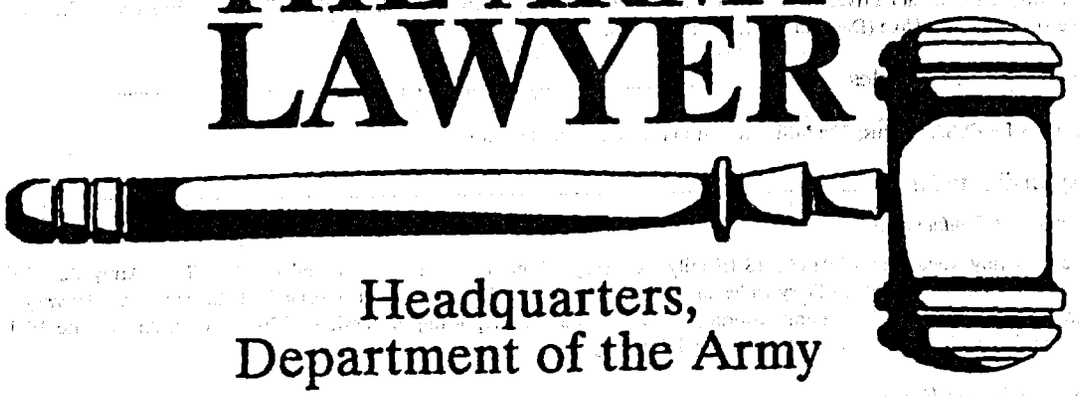
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-265
December 1994

Table of Contents

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index*, and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone (202) 783-3238.

Address changes: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Security Deposit Disputes Under Virginia Landlord-Tenant Law: Traps for the Unwary

Major Michael J. Davidson
Special Assistant United States Attorney
District of Arizona

Introduction

Landlords generally require prospective tenants to advance money—a security deposit—to ensure tenant compliance with the terms of the lease and to protect the landlord in the event of tenant-caused damage to the rental dwelling. At the conclusion of the tenancy the renter is entitled to the timely return of the security deposit subject to any valid landlord deductions. The existence, cause, and value of damage to the rental is, however, often a subject of disagreement between landlord and tenant. Furthermore, a substantial number of landlords—particularly landlords of residential tenancies—fail to return all or portions of the deposit, by either arbitrarily retaining the deposit or falsely charging damage costs to justify the retention.[1] Not surprisingly, the most common landlord-tenant legal dispute concerns the landlord's failure to return all or part of a security deposit after the tenant terminates the tenancy.[2]

The mobile nature of military society severely handicaps the soldier's ability to contest improper deductions or withholdings. Depending on the soldier's new duty assignment, the cost and inconvenience of returning to pursue the action in court often is prohibitive.[3]

Most soldier-tenants also will be hesitant to hire an attorney. Usually, the amount of the contested security deposit is not worth fighting for when weighed against the amount of potential attorney's fees and associated costs in a possibly unsuccessful action.[4]

The military provides little assistance in this regard. Legal assistance attorneys rarely are aware of the intricacies of Virginia law. Furthermore, because the military does not have an Extended Legal Assistance Program established in Virginia, unless they are Virginia licensed attorneys, legal assistance attorneys may not represent soldiers and their dependents in Virginia courts.[5] To further exacerbate the problem, as a matter of policy, the Judge Advocate General's Corps (JAGC) does not assign first-term judge advocates—those most likely to be assigned as legal assistance officers—to Virginia if admitted to practice there or if they attended a Virginia law school.[6]

This article is designed to provide military attorneys with an overview of Virginia procedure and landlord-tenant law so that they may provide useful and accurate advice to their clients or, if necessary, reference material for their own lawsuit. Because of the large number of soldiers, marines, sailors, and coast guard transferring to and from the numerous

---

[1] DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 278 (1986); *see also* Note, *The Uniform Residential Landlord And Tenant Act: Facilitation Of Or Impediment To Reform Favorable To The Tenant?*, 15 WM. & MARY L. REV. 845, 876-77 (1974) ("tenants frequently encounter negligent or willful retention of their deposits by careless or unscrupulous landlords") [hereinafter Note]; Ann Mariano, *Va. Tenants Lose Security Deposit Money*, WASH. POST, July 9, 1983, at E1 ("'A lot of landlords will pay back security deposits,' ignoring the interest they are required to pay if a tenant has lived in an apartment more than a year . . . ."). Virginia enacted the Virginia Residential Landlord And Tenant Act, in part, to remedy the practice of arbitrary and inflated security deposit deductions by some landlords. Comment, *Nineteenth Annual Survey of Developments in Virginia Law 1973-1974*, 60 VA. L. REV. 1443, 1601 (1974) [hereinafter *Nineteenth Annual Survey*].

[2] RALPH WARNER, EVERYONE'S GUIDE TO SMALL CLAIMS COURT 20:2 (5th ed. 1993); *see also* Mariano, *supra* note 1, at E1 (security deposit complaints are common cases); Mary Marks, *Va.'s Tenant Protection Weaker Than Many Other States*, WASH. POST, Oct. 2, 1982, at E21 ("Security deposits are a major source of tenant-landlord contention . . . .").

[3] The soldier-tenant may wish to explore the possibility of administrative remedies with local landlord-tenant commissions, the installation housing referral office, or through the Armed Forces Disciplinary Control Board. *See generally* DEP'T OF ARMY, REG. 190-24, MILITARY POLICE: ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS (30 June 1993).

[4] *Survey Of The Virginia Law Of Landlord And Tenant*, 8 U. RICH. L. REV. 459, 471 (1974) [hereinafter *Survey*]; *see also* HILL, *supra* note 1, at 278 ("all too often the amount of the security deposit is too small to justify litigation").

[5] Section 54.1-3900 of the Virginia Code permits military legal assistance attorneys, who are not members of the Virginia Bar, to represent low-income military clients and their dependents in Virginia courts. However, this statute qualifies such authority with the phrase "pursuant to rules promulgated by the Supreme Court of Virginia." The Supreme Court of Virginia has failed to promulgate any such rules. The Military Law Committee of the Virginia State Bar is proposing that Unauthorized Practice of Law Rule 1-101 be amended to permit judge advocates to represent certain categories of military personnel and their dependents in General District Court. The proposal limits representation to (1) active duty military personnel in pay grades E-3 and below without dependents and (2) active duty military personnel E-4 and below with dependents. These dependents also would be eligible for representation. However, representation is limited to consumer and landlord tenant disputes as well as the defense of garnishment proceedings. Letter from William H. Hauser, Senior Assistant Attorney General, to Susan W. McMakin, Chair, Military Law Committee (Mar. 30, 1994).

[6] JAGC PERSONNEL POLICIES § 5-4 (b) (Initial Assignment Practices) (1994-1995). An exception to this policy is possible in states having an expanded legal assistance program. *Id.* Virginia does not yet have such a program.

installations located in Virginia, this article should prove useful to legal assistance attorneys from all services, wherever located. Furthermore, because fourteen states in addition to Virginia have adopted some version of the Uniform Residential Landlord and Tenant Act, the citations and analysis contained in this article may prove helpful in interpreting the landlord-tenant statutes of other states. The soldier's success in challenging an improperly withheld security deposit will depend, in large part, on whether the soldier enjoys the protection of the Virginia Residential Landlord and Tenant Act. Accordingly, while focusing on the rights and remedies created under that statute, the article will address legal avenues of redress when the Virginia Act does not apply. Furthermore, the article will discuss the mechanics of initiating and maintaining a lawsuit in Virginia's General District Court, the most likely forum for a residential tenant's suit for the return of all or part of a security deposit.[7]

Virginia Residential Landlord and Tenant Act

During the early 1970s, state legislatures began to reverse the traditional preference that the law gave to landlords in landlord-tenant relationships.[8] A realization that traditional landlord-tenant principles—evolved from feudal origins—had become anachronistic in a highly mobile, urbanized society, and had failed to equitably resolve modern landlord-tenant disputes, formed the genesis for a powerful reform movement.[9]

This movement initially manifested itself in a tentative draft of the American Bar Foundation's *Model Residential Landlord-Tenant Code* (*Model Code*), which was a proposal for reform and a vehicle for further discussion of landlord-tenant problems.[10] The *Model Code* formed the basis for the Uniform Residential Landlord and Tenant Act (Uniform Act), promulgated on August 10, 1972 by the National Commissioners on Uniform State Laws.[11]

In 1974, following a comprehensive study by the Virginia Housing Commission of the rental situation in Virginia from the perspectives of both landlords and tenants,[12] the Virginia General assembly enacted the Virginia Residential Landlord and Tenant Act (Virginia Act).[13]

Patterned after the Uniform Act, the Virginia Act sought to simplify, clarify, and modernize Virginia landlord tenant law.[14] To the extent that it sought to be a model of clarity, the Virginia Act has fallen short of its goal. Many of its provisions are vague and the Virginia court system has failed to provide assistance.[15]

Applicability

The Virginia Act applies only to certain types of residential leases. Section 55.248.5(A) *excludes* the following situations from coverage:

(1) Residents of public and private institutions that provide detention, medical, geriatric, educational, counseling, religious or similar services;

(2) Occupancy by contract property purchasers or their successors in interest;

(3) Dwellings owned and operated by fraternal or social organizations and occupied by a member of that organization;

(4) Transient lodging, unless occupied for more than thirty days;

(5) Residency conditioned on working for the landlord in or near the rental dwelling;

---

[7] General district courts have exclusive jurisdiction in cases involving $1000 or less, and concurrent jurisdiction with the circuit courts for claims between $1000 and $7000. COMMONWEALTH OF VIRGINIA, DISTRICT COURT MANUAL II-7 (C16, 26 Feb. 1992) [hereinafter DISTRICT COURT MANUAL]. Additionally, because there is no trial by jury in a general district court, the proceedings tend to be less formal than circuit court proceedings. W. HAMILTON BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE 513 (2d ed. 1989).

[8] *Survey, supra* note 4, at 459, 461 (1974).

[9] *Id.*

[10] Larry Clark & Daniel Hutchinson, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974).

[11] *Id.* The following states have adopted some version of the Uniform Act: Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, introduction, *reprinted in* 7B U.L.A. 427 (1985), *and in* 7B U.L.A. 45 (Supp. 1994) [hereinafter UNIF. ACT].

[12] *Survey, supra* note 4, at 570-71. The Report of the Virginia Housing Commission noted that (1) almost 50% of Virginians resided in rentals, (2) Virginia's laws were antiquated and failed to provide a system capable of defining the rights and duties of modern, urban landlords and tenants, and (3) the new Act would be the first substantial step in clarifying and modernizing Virginia landlord-tenant law. *Id.* at 571.

[13] VA. CODE ANN. §§ 55-248.2 to -248.40 (Michie 1974).

[14] *Survey, supra* note 4, at 459, 461.

[15] As of September 1988, there were no reported cases from either the Virginia Court of Appeals or the Virginia Supreme Court interpreting *any* provisions of the Act. THE CONTINUING LEGAL EDUCATION COMMITTEE OF THE VIRGINIA LAW FOUNDATION, LANDLORD TENANT LAW AND PRACTICE § 1.2 A (2d ed. 1991) [hereinafter VIRGINIA CLE]. As of the writing of this article, no reported cases interpreting the security deposit provisions of the Act exist.

(6) Occupancy by condominium unit owners or holders of a cooperative proprietary lease;

(7) Occupancy under rental agreements covering premises used by the occupant primarily for business, commercial, or agricultural purposes;

(8) HUD-regulated housing subject to federal regulations inconsistent with the Virginia Act;

(9) Occupants not paying rent; and

(10) Occupancy of single-family residences owned by individuals who own and rent no more than ten such residences or who own four or less condominiums.[16]

For many military renters, the last exception will deny them any of the Virginia Act's protections.[17] Fortunately, Virginia provides for a landlord waiver of the statutory exclusions when the Virginia Act is specifically made applicable in the rental agreement. Section 55-248.5(B) provides "[n]otwithstanding the provisions of Subsection A of this section, the landlord may specifically provide for the applicability of the provisions of this chapter in the rental agreement." Military renters should look for, and insist on, a rental agreement that contains a provision that incorporates the Virginia Act.

Although the Virginia Act does not specifically state that it applies to renewals of existing leases, commentators opine that this application may be inferred.[18] The language of the comparable provision in the Uniform Act is identical to the Virginia statute, and the Uniform Act's official comment makes it applicable to lease renewals.[19]

Tenant Protections

Application Fees

Despite its shortcomings, the Virginia Act provides tenants with a number of statutory rights and remedies. A landlord may require a prospective tenant to forward an application fee prior to being considered for occupancy of a rental dwelling.[20] The Virginia Act defines "application fee" broadly to include "any deposit of money or property whether termed application fee, service fee, or processing fee, or however denominated, which is paid by a tenant to a landlord, lessor or agent of the landlord for the purpose of being considered as a tenant for a dwelling unit."[21]

If the tenant elects not to rent the dwelling or if the landlord rejects the application, the landlord must return any application fee in excess of twenty dollars within twenty days.[22] If the landlord rejects the application and the application fee was paid by cash, certified check, cashier's check, or postal money order, the landlord must return the fee within ten days.[23] The Virginia Act permits the landlord to retain actual expenses and damages from the application fee conditioned on providing the tenant with an itemized list of those expenses and damages.[24] The landlord's failure to comply with this statutory provision entitles the tenant to the return of that portion of the fee wrongfully withheld and reasonable attorney's fees.[25]

Security Deposits

The Virginia Act broadly defines security deposits to include "any deposit of money or property, whether termed security deposit or 'prepaid rent,' however denominated, which is furnished by a tenant to a landlord, lessor or agent of a landlord or lessor to secure the performance of any part of a written or oral lease or agreement, or as a security for damages to the leased premises."[26] If the landlord requires a deposit, section 55-248.11 of the Virginia Act imposes the following requirements:

(1) the security deposit cannot exceed two months rent;

(2) any security deposit held for more than thirteen months must accrue interest at a rate of five percent, calculated semiannually, and payable to the tenant at the conclusion of the tenancy;

---

[16] Va. Code § 55-248.5(A) (Michie Supp. 1993); VIRGINIA CLE, *supra* note 15, § 1.2(B)(2), at 1-8.

[17] This last exclusion does not appear in the Uniform Act. Generally, this section operates to exclude from the applicability of the Act all but the larger apartment complexes. VIRGINIA CLE, *supra* note 15, § 1.2(BX2), at 1-8.

[18] *Id.* at § 1.2 B(1).

[19] *Id.*

[20] VA CODE ANN. § 55-248.6:1 (Michie Supp. 1993).

[21] *Id.* § 55-248.4 .

[22] *Id.* § 55-248.6:1.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* § 55-248.4.

(3) the landlord may only apply the security deposit to the payment of accrued rent, to offset tenant caused damage—beyond reasonable wear and tear—to the rental unit, and to the payment of other charges or damages, such as reasonable late charges, as specified in the rental agreement;

(4) within thirty days after the conclusion of the tenancy, the landlord must return the security deposit with interest or the unexpended portion of the deposit with an itemized list of deductions from the deposit;

(5) the landlord must provide written notice to the tenant of any deductions from the security deposit made during the tenancy within thirty days of the deduction;

(6) the tenant has a right to accompany the landlord on a final inspection of the rental property within seventy-two hours of the tenancy's termination;

(7) if the landlord or landlord's successor in interest willfully fails to comply with these provisions, the tenant may recover the security deposit, actual damages, and attorney's fees;

(8) the landlord must provide the tenant, within five days of occupying the premises, a written list of existing damages; and

(9) the tenant, or tenant's representative, may inspect the landlord's records listing deductions from the tenant's security deposit, at any time during normal business hours.[27]

Landlords typically deduct the cost of repairing tenant-caused damage from the security deposit.[28] Unfortunately, some landlords abuse this practice by deducting money for pre-existing damages.[29] In an attempt to remedy such abuse, the Virginia Act requires the landlord to give the tenant an itemized list of defects, which the tenant may object to in writing.[30]

The Virginia Act requires the landlord to provide an initial list of damages to the tenant within five days after occupancy.[31] However, the statute does not require the landlord to inform the tenant of the significance of this list or the tenant's opportunity to object to it. The tenant's failure to render a written objection, noting damage or defects omitted from the landlord's list, can be fatal in any subsequent litigation. Unless the tenant objects, *in writing*, within five days after receipt of the itemized list, it is "deemed correct."[32]

The Virginia Act does not indicate whether this portion of the statute precludes the presentation of evidence as to the true condition of the dwelling at the time of occupancy. Interpreting the Virginia Act to preclude evidence of the true state of affairs would work an injustice on the typical tenant, ignorant in the ways of the law, and would sanction landlord misconduct. Given that the basic intent of the Virginia Act was to provide protection to the tenant, a court should not conclude that the Virginia legislature intended such a harsh result absent a clear expression of that intent.[33] Rather, a court should view the list memorializing the results of the initial inspection as creating a rebuttable inference as to the condition of the rental dwelling at the time of the inspection; it should not prohibit the introduction of evidence to overcome this inference.[34]

Significantly, the Virginia Act imposes no duty on the landlord to pay interest unless the security deposit has been held for a period in excess of thirteen months.[35] Commentators surmise that this limitation was added to the statute more likely as a result of political compromise than legislative reasoning.[36]

---

[27] *Id.* §§ 55-248.11, 11:1 (Michie 1986 & Supp. 1993); VIRGINIA CLE, *supra* note 15, § 1.2(B)(8), at 1-11 to 1-12.

