in the indictment and proved at trial support the inference that the defendant committed the less serious offense and an 'inherent relationship' exists between the two offenses."[17] An inherent relationship exists when "the two offenses relate to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser offense."[18]

The second standard was the elements test. Under this test "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no [lesser offense] instruction is to be given . . . ."[19]

In *Schmuck v. United States*,[20] the Supreme Court rejected the inherent relationship test and adopted the elements approach as the applicable standard for federal civilian courts. After *Schmuck*, the military courts expressed some confusion over which test should apply in determining lesser-included offenses in courts-martial.[21] This confusion, however, should be a thing of the past.

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[11] 37 M.J. 632 (A.C.M.R. 1993), *aff'd on reh'g*, 38 M.J. 633 (A.C.M.R. 1993).

[12] UCMJ art. 134 (1988). The accused was charged with committing a noncapital federal offense under clause three of Article 134.

[13] United States v. Mayo, 12 M.J. 286 (C.M.A. 1982).

[14] *See* United States v. Duggan, 15 C.M.R. 396, 399-400 (C.M.A. 1954); *see also* United States v. Thacker, 37 C.M.R. 28 (C.M.A. 1966).

[15] FED. R. CRIM. P. 31(c). "Conviction of Less[er] Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

[16] UCMJ art. 79 (1988). "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

[17] Schmuck v. United States, 489 U.S. 705, 708-09 (1989).

[18] *Id.*

[19] *Id.* at 716.

[20] *Id.* at 705.

[21] *Compare* United States v. Carter, 30 M.J. 179, 181 (C.M.A. 1990) ("[t]he appropriateness of such a broad test for determining a lesser-included offense has become increasingly suspect") *with* United States v. Strachan, 35 M.J. 362, 365 (C.M.A. 1992) (Gierke, Wiss, JJ., dissenting) (determination of the lesser-included offenses should "turn on both the charge and the evidence"), *cert. denied*, 113 S. Ct. 1595 (1993). *See* United States v. Littles, 35 M.J. 644 (N.M.C.M.R. 1992); United States v. Foster, 34 M.J. 1264 (A.F.C.M.R. 1992).

In *United States v. Teters*,[22] the COMA adopted the elements test for determining lesser-included offenses in military law. Henceforth, an offense is lesser included if it contains some, but not all, of the elements of another offense and contains no additional elements.

However, the COMA may not have resolved one lesser-included offense issue. Every offense under clauses one and two of Article 134[23] contains the element that the conduct alleged was either prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces. This element is *unique* to Article 134 and is *not* an element of any other offense in the UCMJ. Moreover, this is an actual element and not a mere jurisdictional requirement.[24] Under a literal interpretation of *Teters*—which defines lesser-included offenses as a subset of the elements of charged offenses—violations of the first two clauses of Article 134 never would be lesser-included offenses of offenses listed in the other punitive articles of the UCMJ. For example, unlawful entry under Article 134 would not be a lesser-included offense of burglary or housebreaking under Articles 129 and 130.[25] Neither would negligent homicide under Article 134 be a lesser-included offense of murder or manslaughter under Articles 118 and 119.[26]

This literal interpretation of *Teters* would be precluded *if* every crime within Articles 78 through 133 of the UCMJ were considered to be per se prejudicial to good order and discipline or service discrediting. Arguably, the past practice of treating Article 134 offenses as lesser-included offenses still should be viable if the only additional element is that unique to Article 134. Congress or the courts need to clarify this issue.

Once the military judge has determined which offenses are, as a matter of law, lesser included, he or she must determine whether the evidence has raised any of the lesser offenses. The military judge must instruct on all lesser-included offenses reasonably raised by the evidence.[27] A lesser-included offense is raised "whenever 'some evidence' is presented to which the fact finders might 'attach credit if' they so desire."[28] Some evidence is so incredible that the members could not reasonably rely on it to find the lesser-included offense applicable.

Counsel often are content to leave the issue of lesser-included offenses to the wisdom of the military judge. As demonstrated by two recent cases, this is an unwise practice. In *United States v. Duncan*,[29] the judge decided to instruct on voluntary manslaughter as a lesser-included offense of premeditated murder. The evidence indicated that the accused killed his fiancee because she would not engage in sexual intercourse with him on the beach. The Navy-Marine Corps Court of Military Review (NMCMR) held that as a matter of law, the mere refusal to engage in sexual intercourse could not "have a reasonable tendency to provoke "sudden and uncontrollable anger and heat of [passion] in the ordinary man" which would bring voluntary manslaughter into issue.[30] Accordingly, the evidence did not raise voluntary manslaughter and the judge erred in giving this instruction.

In *United States v. Cameron*,[31] the accused was charged under Article 91[32] for the willful disobedience of the order of a superior noncommissioned officer to clean the accused's barracks room. On the several occasions when the noncommissioned officer gave the accused the order, the accused "was not all that coherent" or "was in 'somewhat' of a drunken stupor."[33] At trial, the military judge instructed the members

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[22] 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 213 (1994). In *Teters*, the granted issue concerned whether the offenses of larceny and forgery were multiplicious. The COMA determined that the military law of multiplicity has its roots in "the military definition of lesser-included offenses." *Id.* at 374. Thus, while *Teters* is nominally a multiplicity case, in reality, it is a lesser-included offense case. Because determining what is a lesser-included offense is vital to deciding what instructions to give in a case, *Teters* is at its very core an instructions case. For an analysis of *Teters*, *see* Holland & Hunter, United States v. Teters: *More Than Meets the Eye?*, ARMY LAW., Jan. 1994, at 16.

[23] UCMJ art. 134 (1988).

[24] *See, e.g.*, United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990); United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991). Unlike most of the substantive offenses in the UCMJ, however, this element is not one that the form specifications contained in the *Manual for Courts-Martial* require to be alleged. MANUAL FOR COURTS-MARTIAL, United States, pt. IV (1984) [hereinafter MCM].

[25] UCMJ arts. 129, 130 (1988).

[26] *Id.* arts. 118, 119 (1988).

[27] *See* United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985); United States v. Jackson, 12 M.J. 163 (C.M.A. 1981).

[28] *See* United States v. Jackson, 12 M.J. 163, 166-67 (C.M.A. 1981); *see generally* United States v. Emmons, 31 M.J. 108 (C.M.A. 1990).

[29] 36 M.J. 668 (N.M.C.M.R. 1992).

[30] *Id.* at 671.

[31] 37 M.J. 1042 (A.C.M.R. 1993).

[32] UCMJ art. 91 (1988).

[33] *Cameron*, 37 M.J. at 1043.

on the defense of voluntary intoxication as to the Article 91 offense, but gave no instruction on the Article 92[34] offense of failure to obey a lawful order as a lesser-included offense. Counsel made no objections to the judge's instructions.[35] The ACMR found that the accused's violation of the order was not willful as required for the offense of willful disobedience under Article 91. However, the ACMR determined that the accused had knowledge of the order as required for the offense of failure to obey an order under Article 92. As a result, the ACMR affirmed a conviction only for the lesser offense of failure to obey an order.[36] The lesson for judges and counsel is to consider the effects of an affirmative defense. As *Cameron* illustrates, a defense may bring a lesser-included offense into issue.

Another development regarding lesser-included offenses in the military resulted from Change 6 to the *Manual for Courts-Martial (Manual)*, which was signed by President Clinton on December 23, 1993.[37] Rule for Courts-Martial (R.C.M.) 918(a)(1)[38] now permits findings to a named lesser-included offense without the need for the judge or court members to make findings by exceptions and substitutions. This procedural change should permit less confusion about lesser-included offenses and make findings worksheets[39] easier to prepare and understand.

Instructions on Defenses

An affirmative or special defense includes any defense that "although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts."[40] As with lesser-included offenses, when the evidence places an affirmative defense in issue, the judge has a sua sponte obligation to instruct on the defense.[41] The threshold for this obligation is very low. A defense is in issue if *any* evidence of the defense exists to which the court members might attach credence.[42]

One potential defense that arises in child abuse cases is the defense of parental justification or discipline. In 1988, the COMA adopted the Model Penal Code standard[43] for the defense of parental discipline: the discipline must be for a proper purpose and the punishment inflicted must not be unreasonable or excessive.[44] This standard is one of many instructions contained in the seven updates to the *Military Judges' Benchbook (Benchbook)* promulgated in 1993 by the Office of the Chief Trial Judge, United States Army Trial Judiciary.[45] Judges may be more willing to give the instruction, because the instruction is now readily available in the *Benchbook*.

In *United States v. Ziots*,[46] the judge refused a defense request to give the Model Penal Code instruction, but did elaborate to the members on the reasonableness of the force used by the father in assaulting his son. The ACMR held that the judge's tailoring of the assault instructions was sufficient to allow the members to decide the issue. The ACMR also held that if error did exist, it did not amount to plain error and, therefore, was waived when the defense did not object to the instructions given.[47]

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[34] UCMJ art. 92 (1988).

[35] *Cameron*, 37 M.J. at 1043.

[36] *Id.* at 1044.

[37] MCM, *supra* note 24 (C6, 21 Jan. 1994), *reprinted in* 58 Fed. Reg. 248 (1993).

[38] MCM, *supra* note 24, R.C.M. 918(a)(1) (C6, 21 Jan. 1994).

[39] *See* BENCHBOOK, *supra* note 5, app. B.

[40] MCM, *supra* note 24, R.C.M. 916(a) discussion. Examples of affirmative defenses listed in R.C.M. 916 are: justification, obedience to orders, self-defense, defense of another, accident, entrapment, coercion or duress, inability, ignorance or mistake of fact, and lack of mental responsibility.

[41] *Id.* R.C.M. 920(e).

[42] *See* United States v. Watford, 32 M.J. 176, 178 (C.M.A. 1991).

[43] MODEL PENAL CODE § 3.08(1) (1985).

[44] *See* United States v. Brown, 26 M.J. 148, 150 (C.M.A. 1988); *see also* United States v. Robertson, 36 M.J. 190 (C.M.A. 1992).

[45] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 8 (10 Dec. 1993) [hereinafter Update Memo 8]. The parental discipline instruction is now located at paragraph 5-16 of the *Benchbook*. *See* BENCHBOOK, *supra* note 5. At the time of the writing of this article, the Army trial judiciary had published nine updates to the *Benchbook*.

[46] 36 M.J. 1007 (A.C.M.R. 1993).

[47] *Id.* at 1009.

In *United States v. Gooden*,[48] the accused was charged with assault by intentional infliction of grievous bodily harm for striking his son with an electrical cord, a belt, and a heavy belt buckle. The accused struck his son "out of frustration and as a means of punishing the child."[49] Besides the accused's wife—who eventually exercised her rights against self-incrimination—the defense presented no evidence. The military judge gave the parental discipline instruction, but the defense also desired a mistake of fact instruction[50] regarding the accused's mistaken belief that the force used on the child would not cause serious bodily harm. In holding that the judge properly refused to give the instruction, the NMCMR stated

> The crux of appellant's defense at trial was that he was justified in appropriately punishing his child and that he was not responsible for some of the child's injuries. There is no evidence that appellant mistakenly believed that the blows he administered did not, or would not, create a substantial risk of serious injury to the child.[51]

Several other cases in the past year have addressed the mistake of fact instruction. In *United States v. Hurko*,[52] the accused was charged with making and uttering worthless checks, but was convicted of, among other things, the lesser-included offense of dishonorable failure to maintain sufficient funds in his checking account. The judge gave a proper mistake of fact instruction to the charged offenses, but erroneously omitted, without objection, any mistake of fact instruction as to the lesser-included offenses. The NMCMR noted that the judge's omission might have required reversal, despite the failure to object, but set aside the failure to maintain funds conviction on other grounds. The COMA previously has held that the failure of the defense to request an instruction on an affirmative defense does *not* waive the error on appeal.[53] Trial counsel must be alert to ensure that the judge gives proper instructions.

In *United States v. Guron*,[54] the military judge gave the mistake of fact instruction as to two false statements with which the accused was charged, but neglected to do so regarding a third false statement. Even after counsel had discussed proposed instructions with the judge, reviewed the judge's written instructions, and been given the opportunity to object to the judge's written and oral instructions, counsel made no objections to the omission. Although the Air Force Court of Military Review (AFCMR) found the omission to be error, it found, based on the totality of other instructions and the arguments of counsel, that no "substantial risk of prejudice" to the accused existed.[55]

In *United States v. Lancaster*,[56] the AFCMR also found the military judge's mistake of fact instruction to be in error. In *Lancaster* the accused was charged with wrongful use of oxycodone, a controlled substance. The accused's defense was that she had been prescribed the substance two years earlier after a wisdom tooth extraction and had used the leftover prescription recently to relieve pain from a hip injury. The defense had asked the judge to further define "legitimate medical practice" for the members beyond merely informing them that use of a controlled substance is not wrongful if done pursuant to "legitimate medical practice."[57] The judge, instead, instructed on mistake of fact. He informed the members that if the accused honestly believed that her use of the leftover prescription was not wrongful, then the mistake of fact defense would apply. The AFCMR found this instruction had "a necessary predicate that the use of leftover prescription drugs for another ailment constitutes wrongful use as a matter of law."[58] The AFCMR could find no authority for this proposition. Although the defense did not object to this

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[48] 37 M.J. 1055 (N.M.C.M.R. 1993).

[49] *Id.* at 1057.

[50] BENCHBOOK, *supra* note 5, para. 5-11.

[51] *Gooden*, 35 M.J. at 1057-58.

[52] 36 M.J. 1176, 1179 n.3 (N.M.C.M.R. 1993).

[53] *See* United States v. Sellers, 33 M.J. 364, 368 (C.M.A. 1991); United States v. Taylor, 26 M.J. 127, 129 (C.M.A. 1988).

[54] 37 M.J. 942 (A.F.C.M.R. 1993).

[55] *Id.* at 950. The AFCMR further noted that R.C.M. 920(f) provides waiver if counsel fail to object to instructional errors or omissions. Practitioners, however, should not rely on waiver regarding affirmative defenses. The COMA has indicated that R.C.M. 920(f) should not be read to include affirmative defenses. MCM, *supra* note 24, R.C.M. 920(f); United States v. Taylor, 26 M.J. 127, 129 (C.M.A. 1988); United States v. McMonagle, 38 M.J. 53, 61 (C.M.A. 1993).

[56] 36 M.J. 1115 (A.F.C.M.R. 1993).

[57] *Id.* at 1117.

[58] *Id.* at 1118.

instruction at trial, the AFCMR held that the erroneous instruction essentially dealt with the wrongfulness element of the offense and, therefore, that waiver did not apply.[59]

In *United States v. McMonagle*,[60] the COMA clarified the applicability of a mistake of fact defense to the offense of murder while engaged in an inherently dangerous act to others under Article 118(3).[61] *McMonagle* involved a soldier who shot and killed a civilian during a firefight while in Panama during Operation Just Cause. The military judge did not give a mistake of fact instruction to the Article 118(3) offense. In reversing the accused's conviction of this offense, the COMA held that mistake of fact can negate an accused's state of mind—"wanton disregard" for human life—required under Article 118(3). The COMA stated that under Article 118(3), the accused must be subjectively aware of the risk that his actions were creating.

McMonagle should alert military judges to be careful when instructing the members on which defenses apply to which crimes. Although the judge indicated that he would instruct on mistake of fact as to both murder under Article 118(2) (murder resulting from an intent to kill or to commit great bodily harm) and Article 118(3), he only did so under Article 118(2). Despite the defense's failure to object at trial, the defense did not waive this error on appeal.[62]

In *McMonagle*, the COMA also indicated that the defense of accident[63] did not apply. Accident "focuses on the unintended and unexpected result of an otherwise lawful act."[64] No evidence at trial suggested that the death of the person at whom the accused was shooting was unintended or unexpected. What was in issue was the accused's mistake of fact as to whom his target was, because he allegedly thought his target was a combatant, not a civilian. *McMonagle* should remind judges and counsel that instructions are not determined by counsel's theories, but solely by the evidence at trial. Any doubt about giving an instruction on a defense must be resolved in favor of the accused.[65]

To eliminate confusion, the United States Army Trial Judiciary recently revised the accident instruction.[66] The prior instruction was the subject of error in *United States v. Curry*.[67] In *Curry*, the accused was charged with assaulting his superior commissioned officer by hitting him with his elbow as the accused turned around at the helm of the ship. The military judge agreed that accident was in issue as to a culpably negligent battery, but held that accident could not be a defense to the intentional assault on the victim, a specific intent crime. The COMA rejected the judge's conclusion. The defense of accident "can amount to a total refutation of the intent element" involved in a crime; therefore, the judge's instruction that it could not apply to specific intent crimes and other misleading statements were so confusing as to make his instructions plain error.[68] The COMA warned judges that they have to do a better job of tailoring the instructions within the *Benchbook*. The instructions are only suggested guides and must not be relied on blindly. The COMA stated that "[e]ven if we, as lawyers, can sift through instructions and deduce what the judge must [mean], the fact-finders [are] not lawyers and cannot be presumed to correctly resurrect the law."[69]

In *United States v. Van Syoc*,[70] the COMA reversed a trial judge's refusal to give an accident instruction. In *Van Syoc*,

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[59] *Id.* at 1118-19. *Cf.* United States v. Mance, 26 M.J. 244, 255-56 (C.M.A. 1988) (where judge omits entirely any instruction on an element, the error cannot be tested for harmlessness; but if the judge identifies the element but erroneously instructs on it, the error may be tested for harmlessness), *cert. denied*, 488 U.S. 942 (1988).

[60] 38 M.J. 53 (C.M.A. 1993).

[61] UCMJ art. 118(3) (1988). The Defense Authorization Act for fiscal year 1993 changed the nature of this offense from inherently dangerous to "others" to inherently dangerous to "another."

[62] *McMonagle*, 38 M.J. at 61.

[63] MCM, *supra* note 24, R.C.M. 916(f); BENCHBOOK, *supra* note 5, para. 5-4. The accident instruction has been updated by Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 7 (15 Oct. 1993), para. 5-4 [hereinafter Update Memo 7]. *See supra* note 45 and accompanying text.

[64] *McMonagle*, 38 M.J. at 59.

[65] *Id.* at 58-59.

[66] *See* Update Memo 7, *supra* note 63, para 5-4; *see also supra* note 45 and accompanying text.

[67] 38 M.J. 77 (C.M.A. 1993).

[68] *Id.* at 79-81.

[69] *Id.* at 81.

[70] 36 M.J. 461 (C.M.A. 1993).

the accused was charged with the unpremeditated murder of an infant. The government produced five doctors who testified that the infant's death was consistent with "shaken-infant syndrome." The evidence favorable to the defense—solely introduced through other prosecution evidence—suggested that the accused's son died when the accused was changing the child's diaper and the infant slipped out of the accused's hands, falling to the floor. Both the trial and defense counsel thought the defense of accident was in issue, but the trial judge refused to give an accident instruction. The trial judge did permit the defense to argue accident "in the lay understanding of the word" to the members. The COMA had little hesitation in reversing the judge and finding prejudicial error. The judge was wrong not only for failing to give the instruction, but also for permitting argument to the members on accident without any legal guidance.[71]

Two cases concerned instructions on the defense of divestiture of rank.[72] In *United States v. Johnson*,[73] the military judge gave the instruction regarding two offenses, but the judge forgot to give the concluding portion of the instruction on one of them,[74] informing the members that they could convict the accused only if they were satisfied that the victim did not abandon his superior commissioned officer status. Because the omission concerned an instruction regarding a defense, the ACMR properly refused to apply waiver, but testing the omission for prejudice, the ACMR could find none when the instructions were viewed as a whole.[75] In *United States v. Sanders*,[76] the judge correctly instructed on divestiture, but on appeal, the accused challenged the sufficiency of the evidence when the court members did not apply the defense. The ACMR affirmed the conviction, noting that "[i]t is well settled that a panel is presumed to have obeyed the instructions given by the military judge absent evidence indicating otherwise."[77]

The *Manual* states—in its explanation of murder—that voluntary intoxication will *not* reduce unpremeditated murder to manslaughter or any other lesser offense.[78] In *United v. Morgan*,[79] the COMA had the opportunity to consider this long-standing rule when the military judge did not instruct on voluntary intoxication because all parties recognized the applicability of the *Manual* provision. Ample testimony indicated that the accused may have been highly inebriated at the time he thrust a broken bottle in the victim's neck, causing his death. A three-member majority of the COMA upheld the rule and held that if changes were to be made to current military practice, Congress, and not the COMA, should mandate those changes.[80]

In *United States v. Howell*,[81] the COMA clarified when the trial judge must give an instruction on entrapment. In *Howell*, the COMA stated that "entrapment has two elements: government inducement and an accused with no predisposition to commit the offense."[82] The nature of the inducement can take different forms—such as pressure, assurances of no wrongdoing, persuasion, threats, force, coercion, fraudulent representations, promises of reward, or pleas. However, merely providing the opportunities or facilities to commit the offense does constitute inducement. Therefore, an undercover government agent's request that the accused acquire drugs for the agent "is not sufficient evidence to warrant an entrapment instruction," even if the request is repeated.[83] Additionally, some evidence must be presented that the accused was not predisposed to commit the offense before the entrapment instruction becomes necessary.[84] Some evidence as to both elements of the defense must exist before the judge is required to give an instruction.

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[71] *See id.* at 465 (Sullivan, CJ, concurring).

[72] Divestiture of rank occurs when a superior commissioned or noncommissioned officer loses his or her protected status as a victim of a disrespect or assault offense due to his or her own misconduct. *See* BENCHBOOK, *supra* note 5, para. 3-19.

[73] 36 M.J. 862 (A.C.M.R. 1993).

[74] BENCHBOOK, *supra* note 5, para. 3-19, note 4.

[75] *Johnson*, 36 M.J. at 868-69.

[76] 37 M.J. 628 (A.C.M.R. 1993).

[77] *Id.* at 631.

[78] MCM, *supra* note 24, pt. IV, para. 43c(3)(c).

[79] 37 M.J. 407 (C.M.A. 1993).

[80] *Id.* at 410-13.

[81] 36 M.J. 354 (C.M.A. 1993).

[82] *Id.* at 358.

[83] *Id.* at 359-60. *See* United States v. Tatum, 36 M.J. 302 (C.M.A. 1993).

[84] *Howell*, 36 M.J. at 360.

In *United States v. Wilhelm*,[85] the AFCMR clarified and expanded the law surrounding the affirmative defense of self-defense.[86] In *Wilhelm*, the accused was convicted of several batteries on his wife. The defense counsel asked the judge to instruct the members that if they found the accused and his wife to have engaged in a mutual affray, then any touching of the wife was consensual. The military judge correctly denied this request. The COMA long ago held that both parties to mutual combat are wrongdoers and self-defense remains inapplicable to both as long as they continue in the mutual affray.[87] As wrongdoers, participants in mutual combat cannot give lawful consent to being struck; therefore, "an accused may not claim mutual affray or mutual combat as a defense to a charge of battery."[88]

In *United States v. Weinmann*,[89] the AFCMR expanded the law concerning self-defense. In *Weinmann*, the defense counsel expressly waived an instruction on self-defense as to one of three specifications. Although the AFCMR found the evidence at trial raised the issue of self-defense, the AFCMR treated the waiver as it would an express waiver to a lesser-included offense instruction.[90] The AFCMR did so because the military judge's duty to instruct on affirmative defenses is analogous to the duty to instruct on lesser-included offenses and the COMA has recognized that the defense may affirmatively waive instructions on lesser-included offenses absent plain error.[91] Finding no plain error, the AFCMR affirmed the judge's election not to give the instruction.[92] While logically sound, this decision—as the AFCMR recognized—may not be in keeping with the precedent of the COMA's decisions regarding a judge's sua sponte obligation to give instructions on affirmative defenses raised by the evidence without regard to the defense counsel's theories in the case.[93]

Evidentiary Instructions

Counsel ordinarily must request evidentiary instructions. Otherwise, they waive them.[94] Even when counsel requests an instruction and the judge refuses to give it, appellate courts will overturn the judge's decision only if: (1) the requested instruction is a correct statement of the law; (2) other instructions do not substantially incorporate the requested instruction; and (3) the instruction concerns such a vital point in the case that the failure to give it deprives the accused of a defense or seriously impairs its effective presentation.[95]

In *United States v. Damatta-Olivera*,[96] the COMA used the above test to uphold a trial judge's refusal to give requested instructions. In *Olivera*, an accomplice testified against the accused at trial, stating that he met the accused between 0745 and 0900. On cross-examination, the witness admitted telling law enforcement officials that he had met the accused at approximately 0745. Other defense evidence indicated that the accused could not have met the accomplice at 0745 because the accused participated in physical training until 0830. The defense counsel requested that the military judge instruct the members regarding the prior inconsistent statement given by the accomplice to law enforcement officials.[97] The COMA upheld the judge's refusal to give the requested instruction because (1) the prior inconsistent statement instruction would not be entirely correct, because the accomplice's trial testimony arguably was only a clarification of his earlier statement, (2) the judge adequately addressed the issue

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[85] 36 M.J. 891 (A.F.C.M.R. 1993).

[86] MCM, *supra* note 24, R.C.M. 916(e), contains the military's definition of self-defense.

[87] United States v. O'Neal, 36 C.M.R. 189, 193 (C.M.A. 1966). Rule for Courts-Martial 916(e)(4) codifies the rule that anyone engaging in mutual combat loses the right to self-defense, unless a good faith withdrawal from the mutual combat has occurred. *See* BENCHBOOK, *supra* note 5, para. 5-2(VI)(d).

[88] *See Wilhelm*, 36 M.J. at 892; *see also* MCM, *supra* note 24, pt. IV, para. 54c(1)(a).

[89] 37 M.J. 724 (A.F.C.M.R. 1993).

[90] *Id.* at 726-27.

[91] United States v. Strachan, 35 M.J. 362 (C.M.A. 1992).

[92] *Weinmann*, 37 M.J. at 727-28.

[93] *See* United States v. Steinruck, 11 M.J. 322, 324 (C.M.A. 1981) (military judge has sua sponte duty to instruct on affirmative defenses regardless of defense theories or requests); United States v. Taylor, 26 M.J. 127, 129 (C.M.A. 1988); *see also supra* note 65 and accompanying text.

[94] MCM, *supra* note 24, R.C.M. 920(e), (f).

[95] *See* United States v. Winborn, 34 C.M.R. 57, 62 (C.M.A. 1963); *see also* United States v. Rowe, 11 M.J. 11, 13 (C.M.A. 1981); United States v. DuBose, 19 M.J. 877, 879 (A.F.C.M.R. 1985).

[96] 37 M.J. 474 (C.M.A. 1993).

[97] *Id.* at 475-76.

of the accomplice's credibility in his other instructions, and (3) the judge allowed the members to consider the apparent inconsistency and permitted the defense counsel to focus on it during closing argument.[98] The COMA also reminded military judges not to "give undue emphasis to any evidence favoring one party."[99] In this case, the judge properly refused to lend the prestige of his judicial office to the defense theory of the case by giving the prior inconsistent statement instruction.

If an evidentiary instruction applies, the defense may waive it by requesting that it not be given. This is what occurred in *United States v. Anderson.*[100] In *Anderson*, the accused was charged with murdering his wife. The prosecution introduced a handwritten document purporting to be the accused's will in which he described some uncharged misconduct concerning his wife. The AFCMR found the admission of some of the uncharged misconduct to be improper, but harmless error.[101] However, the AFCMR also had to address the judge's failure to instruct on the uncharged misconduct. When the defense counsel could not persuade the judge to instruct according to the defense's proposed limiting instruction, the defense counsel requested that the judge give no instruction on the uncharged misconduct. Although the AFCMR found that a limiting instruction was required, it found that the defense had waived it.[102]

United States v. Lake[103] illustrates both the appropriate use of uncharged misconduct and proper limiting instructions. In *Lake*, the accused testified that he did not travel to the District of Columbia to purchase drugs and denied that he ever went there with certain named individuals for that purpose. In rebuttal, the prosecution presented evidence of the accused's prior trips to purchase drugs by calling the named individuals. The trial judge correctly gave a limiting instruction before the witnesses testified and again before the members closed for deliberations, informing them exactly why the evidence was presented and how they could use it. While the uncharged misconduct was obvious in this case, judges and counsel constantly must be aware of uncharged misconduct creeping into the court-martial and must react accordingly. Usually, a limiting instruction at the time of its admission and again before the members retire to deliberate is appropriate.

Closely related to the topic of uncharged misconduct is the "spillover" effect of one charged offense to another charged offense. This occurs when the members decide that the accused committed one offense merely because the proof clearly establishes another charged offense. Previously, the COMA has suggested that judges consider giving instructions that tell the members not to merge the evidence between offenses.[104] However, sometimes an instruction is inadequate. *United States v. Palacios*[105] illustrates these points. The members convicted the accused of committing indecent acts and sodomy on his stepdaughter. The stepdaughter did not testify at trial, but a prior videotaped interview of her by law enforcement officials was admitted under the residual hearsay exception. During this interview, which occurred about a month after the indecent acts allegations, the stepdaughter for the first time stated that the accused had sodomized her. On appeal, the ACMR found that the videotape was improperly admitted. The ACMR dismissed the sodomy charge but held that the admission of the videotape was harmless beyond a reasonable doubt regarding the remaining charge of indecent acts.[106] The COMA disagreed that the admission of the videotape was harmless. The COMA, concerned with the "spillover" effect, noted that the trial judge did not instruct the court members to consider the videotape only as evidence of sodomy. As a result, the COMA reversed the accused's remaining conviction. *Palacios* should alert counsel and judges that the "spillover" effect may occur with both unrelated offenses as well as related offenses. Judges should consider

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[98] *Id.* at 478-79.

[99] *Id.* at 479.

[100] 36 M.J. 963 (A.F.C.M.R. 1993).

[101] *Id.* at 978-81.

[102] *Id.* at 982. The AFCMR gives a nice summary of the law regarding uncharged misconduct and the necessity of instructing on such evidence. *Id.* at 981-82. No instruction is necessary when the uncharged misconduct is "part and parcel" to the charged misconduct. Otherwise, a limiting instruction is required unless the defense waives the instruction. The limiting instruction should identify the purpose for which the evidence was admitted and bar its use for improper purposes. The limiting instruction should be given at the time of the introduction of the uncharged misconduct and again before deliberations on findings. *See* BENCHBOOK, *supra* note 5, para. 7-13.

[103] 36 M.J. 317 (C.M.A. 1993).

[104] *See* United States v. Haye, 29 M.J. 213, 214 (C.M.A. 1989); United States v. Hogan, 20 M.J. 71, 73 (C.M.A. 1985); *see also* Update Memo 8, *supra* note 45, para. 7-17 and accompanying text.

[105] 37 M.J. 366 (C.M.A. 1993).

[106] United States v. Palacios, 32 M.J. 1047 (A.C.M.R. 1991).

giving a "spillover" instruction whenever the members must deliberate on more than one offense.[107]

Several cases during the past year dealt with the appropriateness of the military judge's limiting instructions. In *United States v. Jackson*,[108] the judge's instructions concerned the proper use of cross-examination of a government urinalysis expert. During the cross-examination, the defense counsel read from learned treatises discussing the pitfalls of urinalysis and quality-control reports from the laboratory.[109] The judge instructed that the statements read to the witness "were admitted solely for the purpose of testing the testimony of this witness. You may not consider those statements for the truth of the matters contained in the statements . . . ."[110] The COMA held that the instructions were in error because they may have prevented the members from considering the truth of the matters contained in the learned treatises, and the factual statements in the quality-control reports of which the expert had personal knowledge. The COMA held, however, that the instructions were proper to the extent that the members could not consider the statistics and conclusions in the quality-control reports.[111] The COMA held that the defense counsel waived any error, other than plain error (not present in this case), by not objecting to the limiting instructions at trial.[112]

In *United States v. Burks*,[113] the trial counsel desired to show that law enforcement officials focused on the accused as a suspect because of a "presumptive positive" luminol test for blood in the accused's car. The judge permitted the testimony based on trial counsel's assurances that subsequent testimony by a forensic expert would overcome any prejudicial effect on the accused. After the police agent testified about his "field" luminol test, the judge instructed the members that the test was a screening test, that the members could not consider the test as confirming that blood was in the accused's car, and that the testimony was presented only to show why the accused continued to be a suspect.[114] The COMA lauded the judge's "clear and accurate instructions to the members that properly limited their consideration of the luminol test . . . ."[115]

United States v. Rodriguez[116] concerned the use of polygraph evidence by the prosecution in rebuttal. The COMA reversed the case, stating that the judge properly instructed on the limited use of the polygraph examiner's testimony, but failed in not ensuring that the prosecution established the necessary foundation for the admissibility of the polygraph results.[117]

In *United States v. Dancy*,[118] the judge's limiting instructions helped save the case on appeal. Before trial, the trial counsel failed to disclose a letter written by the accused to the victim's sister, yet used the letter during the cross-examination of the accused for impeachment purposes. The accused

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[107] Update Memo 8, *supra* note 45, para. 7-17, contains the following instruction to address the "spillover" effect:

> Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

See supra note 45 and accompanying text.

[108] 38 M.J. 106 (C.M.A. 1993).

[109] *Id.* at 107.

[110] *Id.* at 109.

[111] *Id.* at 110-11. Limiting instructions are appropriate when evidence is admitted for the limited purpose of showing the foundation for an expert's testimony. *See* United States v. Neeley, 25 M.J. 105, 107 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988).

[112] *Jackson*, 38 M.J. at 111. Appellate courts consistently apply waiver absent plain error when counsel fail to object to evidentiary instructions. *See, e.g.*, United States v. Hargrove, 25 M.J. 68 (C.M.A. 1987), *cert. denied*, 488 U.S. 826 (1988); United States v. Yanke, 23 M.J. 144 (C.M.A. 1987); United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

[113] 36 M.J. 447 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 187 (1993).

[114] *Id.* at 452.

[115] *Id.*

[116] 37 M.J. 448 (C.M.A. 1993). This trial occurred prior to the promulgation of Military Rule of Evidence (MRE) 707, which prohibits the introduction of polygraph evidence. MCM, *supra* note 24, MIL. R. EVID. 707. A recent case essentially holds that MRE 707 is unconstitutional because it denies an accused the opportunity to establish a foundation for the admissibility of favorable polygraph evidence. *See* United States v. Williams, No. 9202646, 1994 WL 23841 (A.C.M.R. Jan. 28, 1994).

[117] *Burkes*, 36 M.J. at 452. While appellate courts usually apply waiver when no objection exists to an erroneous limiting instruction, the courts seldom will uphold a case when the evidence which is the subject of the limiting instruction itself is erroneously admitted. *See, e.g.*, United States v. Pollard, 38 M.J. 41 (C.M.A. 1993) (limiting instruction of no use when the residual hearsay which was the subject of the instruction was inadmissible).

[118] 38 M.J. 1 (C.M.A. 1993).

was so flustered and surprised by the cross-examination that he eventually asserted his Fifth Amendment privilege. The military judge struck the accused's testimony and told the members to disregard it, but not to draw any adverse inference against the accused. The defense moved for a mistrial because of the trial counsel's failure to disclose the letter. When the judge indicated that he would give further limiting instructions, the defense proposed that the letter be introduced as a defense exhibit and that the accused's testimony be reinstated, except for the testimony on cross-examination on the letter. The judge, upset over the trial counsel's "ambush," agreed to this procedure and extensively instructed the court members about the trial counsel's error, their responsibility to disregard the evidence concerning the letter, and what evidence to consider.[119] This case demonstrates that a mistrial is a drastic remedy to be granted only in cases of manifest injustice.[120] The case also shows that proper limiting instructions may prevent the necessity of a mistrial.

At issue in *United States v. Austin*,[121] was the propriety of accomplice testimony instruction.[122] In military law, an accomplice includes anyone culpably involved in the crime for which the accused was charged, regardless of whether the accomplice is subject to prosecution.[123] Whenever the evidence raises a reasonable inference that a witness may have been an accomplice, and counsel requests a limiting instruction, the judge must inform the members on how they should determine if the witness is an accomplice, and that accomplice testimony is of questionable credibility.[124] In *Austin,* the accused was charged with sodomy. The accused's alleged sexual partner testified under a grant of immunity against the accused and admitted to the sodomy. The prosecution also introduced the accused's admission to law enforcement officials that she and her partner had committed sodomy during a homosexual relationship. Although the defense requested the accomplice instruction for the partner, the military judge refused to give it based on the certainty of the evidence, and the confusion the instruction would cause. The judge did incorporate into the general instruction on credibility of witnesses[125] a specific reference to the need for close scrutiny of the sexual partner's testimony. The defense counsel expressly said that the proposed instruction was acceptable. The ACMR agreed with the ruling of the military judge that the accomplice instruction was unnecessary. However, the ACMR also found that the defense had waived the issue.[126]

One final case on evidentiary instructions is worthy of mention. *United States v. Webb*[127] dealt with a witness's pretrial identification of the accused at a line up. After extensive litigation to suppress the pretrial identification, the military judge determined that it was reliable enough for the members to consider. In accordance with the *Benchbook*, the judge instructed the members on the unreliability of eyewitness identification and the need to evaluate such evidence with close scrutiny.[128] The COMA held that the judge properly placed the issue before the members by stating, "the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform."[129]

Procedural Instructions on Findings

The military's reasonable doubt instruction was attacked during the past year as a result of the Supreme Court's decision in *Cage v. Louisiana*.[130] In *Cage,* the judge instructed that reasonable doubt is a "doubt as would give rise to a grave uncertainty. . . . It is an actual substantial doubt. . . . What is required is not an absolute or mathematical certainty, but a moral certainty."[131] The Supreme Court held that this instruction was improper because equating of reasonable doubt to

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[119] *Id.* at 3-6.

[120] *See* United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990).

[121] No. 9201868 (A.C.M.R. Jan. 31, 1993).

[122] BENCHBOOK, *supra* note 5, para. 7-10.

[123] United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963).

[124] United States v. Gillette, 35 M.J. 468 (C.M.A. 1992).

[125] BENCHBOOK, *supra* note 5, para. 7-7.

[126] *Austin,* slip op. at 3.

[127] 38 M.J. 62 (C.M.A. 1993).

[128] BENCHBOOK, *supra* note 5, para. 7-7.

[129] *Webb,* 38 M.J. at 68.

[130] 498 U.S. 39 (1990).

[131] *Id.* at 40.

"grave uncertainty" and "an actual substantial doubt" created too much potential of misunderstanding by the jurors when used in conjunction with the words "moral certainty" instead of the more precise terminology of "evidentiary certainty."[132]

The military's reasonable doubt instruction states that "[p]roof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty."[133] In *United States v. Robinson*,[134] the defense alleged that the military judge erred by using this moral certainty language in his reasonable doubt instruction. However, because the defense counsel did not object to the instruction at trial, the COMA treated the issue under the plain-error doctrine. Under this more stringent test, the COMA held that the defense was not entitled to relief.[135] Although the COMA did not state what the result would have been if the defense had objected at trial, the COMA indicated that the military's instruction is not substantially the same as the one found defective in *Cage*. The COMA also could find no authority condemning the military instruction.[136] Military appellate courts consistently have upheld the military's reasonable doubt language since the *Cage* decision, despite the Supreme Court's apparent preference for the language "evidentiary certainty" as opposed to "moral certainty."[137]

The ACMR opinion in *United States v. Bins*[138] reflects the need for military judges to use checklists to ensure that they give the required instructions.[139] On appeal, the defense complained that the military judge did not define reasonable doubt when instructing the court after argument by counsel, nor did the judge give the court the statutory charge on the presumption of innocence, the burden of proof, and how to consider lesser-included offenses when in issue.[140] However, the ACMR was able to affirm the conviction by looking at the instructions given throughout the trial. The judge defined reasonable doubt prior to *voir dire* and, while not giving the statutory charge listed in the *Benchbook*,[141] adequately covered the concepts elsewhere. Not only was the judge apparently "asleep at the switch," but so were counsel. On being asked if there were any objections or requests for additional instructions, counsel replied that they had none. Counsel must make a habit of listening to the instructions and use a checklist of their own to ensure that the judge properly instructs the members.

Counsel and judges should be leery of changing established procedures. *United States v. Jones*[142] involved "a procedural error caused by the instructional error."[143] After the judge gave the members their instructions on sentencing, the members desired a recess prior to beginning their deliberations. The judge, contrary to established procedure,[144] instructed the members, with the express permission of counsel, that they could begin their deliberations without reassembling the court after they had finished taking their recess. While not finding any prejudicial error, the COMA stated not only that this was not a wise practice, but "emphasize[d] in the strongest terms that the administrative instruction in the *Benchbook* [the need for formally reassembling before and after any recess] be given by all judges prior to deliberation on findings and sentence."[145] To comply with the court's admonition to give the

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[132] *Id.* at 41. The Supreme Court has held that a constitutionally deficient reasonable doubt instruction requires reversal of the conviction and cannot be tested under a harmless error analysis. Sullivan v. Louisiana 113 S. Ct. 2078 (1993).

[133] BENCHBOOK, *supra* note 5, para. 2-29.1.

[134] 38 M.J. 30 (C.M.A. 1993).

[135] *Id.* at 31.

[136] *Id.* at 32.

[137] *See, e.g.*, United States v. Gray, 37 M.J. 730, 748-49 (A.C.M.R. 1992), *app'd on reh'g*, 37 M.J. 741 (A.C.M.R. 1993); United States v. Ginter, 35 M.J. 799, 803 (N.M.C.M.R. 1992), *pet. for review denied*, 37 M.J. 232 (C.M.A. 1993); United States v. Czekala, 38 M.J. 566 (A.C.M.R. 1993); United States v. Williams-Oatman, 38 M.J. 602 (A.C.M.R. 1993); United States v. Youngberg, 38 M.J. 635, 639 (A.C.M.R. 1993).

[138] 38 M.J. 704 (A.C.M.R. 1993).

[139] *See, e.g.*, BENCHBOOK, *supra* note 5, app. A.

[140] UCMJ art. 51(c) (1988).

[141] BENCHBOOK, *supra* note 5, para. 2-29.1.

[142] 37 M.J. 321, 323 (C.M.A. 1993).

[143] *Id.* at 323.

[144] *See* MCM, *supra* note 24, R.C.M. 813(b) (military judge must ensure all parties are accounted for after a recess); BENCHBOOK, *supra* note 5, para. 2-30 at 2-37 (judge instructs members that court must formally reassemble before and after any recess from deliberations).

[145] *Jones*, 37 M.J. at 324. *Cf.* United States v. Cordell, 37 M.J. 592, 595 (A.F.C.M.R. 1993) (necessity for formally reassembling before recessing during deliberations is a subject best left to the discretion of the judge).

instruction before sentencing deliberations, judges will have to add the instruction to their *Benchbook* as this specific administrative instruction is contained only in the findings instructions.[146]

In *United States v. Behling*,[147] the ACMR also chastised the trial judge for substituting a new procedure for an established one. In *Behling*, the military judge typed out the instructions that he was going to give the members and attached the written instructions as an appellate exhibit. Instead of having the court reporter type the instructions into the record, the judge advised the court reporter to use a "reporter's note" stating that the judge had read verbatim from the appellate exhibit in giving the members their instructions on findings. While finding that this procedure was not a substantial omission from the verbatim record of trial requirement, the ACMR condemned the practice as likely to cause unnecessary appellate litigation.

In *United States v. Guron*,[148] the AFCMR commended the judge for doing something out of the ordinary. In *Guron*, the prosecution's theory of a larceny charge had two possible bases, a wrongful obtaining or a wrongful withholding. The judge instructed on both theories and also instructed the members to indicate on the findings worksheet on which theory they based their findings. While finding no express authority for the judge to have members give their underlying basis for a conviction, the AFCMR found the procedure helpful in the case and upheld the judge's instruction under R.C.M. 801(a), which gives the judge authority to generally control the proceedings.[149]

A recent development in procedural instructions concerns the timing of instructions. In the past, military judges were required to give instructions after argument by counsel. However, in 1993 the President amended R.C.M. 920(b) to permit the judge—within his or her discretion—to give instructions before or after argument, or at both times.[150] This change may allow the judge to highlight the essential issues in a case before argument by counsel and will allow the court members to understand counsel's argument more clearly in light of the instructions already given. Although now codified in the *Manual*, appellate courts previously upheld the practice of giving instructions prior to argument.[151]

Judges and counsel should be aware of the proper procedures when the accused pleads guilty to a lesser-included offense and the greater offense will be contested before the court members. In *United States v. Staton*,[152] counsel allowed the trial judge to ignore the procedures in the *Manual* and *Benchbook*,[153] by entering findings of guilty to the lesser offense of an unauthorized absence when the prosecution sought to prove the greater desertion offense. The judge did not inform the members that he had accepted the accused's guilty plea to the lesser offense, nor did he instruct the members on the lesser offense when giving the elements of desertion. Because of these procedural errors, the NMCMR could not affirm the accused's conviction for the desertion offense of which the members convicted him.

United States v. Fleming[154] involved the failure of the military judge to give proper instructions at a court-martial involving classified information. When classified information is used at a court-martial, judges and counsel must not only be aware of the special security precautions and rules of evidence applicable,[155] but also the special instructions that are necessary. In *Fleming*, the government charged the accused with several offenses relating to classified materials. The military judge gave the members instructions about the necessity for closing the courtroom at times to the public, but failed to give required instructions informing the members that they were not to conclude that testimony given in the closed session was true, or that the testimony automatically cast doubt on the accused's innocence merely because of the closed proceeding.[156] The COMA did not find reversible error, however, because the judge's other instructions and the specific eviden-

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[146] The appropriate place to incorporate the instruction is at the last question of paragraph 2-39, page 2-48, of the *Benchbook*. BENCHBOOK, *supra* note 5.

[147] 37 M.J. 637 (A.C.M.R. 1993).

[148] 37 M.J. 942 (A.F.C.M.R. 1993).

[149] *Id.* at 950 n.8.

[150] MCM, *supra* note 24, R.C.M. 920(b) (C6, 21 Jan. 1994).

[151] *See* United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979); United States v. Pendry, 29 M.J. 694 (A.C.M.R. 1989).

[152] 37 M.J. 1047 (N.M.C.M.R. 1993).

[153] MCM, *supra* note 24, R.C.M. 910(g)(2) (military judge should not enter findings as to the lesser offense); BENCHBOOK, *supra* note 5, para. 2-21 n.3 (guilty findings should not be announced, but the members must be instructed as to the meaning of the guilty plea).

[154] 38 M.J. 126 (C.M.A. 1993).

[155] MCM, *supra* note 24, MIL. R. EVID. 505.

[156] *See* United States v. Grunden, 2 M.J. 116, 123-24 (C.M.A. 1977).

tiary issues in the case were of sufficient clarity to ensure that the members did not leap to improper conclusions.[157] The most important aspect of *Fleming* for practitioners is contained in a footnote: "[m]embers should be instructed any time an unusual trial procedure might suggest the guilt of an accused."[158]

Sentencing Instructions

The military judge's sentencing instructions often are used to defuse improper sentencing argument by counsel.[159] This occurred in *United States v. White.*[160] The members convicted Sergeant White of wrongful use of cocaine as a result of a positive urinalysis test. During cross examination of a defense character witness, the trial counsel referred to a second uncharged urinalysis by asking if the witness' opinion would change if she knew that the accused had used cocaine again. She responded that she did not know.[161] During sentencing argument, the trial counsel improperly referred to the second urinalysis by commenting that "we are not just talking about one use of Cocaine."[162] The defense did not object to this argument. The COMA ruled that the argument was not plain error, relying, in part, on the military judge's instruction that "the accused is to be sentenced only for the offense of which he has been found guilty."[163] This case demonstrates how important instructions are in curing improper sentencing arguments.

During sentencing instructions, the military judge typically informs the members that a dishonorable or bad-conduct discharge deprives the accused of substantially all benefits administered by the Veterans Administration.[164] This standard instruction may not be appropriate, however, if an accused has an honorable discharge from a prior enlistment.[165] *United States v. Longhi*[166] discussed this issue.

In *Longhi,* the accused had an honorable discharge from a prior enlistment. The military judge instructed the members that "vested benefits from a prior period of honorable service are not forfeited by receipt of a bad-conduct discharge . . . ."[167] Although the defense did not object to this instruction at trial, on appeal the defense alleged that the term "vested" was improper because benefits from a prior term of service may be forfeited if the accused is discharged after being convicted of certain offenses.[168] The AFCMR rejected this argument, holding that the instruction, although technically incorrect, was accurate in this case because the accused was not convicted of any offense which could result in forfeiture of his benefits from a prior enlistment.

During presentencing proceedings, the military judge must inform the members of the maximum punishment.[169] Several recent cases demonstrate how important this requirement is.

In *United States v. Pabon,*[170] the military judge's instruction on the maximum punishment was held to be plain error. In *Pabon,* the accused was convicted of stealing five military parkas, valued at $80.50 each, and various drug offenses. The thefts were all charged in one specification, although no evidence existed that the thefts occurred at the same time.[171]

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[157] *Fleming,* 38 M.J. at 129.

[158] *Id.* at 129 n.*.

[159] *See* United States v. Flynn, 34 M.J. 1183 (A.F.C.M.R. 1992).

[160] 36 M.J. 306 (C.M.A. 1993).

[161] Update Memo 8, *supra* note 45, para. 7-18, for a limiting instruction when a witness responds negatively to "did you know" or "have you heard" questions. *See supra* note 45 and accompanying text.

[162] *White,* 36 M.J. at 308.

[163] *Id.* This is part of the standard sentencing instruction. *See* BENCHBOOK, *supra* note 5, para. 2-37.

[164] *See* BENCHBOOK, *supra* note 5, para. 2-37.

[165] United States v. Goodwin, 33 M.J. 18 (C.M.A. 1991).

[166] 36 M.J. 988 (A.F.C.M.R. 1993).

[167] *Id.*

[168] The accused provided the court with an opinion from the General Counsel of the Department of Veterans' Affairs that explained that veterans benefits from a prior term of service are forfeited when the accused is discharged by a court-martial convicting the accused of mutiny, sedition, aiding the enemy, spying, espionage, treason, rebellion, subversive activities, sabotage, and certain violations of the Atomic Energy Act of 1954 and the Internal Security Act of 1950. *Id.* at 988-89.

[169] MCM, *supra* note 24, R.C.M. 1005(e)(1).

[170] 37 M.J. 836 (A.F.C.M.R. 1993).

[171] *See* United States v. Rupert, 25 M.J. 531 (A.C.M.R. 1987) (when an accused is charged with a larceny "mega-specification," he or she may be convicted of larceny over $100 only if one item is over $100 or several items taken at the same time and place have that aggregate value).

Because the aggregate value of the parkas was over $100, the military judge calculated the maximum punishment for the thefts to be ten years. The AFCMR ruled that the maximum punishment for the thefts should have been one year. The AFCMR held that the value of the parkas should not have been combined to calculate the maximum punishment, because no evidence existed that they were stolen at the same time. The AFCMR found that the total maximum confinement should have been twenty years, not twenty-nine, as the trial judge instructed the members. Finding this to be plain error, the AFCMR set aside the sentence.

In *United States v. Olson,*[172] the military judge's maximum punishment instruction also was held to be plain error. The accused in *Olson* was convicted of one charge of using marijuana and one charge of conduct unbecoming an officer by using marijuana with an enlisted person and providing an enlisted person drug paraphernalia. The trial judge ruled that the use of marijuana offense in the first charge and the paraphernalia offense in the second charge were separate for punishment purposes. Consequently, he instructed the members that the maximum punishment included four years confinement. The AFCMR ruled that the two charges were multiplicious for findings. Applying the test of *United States v. Teters,*[173] the AFCMR found that all of the elements of the first charge were included in the second charge. The AFCMR ruled that the maximum punishment should have been two years and held that the trial judge's instruction was plain error. Consequently, the AFCMR reassessed the sentence.

When the court convicts the accused of several offenses, the military judge ordinarily informs the members of a single maximum punishment, combining the maximum authorized punishment for each offense.[174] However, the military judge also may advise the members of the maximum punishment for each offense.[175] *United States v. Austin*[176] discussed this issue. In *Austin,* the court convicted the accused of sodomy and assault with a dangerous weapon. The defense counsel attempted to discuss the maximum punishment for each separate offense in his sentencing argument to the members. However, the military judge prohibited this. The ACMR upheld the trial judge's action. The ACMR noted that, although the military judge may instruct on the maximum punishments for separate offenses, he or she need not allow counsel to argue this when there is a fair risk of misleading the members.

Several offenses under the UCMJ, such as premeditated murder, carry a mandatory minimum penalty.[177] If the accused is convicted of one of these offenses, the military judge is required to inform the members of the mandatory minimum sentence.[178] *United States v. Anderson*[179] upheld this requirement. In *Anderson,* the accused was convicted of assault, premeditated murder, and escape from confinement. The accused argued that the mandatory minimum instruction violated Article 52(b)(2) of the UCMJ,[180] which requires a vote of three quarters of the members to sentence the accused to confinement of over ten years. The accused relied on *Dodson v. Zelez,*[181] a recent federal case in which a military judge's instruction on the mandatory life sentence was held to be error.

The AFCMR rejected the accused's argument. The AFCMR indicated that in *Dodson* the military judge told the jury that if any member voted for confinement, the mandatory minimum life sentence would follow automatically.[182] In *Anderson,* however, the military judge followed the current procedures requiring a three quarters vote before the members can impose the mandatory minimum life sentence. The AFCMR held that the mandatory minimum instruction did not violate the three quarters vote requirement.[183]

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[172] 38 M.J. 597 (A.F.C.M.R. 1993).

[173] 37 M.J. 370 (C.M.A. 1993). *See supra* note 22 and accompanying text.

[174] *See* MCM, *supra* note 24, R.C.M. 1005(e)(1) discussion.

[175] United States v. Gutierrez, 11 M.J. 122 (C.M.A. 1981).

[176] No. 9201868 (A.C.M.R. Jan. 31, 1993).

[177] Spying under Article 106 carries a mandatory death penalty. Premeditated murder and felony murder under Articles 118(1) and 118(4) carry a mandatory minimum sentence of life imprisonment. UCMJ arts. 106, 118(1), 118(4) (1988).

[178] MCM, *supra* note 24, R.C.M. 1005(e)(1).

[179] 36 M.J. 963 (A.F.C.M.R. 1993).

[180] UCMJ art. 52(b)(2) (1988).

[181] 917 F.2d 1250 (10th Cir. 1990).

[182] *Dodson* was a capital case that was tried in 1981, before our present bifurcated procedure for capital sentencing. The military judge in *Dodson* instructed the members that if any member voted for confinement, the balloting could stop then, because death was excluded for lack of unanimity. The judge then told the members that the mandatory minimum life imprisonment would follow automatically. *Id.; see Anderson,* 36 M.J. at 986.

[183] The AFCMR relied on United States v. Shroeder, 27 M.J. 87 (C.M.A. 1988), *cert. denied,* 489 U.S. 1012 (1989).

United States v. Gray[184] upheld the military's death penalty instructions.[185] In *Gray*, the defense challenged the military judge's instruction that the members could not adjudge a death sentence unless they found that extenuating and mitigating circumstances were substantially outweighed by any aggravating factors. Although no objection existed to this instruction at trial, appellate defense counsel alleged that the trial judge committed plain error by failing to define the term "substantially outweighed" in more detail. The ACMR rejected this argument, holding that no constitutionally mandated standard for balancing aggravating and mitigating factors exists.

The defense in *Gray* also argued that the trial judge erred by not instructing the members that the only offenses for which the accused could be sentenced to die were premeditated murder and felony murder. The ACMR rejected this argument as well. The ACMR ruled that the trial judge properly informed the members of a single maximum punishment and was not required to instruct that the accused could not be sentenced to die on the basis of the cumulative effect of all offenses.

The military judge also must instruct the members on the voting procedures during sentencing.[186] In *United States v. Greene*,[187] the military judge failed to properly instruct the members about the secrecy of their written ballot. The defense did not object to the incomplete instruction. The ACMR held that the judge's omission was not plain error because it did not have a substantial unfair impact. The ACMR distinguished other cases in which they had found such instructional errors to be plain error because the omission here was relatively minor.[188]

Conclusion

The recent cases dealing with instructions demonstrate how important instructions are during a court-martial. Practitioners may glean two general themes from these cases. First, appellate courts require military judges to give complete and accurate instructions. Second, appellate courts willingly apply the waiver doctrine unless counsel at trial object to improper instructions. As a result, this is an area that requires a great deal of attention, both by judges and counsel.

[184] 37 M.J. 751 (A.C.M.R. 1993).

[185] Many of these instructions are contained in the BENCHBOOK, *supra* note 5, para. 2-61.

[186] MCM, *supra note* 24, R.C.M. 1005(e)(2). These procedural instructions are contained in the BENCHBOOK, *supra* note 5, para. 2-38.

[187] 36 M.J. 1068 (A.C.M.R. 1993).

[188] The ACMR cited United States v. Harris, 30 M.J. 1150 (A.C.M.R. 1990) where plain error was found because the trial judge failed to instruct on secret written ballot procedures, the manner of collecting and counting votes, the requirement that only members be present during deliberations, the prohibition on the use of rank, and the requirement for a full and free discussion on sentencing.

Proving Economic Crime: A Guide for Prosecutors

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Introduction

Prosecuting economic crime[1] cases can be complex. The proliferation of checks, automatic teller machine (ATM) cards, credit cards, and telephone calling cards has given soldiers greater opportunities to steal. Prosecutors usually are faced with several choices in charging such thefts and often must present numerous documents and witnesses to prove economic crimes.

This article will give prosecutors suggested approaches for charging and proving economic crimes. It will focus on five economic crimes: check forgeries, bad check offenses, ATM card theft, credit card theft, and telephone calling card theft.

Check Forgery

Charging

A soldier who forges a check typically is charged with forgery under Article 123 of the Uniform Code of Military Justice (UCMJ).[2] Article 123 covers two separate offenses:

[1] The term "economic crime" will be used in this article to refer to any crime that affects one's property rights.