[28] Absent a contractual agreement to the contrary, the usual measure of damages for the destruction of personal property is the reasonable market value at the time of the loss rather than replacement value. DAN B. DOBBS, REMEDIES 375 (1973) ("the usual measure of damage is the market value of the chattel at the time and place of destruction with adjustments for salvage value"); 25 C.J.S. *Damages* § 83a, at 905 (1966); *see* Wenninger v. Wollerman, 482 N.W.2d 671 (Wis. Ct. App. 1992) (carpet). Further, the usual measure of damages for an injury to personal property that has not been entirely destroyed is the difference between its value immediately before and after the injury, or, if less, the reasonable cost of repair. 25 C.J.S., *Damages* § 83b, at 907 (1966); DOBBS, *supra*, at 379; *see* Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977) (reciting this general rule for damages to an automobile, with a reasonable allowance for depreciation).

[29] *See Nineteenth Annual Survey*, *supra* note 1, at 1601.

[30] *Id.*

[31] VA. CODE ANN. § 55-248.11:1 (Michie Supp. 1993).

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

[33] *Cf.* Buettner v. Unruh, 642 P.2d 124, 127 (Kan. App. 1982) (adopting a similar rationale when interpreting the Kansas Residential Landlord and Tenant Act).

[34] *Id.*

[35] VA. CODE ANN. § 55-248.11(b) (Michie 1986).

[36] *Survey*, *supra* note 4, at 577.

Failure to Return the Security Deposit

A major shortcoming of the Virginia Act deals with the remedy for a landlord's failure to return the security deposit. Many state statutes provide that if a landlord fails to return the deposit or provide an itemized list of deductions within the requisite statutory time after the tenant departs, and if the landlord has retained the deposit in bad faith, the tenant may be entitled to some form of punitive damages in addition to the return of the deposit.[37]

Unfortunately, under the Virginia statute, even if the landlord willfully fails to return a deposit or provide an itemized list of deductions, the tenant's remedy is limited to the security deposit with interest due, actual damages, and attorney's fees.[38] Further, although no published Virginia cases address the issue, it is unlikely that the Virginia Act provides for attorney fees to tenants/plaintiffs acting pro se or in proper person.[39] Realistically, the amount of actual damages that a tenant may collect is likely to be small or nonexistent.[40]

Additionally, the Virginia Act suffers from a definitional flaw. Neither the Virginia Act nor any published Virginia case or legislative history defines what constitutes a "willful" failure to return the security deposit. To interpret this provision of the Virginia Act one must look to case law from states adopting some version of the Uniform Act[41] or to judicial interpretations of state statutes similar to Virginia's statute.

In other states, courts have interpreted statutory language prohibiting the willful retention of a security deposit or the willful failure to provide a timely itemized list of deductions in one of three ways, prohibiting retention that is either (1) deliberate, (2) in bad faith, or (3) arbitrary and unjustified.[42] States such as Colorado have equated "willful" with "deliberate."[43] The deliberate failure to retain the security deposit or provide an itemized list of deductions—even when a valid dispute exists between the parties—constitutes a violation of the statute.[44]

Maine takes the position that its statute, which penalizes the willful retention of a security deposit, punishes only bad-faith retention.[45] The court interpreting the statute (which makes the landlord liable for double the amount of the security deposit withheld) opined that construing the term "willful" to mean merely deliberate would create an unduly harsh rule in light of the penalties involved.[46] Several Louisiana courts have awarded damages and attorney's fees for willful retention of a security deposit when the landlord's justification for the retention was arbitrary, capricious, or similarly unjustified.[47]

Although neither the Virginia legislature nor Virginia's courts have taken a position on this issue, the term willful should be interpreted to mean deliberate. If a landlord believes that the tenant has caused damage to the rental dwelling, the landlord may retain a portion of the security deposit to cover the estimated value of the damage as long as the landlord provides an itemized list of damages and the remainder of the deposit within thirty days of the tenancy's termination.[48] To permit a landlord to retain the entire security deposit when only a partial retention is proper, or to permit

---

[37] WARNER, *supra* note 2, at 20:3. California permits $200 plus interest; Illinois, New Jersey, Michigan, Ohio, and Pennsylvania allow for double damages; Georgia and Maryland permit triple damages; and Texas allows $100 plus three times the amount wrongfully withheld and attorney's fees. *Id.* at 20:3 n.1. *See generally* John P. Ludington, Annotation, *Landlord-Tenant Security Deposit Legislation*, 63 A.L.R. 4th 901 (1988).

[38] Section 55-248.11(a) states that if the landlord "*willfully* fails to comply with this section or if the landlord fails to return any security and interest required to be paid to the tenant under this chapter, the tenant may recover such security due him together with actual damages and reasonable attorney' fees." VA. CODE ANN. § 655-248.11(a) (Michie 1986) (emphasis added).

[39] *See* Davidson v. Manning, No. GV93-3783 (Loudoun Cty. Gen. Dist. Ct. Dec. 13, 1993) (first return on a civil warrant) (Cannon, J.) (no attorney fees if acting in proper person); *see also* Golden v. Riverside Apartments, Inc., 488 So. 2d 478 (La. 1986) (attorney representing himself and his wife, in proper person, not entitled to attorney's fees because he had incurred no out-of-pocket expenses associated with hiring an attorney).

[40] *Survey, supra* note 4, at 577.

[41] *See* Hicks v. Meyers, 2 Va. Cir. 122 (1983) (Oregon's version of the Uniform Act). The security deposit provisions of the Virginia Act were modeled on § 2.101 of the Uniform Act. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 427, 453 (1985).

[42] Ludington, *supra* note 37, at 987-88.

[43] Kirkland v. Allen, 678 P.2d 568, 571 (Colo. App. 1984); Martinez v. Steinbaum, 623 P.2d 568, 571 (Colo. 1981) (en banc) ("willful, *i.e.*, deliberate"); Turner v. Lyon, 539 P.2d 1241, 1243 (Colo. 1975) (en banc) ("'willful' means 'deliberate'"); *see also* Ludington, *supra* note 37, § 27[a].

[44] *See* Altazin v. Pirello, 391 So. 2d 1267, 1269 (La. App. 1980) ("Even if there is a valid dispute over a lease, the lessor must comply with the statutes or suffer the penalties provided."); Bradwell v. Carter, 299 So. 2d 853, 854 (La. App. 1974) (court held that the failure to return the security deposit within 30 days was "willful" notwithstanding a bona fide dispute between the parties).

[45] Ludington, *supra* note 37, § 27[b], at 988 (citing Karantza v. Salamone, 435 A.2d 1384 (Me. 1981)).

[46] *Id.*

[47] *Id.* § 27[c] (citations omitted).

[48] VA. CODE ANN. § 55-248.11(a) (Michie 1986). *Cf.* Duchon v. Ross, 599 N.E. 621, 624-25 (Ind. 1992) ("Disputes over the costs of repair or the assessment of damages do not relieve the Landlords of the requirement to provide the estimated costs of repair to the Tenants with [the statutory period] of the termination of the tenancy."). A letter from the landlord indicating that damage exists—but providing that the tenant will not receive a final accounting until costs associated with the damages are assessed—does not satisfy the landlord's burden. *Id.* at 622, 624.

a landlord to provide an itemized list of deductions months after the tenant has departed, without any associated penalty or declaration of a statutory violation, would emasculate this portion of the statute.[49] Furthermore, unlike the Maine statute discussed earlier, the Virginia Act's limited punitive provision—actual damages and attorney's fees—would not cause an unduly harsh result if so interpreted.

Additionally, whether a showing of willfulness is a condition precedent to obtaining the return of the security deposit if an itemized list of deductions is not received within thirty days, or whether such a showing is only required when seeking actual damages and attorney fees, is unclear.[50] Albeit subject to a contrary view, apparently two separate statutory provisions are envisioned under the Virginia and Uniform Acts.[51] The first provision requires the landlord to return the deposit or an itemized list of deductions within a limited period of time.[52] The second provision is punitive, and provides a penalty for the landlord's failure to satisfy the timeliness provision.[53] Because the punitive provision provides an extraordinary remedy in addition to the return of the security deposit, it contains a scienter element, *that is* willful.[54] Accordingly, a tenant need only prove willfulness if it seeks actual damages and attorney's fees in addition to the return of the security deposit.[55]

Prohibited Provisions

The Virginia Act prohibits the landlord from inserting certain provisions into the lease. Specifically, section 55-248.9 provides that the following provisions are void if contained in a rental agreement:

> (1) A waiver of any rights or remedies granted by the Act;
>
> (2) An authorization to confess judgment on a rental obligation;
>
> (3) An agreement to pay attorney's fees except as provided in the Act;
>
> (4) An agreement exculpating or limiting the landlord's liability to the tenant.[56]

If a landlord brings suit to enforce any of these provisions, the tenant may recover actual damages and attorney's fees.[57] When the Virginia Act does not apply, the parties are free to include any other provision in the lease.[58]

The Military Clause

Section 55-248.21:1 provides some protection to military tenants who must terminate their lease early because of military orders. Unlike the remainder of the Virginia Act, this provision applies to all residential leases, including single-family residences owned by landlords renting fewer than ten such residences.[59] Specifically, this provision protects any member of the armed forces, the Virginia National Guard serving on full-time duty, and National Guard Technicians who

[49] It is axiomatic in statutory construction that a court is obligated to give effect, if possible, to every word in the statute; in the instant case, the word "shall." *See* In re Kitchen Equipment Co. of Virginia, Inc., 960 F.2d 1242, 1247 (4th Cir. 1992).

[50] Section 55-248.11(b) of the Virginia Code provides "If the landlord *willfully* fails to comply with this section or if the landlord fails to return any security and interest required to be paid to the tenant under this chapter, the tenant may recover such security due him together with actual damages and reasonable attorney's fees."

[51] Statutes adopting the Uniform Act "generally require a landlord to return security deposits to tenants within a specified time period, account for his claim to any part of the security deposit and provide for penalty in the event landlord fails to comply." UNIF. ACT, *supra* note 11, at 454, comment.

[52] Section 55-248.11 of the Virginia Code requires that the landlord "shall" return the deposit or an itemized list of deductions within 30 days of the termination of the tenancy. In Virginia statutory construction, the term "shall" means that it is mandatory. Wendell v. Commonwealth, 12 Va. App. 958, 962 (1991) ("'When the word 'shall' appears in a statute it is generally used in an imperative or mandatory sense.'") (citing Schmidt v. City of Richmond, 142 S.E.2d 573, 578 (Va. 1965)). *Cf.* Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

[53] That the Virginia statute says the tenant "may" recover, rather than "shall" recover, does not give the court discretion. The language merely is a statement of the steps the tenant must take to recover if the landlord fails to comply with the timeliness portion of the statute. *See* Love v. Monarch Apartments, 771 P.2d 79, 82 (Kan. App. 1989) (interpreting Kansas Residential Landlord and Tenant Act); Beckett v. Olson, 707 P.2d 635, 637 (Or. App. 1985).

[54] *See generally* Note, *supra* note 1, at 878-79.

[55] The applicable Maine statute distinguishes between the two types of statutory provisions. Failure to meet the timeliness requirement raises a presumption of willfulness. Karantza v. Salamone, 435 A.2d 1384, 1386 (Me. 1981). The landlord's good faith belief in entitlement does not justify retention of the deposit; it is only a defense to the penal/punitive portion of the statute. *Id.* ("Such a showing would not, of course, justify the retention, but it could suffice to rebut the presumption and spare defendant the extraordinary liability obtained by statute for willful withholding."); *cf.* VIRGINIA CLE, *supra* note 15, § 1.2(B)(6), at 1-11 (those provisions of the Virginia Act granting attorney fees to the prevailing party usually require that the opposing party's breach or violation be willful).

[56] VIRGINIA CLE, *supra* note 15, § 1.2(B)(3)(c), at 1-9 to 1-10 (citing VA. CODE ANN. § 55-248.9 (Michie Supp. 1993)). The last clause is a deviation from Virginia common law, which upholds the validity of these clauses. *Id.* at 1-10 (citing Taylor v. Virginia Const. Corp. 161 S.E.2d 732 (Va. 1968)).

[57] VA. CODE ANN. § 55-248.9(B) (Michie Supp. 1993); *Survey*, *supra* note 4, at 574.

[58] VIRGINIA CLE, *supra* note 15, § 1.2(B)(3)(b), at 1-9; *Survey*, *supra* note 4, at 574 (the Virginia Act "remains consistent with old law in allowing a landlord to include in the rental agreement those terms and conditions not prohibited by the Act governing the rights and obligations of the parties").

[59] *See* VA. CODE ANN. § 55-248.21:1(E) (Michie Supp. 1993) ("The exemption provided in subsection 10 of § 55-248.5 shall not apply to this section."); *see also* VIRGINIA CLE, *supra* note 15, § 1.2(F)(8), at 1-26 ("appl[ies] to single-family dwellings regardless of the number rented by the landlord, as well as to rental situations normally covered by the Act").

(1) have received PCS orders moving the service member at least thirty-five miles from the rental dwelling;

(2) have received TDY orders longer than three months duration that move the service member at least thirty-five miles from the rental dwelling;

(3) are discharged or released from active duty; or,

(4) are ordered to report to government quarters with a concomitant loss of BAQ.[60]

Eligible service members may terminate their leases prematurely by serving on the landlord (at least thirty days prior to termination) written notice, along with a copy of the official orders or a commander's letter confirming the orders.[61] The military tenant may not terminate the tenancy more than sixty days "prior to the date of departure necessary to comply with the official orders or any supplemental instructions for interim training or duty prior to the transfer."[62]

The Virginia Act requires that the final rent be prorated to the date of tenancy termination and be made payable in accordance with the terms of the rental agreement.[63] However, early termination of the rental agreement permits the landlord to demand liquidated damages. The landlord may require the tenant to pay one month's rent if the tenant has completed less than six months of the tenancy, and one-half of one month's rent if the tenant has completed more than six, but less than twelve, months of the tenancy.[64]

When the Virginia Act Does Not Apply

Prior to adopting its landlord-tenant act, Virginia possessed no law regulating security deposits.[65] Accordingly, a tenant operating without benefit of the Virginia Act must look elsewhere for relief. Under common law, tenants enjoy a right to the timely return of their security deposit on termination of the tenancy, either in full or as reduced by legitimate landlord deductions.[66] A landlord's refusal to return the security deposit may render the landlord liable for conversion.[67] Alternatively, a tenant may sue based on breach of the rental agreement.[68]

Realistically, however, once they exit the dwelling, tenants have little practical leverage over landlords—including threat of legal action—to force the return of a contested deposit.[69] Because Virginia follows the American Rule,[70] a successful tenant-litigant would be required to absorb his or her own legal fees, making the prospect of legal action extremely unattractive.[71]

The Mechanics of a Lawsuit

Preparation

A tenant must prepare for trial long before a dispute arises. Commonly, experienced landlords will come to trial with a long list of damaged and dirty items that they claim were caused by the tenant, often catching the unprepared tenant off guard.[72] If the tenant has not collected evidence long before vacating the rental dwelling, the judge may rule in the landlord's favor or simply split the difference.[73]

---

[60] Va Code Ann. § 55-248.21:1(A) (i)-(iv); *see also* VIRGINIA CLE, *supra* note 15, § 1.2(F)(8), at 1-25 to -26.

[61] VA CODE ANN. § 55-248.21:1(B) (Michie Supp. 1993). A copy of the official orders or commander's letter must be furnished prior to actually terminating the tenancy. *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* § 55-248.21:1(C). The amount of liquidated damages is determined as of the effective date of termination. *Id.*

[65] *Survey*, *supra* note 4, at 576; *see also* VIRGINIA CLE, *supra* note 15, § 1.2(B)(8), at 1-11 ("Prior to the Act, there had been no state-wide statutory or case law regulation of security deposits.").

[66] Note, *supra* note 1, at 876 (citations omitted).

[67] 52 C.J.S. *Landlord & Tenant* § 473(1) (1968).

[68] *Id.* § 474 ("the tenant may disregard the conversion, and recover on proof of the deposit, the breach of the covenants of the lease, and the refusal of the landlord to pay over the money") (citation omitted).

[69] Note, *supra* note 1, at 877 ("With the tenant having vacated the premises, the landlord has no risk in terms of rent withholding or damage to the premises.").