[2] UCMJ arts. 1-146 (1988).

forging a check and knowingly transferring a forged check.[3] If the accused did both, as often is the case, he or she can be charged separately for each offense.[4] However, these two charges usually are combined into one specification.[5]

A soldier also can be charged with larceny under Article 121, UCMJ, when he or she cashes a forged check and obtains cash or merchandise in return.[6] If the soldier receives services in return for the forged check, he or she can be charged with obtaining services by false pretenses under Article 134, UCMJ.[7] These acts are usually charged, however, under Article 123, rather than Articles 121 or 134,[8] because the forgery charge more accurately describes what the soldier did.[9]

Soldiers who steal blank checks to forge them should be separately charged for the larceny of the checks.[10] The charge should indicate that the checks are "of some value."[11]

The Government Case

To prove a check forgery under Article 123, UCMJ, the prosecutor must establish that the check was forged and that the accused forged or transferred it knowing that it was forged.[12] If the accused is charged with larceny or obtaining services under false pretenses, the prosecutor must establish that the accused used a forged check to wrongfully obtain something of value.[13] Once these facts are established, the required intent to defraud can be inferred.[14] The prosecutor can establish these facts by calling three witnesses: the victim, a cashier, and a questioned documents examiner.

The prosecutor should call the victim as the first witness.[15] The victim should establish that the check was stolen and that he or she did not make the forged entries on it. The victim also should relate any conversations that he or she had with the accused about the forged check.[16]

The prosecutor should call a cashier from the store or bank where the accused cashed the check as the second witness.[17] Ideally, this cashier should be the one who actually cashed the check and should be able to recognize the accused. However, this is not required;[18] the cashier only need establish where and when the check was cashed, and what the accused received in return. The cashier can do this by examining the

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[3] MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 48b (1984) [hereinafter MCM]. The terms "forging" and "transferring" are not used in Article 123, UCMJ; the more precise terms "falsely made and altered" and "uttered" are used. "Making" means writing out a writing or signature. "Altering" means making a material change in the legal tenor of the writing. "Uttering" means transferring or offering to transfer a writing. *Id.*

[4] United States v. Albrecht, 38 M.J. 627 (A.F.C.M.R. 1993).

[5] This is done to simplify the charges. Although such a specification is duplicious—alleges two offenses—the defense is unlikely to object because the remedy—severance—may result in a greater maximum penalty. MCM, *supra* note 3, pt. IV, ¶ 48.

[6] *Id.* pt. IV, ¶ 46b.

[7] *Id.* pt. IV, ¶ 78b.

[8] Although often done to simplify the charges, this approach is not required because these charges are not multiplicious for findings. *See* United States v. Teters, 37 M.J. 370 (C.M.A. 1993). Whether they are multiplicious for sentencing is unclear. *See generally* Gary J. Holland & Willis C. Hunter, *United States v. Teters: More Than Meets the Eye?*, ARMY LAW., Jan. 1994, at 16.

[9] *See* MCM, *supra* note 3, pt. IV, ¶ 48. The forgery charge also may carry a greater maximum punishment. The maximum confinement authorized for forgery is five years. The maximum confinement authorized for larceny and obtaining services under false pretenses is only six months if services or nonmilitary property of a value of $100 or less are stolen. *Id.* pt. IV, ¶¶ 46e, 48e, 78e.

[10] This charge is not multiplicious with any subsequent forgeries of the checks. United States v. Mireles, 17 M.J. 781 (A.F.C.M.R. 1983).

[11] Because the checks were blank at the time they were stolen, assigning them the value they later had when forged is improper. The value of stolen property is its legitimate market value at the time of the theft. MCM, *supra* note 3, pt. IV, ¶ 46c(1)(g).

[12] *Id.* pt. IV, ¶ 48b.

[13] *Id.* pt. IV, ¶¶ 46b, 78b.

[14] United States v. Cook, 15 C.M.R. 876 (A.F.B.M.R. 1954) (intent to defraud required for forgery can be inferred); MCM, *supra* note 3, pt. IV, ¶ 46c(1)(f)(ii) (intent to steal required for larceny may be proven by circumstantial evidence). In a forgery case, inferring the intent to defraud may be difficult if the accused did not transfer the forged check. *See* United States v. Sheeks, 37 C.M.R. 50 (C.M.A. 1966) (intent to deceive by using forged checks to make it appear accounts balanced is not sufficient to establish intent to defraud).

[15] *See infra* Appendix A for a suggested set of direct examination questions for the victim.

[16] The accused's statements to the victim usually are admissible—even if no warnings were given under Article 31, UCMJ—because the victim's questioning usually does not occur in any official capacity. United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

[17] *See infra* Appendix B for a suggested set of direct examination questions for the cashier.

[18] As a practical matter, calling the cashier who actually cashed the check may be difficult, especially if several checks and several cashiers are involved. The cashier may find it impossible to recognize the accused. The head cashier often is a good substitute because he or she usually is able to recognize the initials or other markings of the cashier who actually cashed the check and should be able to explain that cashier's check cashing procedures.

endorsements on the back of the check and explaining the check cashing procedures at the store or bank.[19]

The prosecutor should call a questioned documents examiner as the third witness[20] to establish that the accused made the forged entries on the check.[21] A questioned documents examiner often will be unable to state conclusively that the accused authored the forged entries. However, he or she should be able to give an opinion about the probability that the accused made the entries.

The prosecutor also may want to call a latent prints examiner if the accused's fingerprints were found on the forged check. This testimony can be especially important if the questioned documents examiner is unable to identify the accused as the author of the forgeries.

Bad Check Offenses

Charging

A soldier who obtains cash or merchandise by intentionally writing bad checks can be charged with larceny or wrongful appropriation under Article 121, UCMJ.[22] If the soldier obtains services instead, he or she can be charged with obtaining services by false pretenses under Article 134, UCMJ.[23] However, the accused usually is charged with intentionally writing checks with insufficient funds under Article 123a, UCMJ, or writing bad checks by dishonorably failing to maintain funds under Article 134, UCMJ, because these charges more accurately reflect what the accused did.[24]

Article 123a prohibits intentionally writing or cashing[25] a bad check to obtain cash or something of value or to pay off a debt.[26] To be guilty of this offense, the accused must know that at the time of writing the check, enough money or credit is not present in the account to cover the check.[27] Writing bad checks under Article 134, on the other hand, prohibits a soldier from cashing a check and then, through bad faith or gross negligence, failing to maintain enough money in the account to cover the check. To be guilty of this offense, the accused need *not* know that insufficient funds existed in the account when he or she wrote the check.[28]

Charging the accused under Article 123a allows for greater flexibility, because dishonorable failure to maintain funds under Article 134 is a lesser-included offense of Article 123a.[29] Additionally, the maximum punishment under Article

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[19] The endorsements and other markings on the check are admissible as an exception to the hearsay rule because they are records of a regularly conducted activity. MCM, *supra* note 3, MIL. R. EVID. 803(6). Testimony on the procedures used to cash a check—such as, using the picture, signature, and name on the customer's identification card to verify the customer's identity—may be sufficient to identify the accused as the person who cashed or endorsed the check. *United States* v. Olson, 28 C.M.R. 766 (A.F.B.M.R. 1959).

[20] *See infra* Appendix C for a suggested set of direct examination questions for the questioned documents examiner in a check forgery case.

[21] An expert's opinion can be sufficient to establish that the accused authored the forged entries. *See* United States v. Lehart, 21 C.M.R. 904 (A.F.B.M.R. 1956). The trier of fact also may identify the accused as the author of forged entries by comparing them with known samples of the accused's handwriting. *Id.*; United States v. Brody, 5 C.M.R. 264 (A.C.M.R. 1952). Additionally, a nonexpert who is familiar with the accused's handwriting may identify the accused as the author of entries on a check. MCM, *supra* note 3, MIL. R. EVID. 901(b)(2).

[22] MCM, *supra* note 3, pt. IV, ¶ 46b.

[23] *Id.* pt. IV, ¶ 78.

[24] *Id.* pt. IV, ¶¶ 49, 68. This is not required, however, because these charges are not multiplicious for findings. *See* United States v. Teters, 37 M.J 370 (C.M.A. 1993). *But see* United States v. Allen, 16 M.J. 395 (C.M.A. 1983).

[25] Article 123a, UCMJ, does not use the terms "drafting" and "cashing"; the more precise terms "making," "drawing," "uttering," and "delivering" are used. Making and drawing are synonymous terms referring to writing and signing a check. The terms uttering and delivering have similar meanings; both refer to transferring a check to another, but uttering has the additional meaning of offering to transfer. MCM, *supra* note 3, pt. IV, ¶ 49c. An accused can be charged separately for making and uttering a bad check, because these charges are not multiplicious for findings. *See* United States v. Albrecht, 38 M.J. 627 (A.F.C.M.R. 1993). *But see* United States v. Holiday, 24 M.J. 686 (A.C.M.R. 1987). However, an accused typically is charged with both making and uttering a bad check in the same specification.

[26] Article 123a, UCMJ, includes two offenses: intentionally writing a bad check for the procurement of a thing of value with the intent to defraud and intentionally writing a bad check for the payment of a past due obligation or any other purpose with the intent to deceive. The first offense requires that the accused obtain something by misrepresentation. The second offense requires only that the accused gain an advantage or place someone else at a disadvantage. MCM, *supra* note 3, pt. IV, ¶ 49c.

[27] *Id.* pt. IV, ¶ 49b.

[28] *Id.* pt. IV, ¶ 68.

[29] *Id.* pt. IV, ¶ 49d. *But see* United States v. Teters, 37 M.J. 370 (C.M.A. 1993). Arguably, under *Teters*, the Article 134 offense no is longer a lesser-included offense of the Article 123a offense because Article 134 contains a separate element (conduct prejudicial to good order and discipline or service discrediting) not contained in Article 123a. Until *Teters* is clarified, the better practice would be to charge *both* the Article 134 and 123a offenses and allow the trier of fact to determine which offense the accused is guilty of. *See generally* Holland & Hunter, *supra* note 8, at 16.

123a typically is greater than the maximum punishment for the bad check offense under Article 134.[30]

In the past, bad check offenses were charged by pasting a photocopy of the front and back of the bad check directly into the specification. This no longer is required; the current practice is to include a summary of the essential information from the check in the specification.[31]

If the accused wrote more than one bad check—as is usually the case—he or she can be charged separately for each check or the checks can be combined into "mega-specifications."[32] Although mega-specifications are more efficient and simplify the charge sheet, they also reduce the maximum punishment.[33] They usually are appropriate only when the accused has written a number of bad checks and the maximum sentence that could be obtained by charging each check individually is much greater than the sentence a military judge or panel is likely to impose. When mega-specifications are drafted, the checks should be combined into groups based on the month and store in which they were cashed or by some other logical grouping.

The Government Case

To present a prima facie bad check case, the prosecutor must establish that the accused wrote and cashed the checks, received something in return, and had insufficient funds in the account to cover the checks.[34] The prosecutor also should establish that the accused was notified that the checks were returned for insufficient funds and that the accused did not make restitution within five days. Once the prosecutor establishes these facts, a statutory presumption allows the accused's intent or knowledge to be inferred.[35]

The prosecutor can establish the above facts by calling four witnesses: a cashier, the custodian of the checks, the accused's commander or supervisor, and a questioned documents examiner.[36] Even if the accused has confessed, the prosecutor still must call witnesses to corroborate the confession.[37]

The prosecutor's first witness should be a cashier from the store or bank where the accused cashed the check.[38] The cashier need not be the one who cashed the check and need

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[30] The maximum confinement authorized under Article 123a for writing a check of more than $100 for the procurement of a thing of value is five years. The maximum confinement authorized for the bad check offense under Article 134 is six months, regardless of the amount of the check. MCM, *supra* note 3, pt. IV, ¶¶ 49e, 68e.

[31] United States v. Carter, 21 M.J. 665 (A.C.M.R. 1985); United States v. Palmer, 14 M.J. 731 (A.F.C.M.R. 1982).

[32] Mega-specifications are formed by using the standard language for a single specification but referring to multiple checks. For example, a mega-specification under Article 123a, UCMJ, might look like this:

> In that Specialist John Smith, A Company, 102d Maintenance Battalion, U.S. Army, did at or near Fort Swampy, Virginia, on or between 1 March 1994 and 3 March 1994, with intent to defraud and for the procurement of a thing of value, wrongfully and unlawfully make and utter certain checks upon the Fort Swampy Bank in words and figures as follows, to wit:
>
> | *Check No.* | *Date* | *Payee* | *Amount* | *Payor* |
> |---|---|---|---|---|
> | 100 | 1 Mar 94 | Fort Swampy | PX $100.00 | John Smith |
> | 101 | 2 Mar 94 | Fort Swampy | PX $100.00 | John Smith |
> | 102 | 3 Mar 94 | Fort Swampy | PX $ 50.00 | John Smith |
> | 103 | 3 Mar 94 | Fort Swampy | PX $150.00 | John Smith |
>
> then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said checks in full upon their presentment.

[33] The maximum punishment for a mega-specification is limited to the maximum punishment authorized for the single largest check in the specification. United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987), *aff'd*, 26 M.J. 272 (C.M.A. 1988). Therefore, if two $100 checks were combined into one mega-specification under Article 123a, UCMJ, the maximum confinement authorized would be six months; if these checks were charged separately the maximum would be twelve months.

[34] MCM, *supra* note 3, pt. IV, ¶¶ 49b, 68b.

[35] The accused's act of writing and cashing a check that is dishonored because of insufficient funds is prima facie evidence of the accused's intent to defraud and knowledge of insufficient funds, unless the accused pays the holder of the check the amount due within five days of receiving notice of the dishonor. UCMJ art. 123a (1988). The dishonorable conduct required under Article 134, UCMJ, may be inferred from the accused's acts of writing a series of checks in excess of his or her ability to pay. United States v. Silas, 31 M.J. 829 (N.M.C.M.R. 1990).

[36] A different approach for proving a bad check case is discussed in Henry R. Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, ARMY LAW., Jan. 1990, at 3.

[37] MCM, *supra* note 3, MIL. R. EVID. 304(g).

[38] *See infra* Appendix B for a suggested set of direct examination questions for this witness.

not recognize the accused;[39] he or she need only establish where and when the check was cashed and what the accused received in return. The cashier can do this by examining the markings on the check and explaining the procedures for cashing checks.[40]

The prosecutor's second witness should be the custodian of the accused's check. This is the person to whom the check was sent once it was dishonored. If the check was cashed on post, this person probably will be the installation check control officer.[41] This witness can establish that the check was returned for insufficient funds by examining the insufficient funds markings on the check and explaining the check return procedures.[42] This witness also should establish that the accused was notified of his or her returned check and introduce the copies of the notification letters sent to the accused.[43] Additionally, this witness should explain whether the accused has redeemed the check.[44]

The prosecutor's third witness should be the accused's commander or supervisor. When a soldier's check is dishonored, his or her unit usually is notified and the commander or some other supervisor counsels the soldier about the dishonored check. Whoever performs this counseling should be called as a witness to establish that he or she notified the accused of the dishonored check.

The prosecutor's fourth witness should be a questioned documents examiner.[45] The prosecutor should establish that the accused wrote the bad check.[46] If this is not a contested issue, the prosecutor can substitute a lay witness who is familiar with the accused's signature for the questioned documents examiner.[47]

The prosecutor should have the accused's bank records or an officer from the accused's bank present to testify in rebuttal if the accused alleges that the check was dishonored because of a bank error. To obtain the bank records the prosecutor should comply with the Right to Financial Privacy Act.[48] However, the records may be admissible even if the government fails to comply with the act.[49]

ATM Card Theft

Charging

Charge a soldier who steals cash by unlawfully using an ATM card with larceny under Article 121.[50] The accused should be charged separately for the theft of the card and the theft of cash each time that he or she uses the card.[51] Unau-

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[39] *See supra* note 18 and accompanying text.

[40] The endorsements and other markings on the check are admissible as an exception to the hearsay rule because they are records of a regularly conducted activity. MCM, *supra* note 3, MIL. R. EVID. 803(6).

[41] This individual's duties are defined by DEP'T OF ARMY, REG. 210-60, INSTALLATIONS PERSONAL CHECK CASHING CONTROL AND ABUSE PREVENTION (26 Aug. 1988) [hereinafter AR 210-60]. *See infra* Appendix D for a suggested set of direct examination questions for the custodian of the accused's check.

[42] The dishonor stamps are admissible as an exception to the hearsay rule because they are a record of a regularly conducted activity. MCM, *supra* note 3, MIL. R. EVID. 803(6). To establish the meaning of a dishonor stamp on a check ask the judge to take judicial notice of U.C.C. § 3-510(b) (1977), which provides that, as a regular business practice, a bank's dishonor stamp on a check is admissible and creates a presumption of dishonor. United States v. Dababneh, 28 M.J. 929 (N.M.C.M.R. 1989); United States v. Dean, 13 M.J. 676 (A.F.C.M.R. 1982).

[43] Copies of these notification letters are admissible as an exception to the hearsay rule if they were made and kept in the regular course of business or are public records. *See* MCM, *supra* note 3, MIL. R. EVID. 803(6), 803(8). Generally, proof that these letters were properly mailed to the accused raises a presumption that they were received by the accused. United States v. Cauley, 9 M.J. 791 (A.C.M.R. 1980).

[44] The installation check control officer usually monitors redemption of dishonored checks. *See* AR 210-60, *supra* note 41, para. 2-9.

[45] *See infra* Appendix C for a suggested set of direct examination questions for this witness.

[46] MCM, *supra* note 3, MIL. R. EVID. 901(b)(3).

[47] *Id.* MIL. R. EVID. 901(b)(2).

[48] 12 U.S.C. §§ 3401-3422 (1989). The Army's procedures for complying with the act are contained in DEP'T OF ARMY, REG. 190-6, MILITARY POLICE: OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (15 Jan. 1992). *See generally* Donald W. Hitzeman, *Due Diligence in Obtaining Financial Records*, ARMY LAW., July 1990, at 39.

[49] United States v. Wooten, 34 M.J. 141 (C.M.A. 1992).

[50] MCM, *supra* note 3, pt. IV, ¶ 46b.

[51] These charges are not multiplicious for findings or sentence. United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984); United States v. Fairley, 27 M.J. 582 (A.F.C.M.R. 1988).

thorized withdrawals that are made at the same time and place should be combined into a single specification,[52] unless they are made from different victims' accounts.[53]

The currency wrongfully taken from the ATM can be charged as belonging to the soldier who owns the account or the bank who owns the ATM.[54] The best approach is to charge it as belonging to the bank.[55]

The Government Case

To prove larceny by unlawful use of an ATM card, the prosecutor must establish that the accused took the card, wrongfully used it, and obtained a certain amount of money.[56] The intent to permanently deprive, defraud, or appropriate may be inferred once these facts are established.[57] The prosecutor can establish these facts by calling two witnesses: the cardholder and a bank employee.

The prosecutor should first call the cardholder[58] to establish that the ATM card was stolen and that the accused did not have authority to use the card. The cardholder should state that he or she did not make the unauthorized withdrawals and explain whether they were debited to his or her account. If the cardholder had any conversations with the accused concerning the unauthorized withdrawals, the victim should relate these as well.[59]

The prosecutor should next call a bank employee.[60] Most ATMs have cameras that take photographs of the person making each withdrawal. If the ATM has this capability, the bank employee should introduce these photographs, along with the ATM records, to prove that the accused made the withdrawals.[61] The victim or anyone else familiar with the accused can identify the accused as the person in the photograph.[62]

If the ATM had no camera or the photographs are unidentifiable, the prosecutor must find some other way to prove that the accused made the withdrawals. One way to accomplish this is to question the people who made withdrawals immediately before and after the accused to see if they recall seeing the accused at the ATM. The bank should have records of the people that made these transactions. Another way to do this is to show that the accused was the only one with the opportunity or motive to steal the card. If the card was found in the accused's possession or the accused's fingerprints were on the card, this will connect the accused to the unauthorized withdrawals.

Credit Card Theft

Charging

The unauthorized use of a stolen credit card can be charged as either forgery under Article 123, UCMJ, larceny under Article 121, UCMJ, or obtaining services by false pretenses under Article 134, UCMJ.[63] Typically, the accused is charged

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[52] Unauthorized withdrawals that occur at substantially the same time *are* multiplicious for findings. *Abendschein,* 19 M.J. at 619; United States v. Jobes, 20 M.J. 506 (A.F.C.M.R. 1985).

[53] United States v. Aquino, 20 M.J. 712 (A.C.M.R. 1985) (unauthorized ATM withdrawals made at the same time and place but from different accounts were not multiplicious for findings or sentence). *But see* MCM, *supra* note 3, pt. IV, ¶ 46c(1)(h)(ii) (larceny of several articles committed at substantially the same time and place is a single larceny even though the articles belong to various persons).

[54] MCM, *supra* note 3, pt. IV, ¶ 46c(1)(c).

[55] *See* United States v. Duncan, 30 M.J. 1284 (N.M.C.M.R. 1990); *see also* 15 U.S.C. §1693(g) (1988) (consumer may be held liable for unauthorized use of ATM card only up to $50 if he or she reports theft or loss of card within two business days of discovery of theft or loss).

[56] MCM, *supra* note 3, pt. IV, ¶ 46b.

[57] *Id.* pt. IV, ¶ 46c(1)(f)(ii) (intent to steal may be proven by circumstantial evidence).

[58] *See infra* Appendix E for a suggested set of direct examination questions for the cardholder in an ATM card larceny.

[59] *See supra* note 16.

[60] *See infra* Appendix F for a set of suggested direct examination questions for this witness.

[61] The ATM records are admissible as an exception to the hearsay rule *if* they can be authenticated as a business record. MCM, *supra* note 3, MIL. R. EVID. 803(6). *Cf.* United States v. Duncan, 30 M.J. 1284 (N.M.C.M.R. 1990) (victim's testimony was inadequate to establish reliability of bank's computer printout showing ATM withdrawals). Once the bank records are admitted, the photograph is admissible as real evidence if the bank records and testimony of the bank employee identify it as a picture of a person making an unauthorized withdrawal. United States v. Howell, 16 M.J. 1003 (A.C.M.R. 1983). *Cf.* United States v. Evans, 37 M.J. 617 (A.C.M.R. 1993) (evidence of theft was insufficient because no link between accused's photo and unauthorized withdrawal existed).

[62] *Howell,* 16 M.J. at 1003.

[63] MCM, *supra* note 3, pt. IV, ¶¶ 46b, 48b, 68b.

only under Article 123[64] because the forgery charge more accurately describes what the accused did and usually carries a greater maximum penalty.[65] The charges should list the property or services stolen as belonging to the store owner.[66]

Charge the theft of the card separately as larceny under Article 121.[67] Describe the card in the specification as being "of some value."[68]

The Government Case

To prove unlawful use of a credit card, the prosecutor must establish that the accused wrongfully took the card, used it, and obtained something of value in return.[69] The required intent to permanently deprive, defraud, or appropriate may be inferred once these facts are established.[70] These facts may be established by calling three witnesses: the cardholder, a cashier, and a questioned documents examiner.

The prosecutor should call the victim cardholder as the first witness.[71] The cardholder should explain that the credit card was stolen and that the accused did not have the authority to use it. The cardholder also should testify that he or she did not make the unauthorized credit card purchase. If the cardholder had any conversations with the accused concerning the unauthorized use of the card, he or she should relate these as well.[72]

The second witness the prosecutor should call is a clerk from the store where the accused used the credit card.[73] The clerk need not be able to recognize the accused; he or she need only establish that the credit card receipt was completed at his or her store and explain what the accused received in return.[74] The clerk should be able to do this by examining the markings on the receipt and explaining the store's procedures for credit card transactions.[75]

The prosecutor should call a questioned documents examiner as the third witness.[76] He or she should establish that the accused signed the forged credit card receipt.[77] The questioned documents examiner often will be unable to state conclusively that the accused signed the receipt, but should be able to give an opinion about the probability that the accused signed it.

Telephone Calling Card Theft

Charging

A soldier who uses a telephone calling card to make unauthorized calls should be charged with obtaining services by false pretenses under Article 134, UCMJ.[78] The theft of the card should be separately charged as a larceny under Article

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[64] This is not required, however, because these charges are not multiplicious for findings. United States v. Teters, 7 M.J. 370 (C.M.A. 1993). Whether these charges are multiplicious for sentencing is unclear. *See* Holland & Hunter, *supra* note 8, at 16. *But see* United States v. Bickerstaff, No. S28192, 1990 WL 20017 (A.F.C.M.R. Feb. 2, 1990) (larceny and forgery using credit card are multiplicious for sentencing).

[65] MCM, *supra* note 3, pt. IV, ¶¶ 46, 48, 68. The maximum confinement that may be adjudged for forgery is five years. The maximum confinement that may be adjudged for larceny and obtaining services under false pretenses is only six months if services or nonmilitary property of a value of $100 or less are stolen. *Id.*

[66] United States v. Graham, 38 C.M.R. 923 (A.F.C.M.R. 1968). However, if the cardholder or credit card company was liable for the goods or services, listing them as victims may be appropriate. 15 U.S.C. §1643 (1988) (credit card holder may be held liable for unauthorized use of card only up to $50). Even if the victim is not properly charged, a change at trial would not be fatal as long as the accused is not misled. United States v. Turner, 27 M.J. 217 (C.M.A. 1988).

[67] This charge is not multiplicious with any charges stemming from the use of the card. *See* United States v. Abendshein, 19 M.J. 619 (A.C.M.R. 1984) (theft of ATM card is not multiplicious with subsequent unauthorized withdrawals using card); United States v. Mireles, 17 M.J. 781 (A.F.C.M.R. 1983) (theft of blank checks is not multiplicious with subsequent forgeries of the checks).

[68] United States v. Tucker, 29 C.M.R. 790 (A.F.C.M.R. 1960).

[69] MCM, *supra* note 3, pt. IV, ¶¶ 46b, 48b, 78b.

[70] United States v. Cook, 15 C.M.R. 876 (A.F.B.M.R. 1954) (intent to defraud required for forgery may be inferred); MCM, *supra* note 3, pt. IV, ¶ 46c(1)(f)(ii) (intent to steal required for larceny may be proven by circumstantial evidence).

[71] *See infra* Appendix G for a suggested set of direct examination questions for the cardholder in a credit card larceny.

[72] *See supra* note 16.

[73] *See infra* Appendix H for a suggested set of direct examination questions for this witness.

[74] As a practical matter, it may be impossible for the clerk to recognize the accused if the transaction was made in a busy store.

[75] The markings on the credit card receipt are admissible as an exception to the hearsay rule under MRE 803(6), because they are records of a regularly conducted activity. United States v. Garces, 32 M.J. 345 (C.M.A. 1991).

[76] *See infra* Appendix C for a suggested set of direct examination questions for this witness.

[77] *See supra* note 21.

[78] MCM, *supra* note 3, pt. IV, ¶ 78c.

121, UCMJ.[79] "Mega-specifications" often are used to charge soldiers who have made many unauthorized calls.[80] Mega-specifications simplify the charges but also reduce the maximum punishment.[81] Mega-specifications only should be used when the accused has made so many unauthorized calls that charging them individually would be burdensome and result in a maximum punishment much greater than that a military judge or panel is likely to adjudge. If mega-specifications are used, the calls often are combined into groups based on the month and destination of the call.

The Government Case

To prove theft of telephone services, the prosecutor must establish that the accused made telephone calls using the victim's calling card, that the accused had no authority to do so, and that the calls were of a certain value.[82] Once these facts are established, the accused's knowledge and intent to defraud can be inferred.[83] These facts may be established by calling three witnesses: the victim, a telephone company representative, and the person the accused called.

The prosecutor should call the victim as the first witness.[84] The victim should establish that the calling card was stolen and that he or she did not make the telephone calls in question. The victim also should explain whether he or she was billed for the calls. If the victim had any conversations with the accused about the unauthorized calls, he or she should relate these as well.[85]

The prosecutor should call a representative of the telephone company as the second witness.[86] This person should introduce records of the unauthorized calls as business records[87] and testify about the value of the calls.

The prosecutor should examine the recipient of the call as the third witness. He or she must establish that the accused called on the dates and times in question. This testimony can be difficult to obtain, because the calls usually are made to the accused's friends and family. If it is impossible to obtain reliable testimony from such witnesses, the prosecutor may need to rely on circumstantial evidence, such as the calling card having been found in the accused's possession or that all of the unauthorized calls were made to the accused's friends and family, who are total strangers to the victim.

Trial Preparation

Economic crime cases can be complex because they involve a great deal of documents and witnesses. The prosecutor should keep the case simple by organizing and presenting this evidence in a logical manner.

The prosecutor's first step is to gather all of the documents necessary to prove the case. Originals should be obtained, if possible.[88] If the original is not available, a photocopy may

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[79] *See* United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984) (theft of ATM card was not multiplicious with subsequent thefts of cash using the card).