[70] Ryder v. Petrea, 416 S.E.2d 686, 688 (Va. 1992) ("'[W]e have consistently adhered to the American Rule: ordinarily attorney's fees are not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary.'") (citation omitted); R.L. Moore, Inc. v. Shawn, 23 Va. Cir. 117 (1991) ("In Virginia, the general rule is that attorney's fees are not recoverable generally as an item of damages in tort or in the absence of statutory liability.").

[71] *Cf.* Note, *supra* note 1, at 877 (a lawsuit based on the violation of the common law right to the timely return of a security deposit rarely is justified by the amount in controversy).

[72] WARNER, *supra* note 2, at 20:3.

[73] *Id.*

Preparation for trial should begin as soon as the soldier begins the tenancy. Immediately take photographs and have friends or neighbors view the rental property.[74] Even if the Virginia Act does not apply to your lease, conduct a walk through with the landlord and jointly prepare a written summation of *all* damaged items or dirty conditions. Similarly, on departure the soldier should take photographs, have friends walk through the rental, maintain receipts for cleaning materials or services, and attempt to have the landlord agree in writing that the premises are in satisfactory condition.[75]

The Virginia Act permits a tenant to be present at the landlord's inspection of the rental dwelling. Section 55-248.11 requires the landlord to "reasonable efforts" to advise the tenant of the right to be present at the landlord's inspection of the rental for purposes of determining what, if any, deductions should be made from the security deposit.[76] If the tenant advises the landlord in writing of the tenant's desire to be present at the inspection, the landlord must notify the tenant of the time and date of inspection.[77] The inspection must occur within seventy-two hours of the tenancy's termination.[78] At the end of the inspection, the landlord must provide the tenant with an itemized list of all damages known to exist at that time.[79]

Venue

The Virginia court system is divided into thirty-two districts and thirty-one circuits.[80] Generally, venue will be proper in any district where the landlord lives, is regularly employed, has a regular place of business, or where the cause of action arose.[81] When venue is improper, the court will transfer—rather than dismiss—the lawsuit as long as proper venue exists somewhere in the state.[82]

Initial Pleadings

A plaintiff acting pro se or in proper person may initiate a lawsuit in general district court by filing a Warrant In Debt[83] and paying the appropriate filing fee.[84] The Warrant is a fill-in-the blank form available at any Virginia Clerk of Court's office. This form may be filed in person or by mail.

Typically, the court will require the parties to appear for an initial appearance and order the plaintiff to file a Bill of Particulars.[85] This pleading merely explains to the court the basis of plaintiff's lawsuit, and should state the factual basis for the lawsuit in numbered paragraphs.[86]

The initial appearance usually occurs before the defendant has filed a written grounds of defense.[87] This pleading is

---

[74] *Id.*

[75] *Id.*

[76] VA. CODE ANN. § 55-248.11(c) (Michie 1986). Such efforts should be made on the landlord's request to a tenant to vacate, or within five days of the tenant's notice to the landlord of the tenant's intent to terminate the tenancy. *Id.*

[77] *Id.*

[78] *Id.*; *see also* VIRGINIA CLE, *supra* note 15, § 1.2(B)(8)(f) ("The tenant has the right to be present when the landlord inspects the premises, which must be within 72 hours from the time the tenant vacates.").

[79] VA. CODE ANN. § 55-248.11(c) (Michie 1986).

[80] DISTRICT COURT MANUAL, *supra* note 7, at II-6.

[81] *Id.* at VII-D-2 (citing VA. CODE ANN. § 8.01-262 (Michie 1992)), COMMONWEALTH OF VIRGINIA, GENERAL DISTRICT COURTS 3-4 (Information Pamphlet 1991) [hereinafter GENERAL DISTRICT COURTS].

[82] DISTRICT COURT MANUAL, *supra* note 7, at VII-D-3 (citing VA. CODE ANN. § 8.01-264 (Michie 1992), Rule 7B:11 (Michie 1994)). A party's failure to timely object to improper venue may result in waiver of the objection. *Id.*

[83] Form DC-412 11/88.

[84] Currently, the filing fee is $18. *See* DISTRICT COURT MANUAL, *supra* note 7, at VII-B-1 ("The most frequently used type [of pleading] is the civil warrant or summons form which the plaintiff files with the appropriate filing fee in the clerk's office or with a magistrate to cause the issuance of process such as a Warrant in Debt."). A plaintiff may file a Motion For Judgment, which is a more formal pleading. *Id.*; *see also* GENERAL DISTRICT COURTS, *supra* note 81, at 4 ("[You] may bring your suit in a District Court by either a warrant or the traditional motion for judgment. The warrant is by far the simpler procedure.").

[85] VA CODE ANN. Rule 7B:2 (Michie 1994) ("The judge of any General District Court may require the plaintiff to file and serve a written bill of particulars . . . ."); *see also* W. HAMILTON BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE 512 (1989). Depending on local practice, the initial court date may be the actual trial date. DISTRICT COURT MANUAL, *supra* note 7, at VII-B-1. Generally, the court will set a future trial date unless all parties are present and prepared for trial. BRYSON, *supra*, at 513.

[86] VA CODE ANN. Rule 1:4(d) (1994).

[87] BRYSON, *supra* note 85, at 513.

merely the defendant's explanation to the court why it is not liable to the plaintiff.[88] The tenant should request that the court require the defendant to respond with its Grounds of Defense. Failure to comply with the judge's order to file this pleading may result in the award of summary judgment to the opposing party.[89] Furthermore, the tenant may use at trial any admissions made in the Grounds of Defense. Such judicial admission "conclusively establishes that fact for purposes of the instant litigation. No explanation or rebuttal is allowed, and no other proof of that fact is necessary."[90] Further, the admitting party may not later take a position inconsistent with the pleading.[91] Additionally, the landlord's failure to respond to a specific allegation of fact is deemed admitted.[92]

Initial Appearance

The soldier's first court appearance will be on the return date of the warrant. If all parties appear and are ready for trial, the court "may" proceed with the trial at that time.[93] Oftentimes, the court will merely use the return date as a form of docket call and schedule the trial for a later date. A party should contact the clerk's office to determine the court's practice.

If the defendant (landlord) or his attorney fails to appear on the return date, the defendant is not entitled to notice of further proceedings and waives all objections to the admissibility of evidence.[94] The plaintiff may move for and obtain judgment in the case.[95] The trial judge will determine the amount due. Accordingly, the plaintiff should appear at court with a copy of the lease and any other pertinent documents.

Discovery

At the General District Court, discovery is limited, but by no means nonexistent. If applicable, the Virginia Act permits the tenant, or authorized representative, to inspect the landlord's records of deductions from the security deposit "at any time during normal business hours."[96] The statute fails to provide a remedy, however, for the landlord's failure to permit such an inspection.[97]

The soldier may obtain copies of all documents that the landlord intends to use at trial to support the security deposit retention through the use of a subpoena duces tecum. To use this mechanism, a party need only submit the applicable form to the Clerk of Court, requesting that the court issue such a subpoena.[98] If it grants the request, the court will order the opposing party to supply the requested documents with the court. The requesting party may obtain a copy of the documents from the Clerk's office, free of charge. The opposing party may quash a subpoena duces tecum only if it is unreasonable or oppressive.[99]

Witnesses

Any party to the suit can ensure the attendance of a witness by requesting that the court issue a subpoena. Generally, such subpoenas are issued at no cost to the requesting party. Requests for subpoenas for witnesses should be received in the clerk's office at least ten days before trial.[100] Additionally, nothing precludes the tenant representing himself from testifying on his or her own behalf at trial.

---

[88] *Id.* at 229. The court can order that the defendant's Grounds of Defense be filed and served on the plaintiff. *Id.* at 513. However, the landlord may elect to counterclaim against the tenant or crossclaim against a codefendant. *Id.* Additionally, if the amount in controversy exceeds $1000, the defendant may have the lawsuit removed to the circuit court, by filing an application and affidavit stating its defense, coupled with payment of all accrued district court costs, writ tax, and circuit court costs. *Id.*

[89] VA. CODE ANN. Rule 7B:2 (Michie 1994). At trial, the judge may exclude evidence regarding any matter not addressed in these pleadings. *Id.*; *see also* DISTRICT COURT MANUAL, *supra* note 7, at VII-E-6.

[90] CHARLES E. FRIEND, 2 THE LAW OF EVIDENCE IN VIRGINIA § 18-47, at 244 (4th ed. 1993) (citing General Motors Corp. v. Lupica, 379 S.E.2d 311 (Va. 1989); Lackey v. Price, 128 S.E. 268 (Va. 1925); James River Co. v. Old Dominion Corp., 122 S.E. 344 (Va. 1924)).

[91] FRIEND, *supra* note 90, at 248 n.1 (citing Berry v. Klinger, 300 S.E.2d 792 (Va. 1983)).

[92] VA. CODE ANN. RULE 1:4(e) (Michie 1994). *See also* BRYSON, *supra* note 85, at 230.

[93] VA. CODE ANN. Rule 7B:4 (Michie 1994).

[94] *Id.* 7B:9.

[95] *Id.*

[96] VA. CODE ANN. § 55-248.11(b)(3) (Michie 1986).

[97] This conduct should be deemed evidence of the landlord's "willful" failure to return the deposit or provide an itemized list of deductions.

[98] Form DC-336, entitled "Subpoena Duces Tecum," is a fill-in-the-blank form that may be obtained from the Clerk of Court. The subpoena request may be filed by mail. Requests for subpoenas duces tecum should be received at least 15 days before trial with a certification that the requesting party mailed or delivered a copy of the request to the opposing party. DISTRICT COURT MANUAL, *supra* note 7, at VII-E-4. The district court judge or clerk may issue a subpoena duces tecum directed at either a party or nonparty. *Id.*

[99] *See* Telic Corp. v. Whiteside, 24 Va. App. 87, 90 (1991).

[100] VA. CODE ANN. Rule 7A:12 (Michie 1994). Form DC-326 4/88, Subpoena For Witnesses, may be obtained from the clerk's office. On the form, a party need only supply the case number and caption; the name, address, and telephone number of the witness to be served; and check a block indicating on whose behalf the witness is being subpoenaed.

The Virginia Act prohibits the landlord from retaliating against other tenants who testify in the lawsuit. Specifically, section 55-248.39 prohibits the landlord from retaliating against a tenant for "testif[ying] in a court proceeding against the landlord."[101] This provision prohibits retaliation in the form of an increase in rent, decrease in services, or instituting or threatening to institute legal action to terminate the rental agreement.[102] However, a landlord may increase rent to market level and decrease services if applied equally to all tenants.[103] If the landlord engages in prohibited retaliatory conduct, the tenant may seek injunctive relief, reasonable attorney's fees, and actual damages.[104] The tenant bears the burden of proving retaliation.[105]

Rules of Evidence

Unlike the military and federal systems, Virginia's rules of evidence are not codified, but instead are a collection of both statutory and case law. These rules of evidence apply in all Virginia courts, including general district courts.[106] Although general district courts tend to be less formal than circuit courts, litigants should possess some familiarity with Virginia evidentiary rules prior to proceeding to court. An excellent and current reference in this regard is Charles Friend's *The Law of Evidence In Virginia.*[107]

Appeal

The losing party may appeal the judgment to the circuit court. To appeal an adverse judgment, however, the amount in controversy must be greater than fifty dollars and the appellant must note the appeal within ten days of judgment.[108] Additionally, the appellant must post an appeal bond and pay the circuit court writ tax and costs within thirty days of judgment.[109] Cases appealed to the circuit court are tried de novo.[110]

Enforcing Your Judgment

Assuming that the landlord refuses to pay the judgment, a successful tenant may enforce the judgment in general district court either by garnishment or by levy on the landlord's property.[111] In Virginia, a writ of *fieri facias* is used to execute district court judgments entered on a Warrant in Debt.[112] Alternatively, the tenant may file an abstract of judgment with any circuit court, creating a lien against any real property the landlord owns in that jurisdiction.[113]

Conclusion

Virginia landlord-tenant law is complex, ill-defined, and holds many traps for the unwary renter. Because security deposit disputes are commonplace and because such a large concentration of service members—particularly JAGC officers—and their families are stationed in Virginia, JAGC officers should possess a basic understanding of Virginia landlord-tenant law. This article was designed to provide that basic understanding.

---

[101] VA. CODE ANN. § 55-248.39(a)(iv) (Michie 1986). Additionally, a landlord may not retaliate against a tenant for (1) reporting the violation of a building or housing code materially affecting health or safety to a government agency responsible for enforcing such codes; (2) complaining or filing suit against the landlord for any violation of the Virginia Act; or (3) joining or organizing a tenants' organization. *Id.* § 55-248.39(a) (i)-(iii).

[102] *Id.* § 55-248.39.

[103] *Id.* § 55-248.39(a); *see also* VIRGINIA CLE, *supra* note 15, § 1.2(I)(2)(c)(1). The provision of the statute permitting a decrease in services appears to apply only when the landlord controls more than a single dwelling unit.

[104] VA. CODE ANN. § 55-248.39(b) (Michie 1986); *see also* VIRGINIA CLE, *supra* note 15, § 1.2(I)(2)(d), at 1-35. If applicable, the tenant may assert retaliation as a defense to a landlord's action for possession. VA. CODE ANN. § 55-248.39(b) (Michie 1986).

[105] VA. CODE ANN. § 55-248.39(b) (Michie 1986).

[106] FRIEND, *supra* note 90, § 1-1, at 2 ("The rules of evidence are applicable in trials in courts of record and courts not of record, including preliminary hearings."); BRYSON, *supra* note 85, at 513 ("rules of evidence do apply"). General district courts are referred to as courts not of record.

[107] *See* FRIEND, *supra* note 90.

[108] DISTRICT COURT MANUAL, *supra* note 7, at VII-B-2, VII-E-20; GENERAL DISTRICT COURTS, *supra* note 81, at 5.

[109] DISTRICT COURT MANUAL, *supra* note 7, at VII-B-2, VII-E-20 -21. The minimum bond amount is the "amount of district court judgment (principal, interest, district court costs, attorney's fees) *and* circuit court costs." *Id.*

[110] *Id.* at II-6.

[111] *Id.* at VII-E-23.

[112] *Id.* at VII-E-23; GENERAL DISTRICT COURTS, *supra* note 81, at 5. For a detailed discussion of how the writ operates *see generally* DISTRICT COURT MANUAL, *supra* note 7, at VII-E-23 to -30.

[113] DISTRICT COURT MANUAL, *supra* note 7, at VII-E-3, VII-E-30; GENERAL DISTRICT COURTS, *supra* note 81, at 5.

Recent Developments Concerning the Constitutionality of Military Rule of Evidence 707

Captain Mark D. Maxwell
Instructor, Naval Justice School
International Training Detachment
Newport, Rhode Island

Captain John M. Head
Trial Counsel, Hohenfels

Major Robert Long (USAR)
IMA to Criminal Law Division
The Judge Advocate General's School, United States Army

Major Patrick D. O'Hare
Instructor, Criminal Law Division
The Judge Advocate General's School, United States Army

Introduction

Assume that you are a trial defense counsel assigned a case almost exclusively based on circumstantial evidence. Your client has taken a polygraph administered by the Criminal Investigation Division (CID). A CID-trained polygrapher opined that your client showed no deception when answering questions based on his involvement in the crime under investigation. Nevertheless, the government prefers charges against your client. The defense has no explicitly exculpatory evidence other than the polygraph results and the general denial of the charges by your client.

Contrary to earlier military precedents, Military Rule of Evidence (MRE) 707(a)[1] purportedly creates a categorical bar to the admission of your exculpatory polygraph evidence. Until recently, a defense counsel was left with no more than a speculative constitutional challenge to counter this provision. The military appellate courts recently provided courts-martial practitioners with several instructive cases concerning the use, at trial, of polygraph test results. In *United States v. Rodriguez*,[2] the United States Court of Military Appeals (COMA) reversed the holding of the Army Court of Military Review (ACMR)[3] and set aside the findings and sentence of a convicted cocaine user. In taking that action, the COMA addressed the issue of whether, during rebuttal and over defense objection, the military judge had abused his discretion by *admitting* inculpatory polygraph evidence. In the second decision, *United States v. Williams*,[4] a three-judge panel of the ACMR held that, as applied to the facts of that particular case, MRE 707(a) denied the accused his Fifth Amendment right to a fair trial, and his Sixth Amendment right to produce favorable witnesses on his behalf.[5]

Although *Rodriguez* did not involve the application of MRE 707(a), two of the judges on the COMA did discuss the

---

[1] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 707 (1984) [hereinafter MCM] provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Military Rule of Evidence 707 was promulgated by Executive Order No. 12,767, which amended the MCM. The effective date of the amendment was 6 July 1991.

[2] 37 M.J. 448 (C.M.A. 1993).

[3] 34 M.J. 562 (A.C.M.R. 1991). Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals (COMA) as the United States Court of Appeals for the Armed Forces. The Act likewise redesignated the United States Courts of Military Review for each separate service a United States Court of Criminal Appeals. Accordingly, the United States Army Court of Military Review (ACMR) is now the United States Court of Criminal Appeals. *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to these courts as the COMA and the ACMR.

[4] 39 M.J. 555 (A.C.M.R. 1994), *certificate for review filed*, 39 M.J. 408 (C.M.A. 1994). *See also* United States v. Cato, CM 9200744 (A.C.M.R. 25 Feb. 1993) (summarily rejecting constitutional challenge), *pet. for review granted*, 39 M.J. 391 (C.M.A. 1994) (whether the "bright line rule" in MRE 707 violates appellant's Sixth Amendment right to present a defense).

[5] *Williams*, 39 M.J. at 558. The ACMR remanded the case for a hearing on the admissibility of the proffered polygraph evidence. *Id.*

rule in *dicta*. Although *Williams* is the most direct attack[6] on that controversial evidentiary rule,[7] the issue that it resolved was foreshadowed in the *Rodriguez* decision. This article briefly will discuss the polygraph, the rationale behind MRE 707, recent military precedent, and possible approaches for practitioners when attempting to introduce polygraph evidence.

The Polygraph: Theory and Procedure

Although beyond the scope of this article to fully discuss the mechanical and theoretical intricacies of the polygraph, all criminal lawyers and courts-martial practitioners need a baseline of understanding of the polygraph. The polygraph instrument consists of four components: the nomograph chest assembly measures the inhalation/exhalation ratio; the galvanic skin response measures skin resistance and perspiration changes; the cardiosphygmograph measures the blood pressure and pulse rate; and the kimograph moves the chart paper at a steady rate.[8] The polygraph examiner reviews the graphic record of the examinee's responses and offers a professional opinion as to whether the examinee is truthful or deceptive in responses to the relevant questions.[9]

The most commonly accepted rationale for the polygraph posits that an examinee's fear of detection in a lie will trigger involuntary physiological reactions if and when he or she responds untruthfully to an examiner's questions.[10] Consistent with the equipment described above, the physiological responses tested by polygraphs are changes in blood pressure, respiration, and galvanic skin response. The polygraph machine simultaneously and continuously measures and records these physiological reactions on a chart or "polygram."[11] The machine itself cannot detect deception; it only provides a recording of the physiological responses. The examiner—based on experience, ability, and education—infers deception, or no deception. In other words, the examiner's expertise is arguably the most important factor in the polygraph examination.[12]

Conducting a polygraph examination involves four steps: the preliminary investigation; the pretest interview; the test itself; and the posttest interview. The two most important steps are the pretest interview and the actual test.[13] The pretest phase acquaints the subject with the effectiveness of the technique, either allaying the apprehension of the truthful subject, or enhancing the potentially deceptive subject's concern for being discovered in his or her mendacity.[14] Additionally, the examiner can perform his or her own assessment of the subject's suitability for polygraph testing,[15] as well as formulate the test questions.[16]

The Department of Defense (DOD) uses the so-called Control Question Technique (CQT). This technique involves the formulation of ten to twelve questions to elicit "yes" or "no" responses. In a CQT polygraph, examiners ask irrelevant, relevant, and control questions. Irrelevant questions obtain a subject's normal truthful reactions and chart tracings. Relevant questions concern the matter under investigation. Control questions deal with "an act of wrongdoing of the same general nature as the one under investigation."[17]

---

[6] In United States v. Heyward, ACM S28688, 1993 CMR LEXIS 478, (A.F.C.M.R. Oct. 18, 1993), *pet. for review filed*, 39 M.J. 338 (C.M.A. 1994), the Air Force Court of Military Review (AFCMR) was asked to invalidate MRE 707 on constitutional grounds, but declined to do so. *Id.* at 6-7. In *Heyward*, the accused had taken a polygraph exam with allegedly exculpatory results. The results were invalidated, however, by the Department of Defense Polygraph Institute on subsequent review because of an "improper comparison of a test question to a control question." *Id.* at 3. Although offered the opportunity to take another polygraph examination, the defense initially declined. Two days before trial, the defense sought a continuance to secure another polygraph exam, indicating an intention to contest the constitutional validity of MRE 707. The military judge denied the request. Because the accused offered no exculpatory polygraph at trial, the AFCMR found that no record existed on which the constitutional issue could be decided, and that the issue, accordingly, was not ripe for review. *Id.* at 7.

[7] *See, e.g.*, John J. Canham, Jr., *Military Rule of Evidence 707: A Bright-Line Rule That Needs To Be Dimmed*, 140 MIL. L. REV. 65 (1993).

[8] *Rodriguez*, 34 M.J. at 563.

[9] *Id.* at 563-64.

[10] *Id.* at 563. *See also* United States Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Review and Evaluation—A Technical Memorandum, OTA-TM-H-15 (1983), *reprinted in* 12 POLYGRAPH 196, 201 (1983) ("The most commonly accepted theory at present is that, when the person being examined fears detection, that fear produces a measurable physiological reaction when the person responds deceptively. Thus, in this theory, the polygraph instrument is measuring the fear of detection rather than deception per se.") (*quoted in* PAUL C. GIANNELLI & EDWARD I. IMWINKELRIED, 1 SCIENTIFIC EVIDENCE 216 (2d ed. 1993)).

[11] GIANNELLI & IMWINKELRIED, *supra* note 10, at 217.

[12] *Id.* at 217-18. *See also* Canham, *supra* note 7, at 69.

[13] GIANNELLI & IMWINKELRIED, *supra* note 10, at 219.

[14] *Id.*

[15] "The examiner may be alerted to some condition, such as a physical ailment, low intelligence, or the use of medication, that may affect the test results." *Id.* at 219 (citations omitted).

[16] *Id.*

[17] *Id.* at 221 (quoting J. REID & F. INBAU, TRUTH AND DECEPTION 28 (2d ed. 1977)).

The polygraph has its supporters[18] and critics.[19] While a discussion of the various studies exceeds the scope of this article, the DOD has employed polygraphs since 1947 and maintained records as to their accuracy since 1968.[20] In 1984, a DOD report[21] favorably concluded that analysis, investigator and quality control personnel experience, and mock crime laboratory studies gave estimates of the accuracy of the CQT in criminal investigations ranging from eighty to ninety-five percent.[22] Even studies critical of polygraphs may concede that polygraphs may be useful in identifying deceptive subjects.[23] Probably the most accurate comment concerning the reliability of polygraphs was noted in *United States v. Gipson*,[24] where the accused attempted to introduce the results of an exculpatory polygraph examination.[25] The COMA concluded that the military judge had abused his discretion in not allowing Gipson the opportunity to lay a foundation so that his civilian polygrapher could interpret the polygraph charts, opining, "The state of polygraph techniques is such that . . . results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials."[26]

In *Gipson*, the COMA did not hold that polygraphs are per se admissible, but noted that a polygrapher "can [with a proper foundation] opine whether the examinee was being truthful or deceptive in making a particular assertion at the time of the polygraph examination."[27] The panel or the military judge sitting alone determines if the accused is truthful at trial.[28] *Gipson* broke a longstanding position held by the military courts that polygraphs were per se inadmissible in courts-martial.[29]

Military Rule of Evidence 707

The Military Rules of Evidence were amended in 1991 to expressly prohibit the use, in any fashion, of the results of a polygraph examination and the opinions of the polygrapher. Additionally, any reference to the examination must be excluded.[30] The drafters of the new rule believed that court members could be misled by polygraph evidence, or by a mistaken belief in the polygraph's infallibility.[31] The drafters further believed that the members might focus on the validity of the polygraph, and not the guilt or innocence of the accused, thereby wasting judicial time. Finally, the drafters were dis-

---

[18] *See generally* S. ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS 105 (1977).

[19] *See generally* GIANNELLI & IMWINKELRIED, *supra* note 10, at 227-30 (citing authorities).

[20] REID & INBAU, *supra* note 17, at 564.

[21] Dep't of Defense, The Accuracy and Utility of Polygraph Testing, *reprinted in* 13 POLYGRAPH 1, 58 (1984).

[22] *Id.* at 63.

[23] The study concluded that innocent subjects had a greater likelihood of being erroneously identified as deceptive. Waid & Orne, *The Physiological Detection of Deception*, 70 AM. SCIENTIST 402 (1982).

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

[25] The polygrapher was privately hired by the accused. Gipson also had been polygraphed by a Naval Investigation Service (NIS) polygrapher who concluded, unlike the civilian polygrapher, that the accused was deceptive in his responses to the control questions. *Id.* at 247.

[26] *Id.* at 253.

[27] *Id.*

[28] *Id.*

[29] *See* United States v. Ledlow, 29 C.M.R. 475 (C.M.A. 1960).

[30] MCM, *supra* note 1, MIL. R. EVID. 707; *See* Warner, *The New Rule Against Polygraphs*, ARMY LAW., Sept. 1991, at 31.

[31] MCM, *supra* note 1, MIL. R. EVID 707 analysis, app. 22, at A22-46 (C5, Nov. 15, 1991). The analysis states:

> Rule 707 is new and is similar to Cal. Evid. Code 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility." United States v. Alexander, 526 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted." *Id.* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgement of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of the polygraph machine. State v. Grier, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system. See People v. Kelgeru, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment is not intended to accept or reject United States v. Gipson, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination.

satisfied with the polygraph's reliability.[33] The first two policies articulated by the drafters (*i.e.*, concern that such evidence could mislead the members or infect them with a belief of the polygraph's infallibility) effectively presume that members are unable to evaluate and assign a proper weight to polygraph evidence. Moreover, if polygraph evidence is admitted, the members presumptively would be unable to understand and exercise their fact-finding function in a court-martial.

The drafters did not cite any studies validating those assumptions and those assumptions are arguable at best. Some studies addressing the issue of whether juries can follow the evidence and the instructions of the judge suggest that juries can place polygraphs into proper perspective. Professors Kalven and Zeisel, in their book *The American Jury*,[33] dedicate a chapter to the jury's ability to follow the weight and direction of the evidence. The authors used the Chicago Jury Project,[34] a study on jury behavior, to reach the conclusion that the data shows "a stunning refutation of the hypothesis that the jury does not understand" the facts.[35] Other studies formally conclude that jurors are competent to evaluate scientific evidence, particularly the polygraph.[36] At a minimum, these studies suggest that the drafters' first two rationales are open to debate. As Professor Imwinkelried observed, "[i]f we can have faith in a state trial jury, as suggested by the research to date, there is all the more reason to have faith in the court-martial panels that you present scientific evidence to."[37]

The drafters' third rationale—reliability—previously has been discussed.[38] While the issue is controversial, some studies have found the polygraph to be reliable. Indeed, even the California statute to which the drafters of MRE 707 refer,[39] allows introduction of polygraph results to which the parties stipulate.[40]

The Effect of *Daubert v. Merrell Dow Pharmaceutical, Inc.*

In *Daubert v. Merrell Dow Pharmaceutical, Inc.*,[41] the petitioners sued Merrell Dow Pharmaceutical alleging that Bendectin, a drug produced by the respondent, caused birth defects in the petitioners' children. The expert testimony offered by petitioners was not based on their own published epidemiological evidence and data, but on animal studies and chemical structure analysis. Additionally, the petitioners' experts reanalyzed existing studies that had shown no link between the drug and birth defects. This unpublished reanalysis led the experts to conclude that a possible causative link existed. The trial judge applied the *Frye* [42] test to determine the admissibility of the testimony of the petitioners' eight experts. Given the lack of peer review and scrutiny in the sci-

---

[32] *Id.*

[33] H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966) (*cited in* Imwinkelried, *The Standard For Admitting Scientific Evidence: A Critique From The Perspective of Juror Psychology*, 100 MIL. L. REV. 99, 113 (1983)).

[34] Professor Imwinkelried explains that the Project examined the dynamics of juries in criminal trials by submitting questionnaires to 3500 judges of which 555 cooperated. Imwinkelried, *supra* note 33, at 113 n.65.

[35] *Id.* at 113 (quoting KALVEN & ZEISEL, *supra* note 33, at 157). Professor Imwinkelried notes that Professors Kalven and Zeisel also concluded that the jury was able to follow the "direction" of the evidence. *Id.* (citing KALVEN & ZEISEL, *supra* note 33, at 161).

[36] *Id.* at 114. Concerning one such study, *see* Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 26 A.B.A. J. 161 (1982) (a study conducted by Mr. Robert Peters of the Crime Laboratory Bureau, Wisconsin Department of Justice, measuring a polygraph's effect on juries). The study was based on 11 jury trials in which polygraph evidence was admitted by stipulation of the parties. Professor Imwinkelried quotes the conclusion that "The actual trial results clearly support the belief that juries are capable of weighing and evaluating the evidence and rendering verdicts that may be inconsistent with the polygraph evidence. . . . Polygraph evidence does not assume undue influence in the evidentiary scheme." *Id.* at 165. Similarly, in a Canadian experimental study using mock juries, the results showed that 61% of the mock jurors found polygraphs less persuasive than other scientific evidence. The mock jury spent little or no time discussing the polygraph evidence. Imwinkelried, *supra* note 33, at 115 (citing Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 J. POL. SCI. & ADMIN. 324 (1979)).

[37] Imwinkelried, *supra* note 33, at 117.

[38] *See supra* notes 18-29 and accompanying text.

[39] *See supra* note 31 (citing CAL. EVID. CODE § 351.1 (West Supp. 1988)).

[40] CAL. EVID. CODE § 351.1 provides in part:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing for a criminal offense, whether heard in juvenile or adult court, *unless all parties stipulate to the admission of such results.*

(emphasis added).

[41] 113 S. Ct. 2786 (1993).

[42] Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923).

entific community, the judge found the plaintiffs' proffered testimony to be outside the realm of general acceptance, and therefore, inadmissible.[43]

The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed.[44] The court observed that the petitioners' scientific evidence had not been published or critically analyzed by colleagues in their field. Instead, the scientific evidence was "generated solely for the use in litigation"[45] and, therefore, lacked the requisite foundation needed to be generally accepted as reliable in the scientific community. On appeal, the United States Supreme Court vacated the Ninth Circuit's judgment.[46] The Court held that the Federal Rules of Evidence, not the *Frye* test, control the admission of scientific evidence.[47] Writing for the Court, Justice Blackmun noted concern with the wholesale exclusion of scientific evidence under an "austere" general acceptance test. The Court observed that Federal Rule of Evidence 702[48] spoke to the contested issue, and that the rule contained no prerequisite of general acceptance as a prerequisite to admissibility.[49]

Faced with a proffer of scientific evidence, a trial judge must make a preliminary assessment of whether "the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[50] The Court did not set a definitive, bright-line test. Instead, it offered guidance to the trial judge in applying the Federal Rules of Evidence.[51] First, trial judges should determine whether the scientific technique has been tested by isolating empirical testing results, if any, because the "hallmark of science is empirical testing."[52] Second, "peer review and publication" research may reveal errors in the methodology applied.[53] Third, the scientific technique's "known or potential rate of error" also is a factor for consideration.[54] Fourth, "the existence and maintenance of standards controlling the techniques' operation" is another factor.[55] Finally, the trial judge should look to whether "general acceptance" can still be part of the admissibility equation. The Court noted that a "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and express determination of a particular degree of acceptance within that community."[56]

Application to the Polygraph

The results of an impartial and properly conducted polygraph examination arguably may satisfy the Court's suggested areas of inquiry. The first area—whether or not the scientific method can be or has been tested—is easily met for polygraph evidence. The military has tested the polygraph extensively and the tests have been well documented.[57] The Court's second area of suggested inquiry is peer review and publication and polygraph evidence likewise satisfies this scrutiny.[58] The extensive public debate associated with polygraphs provides

---

[43] *Daubert*, 113 S. Ct. at 2792.

[44] 951 F.2d 1128 (9th Cir. 1991).

[45] *Id.* at 1131.

[46] *Daubert*, 113 S. Ct. at 2799.

[47] *Id.* at 2793.

[48] Federal Rule of Evidence 702 is identical to MCM, *supra* note 1, MIL. R. EVID. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[49] *Daubert*, 113 S. Ct. at 2794.

[50] *Id.* at 2796.

[51] In her concurring opinion in *Rodriguez*, Judge Crawford reiterated some of the factors recognized by the Supreme Court to be applied by trial judges in discharging their "gatekeeping" duties. *See* United States v. Rodriguez, 37 M.J. 448, 453-55 (C.M.A. 1993) (Crawford, J., concurring).

[52] *Id.* at 455 (citing *Daubert*, 113 S. Ct. at 2796).

[53] The rationale is that sometimes these reviews detect an error in methodology. *Rodriguez*, 37 M.J. at 455. The fact of publication, or the lack thereof, is a relevant, but not dispositive consideration. *Daubert*, 113 S. Ct. at 2797.

[54] *Daubert*, 113 S. Ct. at 2797.

[55] *Id.*

[56] *Id.* (citation omitted).

[57] *See supra* notes 18-29 and accompanying text.