[80] Mega-specifications are formed by using the standard language for a single specification but referring to multiple calls. For example, a mega-specification for obtaining services under false pretenses might look like this:

> In that Specialist John Smith, A Company, 102d Maintenance Battalion, U.S. Army, did at or near Fort Swampy, Virginia, on or between 1 March 1994 and 3 March 1994, with intent to defraud, falsely pretend to American Telephone and Telegraph Company that he was the authorized user of a telephone calling card belonging to Private Vic Tim, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from American Telephone and Telegraph Company telephone services, of a value of $100.00, to wit:

Date of Call	*Time*	*Call Destination*	*Tel. No. Called*	*Value*
1 Mar 92	2100	Fort Lee, VA	(804) 221-1111	$21.10
3 Mar 92	2222	Fort Lee, VA	(804) 221-1111	$79.90

[81] The maximum punishment for a mega-specification is limited to the maximum punishment authorized for the most expensive telephone call in the specification. *Cf.* United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987), *aff'd* 26 M.J. 272 (C.M.A. 1986) (maximum punishment for bad check mega-specification is limited to the maximum punishment authorized for largest check in the specification).

[82] MCM, *supra* note 3, pt. IV, ¶ 78b.

[83] *Id.* pt. IV, ¶ 46c(1)(f)(ii).

[84] *See infra* Appendix I for a suggested set of direct examination questions for the victim of a calling card larceny.

[85] *See supra* note 16.

[86] *See infra* Appendix J for a set of suggested direct examination questions for a telephone company representative.

[87] These records are admissible as an exception to the hearsay rule if the telephone company representative can establish their reliability. MCM, *supra* note 3, MIL. R. EVID. 803(6).

[88] In some cases, an original may be self authenticating. *See* MCM, *supra* note 3, MIL. R. EVID. 902(9); United States v. Brandell 35 M.J. 369 (C.M.A. 1992) (original checks are self-authenticating documents).

be an acceptable substitute.[89] The prosecutor should provide the defense copies of this evidence well in advance of trial.[90]

The prosecutor's next step is to organize the documentary evidence in a manner that will make sense at trial. For example, large groups of checks should be combined into a single exhibit and arranged in chronological order. The prosecutor also should prepare demonstrative charts summarizing the exhibits.

The prosecutor's third step is to carefully prepare direct examination questions to lay the proper foundation for the documentary evidence. He or she may use the questions in the appendices to this article as a starting point. However, the prosecutor must tailor the questions to the facts of the case. The prosecutor also should rehearse the questions with the witnesses prior to trial and show them all of the necessary documents and charts. The witnesses should be familiar with all of the exhibits that they will be asked to identify at trial.

The prosecutor's final step is to present the evidence at trial in a logical manner. He or she may call witnesses in the order suggested in this article. However, the prosecutor may need to change this order of presentation to suit the facts of the case. For example, if the accused has confessed, many of the witnesses needed to establish a prima facia case may be dispensed with. However, the prosecutor still will need to present enough witnesses to corroborate the confession[91] and then introduce the confession through the person who witnessed it.

Conclusion

This article provides a starting point for prosecutors involved in economic crime cases. Each case is different and the approaches suggested here may, depending on the facts, need to be modified or abandoned.

All economic crime cases require a great deal of preparation. The prosecutor should begin by carefully drafting the charges, after considering all of the charging options. The prosecutor then should gather and organize all of the necessary documents and witnesses. Finally, the prosecutor should present this evidence in a logical manner at trial. If the prosecutor is well prepared, the military judge and panel can focus on the important issues in the case, rather than flounder in a flurry of documents.

Appendix A

Suggested set of direct examination questions for the victim of a check forgery case:

(1) Please state your full name, rank, and social security number.
(2) What is your unit and branch of service?
(3) Do you know the accused? Please explain your relationship to him/her.
(4) Do you have a checking account?
(5) Did you ever give the accused permission to use your checks?
(6) Did any of your checks become lost or missing? Please explain when and how this happened.
(7) Did the accused or anyone else have access to the area where your checks were secured?
(8) I hand you prosecution exhibit 1 for identification [hand witness the forged check]. Do you recognize that?
(9) Is that one of your checks?
(10) Is it one of the checks that was missing?
(11) Did you make any of the handwritten entries on that check or sign that check?
(12) Was the amount of that check charged against your account?
(13) Has the accused or anyone else reimbursed you for the amount of that check?
(14) Has the accused ever discussed this matter with you? Please describe when and where this conversation took place and what he/she said.

Appendix B

Suggested set of direct examination questions for the cashier in a check case:

(1) Please state your full name, social security number, and address.
(2) Please explain what your job is and describe your duties.
(3) Does your job involve cashing customers' checks?
(4) What procedures does your store/bank use to cash customers' checks?
(5) What does a customer receive in return when he or she cashes a check?
(6) I hand you prosecution exhibit 1 for identification [hand witness the check]; do you recognize that?
(7) Are there any markings on that check indicating it was cashed at your store/bank?
(8) Are those markings placed on the check by your store/bank at the time of the transaction by a person with knowledge of the transaction?
(9) Are they made and kept in the regular course of business?
(10) Please describe what each of those markings mean.

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[89] Photocopies usually are admissible to the same extent as the original unless a genuine question exists as to the authenticity of the original or it would be unfair to admit the photocopy in lieu of the original. MCM *supra* note 3, MIL. R. EVID. 1003, 1001(4). However, in a forgery case, the authenticity of the original generally is in question. Furthermore, handwriting experts may have difficulty making meaningful comparisons using photocopies.

[90] *Id.* R.C.M. 701.

[91] *Id.* MIL. R. EVID. 304(g); United States v. McFerrin, 28 C.M.R. 255 (C.M.A. 1959).

Appendix C

Suggested set of direct examination questions for the questioned documents examiner:

(1) Please state your full name, rank, and social security number.
(2) What is your unit and branch of service?
(3) What is your job title and what are your duties?
(4) What training have you received to prepare you for this work?
(5) How many cases involving questioned documents have you worked on?
(6) Are you affiliated with any professional organizations related to your work?
(7) Have you done individual research, written technical papers, or taught any classes pertaining to document analysis?
(8) Have you testified as an expert witness in the field of document examination prior to today? [Offer the witness as an expert in the field of questioned document examination].
(9) Would you explain why handwriting is identifiable.
(10) Are you always able to identify the author of a particular handwriting?
(11) When you are unable to reach a positive conclusion, do you sometimes render a conclusion expressing a probability of authorship?
(12) I show you prosecution exhibits 1 and 2 for identification [hand the witness the check and handwriting exemplars]. Did you conduct examinations of these documents in your laboratory?
(13) What conclusions did you reach as a result of your examinations in this case?
(14) Have you prepared a chart using photographs of the documents in this case?
(15) Would your testimony be more clear and better understood through the use of this chart, which has been marked prosecution exhibit 3 for identification? [Ask the witness to leave the witness stand and approach the chart].
(16) Using this chart, please explain to the court how you conduct a handwriting comparison and some of the reasons you arrived at your findings in this case.

Appendix D

Suggested set of direct examination questions for a check custodian:

(1) Please state your full name, social security number, and address.
(2) Please state what your job is and describe your duties.
(3) Do you receive checks that have been returned for insufficient funds in the course of your duties?
(4) What procedures are used to return these checks to you?
(5) I hand you prosecution exhibit 1 for identification [hand witness checks]; do you recognize that?
(6) Are there any markings on these checks indicating that they were returned to your office for insufficient funds?
(7) Are those markings placed on the checks at the time the checks are returned by a person with knowledge of the status of the accused's account?
(8) Are they made and kept in the regular course of business?
(9) Please describe what each of those markings mean.
(10) Does your office notify anyone when you receive a dishonored check?
(11) I hand you prosecution exhibit 2 for identification [hand witness notice of dishonor]; do you recognize that?
(12) Is such a letter prepared each time dishonored checks are returned to your office by someone with knowledge that the checks have been returned?
(13) Are copies of these letters made and kept in your office in the ordinary course of business?
(14) Is prosecution exhibit 2 for identification such a copy?
(15) Please describe what happened to the original of prosecution exhibit 2 for identification. Who was it sent to and when and how was it sent?
(16) Has the accused paid any of the amount due on the checks? Please explain.

Appendix E

Suggested set of direct examination questions for a cardholder in an ATM larceny:

(1) Please state your full name, rank, and social security number.
(2) What is your unit and branch of service?
(3) Do you know the accused? Please explain your relationship to him/her.
(4) Do you have an automatic teller machine (ATM) card?
(5) Please explain what this card is and what it allows you to do.
(6) Did you ever give the accused permission to use your ATM card?
(7) Did your ATM card become lost or missing? Please explain when and how this happened.
(8) Did the accused or anyone else have access to the area where your ATM card was secured?
(9) Did you make any withdrawals using your card on [state dates unauthorized withdrawals made].
(10) Were you notified that withdrawals were made with your card on those dates? Please explain when and how you were notified.
(11) Has the accused or anyone else reimbursed you for these withdrawals?
(12) Has the accused ever discussed this matter with you? Please describe when and where this conversation took place and what he/she said.
(13) I show you prosecution exhibit 1 for identification [hand witness photograph of accused taken by ATM camera]. Do you recognize that?
(14) Who appears in that photograph?

Appendix F

Suggested set of direct examination questions for the bank employee in an ATM larceny:

(1) Please state your full name, social security number, and address.
(2) Please explain what your job is and describe your duties.
(3) Does your job require you to be familiar with the automatic teller machine (ATM) at your bank?
(4) Please explain how the ATM works and how customers withdraw money from it.
(5) Are any records or photographs made of each transaction? Please describe how this is done.
(6) Are these records and photographs made at the time of the transaction by a person with knowledge of the transaction?
(7) Are they made and kept in the ordinary course of business?
(8) I hand you prosecution exhibits 1 and 2 for identification [hand witness records and photographs of transaction in question]; do you recognize them?
(9) Please describe what these records and photographs are and what they signify.

Appendix G

Suggested set of direct examination questions for the cardholder in a credit card larceny:

(1) Please state your full name, rank, and social security number.
(2) What is your unit and branch of service?
(3) Do you know the accused? Please explain your relationship to him/her.
(4) Do you have a credit card? Please describe the type of credit card you have and the procedures for using it.
(5) Did you ever give the accused permission to use your credit card?
(6) Did your credit card become lost or missing? Please explain when and how this happened.
(7) Did the accused or anyone else have access to the area where your credit card was secured?
(8) Did you make any withdrawals using your card on [state date unauthorized purchase made].
(9) I hand you prosecution exhibit 1 for identification [hand witness forged credit card receipt]. Do you recognize this?
(10) Does that receipt appear to be made using your credit card?
(11) Did you complete the transaction indicated on that receipt or sign that receipt?
(12) Has the transaction indicated on that receipt been charged to your credit card account? Please explain when and how you were notified that it was charged to your account.
(13) Has the accused or anyone else reimbursed you for these transactions?
(14) Has the accused ever discussed this matter with you? Please describe when and where this conversation took place and what he/she said.

Appendix H

Suggested set of direct examination questions for a store clerk in a credit card larceny:

(1) Please state your full name, social security number, and address.
(2) Please tell us what your job is and describe your duties.
(3) Does your job involve charging customers' purchases on credit cards?
(4) What procedures does your store use to charge a customer's purchases on a credit card?
(5) What does a customer receive in return when he or she completes a purchase using a credit card?
(6) I hand you prosecution exhibit 1 for identification [hand witness credit card receipt]; do you recognize that?
(7) Are there any markings on this receipt indicating that it was completed at your store?
(8) Are those markings placed on the receipt by your store at the time of the transaction by a person with knowledge of the transaction?
(9) Are they made and kept in the regular course of business?
(10) Please describe what each of those markings mean.

Appendix I

Suggested set of direct examination questions for the victim of a calling card larceny:

(1) Please state your full name, rank, and social security number.
(2) What is your unit and branch of service?
(3) Do you know the accused? Please explain your relationship to him/her.
(4) Do you have a telephone calling card?
(5) Please explain what this card is and what it allows you to do.
(6) Did you ever give the accused permission to use your telephone calling card or the number on your card?
(7) Did you ever give anyone else your telephone calling card or the number on your card?
(8) Did your calling card become lost or missing? Please explain when and how this happened.
(9) Did the accused (or anyone else) have access to the area where your calling card was secured?
(10) Did you make any calls using your card on [state dates unauthorized calls made].
(11) Were you notified that calls were made with your card on those dates? Please explain when and how you were notified.
(12) I show you prosecution exhibit 1 for identification [hand witness a copy of telephone bill with unauthorized calls highlighted]. Did you make any of the calls to the highlighted numbers?

(13) Did you authorize anyone to make these calls?
(14) Do you know anyone at any of the numbers where these calls were made?
(15) Has the accused or anyone else reimbursed you for these calls?
(16) Has the accused ever discussed this matter with you? Please describe when and where this conversation took place and what he/she said.

Appendix J

Suggested set of direct examination questions for a telephone company representative:

(1) Please state your full name, social security number, and address.
(2) Please explain what your job is and describe your duties.
(3) Does your job require you to be familiar with telephone calling cards?
(4) Please explain what a telephone calling card is and how customers make calls with it.
(5) Are any records made when a customer uses a calling card? Please describe how this is done.
(6) Are these records made at the time of the call? Please explain how they are made.
(7) Are they made and kept in the ordinary course of business?
(8) I hand you prosecution exhibit 1 for identification [hand witness telephone bill showing unauthorized calls highlighted]; do you recognize this?
(9) Please describe what this record is and what is signifies.
(10) Does that telephone bill indicate that the highlighted telephone calls were made using the telephone calling card of [state name of victim]?
(11) When were those highlighted calls made and to whom were they made?
(12) Do you have any record of the owner of the telephone number to whom those highlighted calls were made?
(13) Please describe how these records are obtained and maintained and state whether they are kept in the ordinary course of business.
(14) Based on those records, to whom were the highlighted calls made?
(15) What is the value of the highlighted telephone services listed on the telephone bill, prosecution exhibit 1 for identification?

The Defense Systems Management College's Program Management Course: A Career Development Opportunity for Acquisition Specialists

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In recent years, a number of judge advocates in the Acquisition Law Specialty (ALS) Program have had the opportunity to receive advanced professional training from an educational institution unfamiliar to many members of The Judge Advocate General's Corps (JAGC). The Defense Systems Management College (DSMC),[1] located at Fort Belvoir, Virginia, provides instruction and a unique joint perspective on the defense acquisition process. Because the Judge Advocate Career Development Model[2] distributed recently by the Personnel, Plans, and Training Office lists the DSMC as one of the sources of continuing education opportunities that judge advocates may encounter during their military careers, all officers in the ALS Program should be aware of the curriculum offered at the DSMC.

[1] The DSMC is a joint service educational institution operated under the Office of the Under Secretary of Defense (Acquisition and Technology). The school traces its roots to a study directed by then Under Secretary of Defense, David Packard, in 1969 which recommended that the Defense Weapon Systems Management Center at Wright-Patterson Air Force Base, Ohio, move to a location closer to Washington, D.C. The study's recommendation resulted in the establishment of the Defense Systems Management School at Fort Belvoir on 1 July 1971, which subsequently has been renamed DSMC. Authority and guidance for the operation of the DSMC are found in DEP'T OF DEFENSE, DIRECTIVE 5160.55, DEFENSE SYSTEMS MANAGEMENT COLLEGE (Aug. 22, 1988) [hereinafter DOD DIR. 5160.55].

[2] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF ARMY, JAG PUB. 1-1, JAGC PERSONNELL AND ACTIVITY DIRECTORY & PERSONNEL POLICIES, app. at 3 (1993-1994).

Although the DSMC offers courses of varying lengths, covering a wide range of acquisition topics, its capstone offering is the Program Management Course (PMC), a twenty-week course of instruction covering all aspects of the systems acquisition and program management process.[3] This article provides an overview of the instruction provided in the PMC.[4]

Introduction

The PMC is designed for midcareer military officers and civilians serving in acquisition management career fields.[5] The course is twenty weeks in length, and is held twice each calendar year. The curriculum is designed to develop a broad understanding of defense systems acquisition management through instruction in program functional areas, case studies, management simulation exercises, interaction with past and current program managers, and analyses of current systems acquisition policies and strategies.[6]

Students entering the PMC come from each of the four military services; defense agencies (such as the Defense Logistics Agency and the National Security Agency); the Coast Guard; the General Accounting Office and other governmental agencies; foreign governments; and from the domestic defense industry. The number of students in each class has grown over the years to a current total of 420. This total is divided into fourteen sections of thirty students each, with each section consisting of military and civilian employees from each of the services, other government agencies, and the defense industry. Nearly all instruction and simulation exercises are conducted at the section level, and students in a section typically develop a close camaraderie over the twenty-week course.

The DSMC Resources and the Educational Environment

The Campus Setting

The DSMC's main campus[7] is situated on the main post of Fort Belvoir, Virginia, across the parade field from the post headquarters building. The campus consists of ten large buildings and a few smaller ones which form a quadrangle. The buildings house classroom facilities, two large auditoriums, faculty offices, administrative support activities, and a cafeteria. Although the architecture dates from about the 1930s, extensive renovations and some new construction provide a modern and comfortable setting for the academic program.

Students attending the PMC in a temporary duty (TDY) status live on post in one of several sets of bachelor officer quarters (BOQ),[8] or off post in commercial, contracted apartments. Students permanently assigned in the Washington, D.C., area[9] commute to the DSMC daily and use most of the available student parking spaces. As a result, those living in on-post quarters generally walk the two or three block distance from the BOQs to the campus.

Except for special events, student attire is casual civilian clothing. This departure from the usual uniforms for military and business dress for civilians contributes to a relaxed learn-

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[3] DEP'T OF DEFENSE, DIRECTIVE 5000.1, DEFENSE ACQUISITION (Feb. 23, 1991) [hereinafter DOD DIR. 5000.1], establishes a comprehensive, structured management approach for acquiring systems and materiel to satisfy the needs of operational users within the Department of Defense (DOD). The PMC explores the policies, requirements, and processes established by DOD Dir. 5000.1 from the macro perspective. Other DSMC course offerings, known collectively as "short courses," provide a more narrow instruction on selected defense acquisition topics in programs lasting from two days to four weeks. *See* DEFENSE SYSTEMS MANAGEMENT COLLEGE 1994 CATALOG (published annually by the Defense Systems Management College, Fort Belvoir, Virginia) at 50-71 [hereinafter CATALOG].

[4] The authors of this article are both PMC graduates. Lieutenant Colonel Dorsey attended the DSMC's Program Management Course 93-1 from January to June 1993, and Major DeMoss attended the DSMC's Program Management Course 92-1 from January to June 1992.

[5] Program Management Course attendance is essential for career progression in the Army Acquisition Corps for both military officers and civilians. Established in 1989, the Army Acquisition Corps is a combined specialized cadre of military and civilian acquisition professionals. Most positions in the Army's weapons system management structure that have been designated as "critical acquisition positions" must be filled by Army Acquisition Corps members who are PMC graduates or who have completed an equivalent course of instruction. *See* 10 U.S.C. § 1735 (1990 & Supp I 1992). Critical acquisition positions include program executive officers, program managers, deputy program managers, and senior contracting officials. *Id.* Program Management Course completion by the legal advisors to these individuals is not required, but it pays great dividends in terms of understanding the intricacies of the acquisition process and in enhancing credibility with senior acquisition officials.

[6] CATALOG, *supra* note 3, at 43.

[7] In addition to its main campus near Washington, D.C., the DSMC has four branch locations situated near major weapon system development sites. The four sites are Boston, Massachusetts (Electronic Systems Division, Air Force Materiel Command, Hanscom Air Force Base); Huntsville, Alabama (Army Missile Command, Redstone Arsenal); St. Louis, Missouri (Army Aviation & Troop Support Command); and Los Angeles, California (Space Division, Air Force Materiel Command, Los Angeles Air Force Base). *See* CATALOG, *supra* note 3, at 34-35. These regional centers offer short courses covering many of the topics featured during the PMC.

[8] The BOQs for military and civilian students in a TDY status at Fort Belvoir are reasonably comfortable and include a kitchen area. They compare favorably with most moderately priced motel rooms.

[9] About half of each of the PMC's 420 students typically reside in the local area.

ing environment, and helps overcome the normal inhibitions present when relatively junior officers and civilians find themselves as classmates of senior officers and civilians.[10]

The classrooms used for most instruction are configured to provide a comfortable setting for the seminar method of instruction during much of the PMC. Each section of thirty students in the PMC has its own classroom,[11] where the section members assemble for most formal instruction. Students in each section form five workgroups of six students each. A group spends most of its classroom instruction and practical exercise time seated at its own conference table in the section classroom.

The Faculty

Undoubtedly the DSMC's most important resource is its faculty. Numbering about 140, the faculty, like the student body, is comprised of an approximately equal number of military and civilian professionals.[12] Most faculty members at the DSMC have at least one masters degree, and many have doctoral degrees as well. They have an average of more than four years of experience working directly with major systems acquisitions, plus many additional years of experience working in their individual areas of technical expertise.[13]

Interestingly, the legal profession is not represented on the faculty. Instead, engineers and business managers predominate.[14] Faculty members in these specialties are well acquainted with many of the legal requirements peculiar to their fields of expertise, however, and make frequent reference to these requirements during their lectures and classroom discussions. The absence of an integrated legal component in the PMC curriculum, however, is a notable weakness of the course.[15]

On balance, the teaching of the faculty is superior to that encountered in many schools. The instructors are technically well qualified and make a concerted effort to relate course materials to the challenges that students will face after completing the course. One of the handicaps under which instructors must operate is the immense volume of laws, international agreements, directives, regulations, program guidance, command publications, and other documents that impact on the work of the acquisition professional in a program office.[16] Selecting which potentially critical information to include in the course materials is a significant challenge, and the faculty does a commendable job overall of selecting and presenting relevant information that most likely will be needed in the field.

Although not immediately evident to many PMC students, the faculty does much more than teach. The faculty also engages in extensive professional research efforts, and accomplishes major research projects for various DOD officials and activities. Additionally, faculty members develop numerous texts for use both in the classroom and in the field. Finally, the faculty also provides consulting services to policy-level executives within the DOD, and to the program executive officers and program managers of ongoing weapons programs.

Administrative Support and Other Resources

A library collection and an individual learning center stocked with numerous video tapes and other reference mate-

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[10] Most students attending the PMC hold the grades of O-4 major/lieutenant commander and O-5 lieutenant colonel/commander for military officers, or GS/GM-13 and GS/GM-14 for civilians. With the recent enactment of statutory provisions making certain educational requirements mandatory for advancement within the acquisition corps, however, a large number of relatively senior DOD officials have attended the last several PMCs, as these individuals vie to stay competitive in the acquisition field. *See supra* note 5. In PMC 92-1, over 100 of the 420 students held the grades of O-6 colonel/captain and GS/GM-15, and the class president was a member of the senior executive service. The current class, PMC 94-1, has about sixty senior members, again including a class president who is a member of the senior executive service.

[11] Modern audiovisual equipment and furnishings in each classroom contribute to a quality educational environment that is conducive to higher learning.

[12] Because the DSMC is a joint school, command of the institution is rotated among the services. The current commandant is Colonel Claude Bolton, United States Air Force.

[13] *See* CATALOG, *supra* note 3, at 18.

[14] The faculty is organized into fourteen departments. Each department focuses on a particular subset of the engineering or business management skills that must be mastered in a program office to develop and successfully produce a major weapon system. The fourteen faculty departments are: Acquisition Policy; Contractor Finance; Contract Management; Cost and Schedule; Education; Funds Management; Logistics Support; Managerial Development; Manufacturing Management; Integrative Program Management; Principles of Program Management; Systems Engineering; Software Management; and Test and Evaluation. *Id.*

[15] Judge Advocate Corps officers attending the PMC help fill this gap within their sections, but only one of the fourteen sections typically has an attorney among its students.

[16] The most basic systems acquisition documents: DOD DIR. 5000.1, *supra* note 3; DEP'T OF DEFENSE, INSTRUCTION 5000.2, DEFENSE ACQUISITION MANAGEMENT POLICIES AND PROCEDURES (Feb. 23, 1991) [hereinafter DOD INSTR. 5000.2]; and DEP'T OF DEFENSE, MANUAL 5000.2-M, DEFENSE ACQUISITION MANAGEMENT DOCUMENTATION AND REPORTS (23 Feb. 1991); total over 800 pages in length, and fill one three-inch binder. This binder is one of dozens issued to PMC students. Together with other texts and materials, these issued references fill about nine feet of book shelf space.

rials provide the DSMC faculty and students with incomparable opportunities for independent study, research, and self improvement.[17] A capable staff makes using these resources simple. No course of study at the school is complete without browsing the collection for materials of interest, either for use in completing course requirements, or for potential access from field locations by telephone, mail, facsimile, or modem.

Support services available at the DSMC are complete and efficient. Each branch of service has a personnel services noncommissioned officer who capably handles any personnel matters that require attention while students are attached to the school. Mail and official distribution are handled without unnecessary inconvenience. Students also have access to official telephones and facsimile machines to keep in touch with their home offices while away for an extended period, although the DSMC actively discourages PMC students from remaining involved in the day-to-day affairs of their current or former offices.

Common-use personal computers are old and overused, but generally are available in classrooms, a computer resource center, a computer room in the BOQ, and the individual learning center. Wordperfect 5.1 is the word-processing program installed on all computers, but Enable is available from the automation department for installation on individual computers if desired. Despite the numerous computers found throughout the school, finding one during peak periods of use is difficult. If possible, students in a TDY status should try to bring a laptop computer and portable printer from their home offices to the course; the number of common-use computers available in the BOQ for use after duty hours is limited, and those computers tend to be low on the school's priority list for maintenance when servicing is required.

The Curriculum

The PMC curriculum stresses a multidisciplinary approach to program management. The early weeks of the course's instruction focus on developing a basic core of knowledge in each of the program management disciplines. The later weeks of instruction demonstrate—through practical exercises and management simulations—that effective program management also requires good communications, effective teamwork, and the integrated application of all program management disciplines.

About half of the PMC instruction is conducted in traditional lecture or seminar format,[18] supplemented with the use of numerous viewgraphs and other supporting media. Classroom discussion and case studies leave the most lasting understanding of the principles discussed during the course, however, and this method of instruction is used extensively during the second half of the course.

A common misconception with some students entering the PMC is that they will not find the course to be particularly challenging. Most students reconsider that viewpoint during the course, however, and find that the PMC is quite intensive. Judge advocates working shoulder-to-shoulder in this environment with program management personnel, applying the resources and tools of the all the disciplines operative in the acquisition process, gain invaluable experience that will serve them well in future acquisition assignments.

Functional Areas

To provide each student in the course a more equal foundation to build on later, the PMC begins with a ten-week overview of the acquisition process, and with core classroom instruction in each of the acquisition functional areas[19] that must interface effectively to produce a modern weapon system. Instruction during the course focuses on the interdisciplinary nature of the weapon system acquisition process and the need to understand more than just the contracting or engineering work required to field a new system. Both the core instruction and the seminars and management simulation exercises later in the course attempt to tie together all of the management, business, and technical activities that must be integrated effectively to develop, produce, field, and support a new weapon system.

The technical functional areas covered in the course—such as software management and systems engineering—initially may appear challenging to many attorneys, but each of the academic departments strives to make its instruction understandable to all students. Because a significant number of the students in the PMC are business majors or have similar "soft" undergraduate or graduate training, attorneys attending the PMC or other the DSMC instruction are not at a substantial disadvantage compared to most of their contemporaries.

The number of hours spent in class receiving functional area instruction ranges from a high of thirty-four hours for

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[17] Notably absent from the library's collection, however, are current sets of *United States Code* and the *Code of Federal Regulations.*

[18] Instruction generally is provided at the section level, although two sections occasionally are combined in a larger lecture hall. At least for the first half of the PMC, the typical day consists of seven or eight hours of instruction. Two or more blocks of instruction—each on a discrete topic and ranging in length from one to four hours—are provided daily. Homework and class preparation generally require two to four hours per day of instruction.

[19] *See supra* note 14. The academic departments correspond directly with the functional disciplines covered during the PMC, with a few exceptions. Of the academic departments listed in note 14, the Education Department and Integrative Program Management Department do not represent functional areas; instead, the Education Department provides general support to the faculty and attempts to enhance the quality of the instruction given at DSMC; the Integrative Program Management Department attempts to tie together the instruction provided by the other departments and illustrate through exercises and case studies how all the pieces of the acquisition puzzle fit together. *See infra* note 21 and accompanying text. An additional functional area, international program management, although receiving increased emphasis at the DSMC, is not taught by a separate academic department and is covered instead as part of the acquisition policy instruction.

funds management, to a low of fifteen hours for manufacturing management. The technical depth of the instruction during such short timespans is limited, but the essentials needed to understand how each aspect of weapons system management fits into the overall process are covered, and these essentials are reinforced through integrated exercises, guest lectures, and the industry program.[20]

Management Simulations and Case Studies

Simulation exercises and case studies afford students numerous opportunities to practice the functional and management skills they learn throughout the PMC. The simulation exercises and the case studies require students to integrate and apply two or more functional areas to develop solutions to problems commonly encountered in weapon systems management.

Teamwork is critical in both the simulations and the case studies. Students from each section role play various positions in a project office, an acquisition center, a DOD staff element, the user community, and contractors' organizations. Student teams confront problems that span the broad range of technical, financial, contractual, and management issues occurring through the full lifecycle of a weapon system, from the pre-Milestone 0 activities necessary to spawn a new program, to the production and fielding issues commonly faced by a program office before a new system achieves its initial operational capability in the field.[21] Just as in the management of a real program, teamwork, compromise, diligence, and effective communications are critical to the successful completion of each major task that the section must accomplish.

Industry Program

One of the highlights of each PMC is the Industry Program. For students relatively new to weapon system management, this program provides an outstanding opportunity to gain an understanding of the acquisition process from industry's point of view.

Industry students and guest lecturers from leading defense contractors play a significant role in the Industry Program by providing government students with direct insights into their businesses. Each PMC section concentrates on a different major program currently in either engineering and manufacturing development or production. Students study program documentation for their section's program, meet both the DOD and the industry program managers, and participate in a field trip to the site where the prime contractor's work on the program is centered.[22]

Weapon systems studied in the Industry Program by at least one section in recent PMCs have included the Army Tactical Missile System (ATACMS), produced by Loral Vought Systems near El Paso, Texas; the Navy's F/A-18 fighter-bomber, produced by McDonnell-Douglas in St. Louis, Missouri; and the Air Force's F-16 fighter, produced by Lockheed in Fort Worth, Texas. Prior to traveling to a contractor's facility for a first hand look at an important part of the defense industrial

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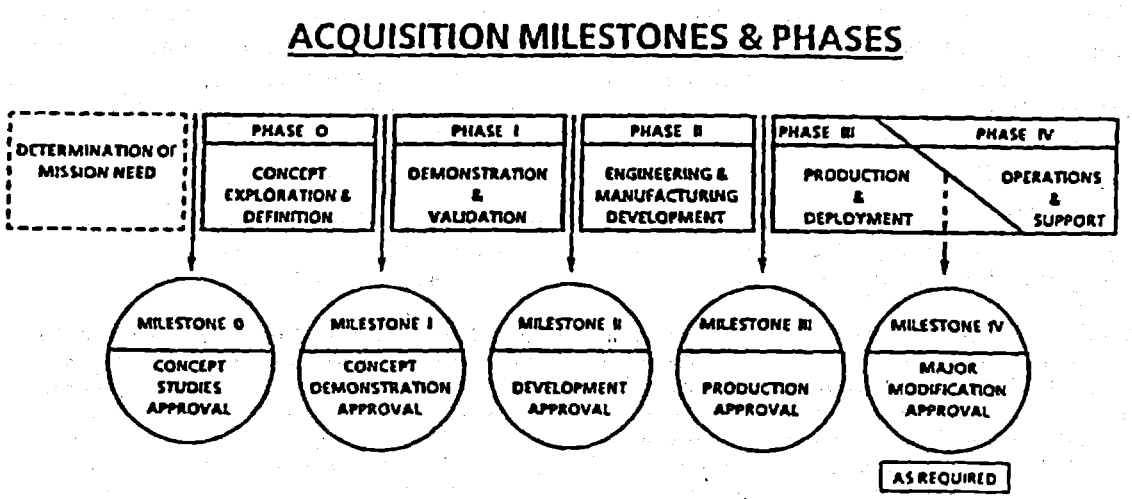
[20] *See infra* text accompanying notes 22-23.

[21] The various milestones that a weapon system must pass before it is developed, produced, and fielded are decision points at which the Milestone Decision Authority must approve the progress made on a program up to the time of the milestone decision briefing, and authorize the commitment of additional resources in the future, so significant work on the program can continue. The Milestone Decision Authority for large programs is either the Defense Acquisition Executive (the Under Secretary of Defense for Acquisition) or the Service Acquisition Executive (for the Army, this individual is the Assistant Secretary of the Army for Research, Development, and Acquisition). The major acquisition milestones and the phases associated with them are depicted in the following diagram:



See generally DOD DIR. 5000.1, *supra* note 3; *see also* DOD INSTR. 5000.2, *supra* note 16.

[22] *See* CATALOG, *supra* note 3, at 43.

base, students prepare detailed agendas that provide for close inspection of those aspects of the programs that they identify as problem areas or that they select for special scrutiny during their visit for other reasons. On returning to the DSMC, students from each section brief students from other sections, and share their findings and observations, to further broaden their understanding of the defense industry through the shared experiences of their contemporaries.

While government students are visiting the facilities of major defense contractors, industry students visit military installations to gain a better understanding of how the equipment they produce is used once deployed in the field.[23] Recent trips have taken the industry students to Fort Stewart, Georgia, for a firepower demonstration by the 24th Infantry Division; to a Navy base in Florida for a tour of an aircraft carrier; and to an Air Force base for a walk down the flightline with pilots who were happy to share their flying experiences with their visitors.

Capitol Hill Program

No course of instruction about DOD acquisition management would be complete without devoting time to the role played in the procurement process by the legislative branch of government. The impact of congressional actions on national security in general, and on defense procurement in particular, is enormous. To familiarize students with the intricacies of the authorization and appropriation processes, PMC students attend an eight-hour congressional orientation and a one-day Capitol Hill tour that attempts to untangle the web of congressional organizations and procedures for those unfamiliar with the legislative process.

During the congressional orientation, the Office of Personnel Management presents an overview of the leadership and organization within Congress, the budget process, legislative procedures, and current national defense issues. Time in the schedule also allows for students to attend committee hearings, meet with representatives from their home states, and observe sessions in the House and Senate Chambers. Students gain a new appreciation from the Capitol Hill Program for the nuances and complexities of navigating an acquisition program through Congress.

Individual Learning Program

In addition to the core curriculum, each PMC student designs an individual learning program[24] that includes elective classes, individual research or study, and a decision briefing given to a senior military or civilian procurement official. Electives are taught in many areas to explore new topics of interest to acquisition managers,[25] or to cover material included in the core curriculum in greater depth.

One of the elective options available to PMC students is the Stored Energy Ground Vehicle Project, also known as "Mousetrap." In this elective, a small group of students works together as a "contractor" to design and build a vehicle powered by mousetraps that will meet the performance requirements stated in a government specification. Each team must formulate its concept, and then design, develop, and fabricate a prototype vehicle that eventually competes against others to determine the best stored energy ground vehicle for the government to "buy" to satisfy its hypothetical requirement. Throughout the process leading to the eventual "drive-off" of competing prototypes, the team members must brief government representatives (faculty members) in simulated design reviews, and must obtain government approval before proceeding further with their work. Each team also must prepare many of the contractor submissions and draft some of the government documents associated with the development of a real weapon system. The total engineering, management, document preparation, and briefing effort required to complete the Mousetrap elective is quite substantial, but the elective counts for a large portion of the PMC's required elective hours, and substitutes for the decision briefing required to meet graduation requirements. The elective is essentially the systems-acquisition equivalent of a mock trial; it becomes a passion for its participants, who generally claim to learn more from the one elective than they do from the rest of the course.

The program management decision briefing is a graduation requirement for students who do not participate in the Mousetrap elective. The briefing is an individual effort on a topic of choice related to one of the simulation exercises, on a "real-world" acquisition policy issue, or on a programmatic issue associated with a real program. Students brief faculty mem-

[23] A secondary reason for organizing a separate trip for industry students, rather than permitting them to travel with their usual sections, is that defense contractors are extremely hesitant to give employees working for competing companies the free rein in their major production facilities that is enjoyed by government-employed DSMC students during their industry trips.

[24] The DSMC has developed a considerable amount of software to automate its administrative processes. One of the software packages loaded on each of the school's microcomputers is an individual learning plan package that permits students to design their own elective and self-study programs. Rather than going to a registration fair to sign up for electives, students select electives and alternate courses at a computer terminal, and save the plan they have designed on a floppy disk. These disks are submitted along with a hard copy printout to the course's academic director, who is able to download the disks and create a master file that generates individual elective schedules for each student. At least in theory, the software produces a schedule for each PMC student that is conflict free, and that conforms with the DSMC's graduation requirements as well as with any service-unique graduation requirements.

[25] Some of the topics available in the electives that are not covered in the core curriculum are: civilian personnel management; comparative studies of other countries' acquisition systems; personal computer basics; and a variety of service-specific acquisition subjects. A complete listing of the electives available in the course is contained in *Individual Learning Program PMC 94-1 Elective Catalog*, DEFENSE SYSTEMS MANAGEMENT COLLEGE (1993).

bers, DOD officials, or senior members of the PMC.[26] The decision briefing requirement poses a moderate challenge to students in the course who are inexperienced in speaking before an audience, but attorneys attending the course historically have been cited for their excellent briefings, even when dealing with issues outside their normal fields of expertise.[27]

Guest Speakers

An impressive array of distinguished guest speakers is featured as part of the PMC curriculum. In addition to government and contractor program managers for major weapon systems, high-level DOD officials, the services' acquisition executives, presidents and vice-presidents of large defense contractors, and foreign visitors regularly address PMC students. Their insights into the systems acquisition process from a level far higher than that previously encountered by most students—or from the perspective of individuals knowledgeable about alternate acquisition systems in other countries—greatly enhances the overall understanding of the systems management process attained by PMC students.

Service Days

During the last week of the course, students spend two or three days with various officials from their own services to familiarize themselves with current service-specific acquisition issues, or with developments that will affect them when they return to their field assignments. Army students receive briefings from officials in the Army Comptroller's office, the Office of the Assistant Secretary of the Army for Research, Development, and Acquisition, and others with insights into the latest Program Objectives Memorandum[28] and budget submissions. After nearly five months of instruction focused on issues at the DOD level, most students greatly appreciate the opportunity to discuss issues of immediate relevance to the programs that they will work with after returning to their normal duty stations.

Academic Issues

The PMC is graded on a pass or fail basis. Faculty members provide critiques of work products, if desired, to provide students with more specific feedback on their performance than would be communicated through a "pass" or "fail" assessment. Because the final grade for the course is simply "pass" or "fail," no class standing or order of merit is established for graduating classes.

To provide individual counseling and assistance to students if needed, each work group of six students is assigned a faculty academic advisor. This individual visits regularly with assigned students in the section classroom, and makes time available as needed in his or her office to talk with students about academic or professional concerns.

Although the DSMC is not formally accredited by any accrediting institution, the PMC is approved for academic credit toward several graduate degrees by about one dozen universities offering programs in the Washington, D.C., area. These schools include George Washington University, the University of Maryland, and the University of Southern California. Degrees that may be earned in part[29] through credits given for the PMC include a Masters of Business Administration, a Masters of Engineering Management, and a Masters of Public Administration.

Conclusion

No promises are made at the beginning of the PMC that it will be the best five months of any student's life. The academic curriculum is challenging, particularly for attorneys or others with little background in business or engineering. The PMC offers a tremendous opportunity, however, for attorneys who work with weapon systems managers to broaden their understanding of the technical and management challenges faced by program managers and other acquisition professionals. Understanding the myriad problems that must be overcome to bring a weapon system from someone's imagination to the hands of a soldier in the field greatly enhances the credibility of a project office's legal advisor, and improves the quality of legal services rendered. Acquisition specialists in the JAGC who expect to deal with weapons system procurement at some point in their careers should pursue continuing education opportunities through the PMC or through other training provided by the DSMC.[30]

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[26] The rationale for permitting senior students (in the grades of O-6 or GM/GS 15 or above) to receive, rather than give, briefings is that those students have invariably given numerous similar briefings in progressing to their present grades. Those holding senior grades benefit instead from practice in receiving and constructively critiquing briefings given by others.

[27] For instance, design and performance trade-offs against an anticipated level of funding for a hypothetical system—which involve engineering or other technical considerations in addition to cost projections—might be a topic that an attorney briefs. The type of decision sought from a briefing of this type is different from that usually sought in a courtroom or other legal forum, but many of the skills required for a successful briefing are the same.

[28] The Program Objectives Memorandum is a six-year program proposal from each service that is submitted to the DOD in April every other calendar year. This document supports service budget requests and describes each service's proposed level of spending for its weapons programs and all other requirements during each of the next six years. *See generally* DEP'T OF DEFENSE, INSTRUCTION 7045.7, IMPLEMENTATION OF THE PLANNING, PROGRAMING, AND BUDGETING SYSTEM (May 23, 1984).

[29] Credits offered range from about six to about nine semester hours, toward a typical degree requirement of about thirty semester hours. *See* CATALOG, *supra* note 3, at 48-49.

[30] *See supra* note 7.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The contents of the latest issues (volume 1, numbers 4 and 5) are reproduced below:

National Environmental Policy Act (NEPA)

Application of NEPA Overseas—An Update

One year ago, the D.C. Circuit Court of Appeals ruled that the NEPA applied to certain federal agency activities in the Antarctic. In *Environmental Defense Fund, Inc. v. Massey*,[1] the court called into question the long-standing presumption against extraterritorial application of United States statutes. More recently, the D.C. District Court ruled on another outside the continental United States (OCONUS) NEPA case involving activities at United States Navy bases in Japan. In *NEPA Coalition of Japan v. Aspin*,[2] the district court reinforced the presumption against extraterritorial application of domestic statutes, particularly when clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power exists. The district court contrasted *Massey*, which involved the unique status of a continent with no internationally recognized sovereign power. The court declined to address whether the NEPA applies overseas in other factual contexts. *Massey* has prompted the administration to order a comprehensive review of the application of the NEPA and Executive Order 12,114 to federal agency actions taken overseas. Although the review is still underway, the process likely will result in a revised executive order, and perhaps an amendment to the NEPA statute that will increase the Army's environmental documentation requirements for overseas actions.

Limitations on Actions During the NEPA Process

We often are asked for guidance on what interim actions a command may take as part of a larger action or proposal, before the NEPA analysis is completed for the overall action. This issue normally arises in the case of unit restationings, in which the command wants to move a portion of the unit or equipment or initiate construction, in advance of the completion of the NEPA process evaluating the entire restationing. The Counsel on Environmental Quality (CEQ) regulations that implement the NEPA address this issue. Section 1506.1(a) of the CEQ sets out the general rule that, until a record of decision is issued, proponents will take no action that will (a) have an adverse environmental impact, or (b) limit the choice of reasonable alternatives. Section 1502.2(f) also provides that proponents may not commit resources prejudicing the selection of alternatives before making a final decision. Unfortunately, no "bright line" test or well-developed body of case law expanding on these general rules exists. Courts applying the regulations look to whether interim actions or investments will so narrow the options that the decision maker's consideration of alternatives under the NEPA will become a "meaningless formality." Applying the general rules to specific cases is largely fact specific and requires a common sense analysis. Coordinate with your Major Command (MACOM) and with us; we have several legal opinions on file that may be of help. Major Miller.

Pollution Prevention and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

List of Chemicals under Executive Order 12,856

Now that the federal government will be reporting toxic chemicals under the Emergency Planning and Community Right-to-Know Act of 1986 and § 6606 of the Pollution Prevention Act of 1990, the list of reportable chemicals becomes an issue of concern. On 12 January 1994, the Environmental Protection Agency (EPA) proposed to add 313 more chemicals and chemical categories to the list of toxic ELD Bulletin chemicals reportable under the Emergency Planning and Community Right-to-Know Act (EPCRA).[3] Comments are being prepared by the Office of the Director of Environmental Programs (ODEP) and are due by 12 April 1994.

Use of the Judgment Fund

On 29 November 1993, the Comptroller General (CG) issued a decision that allows for the payment of CERCLA awards against the United States out of the Judgment Fund.[4]

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[1] 986 F.2d 528 (D.C. Cir. 1993).

[2] No. 91-1522 (D.D.C. Nov. 30, 1993).

[3] 59 Fed. Reg. 1788 (1994).

[4] Matter of the Judgment Fund and Litigative Awards Under the Comprehensive Environmental Response, Compensation, and Liability Act, B-253179 Comp. Gen. (1993).

The CG opined that use of the Judgment Fund to pay CERCLA awards must be decided on a case-by-case basis, but that nothing in the CERCLA precludes use of the fund for judgments or settlements of actual or imminent litigation for claims against federal agencies for contribution of response costs or natural resources damages. Mr. Nixon

Clean Air Act (CAA)

The Conformity Rule

As a reminder, environmental law specialists (ELS) should be assisting installations in identifying projects and activities that can be grandfathered under the new Conformity Rule. Time is running out.[5]

Clarification of the Asbestos National Emissions Standards for Hazardous Pollutants (NESHAP)

On 5 January 1994, the EPA published a clarification of this NESHAP, providing guidance on analysis of multilayered systems, that is, plaster and stucco walls and ceilings.[6] Environmental law specialists should ensure that the appropriate Director, Environmental Housing/Directorate of Public Works (DEH/DPW) staff get a copy.

The Dry Cleaning NESHAP

As reported in last month's *Bulletin*, the EPA promulgated a NESHAP to control perchloroethylene emissions from dry cleaners on 22 September 1993. On 20 December 1993, the EPA extended the initial reporting deadline from 20 December 1993 to 20 June 1994 and eliminated the requirement that reports be notarized.[7]

Information on Title III Requirements

The United States Army Environmental Hygiene Agency (USEHA) is putting out excellent information papers on the EPA's emerging hazardous air pollutant regulations (CAA, Title III), such as the new Chromium Electroplating NESHAP. Make sure that your DEH/DPW is on the mailing list. The point of contact at USEHA is Dr. Reed, commercial (410) 671-3500/3954 or DSN 584-3500/3954.

CAA § 112(r) Accidental Release Prevention Program (ARPP)

On 20 October 1993, the EPA proposed a rule[8] that would require most Army installations to establish a risk management program and a risk management plan (RMP) for the accidental, offsite release of regulated chemicals. The rule would apply to all facilities that have the hazardous chemicals and the threshold quantities specified by the EPA in the *Federal Register*.[9] Risk management programs would have three components: (1) a hazard assessment, including an analysis of the worst case scenario; (2) a prevention program; and (3) an emergency response program. This three-tier program, although overlapping other statutory programs, such as the Occupational Safety and Health Act's Process Safety Management Standard (which focuses on the impact of releases within the workplace, as opposed to the ARPP, which focuses on offsite impacts); the EPCRA of 1986, and the Oil Pollution Act of 1990, would impose major new responsibilities on affected installations. Additionally, affected installations would have to prepare a comprehensive RMP summarizing the elements of the installation's risk management program. The RMP would have to be certified periodically by the "owner or operator" of the facility; registered with the EPA and specified emergency planning organizations; and made available to the public. Development of installation programs and plans under the rule most likely will require contractor support. The rule provides for internal and external audit procedures to ensure program effectiveness. Installations would have to comply within three years after publication of the regulation. Failure to comply with the rule would be punishable by civil and criminal sanctions. Finally, the EPA may approve state ARPP programs, which may be more stringent than required by the EPA.[10] Major Teller.

Inspection/Maintenance (I/M) Programs

Approximately thirty percent of Army installations will have to establish an I/M compliance program shortly. An information paper on how I/M programs will affect your installation follows:

The New I/M Requirements Under the CAA

Introduction

In accordance with § 182 of the CAA, as amended in 1990, the EPA promulgated a final rule on 5 November 1992[11], establishing minimum requirements for local I/M programs.[12] The rule mandates sophisticated emissions testing for vehicles and the repair of vehicles that fail to meet test standards, including vehicles owned by the federal government. While many states have had I/M programs in place, the new rule

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[5] See the December 1993 *Environmental Law Division Bulletin* for details.

[6] 59 Fed. Reg. 542 (1994).

[7] 58 Fed. Reg. 66287 (1993).

[8] *Id.* 54190 (1993).

[9] 59 Fed. Reg. 4478 (1994).

[10] *See* 58 Fed. Reg. 62262 (1993).

[11] 57 Fed. Reg. 52950 (1992).

[12] 40 C.F.R. pt. 51, subpt. S (1993).

generally imposes more stringent testing standards and procedures than have been in effect. As a result, many more vehicles will fail inspection and require repair. Additionally, the rule imposes special responsibilities on federal installations to ensure that privately-owned vehicles operated on the installation meet the I/M program requirements applicable to the installation (local I/M program).

While I/M programs must meet the minimum EPA requirements, the state or local air quality authorities operating I/M programs may impose more stringent requirements and procedures. Areas with poor air quality are under significant pressure to meet the emissions reduction goals mandated by the CAA. Because vehicles are responsible for fifty percent of ozone pollution and virtually all carbon monoxide (CO) pollution, a strict I/M program is an important tool for states and localities in reducing air pollutant emissions. Moreover, I/M programs are an effective way to improve air quality without impeding growth and industrial and commercial development.

Where the Rule Applies

The EPA rule applies to 181 areas nationwide that have not attained the National Ambient Air Quality Standards (NAAQS) (nonattainment areas) for ozone or CO. Inspection/Maintenance programs, either basic or enhanced, as discussed in the next paragraph, are required in ozone and CO nonattainment areas, depending upon population, nonattainment classification, and the level of the ozone or CO pollution in the area (design value). Approximately 30 percent of Army installations will be subject to a local I/M program.

In highly polluted areas, primarily in the Northeast and California, the rule requires an "enhanced" program. Other ozone and CO nonattainment areas that are required to have an I/M program are subject to less stringent "basic" program requirements. The primary differences between enhanced and basic programs are that the former: (1) must have separate test and repair facilities; (2) the testing is more sophisticated; and (3) fleet owners, such as federal agencies, cannot test and certify their own vehicles. State and local programs in areas subject only to the basic requirements may adopt some or all of the features of the enhanced program.

Implementation Deadlines for Local I/M Programs

The deadline for establishing local I/M programs depends upon the type of program. For basic I/M programs, where the state or local authority opts for combined test and repair facilities, the programs must have been operational by January 1994. For basic programs with test-only facilities, the deadline is July 1994. Enhanced programs must be operational by January 1995, unless the program qualifies for a gradual phase-in over a one-year period from January 1995 to January 1996.

Vehicles Subject to I/M Program Requirements

The EPA rule requires that 1968 and later model light duty cars and trucks (under 8500 pounds) meet I/M requirements. States are free to expand the scope and coverage of their I/M programs. For example, Virginia plans to subject vehicles weighing up to 26,000 pounds to I/M requirements. The rule, however, does not apply to military tactical vehicles.[13] While the EPA has not yet defined "tactical vehicle," the Clean Air Act Services Steering Committee has informally proposed the following definition to the EPA:

> A motor vehicle designed to military specification or a commercial design motor vehicle modified to military specification to meet direct transportation support of combat, combat support, tactical, or relief operations, or for training of personnel for such operations.

The intent of the rule is to regulate vehicles that regularly operate within the I/M program area. As a result, I/M programs apply to the following vehicles:

> (1) vehicles registered in the I/M program area;
> (2) fleets primarily operating in the I/M area; and
> (3) vehicles operating on federal facilities within the I/M program area, including agency-owned vehicles and privately-owned vehicles operated by military personnel, civilian employees, and contract personnel.

Under the rule, privately-owned vehicles operated by civilian employees, military personnel, contract personnel, and others on federal facilities must meet the local I/M program requirements, regardless of where the vehicles are registered. As a result, a soldier assigned to Fort Myer, Virginia, whose car is registered in Nebraska, will have to meet the I/M program requirements for northern Virginia. The rule, however, provides that "visiting agency, employee, or military personnel vehicles" do not need to meet local I/M requirements, if visits do not exceed sixty days per year. Additionally, a civilian employee at Fort Myer, residing in Maryland, will have to meet the I/M requirements for northern Virginia. As discussed below, employees, military personnel, contractor personnel, and others operating vehicles on an installation may meet the local I/M requirements by showing compliance with another I/M program, as stringent as the local program, or in other ways acceptable to the local I/M program.

[13] *See* CAA § 118(c); 40 C.F.R. § 51.356(a)(4) (1993).

How a Typical I/M Program Operates

Because I/M programs are implemented by state and local air quality authorities, the programs will vary significantly. The current plan for the northern Virginia I/M program provides an example of how I/M programs will operate nationwide.

The Virginia program will require subject vehicles to undergo emissions testing every two years. New vehicles will require inspection after two years. Virginia will recover the cost of running the program by a $20 inspection fee and a $2 fee added to the state vehicle registration fee. Program requirements will be enforced primarily by denying registration for vehicles without a valid test certificate. Because northern Virginia is subject to enhanced program requirements, vehicles will be tested at contractor-operated, test-only facilities. For vehicles that fail the emissions inspection, owners will have to have the vehicle repaired and reinspected. A waiver, valid for two years, can be obtained by the vehicle owner after the owner spends $450 (consumer price index adjusted) in an unsuccessful attempt to correct the emissions problem. Military personnel residing in northern Virginia will have to meet the I/M program requirements and pay the required fees, irrespective of whether the vehicle is registered in Virginia. Finally, Virginia will recognize inspection certificates issued by other states or localities within the Air Quality Region.

Federal Facility Responsibilities

Section 118 of the CAA and the EPA rule, impose special responsibilities on federal facilities (facilities under the jurisdiction of the federal government) regarding implementation of I/M programs.[14] As a result, installations must establish programs that meet the following requirements.

First, installations must require military personnel, employees, contract personnel, and others operating privately-owned vehicles on the installation to furnish proof of compliance with the local I/M program. Proof may be in the form of (1) an inspection certificate from the local program; (2) an inspection certificate from a program at least as stringent as the local program or deemed acceptable by the local program; (3) registration within the I/M program area; or (4) another method acceptable to the local I/M program. As noted previously, the rule excludes "visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year."[15]

Second, installations must furnish to the local I/M program authority proof of compliance with the requirement in the preceding paragraph. The proof must include an updated list of the vehicles operating on the installation that are subject to the program's requirements. The list must be furnished when required by the I/M program authority, but no less frequently than for each inspection cycle (one or two years).

Finally, the installation must arrange to reimburse the local I/M program for any costs of testing agency vehicles that are not recovered through the inspection fee charged at the test facility, *e.g.*, costs the program normally recovers through vehicle registration fees. As a result, local I/M programs may require installations to collect and transmit fees for agency vehicles operated on the installation. Additionally, some I/M programs may require installations to assist in collecting fees from military personnel whose vehicles are tested locally but registered in other states.

Impact on Army Installations

There are many unanswered questions regarding how states and localities will interpret the EPA's guidance and implement local I/M programs. For example, the EPA has not provided definitions for key terms, such as "federal installation," "tactical vehicle," "operating on a federal installation," and "employee." This will afford states and localities flexibility in establishing local requirements. Installations should work closely with state and local officials to develop local I/M programs that do not impose unnecessarily burdensome requirements on installations and those operating vehicles on installations.

On Army installations, most light duty, nontactical vehicles are GSA owned and maintained. While GSA will be responsible for payment of the testing fees, the installation will be responsible for getting each vehicle tested as required by the local program. For large installations, where vehicles must be taken to a central testing facility, this may present a major, resource-intensive logistical burden.

Additionally, Army installations within an I/M program area will have to establish a program to ensure that privately-owned vehicles operated on the installation meet local I/M requirements. Again, installations will have to work closely with state and local authorities to develop an installation program that meets the legal requirements, without imposing an undue administrative burden. Note that independent of local I/M requirements, CAA § 118 imposes an obligation on federal facilities to "require all employees which operate motor vehicles on the property or facility to furnish proof of compliance with the applicable requirements of any . . . [I/M program] (without regard to whether such vehicles are registered in the State)." Typically, installations will establish I/M compliance programs as part of an installation vehicle registration system. Legal counsel should make the responsible installation staff aware that failure to establish and implement a required installation I/M compliance program could result in criminal or civil penalties. Major Teller.

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[14] 50 C.F.R. § 51.356(4) (1993).

[15] *Id.*

Overseas Issues

OCONUS IPR

The ODEP sponsored an OCONUS in progress review in Washington from 12-14 January 1994. The purpose of the meeting was to improve coordination and communication between OCONUS MACOMs and Headquarters, Department of the Army (HQDA) in environmental matters. Attendees included representatives from the Army Staff, ODEP, Army Environmental Center (AEC), and OCONUS MACOMs, including attorneys from ELD, Office of The Judge Advocate General (International & Operational Law Division), and AEC. Outside the continental United States environmental program managers reported that significant attorney involvement is necessary to ensure that international law and Department of Defense (DOD) policies are correctly applied. As might be expected, OCONUS environmental program managers reported that the lack of personnel and funding is a major problem in dealing with overseas environmental issues. Attorneys OCONUS can help significantly by working closely with their environmental program managers to overcome the difficulties that OCONUS commands face, that is, funding and personnel shortages, time differences, and distance from HQDA. Attorney participation, as assessment team members, in the Environmental Compliance Assessment System (ECAS) program is an effective way to increase understanding of the issues and problems that environmental program managers confront on a daily basis. Lieutenant Colonel Graham.

Environmental Justice

Environmental Justice Executive Order

On 11 February 1994, President Clinton signed an executive order titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." The executive order requires federal agencies to take steps to identify and minimize disproportionately high or adverse impacts on minority and low-income communities, from agency decisions, programs, and policies affecting health or the environment. The order also requires collection and use of information assessing and analyzing environmental and human health risks borne by identifiable population groups. Under the executive order, the EPA will head a federal working group that will include the DOD. The group will develop guidance for further implementation of the executive order. Within six months, agencies are required to outline strategies to reach environmental justice goals; agencies must finalize programs within one year. We anticipate that the Army can implement many of the executive order's requirements through the data collection, analysis, and public participation aspects of the NEPA process. We will keep you advised as DOD becomes involved in the federal working group process. Major Miller.