[58] As the Supreme Court observed, "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 113 S. Ct. at 2797 (citation omitted).

ample evidence of scholarly debate concerning the reliability of polygraphs. The third consideration, quantification of the potential rate of error, also arguably is met. Polygraphs are not perfect "lie detectors" as has been noted in studies, however, to some extent, their accuracy has been verified. A "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[59]

Recent Military Cases: *United States v. Rodriguez*

Rodriguez, a senior noncommissioned officer serving in Panama, submitted to a urinalysis test that revealed the presence of cocaine metabolites. He was charged with wrongful use of cocaine. Before preferral of the charge, and on advice of defense counsel, Rodriguez requested and submitted to a polygraph examination. During the "preinstrument phase," he denied cocaine use and raised the defense of innocent ingestion.[60] The polygraph examiner concluded that Rodriguez was "practicing deception while answering the relevant questions."[61] Pursuant to an agreement between the defense counsel and the polygraph examiner, no "postinstrument phase" interview was conducted. That same day, the wrongful use charge was preferred. The trial counsel moved, *in limine*, to admit the polygraph results in the event that Rodriguez took the stand and denied cocaine use.

To lay a foundation in support of the motion, the polygraph examiner testified on the theory supporting the polygraph, and the procedure that he employed in administering the test.[62] The defense counsel did not challenge the polygraph examiner's qualifications, but objected to the admission of the evidence on several different grounds. First, the defense claimed that the polygraph evidence was not relevant, because the polygraph examiner could not narrow his conclusion of "deception" to questions relating to wrongful use, as opposed to simply being a broad conclusion of deception.[63] Second, the defense argued that the evidence was not helpful to the trier of fact.[64] Third, the defense contended that the evidence would confuse or mislead the members, and would pose risks of unfair prejudice which far outweighed its probative value.[65] Finally, the defense argued that the government had not established, by scientific proof, the reliability of polygraph evidence; therefore, in any event, the evidence was not valid.[66] The military judge ruled that the polygraph evidence could be admitted in rebuttal, provided Rodriguez took the stand and denied cocaine use.[67] The military judge stated:

> I am convinced of the soundness and reliability of the process and techniques used in forming the polygrapher's opinion in this case. I do not think that the evidence will overwhelm or confuse or mislead the jury, and I believe that if presented it will help them to determine the credibility of the accused under the circumstances.[68]

After the government rested, the defense counsel unsuccessfully renewed the objection to the polygraph evidence. Rodriguez testified and denied ever knowingly using cocaine. He admitted to having taken the polygraph examination, and acknowledged having been informed that the test results had indicated deception.[69] Subsequently, defense counsel again

---

[59] *Id.* at 2798 (citation omitted).

[60] United States v. Rodriguez, 37 M.J. 448, 450 (C.M.A. 1993).

[61] *Id.* at 449. The "relevant questions" to which the accused made negative responses were as follows:

> Did you knowingly possess cocaine within 30 days of the urinalysis?
>
> Did you knowingly use cocaine within 30 days of that urinalysis?
>
> Are you lying about receiving advance knowledge of that urinalysis?
>
> Did you knowingly ingest cocaine in any manner within 30 days of that urinalysis?

Id. at 450.

[62] The COMA opinion only briefly discusses the foundational inquiry conducted by the trial counsel. The ACMR's opinion sets forth the step-by-step procedure employed by the polygraph examiner in greater detail. *See* United States v. Rodriguez, 34 M.J. 562, 563-64 (A.C.M.R. 1991).

[63] *Rodriguez*, 37 M.J. at 450.

[64] *Id. See generally* MCM, *supra* note 1, MIL. R. EVID. 702.

[65] *Rodriguez*, 37 M.J. at 450.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 450-51.

[69] *Id.* at 451.

moved to exclude the polygraph examiner's testimony on the ground that the prospective rebuttal evidence would be "overkill" in view of Rodriguez's admission to taking the polygraph exam and its results.[70] The military judge upheld his earlier ruling and permitted introduction of the polygraph examiner's testimony during rebuttal. The polygraph examiner subsequently testified that Rodriguez had been "practicing deception while answering the relevant questions," and that, in his opinion, Rodriguez "was not being truthful" when he denied cocaine use during the polygraph test.[71]

The COMA recognized that MRE 707(a) did not apply to this case because Rodriguez had been tried prior to the effective date of the new rule.[72] Accordingly, in reviewing the admission of the polygraph evidence against Rodriguez, the COMA applied the evidentiary principles set forth in *United States v. Gipson*.[73] The court observed that, "in any given case in which polygraph evidence is offered, the benchmarks against which admissibility must be determined are MRE 401, 402, 403, and 702."[74] The COMA previously had noted that taken together, "the[se] rules seem to describe a comprehensive scheme for processing expert testimony."[75]

In *Rodriguez*,[76] the COMA found that the trial counsel had failed to establish the necessary foundation of reliability inherent in satisfying these rules of evidence.[77] The foundation was deficient in several respects. First, the actual polygraph examination did not "permit the examiner's conclusion of the deception to focus and differentiate between questions relating to criminal conduct (*i.e.*, possession and knowing use of cocaine) and innocent conduct (*i.e.*, learning in advance of the impending urinalysis)."[78] Second, the polygraph examiner conducted no "postinstrument" interview. This omission was important, according to the court, because the postinstrument interview was a "normally required" examination procedure and because it would have been helpful to differentiate the basis of Rodriguez's deception on the relevant examination questions.[79] Finally, the polygraph report erroneously reflected that one of Rodriguez's responses to a critical control question was erroneously recorded, "a fact that d[id] nothing to prop up the reliability of this polygraph examination."[80]

Based on the lack of proper foundation and the test's perceived unreliability, the COMA determined that it could not be satisfied that the error of admitting the questioned evidence was harmless. The COMA observed, "Appellant forthrightly put his lengthy good service and his explicit denial of ever having used cocaine up against the prosecution's case, which consisted of nothing more than the urinalysis results plus expert interpretation. That would seem, under normal circumstances, to be an interesting contest for the factfinders to resolve."[81] Instead, the COMA found that the introduction of the polygraph evidence had "devastated" a critical part of the accused's case (*i.e.*, the credibility of his denials).[82]

Although *Rodriguez* was not based on MRE 707(a), the opinion illuminated some of the views of two COMA judges concerning the rule. In a footnote, the majority opinion observed that

> In Judge Wiss' view, to the extent that, consistent with *Gipson*, . . . an accused is able to carry his foundation burden of demonstrating relevance, reliability, helpfulness to

[70] *Id.*

[71] *Id.* The military judge instructed the court members that the polygraph evidence was introduced to assist them in evaluating the accused's in-court testimony, and for whatever tendency it might have to rebut the accused's testimony that he never knowingly ingested cocaine. He instructed that the weight to be given to this testimony was solely within the discretion of the members. *Id.* The COMA concluded that the military judge's instructions, as a whole, appeared to delineate the proper use of the evidence. *Id.* at 452.

[72] Executive Order No. 12,767, which amended the MCM, promulgated MRE 707 with an effective date of 6 July 1991. The *Rodriguez* case was arraigned on 2 December 1989. United States v. Rodriguez, 34 M.J. 562, 563 n.1. (A.C.M.R. 1991); *see also Rodriguez*, 37 M.J. at 451 n.2.

[73] 24 M.J. 246 (C.M.A. 1987).

[74] *Rodriguez*, 37 M.J. at 452 (quoting *Gipson*, 24 M.J. at 251).

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

[76] Judge Wiss wrote for the majority. Judge Crawford authored a concurring opinion.

[77] *Rodriguez*, 37 M.J. at 452.

[78] *Id.*

[79] The COMA stated that in the absence of such a "normally required" procedure, the proffering party must demonstrate that such an omission does not undermine the reliability of the polygraph examination. *Id.* at 453. This view may give defense practitioners a decided advantage, inasmuch as defense counsel may advise their clients to refuse the postinstrument interview whenever the client is told that deception is indicated. In that event, even if the government could overcome the language of MRE 707(a) in offering the test results, the government would have to explain why a "required" interview actually is not required.

[80] *Id.*

[81] *Id.*

[82] *Id.*

> the factfinder, and relatively minor risk of confusion of the factfinder, due process and fundamental fairness might seem to compel admission of exculpatory polygraph evidence, notwithstanding this rule. . . . These same concerns, of course, do not weigh as heavily in favor of the prosecution. . . . Ironically, then, it seems to him that Mil. R. Evid. 707(a) might be a rule of evidentiary exclusion that applies only to the Government.[83]

In her concurring opinion, however, Judge Crawford directly challenged the position of Judge Wiss. In her view, neither "the Constitution nor the Code requires admissibility of polygraph evidence," because the court's prior decisions implicitly have recognized that no right to introduce the results of polygraph examinations—based on either the Fifth Amendment Due Process Clause, or Article 4 of the Uniform Code of Military Justice (UCMJ)—exists.[84] Judge Crawford noted that *Daubert* could support a military judge's ruling to exclude polygraph evidence, independently of MRE 707(a).[85] Judge Crawford observed that, "a military judge applying the rationale of *Daubert* could properly exercise discretion to exclude the results of a polygraph examination. This would hold true whether the results were inculpatory or exculpatory, or whether they were sought to be introduced by the Government or by the accused."[86]

Because the COMA decided *Rodriguez* before MRE 707 took effect, at first blush it appears that the case has limited precedential value. However, while the COMA based its decision on the evidentiary foundation for the polygraph evidence, the opinion also provided military litigators and jurists with a glimpse of the viewpoints of at least two of the court's judges with respect to the possible future use of polygraph evidence at courts-martial. The ACMR noted these separate views in *Williams*.

The Case of *United States v. Williams*

In *Williams*, the accused was a Chaplain's Fund Clerk in charge of collecting and disbursing funds for the chaplaincy in V Corps.[87] During the six-month period from August 1991 until February 1992, eighteen unauthorized disbursements were made from the fund account. The accused admitted to making three of the unauthorized disbursements, but denied the remainder.[88] In July 1992, the accused consented to a polygraph test administered by the CID. The test focused on whether the accused stole from the chaplains' fund between August and November of 1991. The polygraph examiner concluded that no deception was indicated in the accused's denials, but after reviewing the polygraph charts, CID's quality control center in Maryland opined that the results were inconclusive.[89] The same examiner retested the accused in August 1992 and conducted a more detailed pretest interview. Once again, the examiner opined that the accused did not indicate deception when he denied stealing from the chaplains' fund between August and November of 1991.[90] This time, the examiner sent the charts to his immediate supervisor in Heidelberg for review. The supervisor agreed with the findings of the polygraph examiner and forwarded the charts to quality control in Maryland.[91] The quality control review agreed that the test indicated no deception, and concluded that the findings of the two examiners were "strong."[92]

At trial, the accused filed a motion seeking permission to lay a foundation for the admission of the two exculpatory polygraphs. The military judge ruled that MRE 707 was a proper exercise of the President's rulemaking authority under

---

[83] *Id.* at 452 n.2.

[84] *Id.* at 455. Judge Crawford noted "Mil. R. Evid. 707(a) does not prohibit use of the results of polygraph examinations at the pretrial or post-trial stage of a criminal proceeding." *Id.* at 454. She recognized, for example, that an accused may stipulate to take a polygraph, with a proviso that the convening authority will dismiss the charges if no deception is indicated by the test. "These sort of agreements allow the parties to resolve the objections to the polygraph evidence among themselves and alleviates the concern that there will be a battle of experts at trial." *Id.* Judge Crawford's concurring opinion also focused on the practical difficulties facing commanders who might have to ensure access to polygraph examinations for accused service members in the event that they were deemed to have the right to compel the test. Judge Crawford opined that commands stationed around the world, especially those with administrative limitations, would bear an extremely heavy burden in meeting accuseds' demands for polygraph examinations. She noted that on consideration of the number of investigations, administrative actions, and nonjudicial punishments occurring in all of the services during any particular time, "the burden imposed by a right to present polygraph evidence immediately becomes apparent." *Id.*

[85] *Id.* at 455 (J. Crawford, concurring) (citing Daubert v. Merrell Dow Pharmaceutical, Inc., 113 S. Ct. 2786, 2797 (1993)). In *Daubert*, the Supreme Court noted that all trial judges exercise "gatekeeper responsibilities" with respect to the admission of scientific evidence in their courtrooms. The Supreme Court indicated that the "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability" of the evidence presented.

[86] *Id.* at 454.

[87] United States v. Williams, 39 M.J. 555, 556 (A.C.M.R. 1994).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 556-57.

[91] *Id.* at 557.

[92] *Id.*

UCMJ Article 36, and that the rule did not violate the Fifth or Sixth Amendments of the United States Constitution.[93] In the language of the ACMR decision, the military judge's ruling "impacted greatly" on the accused's decision not to testify.[94]

The ACMR correctly observed that MRE 707(a) was a break with prior military precedent. In *Gipson*, notably, the COMA found polygraph evidence to be in a middle category in the hierarchy of scientific evidence, neither judicially noticeable nor junk science.[95] The COMA refused to hold such evidence per se inadmissible, and reasoned that trial judges would have to determine, on the facts before them, whether to admit polygraph evidence.[96] Like *Rodriguez*, the ACMR's opinion emphasized that the Military Rules of Evidence provide a comprehensive analytical approach to scientific evidence very similar to the one outlined in *Daubert*. That scheme involves a considerable exercise of judgment on the part of the military judge, an allocation of responsibility seemingly inconsistent with the categorical rule of exclusion in MRE 707(a). Indeed, the "key issue" for the ACMR in *Williams* was "whether a rule which forecloses discretion and compels exclusion of polygraph evidence is constitutionally permissible."[97] The ACMR concluded in *Williams* that the Constitution did not permit such a rule.

The ACMR's analysis was cursory, but significant. The opinion first made brief reference to a trilogy of Supreme Court cases in which the Court found certain exclusionary evidentiary rules violative of due process, or violative of the accused's right to present favorable evidence at trial. In *Washington v. Texas*,[98] the Supreme Court held that the Sixth Amendment affords an accused the right to obtain witnesses and to have them testify notwithstanding a contrary state statute concerning the competence of codefendants.[99] In *Chambers v. Mississippi*,[100] the Supreme Court recognized that a state hearsay rule that compromised the right to call witnesses on one's own behalf violated constitutional due process.[101] In *Rock v. Arkansas*,[102] the Supreme Court held that the state's legitimate interest in barring unreliable evidence did not extend to per se exclusions of evidence that might be reliable in a given case.[103] Beyond a general recitation of the holdings of those cases, however, the ACMR did not discuss their application to the particular facts of the case.[104]

The ACMR also rejected, without extensive analysis, the four policy considerations that constitute the articulated rationale for the per se exclusion of polygraph evidence advanced by the drafters of MRE 707(a). The ACMR observed that military judges routinely resolve three of the considerations in applying MRE 403: whether court members would be misled by polygraph evidence; possible confusion of the issues; and the possibility of a substantial waste of the trial court's time.[105] The fourth consideration, the inherent unreliability of polygraph evidence, was described by the court as "disingenuous" in its worst light, or "at its best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations."[106]

The crux of the ACMR's holding was that as a result of the application of MRE 707, the exculpatory results of two polygraph examinations were not analyzed to determine their relevance or helpfulness. The operation of MRE 707 removed that "critical step in the evidentiary process" from judicial discretion.[107] The ACMR held that in this case, the accused's Fifth Amendment right to a fair trial, combined with his Sixth

---

[93] *Id.* The accused filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and a Motion for a Stay of Proceedings Pendente Lite with the ACMR, and a Writ Appeal Petition with the COMA, all of which were denied without prejudice to the accused's right to assert the same error in the normal course of appellate review. *Id.* at 556 n.2.

[94] *Id.* at 557.

[95] United States v. Gipson, 24 M.J. 246, 249 (C.M.A. 1987).

[96] *Id.* at 253.

[97] *Williams*, 39 M.J. at 558.

[98] 388 U.S. 14 (1967).

[99] *Williams*, 39 M.J. at 558.

[100] 410 U.S. 284 (1973).

[101] *Williams*, 39 M.J. at 558.

[102] 483 U.S. 44 (1987).

[103] *Williams*, 39 M.J. at 558 (citing *Rock*, 483 U.S. at 61).

[104] For a more detailed discussion of the application of these cases in the context of an exculpatory polygraph, *see* Canham, *supra* note 7, at 76-80.

[105] *Williams*, 39 M.J. at 558.

[106] *Id.*

[107] *Id.*

Amendment right to produce favorable witnesses "affords him the opportunity to be heard on these foundational matters, and allows for the possibility of admitting polygraph evidence, *notwithstanding the explicit prohibition of Mil. R. Evid. 707.*"[108]

The Right to Present a Defense

In *Rosen v. United States,*[109] the Supreme Court recognized an accused's Sixth Amendment right to present a defense. The Court rejected the notion that Rosen's codefendant was incompetent to testify on Rosen's behalf. The Court concluded, "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving the credit and weight of such testimony to be determined by the jury."[110] In *Rock v. Arkansas,*[111] using *Rosen* as a cornerstone, the Court held that "the Sixth Amendment was designed in part 'to make the testimony of a defendant's witnesses admissible on his behalf in court.'"[112] The *Rock* decision is likely the most persuasive authority for rejecting MRE 707 on constitutional grounds. For that reason, a brief review is appropriate.

The state of Arkansas had charged Vickie L. Rock with manslaughter in the shooting death of her husband.[113] Because she could not remember the exact details surrounding the death, Rock went to a licensed neuropsychologist to be hypnotized in an attempt to refresh her memory. After hypnosis, the accused remembered that her finger was not on the trigger of the handgun in question when it discharged. Instead, the gun discharged because the accused's husband grabbed her arm during a fight. An examination of the gun "revealed that the gun was defective and prone to fire, when hit or dropped, without the trigger being pulled."[114] The trial court limited Rock's testimony, however, to matters remembered prior to her hypnotic session because of an Arkansas per se rule of evidence excluding an accused's hypnotically refreshed testimony.[115] Rock was convicted of manslaughter. On appeal, Rock challenged the constitutionality of the per se rule on grounds that it interfered with her right to present a defense. On appeal, the Arkansas Supreme Court held that the rule did not interfere with her Sixth Amendment right to present a defense.[116] The Arkansas Supreme Court concluded that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have. . . ."[117]

The Supreme Court disagreed and reversed, observing that Arkansas's per se rule excluding all posthypnotic testimony infringed impermissibly on Rock's right to present a defense by testifying on her own behalf.[118] The Court was alarmed that Arkansas's rule did not even allow "a trial court to consider whether posthypnosis testimony may be admissible in a particular case."[119] Similar to the rationale presented by the drafters of MRE 707, Arkansas's principle rationale for the per se exclusionary rule was the unreliability of the posthypnotic evidence. The Supreme Court noted, however, that the state had failed to justify the exclusion of all hypnotically refreshed testimony:

> A state's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction of a defendant's right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections.[120]

Gipson similarly recognized that a soldier has an independent, distinct constitutional right to present relevant exculpatory evidence.[121] The COMA premised its remarks on

---

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

[109] 245 U.S. 467 (1918).

[110] *Id.* at 471.

[111] 483 U.S. 44 (1987).

[112] *Id.* at 54 (quoting Washington v. Texas, 388 U.S. 14, 22 (1967)).

[113] *Id.* at 45.

[114] *Id.* at 47.

[115] *Id.* at 49-50.

[116] Rock v. Arkansas, 708 S.W.2d 78 (Ark. 1986).

[117] *Id.* at 81.

[118] *Rock,* 483 U.S. at 62.

[119] *Id.* at 56.

[120] *Id.* at 61.

[121] United States v. Gipson, 24 M.J. 246, 252 (C.M.A. 1987). The COMA observed that "[t]here can be no right to present evidence—however much it purports to exonerate the accused—unless it is shown to be relevant and helpful. When evidence meets these criteria, no additional justification for admissibility is necessary." The COMA also noted, however, that in "marginal cases" due process considerations "might make the road a tad wider on the defense's side than on the Government's." *Id.*

Chambers v. Mississippi[122] and *Washington v. Texas*.[123] In *Chambers*, an individual (Gable McDonald) had made sworn and unsworn statements confessing to the murder for which Chambers was being tried. The state did not call McDonald so Chambers called him as a defense witness. Under Mississippi's "voucher" rule, the defense was not allowed to impeach McDonald because he was technically a defense witness. Chambers also attempted to introduce the testimony of three witnesses to whom McDonald confessed, but the trial court disallowed their testimony on hearsay grounds. The Supreme Court held that as a result of the mechanistic application of evidentiary rules,[124] Chambers was denied a fair trial in violation of due process.[125] Writing for the Court, Justice Powell opined that "[i]n large part, [Chambers] was thwarted in his attempt to present [a] portion of his defense by the strict application of certain Mississippi rules of evidence."[126] Due process in a criminal case was the "right to a fair opportunity to defend against the State's accusations."[127] Mississippi had not provided that right to Chambers.

In *Washington v. Texas*, the defendant was found guilty of murder. Washington's defense was that he had tried to prevent Charles Fuller from shooting the deceased. Washington called Fuller as a witness, but the state prevented him from testifying on Washington's behalf. A state statute prevented persons charged as principles, accomplices, or accessories in the same crime from testifying on behalf of one another. One rationale behind the Texas law was to prevent codefendants from committing perjury. The Court dismissed this rationale as an "absurdity."[128] Chief Justice Warren, writing for the Court, concluded that the state had violated Washington's Sixth Amendment rights,[129] because compulsory process for obtaining witnesses in the accused's favor was "so fundamental" that it could be considered incorporated in the Due Process Clause of the Fourteenth Amendment.

Conclusion

Arguably, MRE 707 may deny a soldier the opportunity to present a defense and thus invade a constitutionally protected right. As the *Williams* court noted, MRE 707 does not even allow a military judge to probe into whether polygraph evidence is relevant and helpful.[130] If a soldier's defense includes polygraph evidence, then MRE 707 forecloses his attempts to lay an adequate foundation to demonstrate the relevance and helpfulness of that evidence in an effort to defend himself or herself. As *Williams* held, that result may be unconstitutional. Moreover, based on the reported cases, the rule is unnecessary.[131]

Based on the pending review of cases like *Williams*, the COMA will address and determine the constitutionality of MRE 707(a). With *Rodriguez*, we have had a glimpse of how two of the court's five judges may deal with that issue. Until resolved, however, courts-martial practitioners should be ready to litigate this issue. Preparation for that task requires familiarity with the pertinent Military Rules of Evidence and *Gipson*.

The evidentiary scheme envisioned by the Military Rules of Evidence is straightforward.[132] Military Rule of Evidence 401 provides that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This easily satisfied standard also is known as *logical* relevance.[133] Military Rule of Evidence 402[134] provides that all relevant evidence is admissible, except as otherwise provided by the Constitution, the UCMJ, the Military Rules of Evidence, the MCM, or any other act of Congress applicable to members of the armed

---

[122] 410 U.S. 284 (1973).

[123] 388 U.S. 14 (1967).

[124] *Chambers*, 410 U.S. at 302.

[125] *Id.* at 313.

[126] *Id.* at 289.

[127] *Id.* at 294.

[128] Washington v. Texas, 388 U.S. 14, 22 (1967).

[129] *Id.* at 23.

[130] *See supra* note 96 and accompanying text.

[131] While no reported (and affirmed) decision admitting polygraph evidence exists, a number of reported cases involve the failure of the proponent of polygraph evidence to establish the necessary foundation for admission of polygraph evidence. *See, e.g.*, United States v. Rodriguez, 37 M.J. 448 (C.M.A. 1993); United States v. McKinnie, 29 M.J. 825 (A.C.M.R. 1989), *aff'd*, 32 M.J. 141 (C.M.A. 1991); United States v. West, 27 M.J. 223 (C.M.A. 1988).

[132] MCM, *supra* note 1, MIL. R. EVID. 401.

[133] The COMA noted that for any evidence to have logical relevance, some degree of reliability is implicit. United States v. Gipson, 24 M.J. 246, 251 (C.M.A. 1987) (citation omitted).

[134] MCM, *supra* note 1, MIL. R. EVID. 402.

forces. The rule also provides that evidence that is irrelevant is inadmissible.[135]

Although evidence may be relevant within the meaning of MRE 401, it may be excluded under MRE 403[136] where the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." *Legal* relevance has been defined as "[t]he sum of Mil. R. Evid. 401-03."[137] Finally, in the case of expert testimony, which includes polygraph evidence, MRE 702[138] provides a further limitation in the form of a "helpfulness standard." That rule implies a measure of reliability beyond that required to meet a standard of simple logical relevance.[139]

These rules, when read together, can assure that only relevant, reliable evidence reaches the factfinder. In *Gipson*, the COMA reiterated that once the military judge determines that the polygraph evidence withstands scrutiny under the evidentiary scheme envisioned by the rules, the use of the polygraph evidence has well-defined limits:

> First and foremost, while polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character. At best, the expert can opine whether the examinee was being truthful or deceptive in making a particular assertion *at the time of the polygraph exam.* It is then for the fact-finder to decide whether to draw an inference regarding the truthfulness of the examinee's *trial* testimony.[140]

Thus, the use to which polygraph test results may be put at trial is strictly circumscribed. Practitioners can look to *Rodriguez* for an example of an acceptable limiting instruction from the military judge.[141]

The constitutional considerations on which *Williams* is based do not apply to the government. Consequently, in footnote 2 of *Rodriguez*, and in the text of *Williams*,[142] the ACMR suggested that MRE 707(a) may pass constitutional muster only to the extent that it excludes polygraph evidence offered *by the government.*[143] This presents defense practitioners with a possible "window of opportunity." The constitutional argument against the per se exclusion of polygraph results is strong for the defense, whereas the language of MRE 707(a) and the few interpreting cases overtly bind the government. Until the COMA resolves this issue, defense counsel would be remiss not to consider polygraph testing for their clients.

The decision to submit to a CID polygraph is fraught with tactical considerations that defense counsel must address and resolve on a case-by-case basis. If the defense elects to submit to a polygraph examination, the purported reliability of the test results is enhanced where the test is not conducted ex parte.[144] Using a CID polygrapher, as was done in *Williams*, obviates this concern. Under any analysis, practitioners must satisfy the foundational evidentiary requirements previously discussed. Additionally, the conduct of the polygraph examination must be above reproach. The relevant inquiries must be carefully prepared to avoid the ambiguities of interpretation discussed in *Rodriguez* and *Heyward*, a "postinterview" session should be part of the procedure, and the examiner's conclusions should be subject to quality control review. Furthermore, defense counsel should be present during the entire polygraph examination.[145] By following those guidelines, defense counsel can preserve for review an issue of considerable interest and, for the moment, favorable possibility for their clients.

---

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

[136] MCM, *supra* note 1, MIL. R. EVID. 403.

[137] *Gipson*, 24 M.J. at 251 (citation omitted).

[138] *See supra* note 48.

[139] *Gipson*, 24 M.J. at 251 (citing United States v. Downing, 753 F.2d 1224, 1235 (3d Cir. 1985)).

[140] United States v. Rodriguez, 37 M.J. 448, 452 (C.M.A. 1993) (citing *Gipson*, 24 M.J. at 252-53) (footnote omitted).

[141] *See id.* at 451.

[142] United States v. Williams, 39 M.J. 55, 558 (A.C.M.R. 1994). The ACMR stated, "A footnote in the Rodriguez majority opinion suggested that Mil. R. Evid. 707 may ironically survive constitutional scrutiny only to the extent that it excludes polygraph evidence offered by the prosecution, but not the defense. If this is the result, so be it."

[143] There is no evident reason, beyond the language of MRE 707(a), why the government should be barred from admitting relevant and reliable polygraph evidence where the defense enjoys that right. Although not discussed by the court in any detail in *Rodriguez* or *Williams*, the evidentiary scheme described in *Gipson*, and envisioned by the Military Rules of Evidence, involves a determination both of logical and legal relevance, without reference to the proponent.

[144] The theory of the polygraph is predicated on the supposition that fear of detection will affect the responses. If the results can be discarded on a showing that the accused was untruthful, he or she has little to fear. *Gipson*, 24 M.J. at 249 (citation omitted).

[145] The defense counsel should be accompanied by a legal specialist or a noncommissioned officer who would be able to testify, if needed, as to any irregularities in the examination.

The Role of the Judge Advocate Under the New *Field Manual 100-5, Operations*

Lieutenant Colonel Robert L. Swann
Staff Judge Advocate, 2D Infantry Division
Camp Red Cloud, Republic of Korea

Major David Van Brunt Price
Action Officer, Office of the Staff Judge Advocate
Headquarters, United States Central Command
MacDill Air Force Base, Florida

Major Ann Castiglione-Cataldo
Assistant District Counsel
United States Army Corps of Engineers, Mobile, Alabama

Introduction

The Army's doctrine lies at the heart of its professional competence. Doctrine is the authoritative guide to how Army forces fight wars and conduct operations other than war. As the Army's keystone doctrine, *Field Manual (FM) 100-5* describes how the Army contemplates the conduct of operations. *Field Manual 100-5* undergirds all of the Army's doctrine, organization, training, materiel, leader development and soldier concerns.[1]

In June 1993, the Army published a revised *FM 100-5, Operations*. The 1993 manual recognizes that with the breakup of the former Soviet Union, the nature of the threat and, consequently, the strategy of the United States, has changed. Our former national strategy of containment, Soviet orientation, forward defense, and forward deployment has been replaced with one of active engagement, regional orientation, coalition building, and force generation through forward presence, power projection and retaining the national capacity to reconstitute forces. As Army Chief of Staff General Gordon Sullivan has stated, the new *FM 100-5* "is a singularly important event in the development of the twenty-first century Army because we have endorsed and codified an updated view of how we will fight and win our Nation's wars."[2] *Field Manual 100-5*'s message is one of "continuity, change and growth."[3]

For a variety of reasons, every judge advocate needs to understand *FM 100-5*. Because judge advocates are responsible for supporting their commanders on the battlefield,[4] they can best serve their clients when they know their clients' business. Accordingly, this article will familiarize the reader with each chapter of *FM 100-5*, how the Army views mission accomplishment, and potential future challenges facing judge advocates.

Challenges for the United States Army

The first chapter of *FM 100-5* stresses the Army's central focus of winning in land combat. Recent revisions in national security and military strategies, however, have required considerations of how to employ military forces in operations other than war. Chapter One also describes the role of doctrine, the levels of war, and the role of the strategic environment in meeting these challenges.[5]

Doctrine is an authoritative statement of how the Army will meet operational requirements of the future. The Army's doctrine reaches back to Baron von Steuben's *1779 Regulations for the Order and Discipline of the Troops*. Over the years, the Army's doctrine has been refined and replaced to adapt to requirements of the new strategic environment. Many judge advocates are familiar with the Army's 1982 doctrine—Air-Land Battle—and the controversy over whether Operation Desert Shield/Desert Storm validated that doctrine. Given the

---

[1] DEP'T OF ARMY, FIELD MANUAL, 100-5 OPERATIONS, v (14 June 1993) [hereinafter FM 100-5].

[2] General Gordon R. Sullivan, CSA, Speech at the Boston World Affairs Council, "Moving America's Army into the 21st Century" (Apr. 26, 1993).

[3] General Gordon R. Sullivan, CSA, Address at the Pentagon ceremonies celebrating the 218th birthday of the Army (June 14, 1993) (unveiling the newest edition of *FM 100-5*).

[4] DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS, para. 1-4 (3 Sept. 1991) [hereinafter FM 27-100] states, "The Judge Advocate General's Corps primary mission in a theater of operations is to support the commander on the battlefield by providing professional legal services as far forward as possible at all echelons of command throughout the operational continuum." *Id.*

[5] Concepts, Doctrine, Development, Division Doctrine Team, unclassified briefing slides, *FM 100-5, Operations, Impact on the Future* (Spring 1993) [hereinafter *100-5 Briefing*].

victories in Panama and the Persian Gulf, one might question why the Army should change its doctrine if it was so successful. The answer is two-fold: (1) good armies learn from victory as well as defeat;[6] and (2) the times have changed.

The new doctrine guides the Army through post-Cold War challenges including joint and combined operations, counter narcotics operations, disaster relief, regional conflicts, civil war, and other likely modern scenarios. Understanding Army doctrine requires an appreciation of the levels of war: tactical, operational, and strategic.[7] These levels of war also apply to operations other than war. The tactical level addresses battle and engagements, while the operational level focuses on the conduct of campaigns and major operations. The strategic level addresses world-wide and long-range perspectives and national concerns, or in some cases, coalition objectives.

The National Command Authority (NCA) is the strategic decision maker. Strategic decision making concentrates on national and multinational objectives. Commanders-in-Chief (CINCs) of the unified and combined commands are the key players at the operational level where tactical actions are designed to carry out strategic objectives. Battlefield commanders are the tactical level decision makers. They execute the operations.

Judge advocates will assume increased responsibilities at all three levels of war. Interpreting the law of war and domestic laws will become paramount in providing effective guidance for the volatile challenges facing the post-Cold War Army.[8]

Fundamentals of Army Operations

Chapter Two describes the fundamental characteristics of all Army operations. This chapter deals with joint, combined, and interagency operations. Success in these operations will be based on the tenets of all Army operations: initiative,[9] depth,[10] agility,[11] synchronization,[12] and versatility.[13]

Chapter Two also introduces the concept of "Operations Other Than War" (OOTW). Gone are the terms high, medium, and low intensity of conflict and AirLand Battle. The term OOTW spans actions from disaster relief, nations assistance, and counterdrug operations, to arms control and treaty verification. It also includes support to domestic civil authorities, peacekeeping, peacemaking and related activities.[14] The new manual stresses integration of force and range of operations.