Resource Conservation and Recovery Act (RCRA)

Corrective Action Orders

Pursuant to RCRA §3004(u), the EPA may require that facilities clean up past and present solid waste management units (SWMU) as a condition of a permit for treatment, storage, or disposal. Likewise, the EPA has asserted corrective action authority under RCRA §3008(h) for those facilities seeking a permit and operating under interim status. In the past, corrective action orders have mandated clean up of all SWMUs at civilian facilities, fence line to fence line. When applied to federal facilities—which are generally much larger than civilian facilities—such requirements can be particularly onerous. Headquarters, Department of the Army, is working with the EPA to minimize the effects that corrective action orders will have on the Army's Installation Restoration Program and allocation of limited cleanup monies.

Manifesting Transportation of Hazardous Waste

The EPA requires preparation of a manifest for all hazardous wastes being transported for off-site treatment, storage, or disposal.[16] On-site transportation is not subject to this requirement. "On-site" is defined as "the same or geographically contiguous property which may be divided by a public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way."[17] Consequently, crossing a public highway while travelling from one part of an Army installation to another, has not triggered the manifesting requirement. Environmental Protection Agency Region VI, however, has asserted, in a recent penalty action, that manifests are required for shipments that travel on roads that are accessible by the public. Because many installations are open to the public, the latter interpretation of "on-site" would require manifests on hazardous waste shipments that never leave the installation. The ELD will continue to monitor developments in this area. Major Bell.

Superfund

Superfund Reauthorization

The Clinton Administration recently had its CERCLA reauthorization proposal introduced in the House.[18] The proposal evolved after months of discussions between the EPA and

[16] 40 CFR § 262.20 (1993).

[17] *Id.* §270.2.

[18] H.R. 3800; S. 1834, 103d Cong. 2d. Sess. (1994).

other federal agencies, industry groups, and the public. The bills provide for the following: consultation with community working groups during cleanups, with these groups making land use recommendations (§ 103)[19]; a significantly enhanced role for the states, including EPA authorization for states to carry out response and enforcement actions at the National Priority List (NPL) and proposed NPL sites (§ 201)[20]; civil and stipulated penalties against federal agencies, except for natural disaster responses, including waiver of sovereign immunity for violations of the CERCLA, whether or not the agency owned the site; national generic cleanup remedies (supported by the DOD) (§ 503)[21]; and authority to contract for the sale of land before the remedy is complete (§ 603).[22] Moreover, the bills propose to fix perceived injustices in the CERCLA liability scheme (Title IV) by making settlements easier and more equitable. Under the bill, settling potentially responsible parties can pay a premium and receive a final release from additional liability. An EPA prepared summary of the bills, with an analysis of the issues and the EPA's approach to implementation, is in *Inside EPA's Superfund Report*.[23] Mr. Nixon.

Clean Water Act (CWA)

Reauthorization Update

On 31 January 1994, the Clinton Administration submitted its CWA proposal to Congress. A reauthorization bill is pending in the Senate (S. 1114)[24] and a House version is expected soon. The Administration's proposal and S. 1114 provide for a waiver of sovereign immunity, allowing the EPA and the states to assess fines, penalties, and fees against federal facilities (H.R. 340 and 2580 also would amend the CWA to expand the waiver of sovereign immunity).[25] Significantly, S. 1114 and the Administration would strengthen enforcement by permitting citizen suits for repeated past violations of the CWA. Both also propose a field citation program for minor violations, with a maximum fine of $25,000 per violation. Under these proposals, proposed penalties against federal facilities would include an amount for the "economic benefit" received by the federal facility for failing to correct the cause of the violation. Additionally, S. 1114 and the Administration proposal would mandate control of nonpoint sources of pollution on federal lands. They also would require mandatory watershed planning for federal activities that may affect impaired waters. A CWA reauthorization bill is expected to pass this year. To prepare, environmental law specialists should begin to assess the installation's compliance posture by looking at the CWA section of the ECAS report, the installation's history of violations, and other program shortfalls. Lieutenant Colonel Graham.

Endangered Species

Red-Cockaded Woodpecker (RCW) Management Guidelines

The Army RCW Management Guidelines are in the final stages of the approval process. The Army and the Fish and Wildlife Service will conduct a joint training program on implementing the guidelines on 19 and 20 April 1994, in Atlanta, Georgia. Affected installations are encouraged to send natural resources managers, environmental law specialists, and military trainers. Further information on this training session will be disseminated through each MACOM's environmental section. Major Teller.

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Inside EPA's Superfund Report*, vol. VIII, no. 3, pt. I (4 Feb. 94).

[24] S. 1114, 103d Cong. 1st Sess. (1993).

[25] *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Notes

ADPE Procurements Without Proper Authority Are Void

The United States Court of Appeals for the Federal Circuit recently defined, for the first time, the legal consequence of an agency's failure to obtain a proper delegation of procurement authority (DPA) from the General Services Administration (GSA) before proceeding with a procurement for automatic data processing equipment (ADPE) and services.[1] In *CACI, Inc. v. Stone*,[2] the court reversed the General Services Administration Board of Contract Appeals (GSBCA) and held that an agency without a proper DPA lacks authority to enter into an ADPE contract and, therefore, that an ADPE contract awarded without a proper DPA is void.

Legal Background

Under the Brooks Act,[3] the GSA Administrator (Administrator) has sole authority to acquire ADPE for federal agencies.[4] The Brooks Act defines ADPE as "any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception of data or information . . . ."[5] It includes computers, ancillary equipment, software, services (including support services), and related resources as defined by the GSA.[6] It does not include a federal contractor's incidental use of ADPE during contract performance; radar, sonar, radio, and television equipment; certain excepted Department of Defense (DOD) uses of ADPE; or ADPE used by the Central Intelligence Agency.[7]

To promote efficiency in ADPE procurement, the Brooks Act permits the Administrator to delegate the GSA's authority to acquire ADPE to other federal agencies.[8] The Administrator exercises that authority by

> (1) Granting a regulatory "blanket DPA" to most federal agencies, which allows agencies to make small ADPE acquisitions without specific GSA approval;[9]
>
> (2) Granting a specific agency DPA, which may modify on an agency basis the blanket DPA given to other federal agencies;[10] and
>
> (3) Granting a specific acquisition DPA to allow an agency to conduct a specific ADPE acquisition when the value of the needed ADPE exceeds the agency's blanket or specific agency DPA.[11]

The Brooks Act is silent on the legal effect of an agency's acquisition of ADPE without a proper delegation. Previously,

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[1] Automated data processing equipment and services procured by federal agencies also are known as "federal information processing (FIP) equipment and services." GENERAL SERVS. ADMIN. FEDERAL INFORMATION RESOURCES MANAGEMENT REG. 201-4.001 (Oct. 1990) [hereinafter FIRMR]. For consistency with statutory language and the language used by the court, this discussion uses the term "ADPE" to refer to FIP equipment and services.

[2] 990 F.2d 1233 (Fed. Cir. 1993).

[3] 40 U.S.C. § 759 (1988 & Supp. IV 1992).

[4] For purposes of this discussion, the term "acquire" includes purchasing, leasing, or maintaining ADPE.

[5] 40 U.S.C. § 759(a)(2)(A) (1988 & Supp. IV 1992).

[6] *Id.* § 759(a)(2)(B) (1988 & Supp. IV 1992). *See* FIRMR 201-4.001 and *FIRMR Bulletin A-1* for specific examples of "related resources."

[7] *Id.* § 759(a)(3) (1988 & Supp. IV 1992). The exception for DOD uses of ADPE (40 U.S.C. § 759(a)(3)(C)) is known as the "Warner Amendment." This exception applies to ADPE used for intelligence activities, for cryptologic activities related to national security, for command and control of military forces, for integral parts of weapons systems, and for the direct fulfillment of military or intelligence missions (except routine administrative functions such as payroll, logistics, and personnel management).

[8] *Id.* § 759(b)(2) (1988 & Supp. IV 1992).

[9] FIRMR 201-20.305-1. Under this delegation, most agencies may purchase up to $2.5 million of hardware, software, or services under certain circumstances without GSA prior approval.

[10] *Id.* 201.20.305-2. *See, e.g.*, DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. 5339.002 (1 Apr. 1984). Under this implementation of its agency delegation, the Air Force may acquire up to $10 million of ADPE under certain conditions without prior GSA approval.

[11] FIRMR 201-20.305-3.

the GSBCA had held that although a failure to secure a DPA prior to conducting a procurement was "serious," the failure did not render the solicitation void and the government could cure the defect by obtaining a proper DPA.[12] *CACI, Inc. v. Stone* was the Federal Circuit's first opportunity to consider that same issue.

Facts of the CACI, Inc. *Case*

On September 30, 1991, the Army awarded a contract for engineering and data processing services valued at approximately $3 million to VSE Corporation (VSE) to support its Technical Data/Configuration Management System located at Belvoir Research, Development, and Engineering Center (Belvoir Center).[13] This system automates the management and control of the Belvoir Center's individual technical data packages, consisting of over 65,000 engineering drawings and over 11,000 military specifications.[14]

Fifteen days later,[15] on October 15, 1991, CACI, Inc. (CACI) protested the VSE award to the GSBCA for a number of reasons, including the Army's failure to obtain a proper DPA.[16] CACI requested that the GSBCA suspend the procurement until the hearing on the merits.[17]

Before the GSBCA, the Army admitted that it conducted the procurement without a proper DPA. However, the Army argued that the support services were critical to the Belvoir Center's mission to ensure proper technical data for its procurements, and that it was attempting to secure a proper DPA from GSA. Based on the Army's assertions, the GSBCA refused to suspend the procurement.[18] After seeking reconsideration from the GSBCA,[19] CACI appealed to the Federal Circuit.

On appeal, the Army attempted to withdraw its earlier concession that it did not have a proper DPA. It pointed out that at the time it issued the solicitation, the blanket DPA then in effect gave agencies unlimited authority to contract for ADPE support services without GSA approval.[20] As a result, the Army argued its action was proper because it acted within its regulatory DPA.[21] CACI countered that because the Army raised the issue of the existence of a regulatory DPA for the first time on appeal, the Army waived its argument that the procurement fell within a preexisting DPA.[22]

The Federal Circuit's Holding

In writing for the court, Judge Plager wasted little time with the Army's argument that it had a preexisting regulatory DPA. He wrote that because the Army did not raise the existence of the regulatory DPA before the GSBCA, the board did not have an opportunity to make factual findings on whether the regulatory DPA authorized the procurement. Consequently, the court held the Army to its earlier admission that no DPA existed because "it would be unfair to appellant and would disrupt the orderly conduct of litigation if we allowed the Army to change its position at this stage."[23]

The court then turned to the main issue: whether the absence of a DPA voided the procurement. Noting that the court had not addressed the issue previously, the court stated that courts and boards should uphold contract awards unless

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[12] Computervision Corp., GSBCA No. 8709-P, 87-1 BCA ¶ 19,518.

[13] CACI, Inc. v. Stone, 990 F.2d 1233, 1234 (Fed. Cir. 1993).

[14] CACI, Inc.—Federal, GSBCA No. 11523-P, 92-1 BCA ¶ 24,590 at 122,690, *rev'd sub nom.*, CACI, Inc. v. Stone, 990 F.2d 1233 (Fed. Cir. 1993).

[15] The protest was timely because the protester demonstrated that it did not learn of the basis of the protest until October 10, five days prior to filing its protest. *Id.*

[16] CACI also protested the award based on inadequate discussions, improper evaluation of proposals, and alleged favoritism toward VSE. *CACI*, 990 F.2d at 1234.

[17] CACI was not entitled to an automatic stay of the procurement because it did not file its protest within ten days of contract award. 40 U.S.C. § 759(f)(3)(A) (1988 & Supp. IV 1992). Therefore, CACI based its request on the GSBCA's discretionary authority to suspend a procurement if an agency action violates statute or regulation. *Id.* § 759(f)(5)(B) (1988 & Supp. IV 1992).

[18] 92-1 BCA ¶ 24,590 at 122,691.

[19] *Id.* ¶ 24,702.

[20] At the time the Army issued the solicitation (1 April 1991), the applicable blanket DPA required a specific GSA acquisition delegation for ADPE *nonsupport* service contracts greater than $2 million, but not for ADPE *support* service contracts. FIRMR 201-23.104-5; 201-23.104-6. However, effective April 29, 1991, the GSA amended the *FIRMR* to require a specific acquisition delegation to acquire both nonsupport and support services that have a value greater than $2.5 million. *Id.* 201-20.305-1 (1991).

[21] CACI, Inc. v. Stone, 990 F.2d 1233, 1234 (Fed. Cir. 1993).

[22] *Id.* at 1235.

[23] *Id.*

the award "plainly" violates statute or regulation.[24] The court examined the GSBCA's rationale for holding the absence of a DPA to be a curable defect[25] and registered its disagreement by stating as follows:

> There can be no clearer example of a case in which the illegality is plain and clear than one in which there is a facial absence of actual authority to enter into the contract. The Board's only support for its position was its conviction that "[i]t would be contrary to the goals of economic and efficient procurement to declare the award a nullity and thus preclude respondent from exploring with GSA officials a course of action which might cure deficiencies in the procurement . . . ." However, its policy rationale has no basis in law. Thus, to the extent that the Board held that a government procurement or contract may proceed without a valid DPA, the Board was in error.[26]

Once it found that the Army lacked authority to enter a contract, the court adopted a traditional authority analysis, and held that, because the contracting officer had no authority to enter the VSE contract, the contract was void.[27] In addition, the court held that although the Brooks Act gave the GSBCA the authority to suspend or revise a DPA, the Brooks Act did not give the GSBCA the authority to ratify a contract action that did not have a proper DPA.

Finally, the court concluded its opinion with a cryptic statement that although the contract awarded in this case was void, "[t]his does not mean that minor deviations from the applicable regulations will automatically render a contract void . . . .[28] But there cannot be a contract when the government agent lacks actual authority to create one."[29]

Conclusion

CACI, Inc. v. Stone clarified the legal impact of awarding a contract without a proper DPA. However, the case raises several new issues. For example, what happens when an agency awards a contract believing that the contract does not require a DPA (because it believes that ADPE is not involved or that a statutory exception applies), only to discover after performance has begun that the procurement required a DPA? Can the Administrator ratify the procurement action (much like a contracting officer ratifies unauthorized commitments)?[30]

A more interesting, but also unresolved, issue is whether an agency that discovers its need for a DPA during the solicitation phase of an action can secure a DPA from the Administrator that will ratify the preaward actions completed to that point. The GSBCA recently had an opportunity to consider that issue in a wind tunnel automation systems procurement for NASA's Ames Research Center.[31] Unfortunately, the GSBCA declined to rule on the issue because the Administrator had not decided whether to grant NASA's DPA request.

Finally, to what extent may agencies deviate from the strict terms of DPAs before the DPA is invalidated? In *CACI*, the Federal Circuit indicated that "minor deviations" from the DPA would not invalidate the DPA.[32] However, a number of GSBCA decisions have held that a "material" deviation from a DPA requires the agency to seek an amended DPA. In some cases, these material deviations have involved relatively minor matters.[33] How the GSBCA and the Federal Circuit define "minor deviation" will be an area of interest in the months ahead.

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[24] *Id.* The court adopted the standard announced by the Court of Claims in John Reiner & Co. v. United States, 325 F.2d 438, 163 Ct. Cl. 381 (1963), and in Schoenbrod v. United States, 410 F.2d 400, 187 Ct. Cl. 627 (1969).

[25] *See supra* text accompanying note 12.

[26] *CACI*, 990 F.2d at 1236.

[27] *Id.* The court cited a number of cases, including Federal Crop. Ins. v. Merrill, 332 U.S. 380 (1947) and Office of Personnel Mgmt. v. Richmond, 496 U.S. 414 (1990), for the proposition that the government is not bound by its agents that act beyond their authority and contrary to regulation.

[28] The court cited its decision in Andersen Consulting v. United States, 959 F.2d 929 (Fed. Cir. 1992), to support its statement. In *Andersen Consulting*, the court upheld the GSBCA's decision that the agency's failure to require certain benchmark tests in accordance with the solicitation did not per se invalidate the DPA. It is interesting that both *Andersen Consulting* and *CACI* involved the application of 40 U.S.C. § 759(f)(5)(B), which gives the GSBCA the discretionary authority to suspend or revoke procurement authority for a statutory or regulatory violation.

[29] *CACI*, 990 F.2d at 1236-37.

[30] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602-3 (1 Apr. 1984) (general procedures concerning ratification of unauthorized commitments by contracting officers).

[31] Science Applications Int'l Corp. v. NASA, GSBCA No. 12600-P (Nov. 3, 1993), 94-1 BCA ¶ _____.

[32] *See supra* notes 28-29 and accompanying text.

[33] *See, e.g.*, Computer Sys. & Resources, Inc., GSBCA No. 9176-P, 88-1 BCA ¶ 20,331 (slip of award date); C3, Inc., GSBCA No. 10063-P, 89-3 BCA ¶ 22,053 (violation of internal agency procedures).

The Federal Circuit answered one question and raised several others. Obtaining answers to those questions may keep attorneys gainfully employed for years to come. Major Hughes.

Legal Assistance Items

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

Car Repair Rip-Offs: An Analytical Approach

Sergeant Gordon has returned from a deployment and comes to the legal assistance office, presenting the following problem and asking for advice.

While Sergeant Gordon was on leave in another city about eight months ago, his 1985 Chevrolet developed engine problems. He took it to Fix-It-Here Transmission Shop, which advertised same day service, and was told by "Doc" to leave the car and he would look at it when he had time. Sergeant Gordon agreed, instructing Doc to look at the transmission and notify him before any work was done. Sergeant Gordon left his unit and home telephone number with Doc.

Sergeant Gordon returned to his duty station and, after failing to hear from him, called "Doc" several days later to tell him not to do any work on the car and that he would come pick it up. Doc told him that he had already disassembled the car's transmission and wanted $200 for his labor. Sergeant Gordon told him to reassemble the car and he would pick it up. Doc then said that it would cost him $400 and demanded immediate payment before releasing the car. Over the next several months, Sergeant Gordon repeatedly tried to contact Fix-It-Here, even taking additional leave to go to the shop, which proved to be closed when he got there. Finally, he reached "Doc" and tried to negotiate a resolution.

Knowing that his unit was about to deploy overseas and not wanting to pay $400 for nothing, Sergeant Gordon agreed to buy a new transmission and pay $70 for installation. Sergeant Gordon bought the transmission, took it to the repair shop and "Doc" told him to return in one hour for the repaired car. After calling about the car several times, Sergeant Gordon returned to the shop, where "Doc" told him that he did additional work on the car and it would cost $200 more than expected.

Despite the agreed on $70, "Doc" refused to release the car without additional payment in cash, which Sergeant Gordon did not have. Sergeant Gordon offered to give him $100 in cash and a check for the remainder, but "Doc" still refused to release the car. When Sergeant Gordon said he would call the police, "Doc" pulled a pistol, cocked it, and said "This is the only person I need to talk to." Sergeant Gordon left the shop. When Sergeant Gordon returned with the police, the shop was closed. He rented a car to get back to his duty station.

Within the week, Sergeant Gordon's unit was deployed overseas. While overseas, his mother and others tried repeatedly to get the car back, but "Doc" told them it would cost $2000 for storage fees to redeem the car. "Doc" was less than polite in his conversations with them. Meanwhile, "Doc" began steps to place a lien on the car. Sergeant Gordon's mother was notified that a possessory lien was filed and that the car would be foreclosed on. "Doc" sold the car for $1,800 to the owner of M.J. Auto Sales of Houston, Texas.

In formulating advice to a client in Sergeant Gordon's position or one similar, the legal assistance attorney (LAA) may find the following step-by-step analysis useful:

Does the SSCRA Protect Sergeant Gordon?

Yes, the Soldiers' and Sailors' Civil Relief Act (SSCRA) protects Sergeant Gordon. The purpose of the Act is to postpone or suspend certain civil obligations to permit service members to devote their full attention to duty.[34]

What Section of the SSCRA Would Apply in This Case?

The enforcement of storage liens[35] provision would apply, and states the following:

> No person shall exercise any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a person in military service during such person's period of military service and for three months thereafter *except* upon an order previously granted by a court upon application therefor and a return thereto made and approved by the court.

"Doc" violated this section by taking a lien and foreclosing on the car without court order.

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[34] 50 U.S.C. app. § 510 (1993). "Military service" means federal service on active duty (*id.* § 511).

[35] *Id.* § 535 (emphasis added).

What Remedy Is Available for Breaching That Particular Section of the SSCRA?

The Enforcement of Storage Liens states that "[a]ny person who knowingly takes any action contrary to this section, or attempts to do so, shall be fined as provided in 18 U.S.C., or imprisoned for not to exceed one year, or both."[36] Accordingly, "Doc" can be prosecuted criminally for his conduct.

Could Sergeant Gordon Sue in Court for Violations of the SSCRA Which Harm Him and, If Not, Then Who? If Someone Other Than Sergeant Gordon Must Pursue Action, What Steps Are Involved to Refer the Case? How Would You Involve the Staff Judge Advocate (SJA)? How Would You Convince the Appropriate Party to Pursue the Case on Sergeant Gordon's Behalf?

Nothing in the SSCRA expressly provides for a private cause of action to be bestowed on a military plaintiff. In *McMurtry v. City of Largo*,[37] the issue was whether the SSCRA provides a private cause of action under which a plaintiff soldier may sue in federal court.[38] The court, citing *Tolmas v. Streiffer*,[39] said "there is nothing in that Act which contemplates conferring upon a solider or sailor any privilege not enjoyed by a civilian. It is merely intended to secure him in his legal rights until he may return. . . ." The court held that the soldier plaintiff should have availed himself of the protections of § 525 (which tolls statutes of limitations) to appeal the administrative ruling. The court then said that it would not now create a new cause of action for him to substitute for his unused remedy.[40]

Does McMurtry *Stand for the Proposition That a Service Member Plaintiff Has No Cause of Action For SSCRA Violations?*

Not necessarily. In *Crump v. Chrysler First Financial Services Corp.*,[41] a soldier *plaintiff* (and her husband) alleged violations of the SSCRA when their lender failed to reduce their mortgage loan to six percent; violations of the Fair Credit Reporting Act (FCRA) by willfully and maliciously reporting a delinquency when they could not pay the balloon note; and violation of the North Carolina Unfair Trade Practices Act for fraudulent, deceptive, and misleading practices. In their Prayer for Relief, the plaintiffs asked the court for actual and punitive damages, attorneys fees for violating the FCRA and the North Carolina consumer protection statute (treble damages), and court costs, and that all adverse credit references be removed and that they recover *all affirmative relief afforded by the SSCRA*. Because the case was settled,[42] we do not know how the court would have addressed the SSCRA issues. The plaintiffs' attorney did ask for equitable remedies for the SSCRA violations and monetary damages and costs under the other statutes which expressly provide for private causes of action.

So, what is the answer to the question *"Could Sergeant Gordon himself sue in court for violations of the SSCRA which harm him?"* It appears, at least in cases involving other private right of action statutes, that the soldier plaintiff should allege violations of the SSCRA and ask for equitable relief in conjunction with damages and costs allowed by the other statutes. In Sergeant Gordon's case, he should, if proceeding in a civil suit, allege not only violations of the applicable state or federal consumer protection statutes, but also the SSCRA.

Why Was McMurtry Unsuccessful?

It appears that McMurtry sued for damages alleging violation of the SSCRA, after he had failed to use remedies already in place in the SSCRA that would have allowed him to appeal the ruling after the normal appeal period had ended. The court was not sympathetic. More importantly, the city's action in demolishing the building was *not* in itself a violation of the SSCRA, which was the difference in *McMurtry* and *Crump*. In *Crump*, the lender's action in failing to reduce the interest rate to six percent was a violation of the Act.

For *criminal prosecution* under § 535, Sergeant Gordon's case must be referred to the United States Department of Justice. The LAA should forward an appropriate case to the Department of Defense Criminal Investigative Service regional office for investigation. They will investigate and forward the case to the regional United States Attorney, who will assess whether to proceed with prosecution.[43] Before referring the case, the LAA should discuss it with the SJA and, if

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[36] *Id.*

[37] 837 F. Supp. 1155 (M.D. Fla. 1993).

[38] A service member brought action against the city, seeking to recover for the city's condemnation and destruction of his building while he was involved in military action abroad.

[39] 21 So. 2d 387 (Ct. App. La. 1945).

[40] The court concluded that § 521, the stay provisions of the SSCRA, did not apply to board proceedings.

[41] No. 92 CVS 33 (Sup. Ct. Caldwell County, North Carolina, 1992) (case settled between parties).

[42] The settlement included a 15% refinancing loan recomputed at 12%, and that the lender would clear the reservist's credit report and pay her $6000.

[43] If the legal assistance attorney is unsure of the procedural steps to forward the case, he or she should call the criminal division of the regional United States Attorney's office for guidance.

applicable, the Special Assistant United States Attorney at his or her installation. Preparing a brief of the issues for the SJA (and the United States Attorney if the case is referred) is very helpful. Oftentimes, the Assistant United States Attorney who prosecutes the case is not familiar with the SSCRA and the LAA's research and brief will prove invaluable.[44] Convincing the United States Attorney to take the case may be difficult. The more egregious the case, however, the more likely the prosecution. The LAA should document fully the facts of the case and the efforts that his or her client and the legal assistance office made toward resolution.

Do Any Reported Cases Support the LAA's Position That the United States Attorney Should Prosecute This Case?

A case that supports criminal prosecution is *United States v. Bomar*[45] (Sergeant Gordon's hypothetical is based on the egregious facts of this case). The guilty verdict was affirmed and the sentence imposed: $4000 restitution; three years probation; six months home detention; and 250 hours community service.

Generally Speaking, Do Consumer Protection Statutes Exist That Might Apply in Sergeant Gordon's Case?

Yes, there are applicable consumer protection statutes. Except for a limited number of states, state consumer protection statutes provide private remedies for unfair and deceptive acts and practices (called UDAP statutes). All states, including the District of Columbia, have enacted at least one UDAP statute.[46] These statutes apply to most consumer transactions and provide widespread consumer remedies for a number of sales abuses.[47] Violations of UDAP are easier to prove than common-law fraud. Generally, no requirement exists to prove a seller's fraudulent intent or motive. In some cases, consumer reliance, damage, or even actual deception is not a prerequisite for action. When a practice does not fall precisely under another consumer statute, UDAP statutes can provide an all-purpose remedy. Almost any abusive business practice is arguably a UDAP violation. These UDAP statutes are referred to in various states as: Consumer Protection Acts, Consumer Sales Acts, Unfair Trade Practices Acts, Deceptive and Unfair Trade Practices Acts, Deceptive Consumer Sales Acts, and Consumer Fraud Acts.

When a private UDAP action is authorized, most statutes provide for private remedies beyond mere actual damages. Some jurisdictions authorize treble damages in certain situations, such as when the seller's conduct is willful or the seller refuses to make a reasonable settlement. Some UDAP statutes explicitly authorize punitive damages, and such damages may be available in other states through the court's inherent authority. Some UDAP statutes authorize minimum statutory damages ranging from $25 to $2000. Most common among these are $100 and $200 minimum damages. Every state UDAP statute that permits a private right of action also permits the award of attorneys' fees. A majority of statutes explicitly authorize injunctions and they may be allowed, even if not explicitly mentioned, when the UDAP statute refers to "other equitable remedies."

Auto repairs—such as those in Sergeant Gordon's case—are transactions open to a state UDAP approach. Depending on the statute, UDAP liability may exist if the consumer was in any way misled in the transaction. For example, the state of Texas does not have a separate statute governing car repairs; however, its UDAP statute applies.[48] A number of state statutes also specifically govern car repairs.[49]

Assuming This Case Is Worth Pursuing in a Civil Suit, How Would a LAA Refer It to Another Civilian or Reserve Attorney? Is There an Army Regulation That Addresses Referrals from LAAs?

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[44] The SSCRA instructor at The Judge Advocate General's School, United States Army, Charlottesville, Virginia, can help in this regard (the instructor's files contain the legislative history of the SSCRA, which is essential for the prosecutor).

[45] 8 F.3d 226 (5th Cir. 1993). The court concluded that § 535 of the SSCRA does not require that the lien be solely for "storage," rather, "any lien for storage" includes the mechanic's lien in this case. To fall within the Act, a lien must include charges for storage, but need not be limited to such fees. "Household goods, furniture, or personal effects of a person in military service" includes a soldier's car.

[46] Most state UDAP statutes are patterned on the Federal Trade Commission (FTC) Act. 15 U.S.C.A. § 45 (West 1993). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* No private remedies exist, only FTC enforcement.

[47] For an excellent discussion of UDAP statutes *see* National Consumer Law Center, *Unfair and Deceptive Acts and Practices, in* THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES (3d ed. 1991 & Supp. 1993). The following discussion comes from this publication.