War is demanding, uncompromising, and unforgiving.[15] Judge advocates' primary challenge is advising the command on the pursuit of disciplined operations. Battlefield discipline goes beyond routine criminal justice actions; it also includes targeting issues, concern for human rights, adherence to the law of war, and other applicable international law guidance.[16]

The law of war will only effectively reduce casualties and enhance fair treatment of combatants as long as trained leaders ensure that those laws are obeyed. American national policy holds that our forces will comply with the law of armed conflict. *Department of Defense Directive 5100.77* requires commanders to ensure that prisoners, noncombatants, and

---

[6] It was called AirLand Battle in recognition of the three-dimensional nature of warfare. First introduced in the *Field Manual 100-5, Operations*, (1982), AirLand Battle was refined in 1986. For an interesting article on the AirLand Battle doctrine, *see* Tomes, *A Primer on AirLand Battle: What Every Judge Advocate Needs to Know About the Client's Primary Business*, ARMY LAW., Dec 1983, at 1.

[7] *See* McDonough, *Building the New* FM 100-5 *Process and Product*, MIL. REV., Oct. 1991, at 2, for an excellent article on point.

[8] FM 100-5, *supra* note 1, at 1-3.

[9] Staff judge advocates and command judge advocates must act aggressively to provide legal services as required throughout the battlefield. To be effective, "the *SJA or CJA must know the mission, the commander's intent and place, troop placement and dispersion, the flow of the battlefield, and the enemy situation.*" FM 27-100, *supra* note 4, para. 4-4 (emphasis added).

[10] Depth is the extension of legal operations in time and place. The Judge Advocate General's Corps must provide legal services as far forward as possible and judge advocates must be able to provide mission-essential legal services in all functional areas of the law. Regardless of their "primary" duty (defense counsel, trial counsel, international affairs), every judge advocate must be versed in legal assistance matters. *Id.* para. 4-6.

[11] Agility is the ability to think and act quickly and correctly. Judge Advocate General's Corps personnel must react quickly to the changing battlefield with responsive legal services. *Id.* para. 4-5.

[12] Synchronization is the arrangement of legal services in the most effective manner. Staff judge advocates and command judge advocates must coordinate their operations with other units to ensure the greatest contribution to success. *Id.* para. 4-7.

[13] Versatility is the ability of a unit to meet diverse missions. Versatility demands that a unit be able to shift focus, tailor force, and move from one role or mission to another rapidly and efficiently. For judge advocates, versatility means working in multiple legal disciplines and stepping out of traditional roles to assist in other areas. These areas may include augmenting the rear command post operations and assisting in briefing updates or becoming the CG's scribe, recording and disseminating command guidance while providing legal advice. FM 100-5, *supra* note 1, at 2-9.

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

[15] *Id.* at 2-3.

[16] DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 3 (18 July 1956) provides the authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare.

civilians are properly treated by establishing good training programs that reinforce the practice of respecting international laws and rules of engagement (ROE).[17] Judge advocates' input and instruction will make the difference, in classrooms as well as in field training problems. Accordingly, judge advocates must be actively involved with commanders in preparing troops for informed compliance with the governing rules, regardless of the nature of the operation.

Poorly defined ROE undermine morale and may lead to senseless injury or loss of life. Well-defined ROE—such as those used during the Persian Gulf War—proved, however, that efforts to educate our soldiers in the law of armed conflict can succeed with the collateral benefit of establishing the legitimacy of the operation. "Prosecuting the war legally while at the same time treating Iraqi soldiers and civilians humanely was essential to maintaining domestic and international support."[18]

Force Projection

Chapter Three deals with doctrine for a force projection Army. Force projection is the demonstrated ability to rapidly alert, mobilize, deploy, and operate anywhere in the world.[19] Key concerns in this area are force tailoring[20] and its logistical support. Force projection by nature is joint and combined, and occurs in both war and OOTW. Force projection often requires rapid response, contingency plans for simultaneous operations, and quick transition to postconflict activities.

Force Tailoring and Teamwork

In a force projection Army, the force must be continuously prepared to deploy.[21] Force projection operations will challenge judge advocates, who will need to anticipate, plan, and prepare.

Judge advocates bring their analytical skills to bear on the spectrum of predeployment issues—from legal assistance to contracting, criminal law to claims, as well as on international and operational law issues. As the commander is studying the available infrastructure, prepositioning assets, and assessing host nation support,[22] the judge advocate is ensuring that proper mechanisms are in place to use these. During this time, the judge advocate is reviewing the domestic law, treaties, and executive agreements with a view to briefing the commander on actions required to facilitate entry, the diplomatic status of the deploying force, criminal justice jurisdiction, claims procedures, host country law, environmental issues, and other country-specific issues.[23] If gaps occur in the existing agreements, judge advocates need to notify the higher command to initiate proper supplementation. In this regard, communication with in-country units or members of the country team usually will provide key information quickly. Judge advocates also work with the United States Army Corps of Engineers to ensure proper land use agreements.

Finally, judge advocates assist the commander in selecting the combat service support experts who, as part of the advance party, will smooth the movement of personnel and equipment into the theater and set up the logistical infrastructure for operational support. A judge advocate should be part of the advance party.

Logistics[24]

Concerning the issues of host nation support from existing infrastructure, operational law judge advocates will be tracking down treaties and drafting the implementing agreements. Contract attorneys will be working with the J-4, contracting officer, J-2, and the advance party to determine what type of procurement is necessary, the type of funds to support it, and any operation specific contract clauses to avoid administration problems.[25] International law and contract law merge at this point. Host nation support clauses similar to those found in the NATO Mutual Support Agreement are a prime example of this merger. These support clauses set out the supplies and services that may be obtained and a mechanism for contracting and dispute resolution.

---

[17] FM 100-5, *supra* note 1, at 2-4.

[18] Humphries, *Operations, Law and Rules of Engagement*, A.F. AIRPOWER J., Fall 1992, at 39.

[19] FM 100-5, *supra* note 1, at 3-3.

[20] Force tailoring is the process of determining the right mix and sequence of events. *Id.* at 3-4.

[21] *Id.* at 3-3.

[22] *Id.* at 3-5.

[23] FM 27-100, *supra* note 4, para. 1-9.

[24] Logistics includes the design, development, acquisition, storage, movement, distribution, maintenance, evacuation, and disposition of materiel; the acquisition, preparation, maintenance, equipping, movement, and health service support of personnel; the acquisition or furnishing of services; and the acquisition, construction, maintenance, operation, and disposition of facilities. Logistics is an overarching function that must encompass the range of military operations. At the tactical level, logistics focuses on the traditional combat service support functions of arming, fixing, fueling, manning, moving, and sustaining soldiers. FM 100-5, *supra* note 1, glossary 5.

[25] FM 27-100, *supra* note 4, para. 1-9.

Training[26]

"When alerted to deploy, units build on home-station training by focusing on missions and conditions they expect to encounter during contingencies."[27] During this phase, judge advocates are busy instructing troops on the ROE that will be in force during deployment. Judge advocates must carefully explain issues concerning the full scope of the right to self-defense and transitioning from peacekeeping to hostilities. Additionally, judge advocates should review appropriate concepts concerning the law of war and civilian protection.[28] Mr. Hays Parks, a prominent legal scholar in the law of war explains

> Today's law of war programs emphasize the military and political reasons for respect for the law of war. . . . Each military service has developed its law of war program in accordance with its training mission, and the realities of training time of which there is never enough for the myriad demands upon a unit's or individual's time.[29]

He points out that personnel at different levels need to have varying types of knowledge. Law of war training must be packaged and sold—not as a "nice-to-know," but as a "need-to-know"—to meet Army standards.[30] Finally, a broad understanding of the soldier's rights and responsibilities, especially in the areas of criminal jurisdiction and claims under the existing host country law or stationing agreement, should be included in the training. This is also the time for the judge advocate to work with civil affairs personnel to identify bilingual claims investigating officers and train them in their responsibilities.[31]

Regarding soldier support, legal assistance judge advocates will use this time to work as part of a team with other family and community assistance agencies to ensure that the needs and contingencies concerning family matters during the soldiers' absences are provided for. This will include reviewing wills, preparing powers of attorney, and reviewing allotments.[32] Encourage spouses to seek information and assistance from community assistance agencies and judge advocates throughout the period of separation.

Postconflict Considerations[33]

Field Manual 100-5 makes it clear that the predeployment stage is the time for making decisions on mobilizing specific assets for postconflict activities and transition to peace.[34]

"The 'postconflict stage' focuses on restoring order, minimizing confusion following the operation, reestablishing the host nation infrastructure, and preparing forces for redeployment and postconflict stabilization operations, during which other elements of national power may take the lead to achieve the overall strategic aims."[35] The military is currently testing and defining its role in this area. Some of the specific missions that have been identified include: personnel control, marking mine fields, disposing of unexploded ordnance, emergency health service support, and humanitarian assistance. *Field Manual 100-5* states that "Measures taken to achieve unity of effort and mutual trust—such as interoperability, well understood C^2 structure, liaison and interpreters—greatly facilitate operations."[36] The commander's clear understanding of the authorities and responsibilities of the various United States/host nation agencies and nongovernmental organizations, as well as the legal prerequisites for pursuing any of these activities, is essential to assure a cooperative, coordinated effort on the ground.

---

[26] Training in the predeployment phase focuses on the conduct of the mission essential individual and collective training. FM 100-5, *supra* note 1, at 3-6. Commanders must integrate realistic law of war and ROE training into deployment scenarios. *Id.*

[27] *Id.*

[28] This must cover the basic assumptions set out in *Department of Defense Directive 5100.77*: (1) discipline in combat is essential; (2) violations of the law of war detract from the accomplishment of the mission; (3) violations of the law of war may have an adverse impact on public opinion; (4) violations of the law of war may arouse the enemy to greater resistance. DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD PROGRAM FOR THE IMPLEMENTATION OF THE LAW OF WAR (July 10, 1979) [hereinafter DOD DIR 5100.77].

[29] HAYES PARKS, TEACHING THE LAW OF WAR, ETHICS AND NATIONAL DEFENSE—THE TIMELESS ISSUES 145, 147-48 (1993).

[30] *Id.* at 149.

[31] "Civil affairs operations are politically and legally sensitive because they involve the interrelationship between the United States military forces and civilians in the area of operations." FM 27-100, *supra* note 4, para. 11-1.

[32] *Id.* para. 1-9.

[33] FM 100-5, *supra* note 1, at 3-7.

[34] *Id.*

[35] *Id.* at 3-11.

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

Judge advocates are uniquely qualified to advise civil affairs personnel, the J-5, military police, and medical commanders on the coordination and documentation necessary to assure a united effort in this area.[37]

Joint and Combined Operations

Chapter Four discusses joint relationships and theater structure. New issues include clarifying the relationships among various levels of command and discussing theater structure in OOTW.[38] Chapter Five emphasizes the importance of combined operations in the new strategic environment and expands the discussion of principles and conduct of combined operations.[39]

Joint operations are the integrated military activities of two or more service components. Combined operations involve the military forces of two or more nations acting together in a common purpose.[40] Army doctrine stresses that future operations will be both joint and combined. This concept will pose unique challenges for judge advocates in the areas of command authority, human rights and military justice, funding, operational logistics, and LOW/ROE training.

Command Authority

Questions of command authority encompass traditional military justice actions as well as authority to make LOW targeting and tactics decisions and modify the ROE. Command structures and relationships from the Army component level through the multinational coalition must be clearly set out and the proper regulatory documentation prepared to assure that the leadership at each level has sufficient authority to achieve the mission and maintain good order and discipline.[41] To offer sound advice and guidance in this area, judge advocates must become comfortable with the structure of joint and combined command.[42]

Joint Operations Theater Structure

In war and OOTW, the CINC achieves theater focus by applying structure to the theater. In OOTW, CINCs focus their efforts through the designation of an area of operation (AO). The AO may be further subdivided into a joint operations area (JOA), a joint zone (JZ) or joint special operations zone (JSOA). In war, the CINC designates a theater of war. A theater of war is that area required to support and perform military operations against the enemy. The theater of war also could be subdivided into the combat zone (CZ) and communications zone (COMMZ). Legal services in the COMMZ are the responsibility of the theater army staff judge advocate after coordination with unified command staff judge advocates. Legal services in the combat zone fall on the shoulders of Corps, COSCOM, and Division staff judge advocates.[43]

Combined Operations—Teamwork and Trust

Combined operations are more delicate; they require teamwork and trust among nations whose strategic objectives and military doctrine vary.[44] Each member of the coalition or alliance[45] agrees to give the commander the necessary authority.[46] The national components normally give over only Operational Command (OPCON) to the alliance or coalition commander. These commanders may not be United States Army officers, however, "Army commanders fight at the directions of the allied or coalition commander, retaining all

---

[37] FM 27-100, *supra* note 4, para. 1-9. *See also infra* notes 72-84.

[38] *See 100-5 Briefing, supra* note 5.

[39] *Id.*

[40] FM 100-5, *supra* note 1, at 4-1.

[41] "It is important that the commander establish what actions are solely his prerogative, what decisions he absolutely holds for himself." Memorandum For Record, Department of the Army, Battle Command Training Program, ATZL-CTB, subject: Executive Summary, ARRC Seminar, 19-23 July 1993, at 2 (6 Aug. 1993) [hereinafter ARRC Seminar].

[42] Joint forces operate within two distinct chains of command—one for operations and another for administrative and logistical matters.

> The chain of command for operational issues begins at the National Command Authority and passed through the JCS to the commander of unified and specified commands and to the JTFs. . . . These JTFs are established by the NCA and report directly to them.
>
> The military departments are responsible for training, administration and logistical support of forces. . . . They carry out these duties through the individual service chain of command.

FM 100-5, *supra* note 1, at 4-1, 4-2. Forces assigned to joint commands work directly with their respective departments and services on these matters.

[43] For an excellent discussion of responsibility for providing legal services in a theater of war, *see* FM 27-100, *supra* note 4, ch. 5.

[44] FM 100-5, *supra* note 1, at 5-2.

[45] *Id.*

[46] *Id.* at 5-3.

of the command authority and responsibility inherent in the command relationship."[47]

The key to success of joint and combined operations is that the participating services and nations understand the stated objectives, and the goals are well articulated and shared by the members.[48] The execution order must be clear, and the end state must be fully understood.[49] Judge advocates, pulled from multiple legal specialties, are required to address the manifold legal issues that theses operations raise. "Authority brings responsibility and one lawyer is not enough to sort through this."[50]

Combined operations require judge advocates to perform as part of combined teams. Judge advocates working with their counterparts in other nations' forces can identify areas that the written agreements between the parties should address. By assuring that the agreements are clearly worded and clearly express the roles and responsibilities of the parties, judge advocates can eliminate ambiguities that can lead to misunderstandings and divisiveness. Combined legal reviews give agreements credibility and enforceability as well as serve as a check on the "legality" of commitments made by all parties.

Planning and Executing Operations

Chapter Six emphasizes operational level planning and warfighting. Employment of weapons of mass destruction, coalition warfare, and growing concern over fratricide will greatly increase the role of judge advocates in targeting decisions. Rules of engagement issues, compliance with the law of war, and questions of proportionality, suffering, and military necessity make the judge advocate an invaluable member of the commander's team.

Judge advocates must assist in formulating operational plans to meet these new operational law challenges. They must be prepared to answer three questions. First, what legal issues do the strategic objectives in the theater of war or operations raise? Second, how can these issues be resolved? Third, which type of resolution is most supportive of the mission?

The delicate balance between self-defense and force restraint in OOTW ROEs exemplifies the need for thoughtful application of legal principles to operational scenarios. "Rules of engagement have been and always will offer the potential to be the bane of a mission commander's existence."[51] The rules must work for the commander, protect the troops, and support the mission objectives.

The American public wants the Army to "do the right thing" and instantaneous communications make each decision subject to instantaneous review. Clear ROE can greatly assist the commander in maintaining legitimacy in the battle for the "hearts and minds" of the people by providing the legal framework for command actions.

Offense/Defense/Retrograde

Chapters Seven and Eight deal with offensive operations. Chapters Nine and Ten deal with defensive operations. Chapter Eleven deals with retrograde operations. These chapters are essentially unchanged from prior editions. On a practical level, knowledge of what is contained in these chapters will stand a judge advocate in good stead not only for use on the battlefield, but also if selected to attend the Combined Arms and Services Staff School or Command and General Staff College.

Logistics

Chapter Twelve describes the nature of Force Projection Logistics. The new issues include logistics planning considerations, logistics preparation of the theater, force mix, strategic, operational, and tactical links, theater operations, battlefield logistics, and sustaining soldiers and their system.[52]

Acquisition and Movement of Supplies and Personnel[53]

"Logistics is the process of planning and executing the sustainment of forces in support of military operations."[54] Five characteristics—anticipation, integration, continuity, responsiveness, and improvisation—enable success.[55]

---

[47] *Id.*

[48] ARRC Seminar, *supra* note 41.

[49] Peace support terms are not well understood and are different between the United States, other nations, and NATO. *Id.*

[50] *Id.* encl. 3.

[51] Parks, *Righting the Rules of Engagement*, 93 NAV. REV. (1989).

[52] *100-5 Briefing, supra* note 5.

[53] *See supra* note 24; *see also* FM 100-5, *supra* note 1, at 12-1.