[48] *See* TEX. BUS. & COM. CODE ANN. § 17.46 (West 1994) ("Deceptive Trade Practices and Consumer Protection"; interpretive case cited: Hyder-Ingram Chevrolet, Inc. v. Kutach, 612 S.W.2d 687 (Tx. Civ. App. 1981)). In that case, a car rental expense (incurred by the owner who brought suit against the mechanic after the mechanic refused to return the owner's car on which repair work had been performed in excess of that authorized and for which owner refused to pay) was seen as a reasonable and necessary expense and, therefore, recoverable under the Deceptive Trade Practices and Consumer Protection Act. Section 17.50 provides that a prevailing consumer may recover actual damages, statutory damages, an injunction, restitution, other equitable relief as listed, and court costs and attorneys' fees. *See also* TEX. PROP. CODE ANN. § 70.001 (West 1994) ("Possessory Liens"; interpretive case cited: Southwestern Inv. Co. v. Gilbreath, 380 S.W.2d 196 (Tex. Civ. App. 1964) (if work on auto giving rise to claim of artisan's lien was not authorized by owner, lien invalid).

[49] *See* National Consumer Law Center, *Sales of Goods and Services, in* THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES 543-47 (2d ed. 1989 & Supp. 1993) for an excellent discussion of state auto repair laws.

Legal assistance attorneys should be thoroughly familiar with *Army Regulation 27-3,* which governs referrals.[50]

What Preventive Law Measures Should an LAA Take After Hearing About Sergeant Gordon's or a Similar Case?

After dealing with Sergeant Gordon's case, the LAA should consider writing an article for the installation paper,[51] preparing an Information Paper for Commanding Officers (omitting the repair shop's name), and referring the case to the Armed Forces Disciplinary Control Board. Major Hostetter.

Tax Notes

The 1994 Moving Expense *Adjustment*?

Legal Assistance Attorneys are encouraged to use the following information[52] to inform military taxpayers who are moving in 1994. The Omnibus Budget Reconciliation Act of 1993[53] redefined moving expenses for tax purposes. The change means that many military taxpayers will not incur moving expenses that they later may deduct on their 1994 federal income tax return.

Currently, military taxpayers who itemize their deductions (that is, file a *Form 1040, Schedule A*) may claim moving expenses on *Form 3903* (or *Form 3903F* for a move to or within a foreign country). Two basic kinds of deductible moving expenses exist, direct and indirect.

Direct expenses include moving household goods and personal effects from the old to the new residence, and travel costs, including lodging and eighty percent of meals en route, for the taxpayer and the taxpayer's family. These are claimed on *Form 3903,* Part I, Sections A and B. Generally, military taxpayers do not incur very many direct moving expenses.

Indirect expenses cover travel costs, including lodging and eighty percent of meals, for househunting trips after obtaining a job at the new location; lodging and eighty percent of meal costs for temporary quarters (up to thirty days) while waiting to move into a home at the new job location; and brokers' commissions, legal fees, and other costs connected with selling the old home and buying a new one. Many military taxpayers who sell and then buy a replacement home when changing duty stations often claim indirect expenses (such as, househunting, home sale, or purchase expenses) as moving expenses to increase their itemized deductions.[54] *Form 3903, Moving Expenses,* Part I, Sections C and D, are where indirect moving expenses are claimed for 1993 moves.

Beginning 1 January 1994, *indirect* expenses incurred after 31 December 1993 no longer are deductible moving expenses. Taxpayers only can deduct the cost of transporting themselves and family (including the cost of lodging while traveling) and their belongings to their new homes. As a practical matter, many military taxpayers no longer will have deductible moving expenses.

Many of the qualified real estate expenses incurred in a home purchase (such as, attorney fees, transfer and stamp taxes, survey costs) still may be used to adjust the basis of a sold/purchased home.[55]

Those taxpayers who do incur direct moving expenses may claim them *without* itemizing (that is, filing *Form 1040, Schedule A*) on their 1994 federal return. Next year, taxpayers may take a "moving expense adjustment," similar to an alimony adjustment currently on the front of the *Form 1040.* Lieutenant Colonel Hancock.

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[50] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992) [hereinafter AR 27-3]. For an in-depth discussion of the regulation, see Arquilla, *"The New Army Legal Assistance Regulation,"* ARMY LAW., at 3 (May 1993). The article explains the factors that must be considered in making referrals.

[51] Preventive law remains an important area in the Army legal assistance program. Keeping a client out of legal trouble is more important to a client than helping him or her with damage control after the mistake is made. *Army Regulation 27-3* directs that the common legal problems of soldiers and their families be examined for ways in which those problems can be avoided, that regulatory or statutory "fixes" be recommended, and that these solutions be shared with other attorneys providing legal assistance. AR 27-3, *supra* note 50. *Army Regulation 27-3* also requires that "[l]ocal print and electronic media and training and education programs" be used to inform soldiers and their families of their legal rights and entitlements; local legal problems and ways to avoid them; and the location, telephone numbers, and hours of operation of the legal assistance office." Arquilla, *supra* note 50, at 3.

[52] An information paper containing this information may be downloaded from the Legal Automation Army-Wide System Bulletin Board. Check the Legal Assistance Conference, Recent Uploads for the file, 94MOVE.ASC, a file in ASCII. You may want to reprint the *1993 Form 3903* on the back when you distribute the information paper. If you do so, I recommend that you delete (cross out) parts C and D and write "1994 Draft" at the top and the bottom to avoid confusing individuals who are filing a 1993 Moving Expense form.

[53] P.L. No. 103-66 (1993).

[54] A taxpayer has an election with respect to the expenses associated with the purchase of the home (such as, survey, attorney fees). The taxpayer may claim these as indirect moving expenses or increase the basis (usually the cost) of the home. Most taxpayers elect to maximize their moving expense deduction in the year of purchase instead of postponing the effect of these expenses by increasing the home's basis. Basis is used to measure the taxpayer's investment to determine taxable gain on the subsequent disposition of the home. For the indirect moving expenses related to the purchase of a home incurred before 1 January 1994, taxpayers could choose between the moving expense deduction treatment and the increase in basis.

[55] Consult *Internal Revenue Service (IRS) Publication 530, Tax Information for First-Time Homeowners,* for more information on basis and items that may be added to basis when they are claimed as indirect moving expenses. For 1993 and earlier years, consult *IRS Publication 521, Moving Expenses,* pages 6 to 7, for more information on the election between claiming moving expenses and increasing the home's basis.

Tort Claims Note

Tort Claims Involving Federal Agencies Other Than the Army and the Department of Defense Components for Which the Army Has Tort Claims Responsibility

Army claims offices routinely receive tort claims involving damages caused by federal agencies other than the Army or the Department of Defense components for which the Army has tort claims responsibility. These claims may allege that the death, injury, or property damage was caused by the Army acting in concert with another federal agency, or they simply may misidentify the Army as the responsible federal agency.

Claimants file these claims with Army claims offices for several reasons. Frequently the Army claims office happens to be on the nearest federal facility. Just as often, claimants do not know which federal agency is responsible for the damage, and they file claims with the Army because of perceived "military" involvement.

When an office receives such a claim, the Claims Judge Advocate (CJA) should immediately contact the claimant to discuss the matter. If the claimant is represented, the CJA always should contact the claimant's attorney, not the claimant. The CJA should ascertain why the claimant filed the claim with the Army, determine whether claims were sent to other federal agencies, and if so, which ones, and determine the legal basis for the claim. The CJA should draft a memorandum for record of the conversation for the file.

When the claim alleges that both the Army and another federal agency—including another military service—caused the damage or injury, the CJA will contact all other affected agencies to determine which agency will investigate and adjudicate the merits of the claim.[1] This should be done immediately by telephone and followed up in writing. If the Army is designated the lead agency, the CJA should obtain copies of any investigation already conducted by other agencies and any other relevant information. If a lead agency cannot be agreed on, the CJA should immediately contact the United States Army Claims Service (USARCS) for assistance. If the claim is for over $15,000, and therefore reportable to USARCS under the provisions of *Army Regulation 27-20*, paragraph 2-11b(2), the USARCS area action officer will coordinate the determination of the lead agency. After a lead agency has been designated, all claims will be transferred to that agency for action.[2]

Under the Federal Tort Claims Act, a claim is not properly filed for purposes of tolling the statute of limitations until the proper federal agency receives it. The claims office that originally receives the claim is responsible for proper transfer of the claim within a reasonable time.[3]

When a claim arises solely out of the activities of another federal agency or military service, the CJA should coordinate transfer with the other agency and then notify the claimant of the transfer. Whenever possible, the CJA should coordinate the claim transfer prior to notifying the claimant. This will ensure that the claimant does not receive a "bureaucratic runaround."[4]

Whenever it is clear that the Army is not at fault for damages or injury and the federal agency cannot be identified, the CJA should return the claim to the claimant with an appropriate explanation.[5] Before returning such a claim, however, the CJA should contact the USARCS for guidance. If returning the claim is appropriate, the CJA still must date stamp the claim with the date that it was received and retain a copy of the claim form and transmittal letter (which explains the reason for its return) in a potential claim file.[6]

For all claims that involve other federal agencies, forward mirror files to the USARCS regardless of the amount claimed. Captain Bodensteiner.

Sample letters acknowledging these types of claims are below:

Several Federal Agencies Involved

Dear *Mr. Attorney:*

This letter acknowledges receipt of the *Claimant's* claim against the United States Army arising out of *Claimant's* accident on *Date.* As I understand, several other federal agencies also are investigating the circumstances surrounding the accident, to include *Other Agency Name(s).*

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[1] *See* 28 C.F.R. § 14.2(b)(2) (1993); DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 2-6c (28 Feb. 1990) [hereinafter AR 27-20].

[2] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 5-24 (15 Dec. 1989) [hereinafter DA PAM. 27-162].

[3] 28 C.F.R. § 14.2(a), (b)(1) (1993).

[4] *Id.* § 14.2(b)(1); AR 27-20, *supra* note 1, para. 2-6d.

[5] DA PAM. 27-162, *supra* note 2, para. 5-26.

[6] *Id.* para. 5-26b.

The claim will be processed under the provisions of the Federal Tort Claims Act (28 United States Code §§ 2671-2680, as amended), which is implemented by Attorney General's Regulations (28 Code of Federal Regulations 14.1 to 14.11) and further by *Army Regulation 27-20*, Chapter 4.

Under federal regulations, when an incident arises as a result of the activities of more than one government agency, all the agencies involved must select one of the group as the lead agency to represent the United States as a whole. At this moment, several of the agencies with which you filed your tort claim are investigating the matter. When a lead agency is selected, you will be contacted and advised where to send supporting documentation.

The supporting documentation that you send to the lead agency should include:

(1) All medical records pertaining to the treatment of *Claimant's* injuries, as they relate to the claim.

(2) A written report by the attending physician setting forth the nature and extent of the injury, nature and extent of treatment, period of hospitalization, the prognosis, and degree of temporary or permanent disability. If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment is needed.

(3) Itemized bills for medical and hospital expenses incurred, or itemized receipts for the payment of such expenses.

(4) A complete copy of any medical insurance records for the payment of any benefits under *Claimant's* health insurance. In the event *Claimant* received payment under applicable workman's compensation insurance, an itemization of those payments will be required.

(5) If a claim is made for the loss of time from employment, a written statement from any and all employers showing the actual time lost from employment and the amount of wages actually lost.

(6) Any other evidence or information that may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

If you have any further questions regarding this matter, please feel free to contact me at *Telephone Number.*

Possibly Not An Army Matter

Dear *Mr. Attorney:*

This letter acknowledges receipt of the *Claimant's* claim against the United States Army arising out of *Claimant's* accident on *Date.* While the Army is now investigating the circumstances surrounding the alleged incident, it does not appear that the Army was responsible for the claimed activity.

Nonetheless, the claim will be processed under the provisions of the Federal Tort Claims Act (28 United States Code §§ 2671-2680, as amended), which is implemented by Attorney General's Regulations (28 Code of Federal Regulations 14.1 to 14.11) and further by *Army Regulation 27-20,* Chapter 4.

In the event that the claim was not filed with the proper federal agency within two (2) years after the negligent or wrongful act or omission occurred, the statute of limitations would not have been tolled by filing the claim with the Army.

In support of the claim, the following documents and information must be submitted:

(List, as above)

If you have any further questions regarding this matter, please feel free to contact me at *Telephone Number.*

Claims Policy Note

1994 Table of Adjusted Dollar Value

This table updates the *1993 Table of Adjusted Dollar Value* (ADV) previously printed in *The Army Lawyer,* April 1993, page 23, and *Department of the Army Pamphlet (DA PAM) 27-162,* table 2-1. In accordance with *Army Regulation 27-20,* paragraph 11-13c, and *DA PAM 27-162,* paragraph 2-39e, claims personnel should use this table *only* when no better means of valuing property exists.

Year Purchased	*Multiplier 1993 Losses*	*Multiplier 1992 Losses*	*Multiplier 1991 Losses*	*Multiplier 1990 Losses*	*Multiplier 1989 Losses*
1993.....	–	–	–	–	–
1992.....	1.03	–	–	–	–
1991.....	1.06	1.03	–	–	–
1990.....	1.11	1.07	1.04	–	–

Year Purchased	*Multiplier 1993 Losses*	*Multiplier 1992 Losses*	*Multiplier 1991 Losses*	*Multiplier 1990 Losses*	*Multiplier 1989 Losses*
1989	1.17	1.13	1.10	1.05	–
1988	1.22	1.19	1.15	1.10	1.05
1987	1.27	1.24	1.20	1.15	1.09
1986	1.32	1.28	1.24	1.19	1.13
1985	1.34	1.30	1.27	1.21	1.15
1984	1.39	1.35	1.31	1.26	1.19
1983	1.45	1.41	1.37	1.31	1.24
1982	1.50	1.45	1.41	1.35	1.28
1981	1.59	1.54	1.50	1.44	1.36
1980	1.75	1.70	1.65	1.59	1.50
1979	1.99	1.93	1.88	1.80	1.71
1978	2.22	2.15	2.09	2.00	1.90
1977	2.38	2.32	2.25	2.16	2.05
1976	2.54	2.47	2.39	2.30	2.18
1975	2.69	2.61	2.53	2.43	2.30
1974	2.93	2.85	2.76	2.65	2.52
1973	3.26	3.16	3.07	2.94	2.79
1972	3.46	3.36	3.26	3.13	2.97
1971	3.57	3.46	3.36	3.23	3.06
1970	3.72	3.62	3.51	3.37	3.20
1969	3.94	3.82	3.71	3.56	3.38
1968	4.15	4.03	3.91	3.76	3.56
1967	4.33	4.20	4.08	3.91	3.71
1966	4.46	4.33	4.20	4.03	3.83
1965	4.59	4.45	4.32	4.15	3.94
1964	4.66	4.53	4.39	4.22	4.00
1963	4.72	4.59	4.45	4.27	4.05
1962	4.79	4.65	4.51	4.33	4.11
1961	4.83	4.69	4.56	4.37	4.15
1960	4.88	4.74	4.60	4.42	4.19

Notes:

Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Then multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. *Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG).* For example, the adjudicated value for a comforter purchased in 1986 for $250, and destroyed in 1992, is $224. To determine this figure, multiply $250 times the 1986 "year purchased" multiplier of 1.28 in the "1992 losses" column for an "adjusted cost" of $320. Then depreciate the comforter as expensive linen (Item No. 88, *ALDG*) for six years at a five percent (5%) yearly rate to arrive at the item's value of $224. ($250 x 1.28 ADV = $320 @ 30% dep = $224).

The Labor Department calculates cost of living at the end of a year. For losses occurring in 1994, use the "1993" column. *The 1989 multipliers in table 2-1,* DA PAM 27-162 *were based on midyear statistics and are incorrect.* Use these figures instead. Ms. Holderness.

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Ethical Awareness

This article describes the application of the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*[1] to an actual professional responsibility case. To stress education and protect privacy, the identities of the particular Army installation, the federal activity, and the attorneys are not published. Mr. Eveland.

Case Summary

Army Rule 1.1 (Competence)
Army Rule 1.3 (Diligence)

Ethics advice must anticipate latent issues and be based on maturity, experience, judgment, patience, and tact.

The preferred standard for Army procurement lawyers is not mere competence, but proactivity, which means meeting with contracting officials regularly to ensure that latent legal issues are timely identified and resolved.

Army Rule 1.13 (Army as Client)
Army Rule 2.3 (Evaluation for Use by Third Persons)

Attorneys providing ethics advice to individuals must advise that no lawyer-client relationship exists between them, and, if criminal conduct is suspected, they must advise that they are required to report the information.

Army attorneys providing ethics opinions may owe ethical and legal duties to third persons who are identified in opinions, to agency personnel, and to family members who reasonably might be expected to learn of, and to rely on, the opinions. Therefore, attorneys should independently assure that material facts have been accurately and completely described; this helps to avoid unnecessary claims, investigations, and litigation delays.

Army Rule 5.1 (Responsibilities of Supervisory Lawyers)

Supervisory lawyers must ensure that ethics advice is based on maturity, experience, and judgment, and that those providing such advice have the requisite interpersonal skills.

Introduction

A federal activity (that was not subject to the *Federal Acquisition Regulation*[2] *(FAR)*) conducted some of its operations at an Army installation. Although the Army installation provided extensive contracting and legal support, requests for proposals (RFP) and awards were controlled by contracting personnel at the federal activity's independent headquarters, who were advised by *Solon*, an Army procurement law specialist. The installation's staff judge advocate (SJA) office advised not only the installation's contracting officials, but also the federal activity's contract requirements development and oversight personnel. Some of these employees requested and obtained oral and written conflict of interest opinions, but they did not always fully disclose important information.

After a congressional request for information about contracting irregularities, three separate Army commanders and the Department of Defense (DOD) Inspector General investigated. Contracting personnel who were accused of wrongdoing asserted that they had relied on ethics opinions provided by attorneys assigned to the installation's SJA office. They contended that personal and spousal financial interests did not conflict with their official actions, and that this had been confirmed by the installation office's opinions.

Facts

A consulting firm, The Foundation for Accelerated Military Yields (FAMILY), arranged to make a presentation to the federal activity at the Army installation. This arrangement was based on a personal friendship between a senior installation official and FAMILY's vice president. The activity ultimately budgeted $500,000 for a project based on FAMILY's presentation and, because the procurement was poorly planned and executed, and because officials failed to stop the information from being compromised, FAMILY was allowed to gain this procurement sensitive information.

Additionally, several months after the presentation, but before an RFP or award, FAMILY's future project director, *Wheeler*, married *Fisc*, who was the chief of the federal activity's Financial Management Division. *Senior*, *Fisc*'s senior rater, also attended the wedding. Furthermore, *Fisc* was the sister of FAMILY's project manager.[3]

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[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

[2] GENERAL SERVS. ADMIN. ET, AL., FEDERAL ACQUISITION REG. (1 Apr. 1984) [hereinafter FAR].

[3] Fraternal status alone does not trigger section 208. 18 U.S.C. § 208, *see infra* note 4. However, Executive Order 12,674, as amended by Executive Order 12,731, states, "(n) Employees shall endeavor to avoid any actions *creating the appearance* that they are violating the law or the ethical standards promulgated pursuant to this Order." Exec. Order No. 12,674, Principles of Ethical Conduct for Government Officers and Employees, *reprinted as amended in* DEP'T OF DEFENSE, 5500.7-R, JOINT ETHICS REGULATION (JER), ch. 12 (30 Aug. 1993) (emphasis added) [hereinafter JER].

The following year, because of the activity's predisposition toward FAMILY and a lack of regulatory controls, the federal activity issued an RFP that was not synopsized in the *Commerce Business Daily.* The RFP was so vaguely worded and had such minimal substantive requirements that FAMILY, with its previously acquired knowledge of the project, clearly had a competitive edge. FAMILY, the only bidder, offered a price slightly under the budgeted $500,000 and won the contract. FAMILY knew that it was the only bidder when it received no copies of questions from other bidders.

During the procurement, *Fisc* violated a disqualification statement that she had executed with regard to the project by attempting to review FAMILY's proposal and by discussing it with a contracting specialist.

Furthermore, *Pressured,* an installation contracting office worker, sold *Fisc* and *Wheeler* a time-share condominium on an installment contract. Later, *Fisc* strongly implied to *Pressured* that she and her husband could not make the condominium payments until FAMILY received a progress payment. Also, *Senior* asked *Pressured* to accept nonconforming deliverables, which she finally did.

After initiating the investigations, the activity's headquarters terminated the contract for default.

A lack of central review of the legal opinions affecting the FAMILY contract existed. Compounding the problem, *Solon,* the procurement law specialist advising the activity's headquarters, did not review the opinions issued by attorneys from the installations's SJA office. Nor did the installation attorneys independently assure that those seeking their legal opinions accurately and completely described the material facts.

As just one example of these shortcomings, in a supervisory capacity, *Senior* requested legal advice from the installation SJA office but never identified FAMILY's future project director, *Wheeler,* by name. The significant language from the four related written memoranda is as follows:

Senior's memorandum to the installation SJA office (six months before *Wheeler* became FAMILY's project director)—

> One of my employees, *Fisc,* is married to an employee of FAMILY. Accordingly, we wish to alleviate any concerns that there may be a conflict of interest. Although *Fisc*'s husband is an employee of FAMILY, he is not involved in any way in this project. Because he is not involved in any way, we do not believe this is a conflict of interest, but would like your opinion before proceeding with the project.

Lieutenant Colonel *Prudence*'s (the installation Deputy SJA, signing for the SJA) memorandum to *Senior*—

> Based upon the facts outlined on your request, and the fact that *Fisc* is the Chief, Financial Management Division, the appearance of a conflict of interest exists between *Fisc*'s private interests (and those of her husband) and her duties and responsibilities as a federal employee. *Fisc* should submit a disqualification statement to her immediate supervisor and immediate subordinates notifying them of her interest in FAMILY, and removing herself from participation in any matters involving FAMILY. The effectiveness of *Fisc*'s disqualification must be evaluated periodically by *Fisc*'s supervisor. A draft disqualification statement has been prepared and is attached.

Senior's memorandum to the installation SJA office—received by the chief of administrative law (four months before *Wheeler* became FAMILY's project director)—

> I am concerned that the attached disqualification statement may prohibit *Fisc* from participating in the development process after the contract is let instead of only prohibiting her participation in the actual contracting process. Request written clarification on this matter.

Captain *New*'s (Chief of Administrative Law at the installation SJA office) memorandum to *Senior*—

> [ERRONEOUS ADVICE][4] The disqualification statement signed by *Fisc* is intended only to prohibit her from participating in the

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[4] Captain *New* left the Army and was not located by investigators. The erroneous opinion neglected to consider the effect of Executive Order 12,674, *supra* note 3, and three statutory provisions.

The first provision makes it a crime whenever any officer or employee of the executive branch, or of any independent agency of the United States

> participates personally and substantially as a government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, *his spouse,* minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest . . . .

18 U.S.C. § 208(a) (emphasis added).

The second provision, 41 U.S.C. § 423(a), makes it a crime whenever any officer, employee, representative, agent, or consultant of any competing contractor gives, directly or indirectly, any money, gratuity, or other thing of value to any agency procurement official.

The third provision, 41 U.S.C. § 423(b), makes it a crime whenever an agency procurement official receives, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement.

> actual contracting process and does not prohibit her from participating in the development process after the contract has been let. *Fisc*'s participation in the development of the system after the contract is let will not raise the appearance of a conflict of interest between her duties as a federal employee and her private interests and therefore, need not be prohibited. However, she cannot participate in any negotiations, discussions or meetings that would result in a modification to the contract.

None of the attorneys involved—CPT *New*, LTC *Prudence, Solon*—warned that legal opinions would be different in case of changes to duties, financial interests, and individual or family relationships. Neither *Solon*, the procurement law specialist, nor numerous other supervisors and contracting officials, reviewed these or any other SJA office opinions. Had any of them done so, further legal or command guidance could have been obtained and some of the problems might have been avoided.

The wrongdoers—*Senior, Fisc*—asserted that they relied on the opinions—usually after hearing about them, and in some cases after actually reading them—and believed that they were absolved of any further responsibility to seek clarification as circumstances changed. Rather than independently review the legal opinions or consult with the attorneys, key supervisory personnel relied on self-serving assertions by *Senior* and *Fisc* as to the opinions' substance.

Action by the Office of The Judge Advocate General

Before the case arrived at the Office of The Judge Advocate General, the underlying investigations had found an improperly awarded contract, lack of procurement expertise, and inadequate guidance for handling complex procurements by the federal activity (which was not subject to the *FAR*). The Office of The Judge Advocate General's own review found a lack of centralized control over the contracting process and no coordinated review of legal opinions and concluded that an inquiry into the attorneys' legal competence would not be productive or appropriate,[5] noting that no attorneys' advice contravened the federal activity's existing contracting policies or regulations. The Office of The Judge Advocate General specifically determined that no further action should be taken regarding *Solon* based on two considerations.

First, the Office of The Judge Advocate General learned new facts regarding when the activity's headquarters' personnel discovered that *Fisc* and *Wheeler* were married to one another. *Solon* did not know of the marriage until shortly before the contract was terminated. Without such knowledge, *Solon* could not provide effective advice regarding action necessary to eliminate the conflict of interest during contract performance. Second, unlike procurements under the *FAR*, few standards and little guidance existed to assist contracting personnel in the award or administration of the procurement. The federal activity's procurement regulation, primarily covering small purchases, did not address larger projects.

A senior procurement attorney conferred with *Solon* and discussed the various investigations at length. He advised *Solon* that the preferred procurement law standard is not mere competence but proactivity, and encouraged him to meet regularly with contracting officials and ensure that latent legal issues will be timely identified and resolved.[6]

Finally, The Judge Advocate General issued a policy memorandum to SJAs emphasizing the need to closely supervise counsel who provide ethics advice—an area requiring maturity, experience, judgment, and interpersonal skills. These issues often involve the potential for criminal sanctions, or personal and emotional matters such as investments and spousal employment. Employees may be reluctant to divulge the information needed for sound advice, and attorneys serving as ethics counselors must be capable of overcoming reluctance and anticipating latent issues.[7]

Ethical Considerations

A major consideration for attorneys providing conflict of interest advice is the *strict liability*[8] criminal sanction of 18 U.S.C § 208(a),[9] prohibiting federal employees from taking

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[5] Captain *New* and another attorney had left the Army, and their legal advice had been provided four years before the Office of The Judge Advocate General acted on the case.

[6] *See generally* DEP'T OF ARMY, PAMPHLET 27-153, LEGAL SERVICES: CONTRACT LAW, ch. 16 (15 Aug. 1989)

> It is Department of the Army policy that the attorney participate as a member of the contracting officer's team from commencement of the acquisition process to close-out of the contract. Further, it is common sense and good business judgment that mandate the attorney's involvement as early into the process as possible, not only with the contracting personnel, but also with the commanders, requiring activities, and fiscal directors.

Id. para. 16-2 (citation omitted).

[7] Policy Letter 93-1, Office of The Judge Advocate General, U.S. Army, subject: Ethics Counselors and the Army Standards of Conduct Program (19 Jan. 1993) *reprinted in* ARMY LAW., Feb. 1993, at 3.

[8] *See* United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990); *see also* Alan K. Hahn, United States v. Hedges: *Pitfalls in Counseling Retirees Regarding Negotiating for Employment*, ARMY LAW., May 1991, at 16.

[9] *See supra* note 4 (provision dealing with 18 U.S.C. § 208(a)).

official action on matters in which they have conflicting financial interests. Those who have received advance written ethics opinions—provided that they have made full disclosure—generally are protected against disciplinary actions and criminal penalties;[10] when an individual relies in good faith on an agency ethics advisory opinion, the "knowledge" requirement for a criminal violation does not exist. A Designated Agency Ethics Official (DAEO) may grant formal waiver of 18 U.S.C § 208(a) when alternative resolutions such as disqualification, divestiture, reassignment, or rearrangement of duties have been exhausted. If the command is tempted to seek such a waiver, it must first be coordinated with the Office of Government Ethics through the Department of the Army Standards of Conduct Office.[11] While a waiver request and ethics counselor's findings of fact are being forwarded through the chain of command to the DAEO, the DOD employee is disqualified from participating in the particular matter that would have an effect on the financial interest.[12]

Even though their client will be the Army, attorneys should anticipate that their conflict of interest evaluations will be used to establish information for the benefit of third persons. Ethical and legal duties to third persons identified in opinions, to agency personnel, and to family members who might reasonably be expected to learn of and to rely on the opinions, may arise under *Army Rule 2.3* (Evaluation for the Use of Third Persons),[13] as well as other legal theories, to independently assure that material facts have been accurately and completely described. Affirmative claims and defenses to criminal and contract sanctions may arise from assertions of negligent supervision, third party beneficiary status, estoppel, mistake of law, detrimental reliance, and the like. "The investigative and other costs to the government; the disruption of procurements; and possibility of suspension, debarment, or job loss . . . can be a heavy price to pay for all concerned parties."[14]

Furthermore, the duty of competent representation owed to the Army often requires obtaining information that requesters may not want to divulge. Individuals may be naturally reluctant to make full disclosure after ethics counselors advise that no lawyer-client relationship exists between them[15] and, if criminal conduct is suspected, they must report the information.[16] Extraordinary patience and tact may be required to avoid a requester's taking the questioning as a personal affront. Attorneys must be able to identify reluctance, to recognize that something may be wrong, and to ask themselves, "Why is this person having so much difficulty? Is something being withheld?"

Written ethics advice takes two forms. The first is the office opinion, signed by or for the SJA or Command Counsel, to a commander or supervisor in response to an official request for an opinion. The other is a request for advice from an individual concerning his or her own prospective conduct. In the view of the Department of the Army (DA) Standards of Conduct Office, it is preferable if the latter opinions are in letter format, signed by the individual ethics counselor, subject to the office's usual review and approval process.[17] The DA Standards of Conduct Office suggests that the ethics counselor not use his or her official title, but use "Ethics Attorney" for these opinions. A recommended conclusion is as follows:

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[10] This protection is offered, more or less, by the wording found in a complicated array of statutes and federal regulations. Some of the federal regulations were reprinted in and incorporated by the JER, *supra* note 3.

See, e.g., 18 U.S.C. § 208(b); 41 U.S.C. § 423(k), as implemented by FAR, *supra* note 2, at 3.104-8 (knowing violations, duty to inquire, and ethics advisory opinions), *reprinted in* JER, *supra* note 3, app. B; 10 U.S.C. § 2397a; 10 U.S.C. § 2397b(e); 5 C.F.R. § 2635.107 (employees' ethics advice in general) and 5 C.F.R. § 2635.602 (postemployment restrictions) *reprinted in* JER, *supra* note 3, ch. 2; and 5 C.F.R. § 2636.103 (honoraria) *reprinted in* JER, *supra* note 3, ch. 3.

On provisions regarding ethics advice, *see* JER, *supra* note 3, para. 8-300d (procurement official's prohibitions against soliciting, accepting, or discussing employment); para. 8-501 (DOD employee's restrictions on seeking other employment); para. 9-500 (current and former DOD employee's postemployment restrictions); para. 9-600c (former DOD employee's two-year restriction against accepting compensation from defense contractor); para. 9-601c (former DOD procurement official's restriction against participating in award, modification, or performance of contract).

[11] Coordination begins with a telephone call to the Department of the Army Standards of Conduct Office at (703) 697-0921; DSN 227-0921.

[12] *See* 32 C.F.R. § 40.1, *reprinted in* JER, *supra* note 3, app. D; *see also* JER, *supra* note 3, para. 5-302.

[13] AR 27-26, *supra* note 1, rule 2.3. *But see* JER, *supra* note 3, paras. 8-501, 9-500 (ethics advice regarding restrictions on seeking and obtaining employment is "personal" to the former or current DOD employee and does not extend to anyone else, including business, employer, or prospective employer). Because these two *JER* provisions do not by themselves alter an attorney's ethical or other duties to third persons established by *Army Rule 2.3* or other legal theories, cautious practitioners should limit the scope of their opinions by including restrictive language when appropriate.

[14] Hahn, *supra* note 8, at 21.

[15] AR 27-26, *supra* note 1, rule 1.13 (Army as Client); *see generally* Gilpin R. Fegley, Professional Responsibility Notes, *Avoiding Misperceptions About the Existence of a Lawyer-Client Relationship*, ARMY LAW., Dec. 1992, at 41, 42.

[16] 28 U.S.C. § 535; 5 C.F.R. § 2635.107(b) *reprinted in* JER, *supra* note 3, ch. 2.

[17] *See* Frederick D. Lipman, *Legal Opinions, in* THE QUALITY PURSUIT: ASSURING STANDARDS IN THE PRACTICE OF LAW 156 (Board of Editors of the ABA Section of Law Practice Management, eds., 1989) (avoiding inadvertent legal opinions, senior lawyers taking charge of opinions for the office, establishing special procedures for high-risk opinions, and identifying areas in which offices will refuse to issue opinions).

> This letter is issued pursuant to [use the appropriate citation(s): such as, 18 U.S.C. § 208(b), 41 U.S.C. § 423(k), 10 U.S.C. § 2397b(e), 5 C.F.R. § 2635.107, 5 C.F.R. § 2636.103]. It constitutes the opinion of an agency ethics official based on the information that you provided, and, as such, is advisory only. [This opinion is personal to you and does not extend to anyone else].[18] An updated opinion may become necessary when there are changes in duties, financial interests, and individual or family relationships.

Finally, attorneys should insist that all requests for such opinions be in writing. Mr. Eveland.

Ethical Awareness

The following case summary describes the application of the *Army Rules*[19] to an actual professional responsibility case. This item serves not only as precedent, but also as a training vehicle for Army lawyers as they ponder difficult issues of professional discretion. Lieutenant Colonel Fegley.

Case Summary

Reciprocal Discipline

A judge advocate who was decertified and suspended from practice in the Army by Acting The Judge Advocate General is suspended from practice by his state licensing authority as a matter of reciprocity.

An attorney admitted to practice in this Commonwealth who has been suspended from the practice of law in another jurisdiction, including any Federal Court and any Federal administrative body or tribunal, may be suspended here.[20]

Army Rule 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

> *(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice . . . .*[21]

On 23 November and 14 December 1992, Captain *X*, a judge advocate licensed to practice law in Massachusetts, was tried by a general court-martial convened by the Commanding General, Military District of Washington. He was convicted of failure to repair, unauthorized absence, and conduct unbecoming an officer, that is, lying to an Article 32b investigating officer. The charge of conduct unbecoming an officer resulted from his sworn testimony before an Article 32b investigation examining charges of desertion, missing movement, disobedience, and conduct unbecoming an officer stemming from his absence from, and refusal to return to, his unit in Korea. He was sentenced to forfeit pay and allowances, to be confined for one year, and to be dismissed from the service. Pursuant to a pretrial agreement, execution of the portion of the sentence extending to confinement was suspended for one year.

Acting The Judge Advocate General (Acting TJAG) determined that the court-martial conviction provided a reasonable basis for believing that Captain *X* had committed professional misconduct in violation of *Army Rule* 8.4 which provides in part the following:

> It is professional misconduct for a lawyer to: . . .
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice . . . .[22]

At his trial, Captain *X* pleaded guilty to, and was convicted of, "wrongfully and dishonorably lying to . . . an Article 32b investigating officer . . . ." In a stipulation of fact, Captain *X* admitted that he did so by testifying that when he was escorted to the airport by a military policeman in an effort to return him to his unit, it was his intent to get on the plane. This testimony was false and prior to arriving at the airport, Captain *X* had indicated to his military police escort his intent to resist boarding the airplane, and stated that if he did get on he would disembark the plane at the first opportunity and return to

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[18] Practitioners should use the bracketed sentence when advising an individual, but not when providing an office opinion to a commander or supervisor.

[19] AR 27-26, *supra* note 1.

[20] Sup. Jud. Ct. (Mass.) Rule 4:01 [hereinafter S.J.C. Rule 4.01].

[21] AR 27-26, *supra* note 1.

[22] *Id.* Rule 8.4.

Washington, D.C. On his arrival at the airport, Captain *X* threatened to cause a disturbance or become violent on the plane. He told a ticket agent that he "would do anything it takes" not to get on the plane and "would rather be arrested than get on the plane."

A lawyer who commits this type of offense has violated one of the most basic professional obligations, the pledge to maintain honesty and integrity. The ABA Model Standards for imposing lawyer sanctions indicate that disbarment is generally appropriate for this violation on a finding that the conduct involves "intentional interference with the administration of justice" or that the conduct "seriously adversely reflects on the lawyer's fitness to practice."[23]

On 10 June 1993, Acting TJAG suspended Captain *X* from practice in courts-martial and in the ACMR and withdrew his certification of competency to act as counsel before general courts-martial. The Office of the Bar Counsel for the state of Massachusetts and The Judge Advocates General of the other services were informed of these actions.

Despite having initiated an independent professional conduct investigation on Captain *X*, on 27 September 1993 the Bar Counsel for Massachusetts (Bar Counsel) filed a Petition for Reciprocal Discipline with the Supreme Judicial Court of Massachusetts (Court).[24] The petition was based solely on the action taken by the Army suspending Captain *X* from practice before Army courts and withdrawing his certification of competency to act as counsel. In the petition, the Bar Counsel requested that the respondent be suspended from practice in Massachusetts for "an appropriate period of time." The respondent filed an answer, and a hearing was held wherein the Court relied, in part, on the stipulation of fact in Captain *X*'s record of trial.

The Court noted that its Rule 4:01 provides, in pertinent part, that

> [A]n attorney admitted to practice in this Commonwealth [who] has been suspended . . . from the practice of law in another jurisdiction (including any Federal Court and any . . . Federal administrative body or tribunal) may be suspended here. This court may enter "such order as the facts brought to its attention may justify," and may impose "the identical discipline" imposed by the other jurisdiction, unless the court concludes that (a) the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard; (b) there was significant infirmity of proof establishing the misconduct; (c) imposition of the same discipline would result in grave injustice; or (d) the misconduct established does not justify the discipline in this Commonwealth.[25]

Captain *X* argued that he did not receive adequate notice or opportunity to be heard with respect to his suspension from practice before military courts; that he was denied due process because the prosecutor and decision maker in the military matter were one and the same; that his assignment to Korea was contrary to the agreement that he had with the Army, forcing him to plea bargain to avoid more drastic penalties; and that the imposition of suspension in Massachusetts would result in grave injustice.

The Court rejected these arguments, finding that Captain *X* had adequate notice of all proceedings against him, including his suspension; that he had sufficient opportunity to be heard; and that he was not denied due process under military law. In determining what discipline to impose, the Court noted that Captain *X* was, or should have been, aware of his military obligations, and that his conduct reflected a "stubborn and improper refusal to abide by the terms of an agreement." It also noted that the stipulated facts revealed a lack of candor by Captain *X* and that he "stands convicted of an offense which led to the imposition of the equivalent of a suspended house of corrections sentence." In directing that Captain *X* be suspended from the practice of law for a period of six months as a matter of reciprocal discipline with the Army, the Court concluded by stating that "The suspension from practice before military courts was well-justified. All in all, the matter reveals an inauspicious start to a Massachusetts law career, and conduct inconsistent with the high ethical responsibility we expect of lawyers in Massachusetts."

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[23] *Standards for Imposing Lawyer Sanctions*, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA), Feb. 1986, at 01:801.

[24] In re X (Mass. 1994), *reprinted in Board of Bar Overseers Notices*, 22 MASS. LAW. WEEKLY 1128 (1994).

[25] S.J.C. Rule 4.01, *supra* note 20.

Combat Developments Notes

Developments, Doctrine, and Literature Office, TJAGSA

New Manpower Requirements Criteria

Introduction

"Sir, you know anything about the 93d Signal Brigade?" asks Captain JAG. His deputy replies, "What, the 93d Signal Brigade . . . I guess . . . it's . . . one of those echelon above division brigades PP&TO keeps talking about!" "Yes sir, they just called, and that's where I'm going. Do we even have JAG slots there?"

Well not yet, but if you are a judge advocate (JA), you soon may find yourself assigned to an organization that currently has no JAs. Over the next few years, organizational restructuring will impact a number of JA spaces. This note initially examines this process and serves as the first in a series that will discuss force development issues and decisions shaping a dynamic and evolving Judge Advocate General's Corps (JAGC) structure.

The 1993 MARC

Deployable units are designed and tailored—"force structured"—in anticipation of their intended use in war and operations other than war. Therefore, force structure is the on-the-ground expression of operational doctrine. The doctrinal wartime mission of the JAGC is to support battlefield commanders by providing professional legal services "*as far forward as possible. . . .*"[1] A new *Manpower Requirements Criteria* (MARC) study *(1993 MARC)*,[2] establishing JA positions as far forward as possible, is translating this JAGC doctrinal statement into the total Army force structure.[3]

For noncombat arms positions, MARC[4] serve as the basic formula for TOE[5] staffing. The *1993 MARC* provides standards that determine the number of judge advocate, military judge (MJ), and legal administrator requirements in each TOE model in the Army force: active, National Guard, and Reserve. It also standardizes the basic structure of staff judge advocate (SJA) and command judge advocate (CJA) sections. Impact analysis of the *1993 MARC* validates currently existing total Army JA requirements.

The *1993 MARC* study began with a thorough analysis of Army-wide operational doctrine, lessons learned, and extant force structure. This analysis found fundamental problems with current JAGC operational structures, which centralize large SJA sections in the rear.

The problems focus primarily on nondivisional CS and CSS functional brigade and group level headquarters, such as engineer groups and corps support groups. These headquarters and their associated units may arrive in theater either in numbers larger than their senior headquarter's was designed to support or without their senior headquarters altogether. The scope and complexity of the battlefield also can effectively separate these functional brigade and group headquarters from their senior headquarters. In either case, without their own JAs, these nondivisional headquarters would require legal support from SJA sections of other headquarters in theater (for example, divisions), structured with just enough JAs to support themselves.

The underlying concept of the *1993 MARC* focuses placement of JA requirements in these corps and theater CS and CSS functional brigades and groups, while leaving enough JA requirements for inherent command and control functions in the rear area senior headquarters. This concept solves the primary problems (population-intensive functional headquarters and units having organic JA assets) and ensures immediate and responsive legal services to commanders, their staffs, and soldiers during any contingency, regardless of the headquarter's location. Additionally, Army-wide JA requirements would be better aligned against the strength of the Army. The *1993 MARC* added the necessary flexibility to our structure to ensure that JA positioning on the battlefield could be just as fluid as the operational environment.

Importantly, the *1993 MARC* addressed MJs and defense counsel (DC) as separate requirements for the first time. Until

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[1] DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS, para. 1-4 (3 Sept. 1991) (emphasis added).

[2] The Judge Advocate General's School, United States Army, *MARC Study Document for Judge Advocate (AOC 55A), Military Judge (AOC 55B), and Legal Administrator (MOS 550A),* (May 1993) (approved 5 Oct. 1993).

[3] The first unit that the *1993 MARC* will impact is the Special Operations Aviation Regiment, tables of organization and equipment (TOE) 01832A000, which now includes a Command JA major in the organization. The TOE currently is pending TRADOC approval.

[4] Manpower requirements criteria are workload-driven, operational-based standards, published in *Army Regulation (AR) 570-2, Manpower Requirements Criteria,* which reflect the minimum mission-essential wartime requirements for combat support (CS) and combat service support (CSS) positions in TOEs.

[5] Tables of organization and equipment prescribe the mission, organizational structure, and the minimum mission essential personnel and equipment requirements of deployable, "like-type" military units necessary to accomplish wartime missions. It serves as the basis for establishing the modification TOE (MTOE), an authorizations document.

now, all military lawyers were grouped together as JA requirements. Even though the *1993 MARC* establishes TOE requirements for MJs and DC, force design decisions have not been made concerning where and in what type of structure the requirements will appear. Therefore, any information on MJ and DC structure must await future developments.

During development of the *1993 MARC*, it became evident that JA requirements were derived in two distinct ways: inherently and population based. Accordingly, the *1993 MARC* addresses each of them differently.

Inherent JA Requirements

These requirements are derived from law or the magnitude of high-level command and supervisory responsibilities. Positions established from these requirements establish, supervise, and manage command-wide legal issues, policies, and activities, but do not normally provide direct legal services to soldiers or forward area commanders. Sections containing positions of this type can be fixed in size and structure because the workload is not primarily dependent on population supported, but is based on the existence of the command. Inherent requirements include regional and senior regional DCs, senior MJs, and all JAs in senior Army command and control headquarters in-theater (see "fixed, large" and "fixed, small" below); JAs in certain specialized organizations; and all SJAs.

The *1993 MARC* establishes fixed-sized SJA or CJA sections for headquarters where JA requirements are inherent. These sections are of two sizes depending on the echelon of command and organizational mission: fixed, large and fixed, small. Furthermore, the *1993 MARC* addresses JA requirements in specialized organizations.

Fixed, Large

Each theater army, theater army area command, corps and airborne corps SJA section will be comprised of an SJA and deputy SJA, the five functional area chiefs, a contract law attorney, a legal assistance officer, and a trial counsel for a total of ten JAs.

Fixed, Small

Each theater army functional command (except air defense and finance), corps support command, and corps artillery SJA or CJA section will be comprised of an SJA or CJA and two judge advocates for a total of three JAs.

Specialized

Military Police. The *1993 MARC* also addresses certain inherent specialized JA requirements by placing CJAs in military police (EPW/CI) and criminal investigation division detachments and two international law officers in civil affairs commands and brigades and one in civil affairs battalions.

Special Operations. The *1993 MARC* addressed the unique requirements of special operations organizations by placing a CJA in the command section of each theater army special operations support command, airborne (special forces) group, psychological operations group, infantry (ranger) regiment, arctic reconnaissance group, and special operations aviation regiment.

Legal Administrators. The *1993 MARC* also addressed our legal administrator requirements. The standard criteria did not change. It remains one legal administrator for each general court-martial convening authority SJA section.

Population-Based JA Requirements

These requirements are derived from the soldier population directly supported. Positions established from these requirements provide immediate legal services in all functional areas to forward area commanders, their staffs, and all soldiers in theater. Because the workload of these type positions are based primarily on population, the sections containing positions of this type must be flexibly structured to match the soldier population which they support. *The general rules are: one JA for every 1000 soldiers, one DC or senior DC for every 3000 soldiers, and one MJ for every 15,000 soldiers.*

For organizations where JA requirements are population-based, the *1993 MARC* establishes flexible SJA or CJA sections with a preset minimum, or base number of JA requirements depending on the organization's designed troop population. By design, when the number of soldiers directly supported increases, a corresponding increase in JA requirements will occur. This structure features three base sizes: flexible, large; flexible, medium; and flexible small.

Flexible, Large

Each division and air defense command SJA section will be minimally comprised of an SJA and deputy SJA, the five functional area chiefs, a contract law attorney, a legal assistance officer, and three trial counsel (one per maneuver brigade). Additionally, one JA is required for every 1000 soldiers (or major fraction thereof) in excess of 11,000. These additional JAs will be in the SJA section of the organizational TOE.

Flexible, Medium

Each separate brigade (armored, mechanized, or light) and armored cavalry regiment SJA section will be minimally comprised of an SJA and deputy SJA, a trial counsel, an administrative law attorney, and a legal assistance officer. Additionally, one JA is required for every 1000 soldiers (or major fraction thereof) in excess of 4000. These additional JAs will be in the SJA section of the organizational TOE.

Flexible, Small

Each area or corps support group, engineer group, and echelon above division brigade (except separate and civil affairs)

CJA section will be minimally comprised of a CJA and a trial counsel. Additionally, one JA is required for every 1000 soldiers (or major fraction thereof) in excess of 1500. These additional JA requirements will be in reserve component teams of the Judge Advocate General Service Organization (JAGSO).

Conclusion

Tables of Organization and Equipment are scheduled for cyclic review every three years. During this review process, the standards established by MARC will be applied to each, or incorporated into newly developed TOE. In lieu of cyclic review, United States Army Training and Doctrine Command may approve, later this year, a method to apply the *1993 MARC* standards across the board in all TOEs simultaneously. Regardless, the process is going to take time, but it has begun. The *1993 MARC* is approved, and is the standard.

The *1993 MARC* only impacts requirements, not position grading or authorizations. Position grading is done using the applicable chapters of *AR 611-101*.[6] Manpower Requirements Criteria provide model organizations; actual units are established and receive scarce JA authorizations through the MTOE process. Once that occurs, we have a JAG slot, and you may get the call.

If you have questions, contact LTC Chris Maher or SFC Greg Johnson, Combat Developments Section, TJAGSA, Charlottesville, VA 22903-1781. DSN: 934-7115 (ext. 392/397); commercial: (804) 972-6392/7; FAX 6386 (LAAWS BBS "GREG JOHNSON"). Sergeant First Class Johnson.

[6] DEP'T OF ARMY, REG. 611-101, PERSONNEL SELECTION AND CLASSIFICATION: COMMISSIONED OFFICER CLASSIFICATION SYSTEM (30 Apr. 1992).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

LAAWS BBS Reserve Component Conference

The Army Judge Advocate Legal Automated Army-Wide System (LAAWS) Bulletin Board System (BBS) has granted access to Reserve Component (RC) judge advocate officers and enlisted personnel, and has agreed to the creation of a RC Conference. This conference is open to all RC judge advocate officers and enlisted personnel (ARNG/USAR), and those active component judge advocate officers and enlisted interested in RC affairs. You must complete a short validation questionnaire on logging onto the BBS, indicating your reserve unit, civilian position, and telephone number. Within twenty-four to forty-eight hours you should be able to have your access approved to the RC Conference.

The conference is meant to provide a clearinghouse for judge advocate RC information, ideas, lessons learned, and policy memoranda. The conference contains electronic message capability for each enrollee to have their own e-mail mailbox, and to disseminate messages to the rest of the RC judge advocate community. This message capability allows RC judge advocate officers in remote places such as Fargo, North Dakota, to leave messages for other RC judge advocate officers in Salt Lake City, Utah, and Denver, Colorado, or to leave messages for the Legal Advisor, National Guard Bureau, and the Director, Guard & Reserve Affairs. Reserve component judge advocates can use the message board to raise legal problems that they are facing and they can receive many helpful comments and suggestions from their colleagues across the United States. The board is a great problem-solving resource for the RC judge advocate community.

Bulletins and word processing documents ("files") may be uploaded for access by the RC judge advocate community. Among the items listed in the files directory are all The Judge Advocate General's School's publications, including the *Legal Deployment Guide, All-States Wills Guide,* and *Operational Law Handbook.* The OTJAG Guard & Reserve Affairs Office will upload periodically the current IMA vacancy list, and other RC judge advocate policy information. The United States Army Reserve Command Staff Judge Advocate Office, the Forces Command Staff Judge Advocate Office, the National Guard Bureau, the CONUSAs, and ARPERCEN are expected to be regular contributors of files and bulletins to the conference. It is anticipated that BBS users will upload files in the conference—such as, information papers, legal memoranda, briefing slides, and model mobilization plan legal annexes, and word processing macros—to quickly develop RC standard legal documents—for example, line of duty and report of survey legal reviews, elimination board documents and other commonly used legal forms.

Reserve component judge advocates also have been granted access to the LAAWS BBS legal assistance, standards of con-

duct and ethics, military justice, automation, holiday, LAAWS, and general judge advocate information conferences, which also hold a number of files and messages and put RC judge advocates in touch with their active duty counterparts. Reserve component judge advocates with a legitimate need, can request access to the government contract, labor and employment, and environmental conferences, on a case-by-case basis. Reserve component enlisted and warrant officers may access both the RC Conference and their respective LAAWS BBS Enlisted Conference or Legal Administrators Conference.

Reserve component judge advocates are encouraged to regularly use the LAAWS BBS RC Conference to list unit vacancies, good ideas, and problems raised in your military practice. Good ideas should be shared and widely disseminated. The LAAWS BBS offers RC judge advocate officers a great leap forward in communications and collective problem solving.

If you have any problems with accessing the LAAWS BBS RC Conference, call Major Paul Conrad, Reserve Component Conference Coordinator, at DSN 586-3131, or commercial (415) 561-3131. Major Conrad (AGR).

The Judge Advocate Officer Advance Course (JAOAC) Phase I Deadline

Reserve Component judge advocates enrolled in Phase I of JAOAC, the correspondence phase, must fully complete and submit this phase by 15 May 1994 to be eligible to attend Phase II of JAOAC, the resident phase, this summer. I strongly recommend that students complete and submit *JA 151, Fundamentals of Military Writing,* by mid-April 1994. This early completion will allow time for any corrections to be made before the 15 May 1994 deadline mentioned above. Students should mail all courses to The Judge Advocate General's School, United States Army, ATTN: Correspondence Course Office, Charlottesville, Virginia 22903-1781. Captain Parker.

The ROTC Legal Project

The Reserve Officers' Training Corps (ROTC) Legal Project sponsored by the Cadet Command provides an opportunity for United States Army Reserve judge advocate officers to teach military law at more than 300 ROTC detachments across the country. Retirement points are authorized for preparation and teaching time (a minimum of two hours per day qualifies for one point). This is a professionally rewarding experience for those who enjoy teaching at the college level and an opportunity to help build Army leadership for the future.

The United States Military Academy's Law Department, in cooperation with The Judge Advocate General's School, prepared the materials used in the project. These materials will be available late this summer on the LAAWS BBS for you to download onto a computer disk. If interested, contact your nearest college or university's Professor of Military Science. Lieutenant Colonel Menk.

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

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or Captain David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
23-24 Apr 94	Atlanta, GA 81st ARCOM Atlanta Airport Hilton 1031 Virginia Avenue Atlanta, GA 30354	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden MAJ Warner LTC Menk	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	BG Huffman BG Sagsveen MAJ Peterson MAJ Hudson LTC Menk	LTC Samuel A. Rumore 5025 Tenth Court, South Birmingham, AL 35222 (205) 323-8957
14-15 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC Columbus Marriott North Hotel 6500 Doubletree Avenue Columbus, OH 43229	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane COL Schempf	LTC Thomas G. Schumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

2-6 May: 38th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).
(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

July 1994

11-13, ESI: Value Engineering/Analysis, Washington, D.C.

12-15, ESI: Negotiation Strategies and Techniques, Washington, D.C.

19-22, ESI: Contract Pricing, Washington, D.C.

19-22, ESI: Procurement for Administrators, CORs, and COTRs, Denver, CO.

25-27, ESI: Changes, Claims, and Disputes, San Diego, CA.

25-27, ESI: Contracting with Foreign Governments, Washington, D.C.

26-29, ESI: Source Selection: The Competitive Proposals Contracting Process, San Diego, CA.

28, ESI: Protests, San Diego, CA.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually

Jurisdiction	Reporting Month
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

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

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

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

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

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

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

Legal Assistance

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

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

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

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

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

*AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

*AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

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

AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A273376 The Law of Federal Employment/JA-210(93) (262 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

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

Criminal Law

*AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

*AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

*AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

*AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

*AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

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

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

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

The following CID publication also is available through DTIC:

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

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

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

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

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

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

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

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.
>
> Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

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

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

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

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

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

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicat-

ed to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

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

(a) Active duty Army judge advocates;

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

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

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

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

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

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

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

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

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

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

All DOD personnel dealing with military legal issues.

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

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

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

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

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

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

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

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FILE NAME	*UPLOADED*	*DESCRIPTION*
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions.

FILE NAME	UPLOADED	DESCRIPTION
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1993	Defensive Federal Litigation—Part A, June 1993.
JA200B.ZIP	August 1993	Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	November 1993	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235.ZIP	August 1993	Government Information Practices.
NA241.ZIP	August 1993	Federal Tort Claims Act.
JA260.ZIP	September 1993	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1993	Legal Assistance Real Property Guide.
JA262.ZIP	June 1993	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	June 1993	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	November 1993	TJAGSA Fiscal Law Deskbook, May 1993.

FILE NAME	*UPLOADED*	*DESCRIPTION*
JA509.ZIP	October 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
V1YIR91.ZIP	January 1992	Volume 1 of TJAGSA's Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.

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

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

4. 1994 Contract Law Video Teleconferences (VTC)

April VTC Topic: Procurement Management Reviews (SARDA):

19 Apr. 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

22 Apr. 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

May VTC Topic (to be determined):

16 May 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

17 May 1500-1700: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

June VTC Topic (to be determined):

15 June 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

17 June 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

July VTC Topic (to be determined):

18 July 1530-1730: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

19 July 1530-1730: TRADOC installations, ISC, DESCOM, ARL, MICOM

October VTC Topic (to be determined):

5 Oct. 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct. 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined):

8 Nov. 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov. 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined):

5 Dec. 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec. 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer*.

5. TJAGSA Information Management Items

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

"postmaster@jags2.jag.virginia.edu"

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

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

6. The Army Law Library System

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

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

Office of the Staff Judge Advocate, United States Southern Command, Attn: Major Lara, Fort Buchanan, Puerto Rico 00934-5025, commercial: (809) 273-3345.

- Complete set of Corpus Juris Secundum (current as of 1993)

Division Law Library, USA Engineer Division, Missouri River, Attn: Mary Henriksen, P.O. Box 103 Downtown Station, Omaha, Nebraska 68101, commercial: (402) 22-3229.

- Complete set of Williston on Contracts, 21 volumes.

Staff Judge Advocate, Attn: Tonya S. Murphy, Headquarters, Fort Devens, Fort Devens, Massachusetts 01422-5050, commercial: (508) 796-3586/2255.

- The following material is available immediately:

Bender Federal Practice
Moore's Federal Practice
Corbin on Contracts
Personal Injury Valuation Handbook
Moore's Federal Practice Rules
Maine Court Rules

- The following material will be available 1 January 1995:

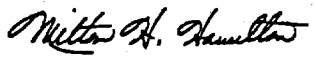
Connecticut General Statutes Annotated
Lawyer's Medical Cyclopedia
Maine Revised Statutes Annotated
U.S. Code Congressional and Administrative News

*U.S. Government Printing Office: 1994 — 300-675/00001

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



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