[54] FM 100-5, *supra* note 1, at 12-1.

[55] In the 1986 version, these characteristics were labeled "sustainment imperatives."

In a force projection Army, accurate anticipation[56] of requirements and pre-established arrangements for host nation support in theater without an existing United States presence[57] will facilitate the supply acquisition and troop movements.[58]

Operations tend not to begin all at once. They develop gradually.[59] As judge advocates may recall, the buildup in the Persian Gulf took over five months before the ground war could start. Failure to anticipate needs and understand legal methods of acquisition can seriously undermine the mission and cause the unknowing commander to slip into fiscal, contracting, or even law of war violations.[60] "Whether or not the Army has a host nation support agreement, logistics contracting support . . . should deploy early to arrange access to host nation capabilities."[61] Judge advocate review and participation in these activities at their initiation will assure legal and regulatory compliance in a timely manner.

Field Manual 100-5 stresses the high priority of logistical planning and preparation in theater.[62] At the strategic level, key players in this process are the continental United States based civilian and military suppliers and contractors as well as national political and military-strategic leadership.[63] At the operational level, logistics focuses on force reception, infrastructure, and the management and movement of supply and personnel.[64] Tactical logistics offer the ultimate test of the process, focusing on providing the right support at the right time and place to support command operations.[65] Operations other than war make their own demands on logistics planning. They often present short-fused requirements with unique logistics needs including: distribution of relief supplies; construction of temporary shelters, roads, bridges, and other infrastructure; and providing emergency medical support.[66]

Judge advocate involvement in logistical planning is critical to assure that acquisitions are carried out in the most efficient manner possible within the law. Perhaps in no other area of readiness is the need to improvise more critical to success than in logistics and nowhere is it more fraught with legal pitfalls. Fast-breaking situations—often the trap for the unknowing—require on-the-spot legal advice. Judge advocates must know the proper procedures for carrying out these types of actions, when such actions are prohibited, and whether alternatives are available. Many deploying commanders do not have a sufficient background in recognizing and disposing of property and could easily violate international or fiscal law, or commit violations of the Uniform Code of Military Justice. This became evident in the 9 March 1984 memorandum,

---

[56] Anticipation means foreseeing future operations and maintaining assets and information to support operations at the right times and places. Legal operations must be mobile enough to accommodate demands. Staff judge advocates must plan for every possibility. FM 100-5, *supra* note 1, at 12-3.

[57] *Id.* at 12-6.

[58] *Id.* at 12-1.

[59] *Id.*

[60] No one can anticipate all contingencies. Improvisation is the ability to make, invent, or arrange what is needed. This may require staff judge advocates to suspend normal procedures. With improvisation there is risk. Staff judge advocates need to minimize the risk associated with improvisation.

[61] FM 100-5, *supra* note 1, at 12-5.

[62] *Id.* at 12-2.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 12-3.

[66] *Id.* at 12-7.

Claims Operations in Grenada—After Action Lessons Learned.[67]

A thorough understanding of the law of war, appropriations acts, and acquisition regulations, as well as the role of host nation support, must be factored into the logistics planning process. *Field Manual 100-5* states that "[p]reestablished arrangements for host nation support" are best effectuated through written agreements among the countries participating in the actions.[68] These can range from status of forces agreements to foreign military sales contracts. Judge advocates need to examine the necessary type and level of agreement to set out the understanding between the parties.

Sustaining Soldiers and Their Systems

The final section of Chapter Twelve deals with sustaining soldiers and their systems.[69] Sustainment is broken down into five elements—personnel services, health services, field services, quality of life, and general support services.[70] Legal services are specifically mentioned as part of personnel service support. *Field Manual 100-5* recognizes that family considerations affect every soldier's readiness and willingness to fight.[71] The command is responsible for reassuring soldiers through concerned positive leadership that the system will care for their families' needs during unit deployments. Judge advocates play a major role in preparing soldiers and their families for deployment by providing them with legal assistance—such as wills, powers of attorney, and legal advice. Judge advocates should be personally involved, not only with the soldiers' predeployment preparation, but with the continuing support to the family throughout the deployment. Furthermore, judge advocates should be key players in the family support services available at home and during deployment.

OOTW

Chapter Thirteen expands doctrine to include Army activities in OOTW, which is a new term of art. Broader than the

---

[67] *The need for training in the recognition and disposition of property.* Most of the substantive issues raised in the context of claims operations demonstrated a chronic need for additional training of U.S. personnel in the area of property classification, control and disposition. Such training should be directed not only at enlisted personnel, but at noncommissioned and commissioned officers. (The discovery at Fort Bragg of vehicles redeployed from Grenada and laden with private property indicates that many commanders had little understanding of the status of property.) At a minimum, the instruction should ensure that commanders are aware of the following points:

Public property captured or seized from the enemy, as well as private property validly captured on the battlefield and abandoned property, *is property of the United States*, and failure to turn over such property to the proper authorities or disposal thereof for personal profit is a violation of Article 103 of the UCMJ. (Certain items of enemy property, including firearms, may, however, be designated by the command as war trophies which may be retained by personnel UP AR 608-4.).

Private property may not be confiscated. It may, however, be seized or requisitioned, but in either case restoration and compensation must be made at the conclusion of hostilities. In order to accomplish restoration and compensation, receipts for the property should be provided to the owner and property accountability must be maintained during the period of use.

Seizure of privately-owned vehicles. The seizure of privately-owned vehicles, while in itself not legally objectionable in the context of armed conflict, poses significant claims problems. Over 50 claims were received which alleged vehicle damage resulting from unauthorized use by U.S. soldiers. Almost without exception, the claimant was unable to present any receipt for the seized vehicle. Because no records were promulgated which documented the seizure or established property accountability, claims were undoubtedly paid for damage not done by U.S. soldiers. Conversely, the lack of property accountability encouraged needless damage and delayed the return of vehicles to their owners. Given the inevitability of seizures of privately-owned vehicles by combat units lacking sufficient organic transportation assets, a receipt and accountability system for requisitioned property should be implemented. Such a system is necessary not only for claims purposes, but for compliance with the provisions of Article 53, Hague Convention No. IV, which requires that requisitioned private property be restored and compensation fixed at the end of hostilities.

Occupation of civilian buildings. Wholesale and continuing occupation of civilian buildings, including homes, presented a major legal and financial problem. The practice became epidemic in Grenada because of the number of isolated and vacant vacation homes available for occupancy. Many of the homes were located on scenic—and tactically advantageous—overlooks. To minimize claims and leasing liability, civilian buildings should be occupied only under either the provisions of a lease or the requirements of military necessity. (Convenience does not equal military necessity.) Under either rationale, damage to the premises must be minimized and, if time and resources permit, an inventory of the building's contents and pre-existing damage should be promulgated.

The impact of irregular procurements on claims operations. A significant number of claims and related inquiries were received from persons and businesses who had provided goods or services to U.S. Forces. The claims were generally contractual in nature and thus not payable under the provisions of the Foreign Claims Act (paragraph 10-11b, AR 27-20). The claims must be promptly directed to the appropriate staff section (G4, Comptroller) or individual (Purchasing Officer) for disposition. Close coordination with the Comptroller is particularly important to overcome the understandable preference that every conceivable liability be satisfied with claims funds, not OMA funds.

Memorandum, Department of Army, AFZA-JA-A6, subject: Claims Operations in Grenada—After Actions Report/Lessons Learned (9 Mar. 1984).

[68] FM 100-5, *supra* note 1, at 12-12.

[69] *Id.*

[70] *Id.*

[71] *Id.*

old concepts of mid and low intensity conflicts, it includes "military activities during peacetime and conflict that do not necessarily involve armed clashes between two organizations."[72] In scope, OOTW covers the range of situations "from support to U.S., state and local governments, disaster relief, nation assistance, and drug interdiction, to peacekeeping, support for insurgencies and counterinsurgencies, noncombatant evacuation, and peace enforcement."[73]

Because this concept is so broad and encompasses such diverse activities, it presents a mix of traditional and novel challenges to the commander and, in turn, the commander's legal counsel. Operations other than war often require backward planning from the strategic end states sought as to the best means of achieving it. Key concepts to successful planning include the following:

- Operations other than war are of long duration and undergo a number of shifts.
- Immediate solutions to difficult problems may not be obvious or may jeopardize long-term objectives.
- Certain military responses to civil disturbances may solve the immediate crisis, but subvert the legitimacy of local authorities and cause further civil unrest.
- Humanitarian relief and nation assistance should not promote dependency on civil aid from outside sources.
- Quick, efficient action by United States forces that resolves an immediate issue without considering the long-range consequences and goal may promote instability.
- In OOTW, victory comes more subtly than in war.
- Disciplined forces, measured responses, and patience are essential to successful outcomes.[74]

Operations other than war may precede, occur simultaneously with, or follow combat operations.[75] They may occur in multiple regions of the same theater or in more than one theater.[76] Frequently, the Army is not the lead agency in OOTW—the Department of State, United States, or host government civil authorities may have the lead in these operations.[77]

The "principles of war" that provide the basis for the Army's warfighting doctrine also apply to the types of OOTW that involve our troops in combat. Some noncombatant activities require modification and supplementation of these principles, however, to meet their nontraditional challenges.[78] Judge advocates will find their greatest challenges when applying three new principles—legitimacy, perseverance, and restraint—to OOTW.[79]

Field Manual 100-5 defines legitimacy as "the willing acceptance by the people of the right of the government to govern or of a group or agency to carry out decisions."[80] Legitimacy is built on adherence to law and promise keeping. On the basic level, human rights and subordination to civil authority are the keys to legitimacy. Supporting activities include payment of personal and property damage claims, timely payments for goods and services, proper coordination

---

[72] *Id.* glossary.

[73] *Id.* at 13-0.

[74] *Id.* at 13-1.

[75] *Id.*

[76] *Id.*

[77] United States agencies may include the Drug Enforcement Administration (DEA), Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), Agency for International Development (AID), Department of Justice (DOJ), Environmental Protection Agency (EPA), and others. *Id.*

[78] The traditional nine principles of war provide general guidance for the conduct of war. They include objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. *Id.* at 2-4 to 2-5.

Operations other than war also have principles that guide our actions. For those OOTW that involve our forces in direct combat, the principles of war apply. Some, such as the principles of objective and security, apply equally to noncombat operations. Unity of command requires modification. The Army must supplement these three with principles more suited to the noncombat operations that comprise most OOTW. While these principles are not immutable, they serve as guides for action.

The relative application of each principle will vary depending on the specific operation. The principle of perseverance, for example, will impact more during long-term nation assistance and counterdrug operations than during a short-term noncombatant evacuation mission. Commanders must balance these principles against the specific requirements of their mission and the nature of the operation. *Id.* at 13-3.

[79] *Id.* at 13-4.

[80] *Id.*

with local civil or military authorities prior to going into an area, and providing a point of contact for the populace.

Judge advocates, working in concert with the J-5, J-3, and host country civil or military leaders, can add legitimacy to OOTW operations. Judge advocate participation in civil military coordination puts judge advocates in the position where they can carry out their claims and contracting duties, supply planning guidance to the command and have continuous contact with the local population. Making a judge advocate the people's point of contact plants the image in the popular mind that the rule of law will be preeminent in the military's dealing with them and that their rights will be protected.

Field Manual 100-5 defines perseverance as the ability to prepare for the measured protracted application of military capability in support of strategic aims.[81] Judge advocate involvement in OOTW, whether long or short, begins in the earliest planning phase and continues through deployment to postconflict resolution and after-action reviews. Perseverance requires a firm grasp on the long-term strategic ends and continuous vigilance of the changing scenario to anticipate the legal issues and to provide timely guidance that assures compliance with the rule of law.

Field Manual 100-5 defines restraint as the ability to "apply appropriate military capability prudently."[82] According to *FM 100-5*, restraint in OOTW includes carefully crafted ROE "more restrictive, detailed and sensitive to political concerns than war"[83] and subject to frequent changes. A critical need exists to clearly define the limitations on weapons, tactics, and force. Moreover, the challenge continues through "transmission of and a shared understanding of ROE throughout the totality of units [which] requires follow-through rehearsal with situations to check understanding."[84] Rules of engagement are the joint work of the J-3 and judge advocate. The J-3 brings understanding of the operation while the judge advocate provides the legal concepts necessary for complying with the law of war, and United States/host country law. Rules of engagement for these OOTW will provide the structure for clarity in these operations that the LOW provides for ROE in combat.

The Environment of Combat

Chapter Fourteen discusses the human and physical dimension of combat, keying on the ethical perspective. The nation expects its Army to adhere to the highest standards of professional conduct and reflect American values. These include a strong respect for the rule of law, human dignity, and individual rights—the foundations of the Constitution. "Amid the rigors of combat, the integrity of every soldier—from the highest to the lowest ranks—is of paramount importance."[85]

Judge advocates traditionally advise leaders on the fair administration of justice. Both trial and defense counsel play a vital role in assuring that commanders recognize the importance of due process of law. Particularly in a difficult combat environment, fair administration of justice and respect for the individual rights of the soldier contribute to unit morale and help maintain discipline necessary for battlefield success.

Conclusion

The new *FM 100-5* synthesizes 218 years of Army history, lessons learned from recent experiences, today's strategic and technological realities, today's threats, and the collective wisdom of the Army's leadership. Using this base, it anticipates how warfare will develop to keep the Army ahead. The Army of today is a different organization. The counter-Soviet Union focus has evaporated. Power projection from either the United States or overseas bases is the future.

Field Manual 100-5 is the "engine of change" for the future. It drives all aspects of the force from equipment and unit composition to individual training. The 1993 doctrine retains the best of prior doctrine and expands it to meet future commitments. The new doctrine will require a different kind of leader than did the Cold War era. Junior officers may find themselves making decisions without the same access to command and control that was so readily available in the "Fulda Gap" or even during Operation Desert Storm/Shield. Leaders in the future will likely encounter conditions of ambiguity and uncertainty. Judge advocates need to read and master *FM 100-5*. Having done so, they can truly be the commander's counsel.

---

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 14-2.

Litigation Division Notes

Ninth Circuit Renders Partial Victory on Department of Defense Homosexual Policy[1]

On 31 August 1994, a three-judge panel of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) decided the long-awaited case of *Meinhold v. Department of Defense*. The Ninth Circuit held that the Navy could not discharge Petty Officer Meinhold based on a single statement that "[he] was gay" absent evidence of a "concrete, fixed, or expressed desire to commit homosexual acts" in violation of military policy.[2] The court reached this conclusion by construing the Department of Defense's (DOD) implementing regulations, and thus avoided the constitutional issues raised and briefed by the parties. The narrow basis of the opinion provides advocates for both sides of the issue an opportunity to claim a qualified victory.

Navy Petty Officer Volker Keith Meinhold, a Navy sonar analyst with over twelve years of service, appeared on ABC World News Tonight on 19 May 1992 and announced, "Yes, I am in fact gay."[3] Based on this statement alone, he was honorably discharged under the DOD's then-existing policy on homosexuals in the military.[4] Seeking reinstatement in the Navy, Meinhold filed suit challenging the policy as unconstitutional.[5] The district court granted summary judgment for Meinhold, rescinding his discharge from the Navy.[6] The DOD appealed to the Ninth Circuit.

The Ninth Circuit upheld the district court injunction which reinstated Meinhold to active duty, but reversed that part of the injunction that prohibited the DOD from separating other service members under the old homosexual policy.[7]

Although Meinhold ultimately won reinstatement at the Ninth Circuit, the military obtained an important victory in its defense of the old homosexual policy. The court, applying a long-standing legal principle of judicial deference to military professional judgment,[8] recognized that it was constitutional to separate service members for homosexual acts.[9] The court also acknowledged the DOD's argument that, because of the critical nature of the military mission, it need not assume the risk that a person with a homosexual desire or propensity will act on those desires.[10] Furthermore, the court acknowledged that the military could separate a person based only on a statement, as long as the statement evidences a "concrete, fixed, or expressed desire to commit homosexual acts."[11] In this case, the court determined that the statement, "Yes, I am in fact gay" did not provide such evidence and therefore could not serve as the basis for Meinhold's separation. The court left the door open to the Navy, however, to process Meinhold or others under the current policy if the Navy possesses other statements or evidence of homosexual acts.

---

[1] An earlier version of this article was provided to judge advocates attending the 1994 JAG Annual Continuing Legal Education Workshop in Charlottesville, Virginia, on 4 October 1994. The final paragraph was subsequently changed to provide for Article 31 rights warnings at the beginning of any interview with a soldier who has stated that he or she is "gay." Because this article recommends that a commander question such a soldier about the definition of "homosexual," which includes a person who commits homosexual acts, Article 31 warnings prior to questioning are deemed necessary and prudent.

[2] Meinhold v. Department of Defense, Nos. 93-55242, 93-56354, 1994 U.S. App. LEXIS 23705, at *31 (9th Cir. Aug. 31, 1994).

[3] *Id.* at *1.

[4] *Id.* at *3. Meinhold was discharged pursuant to *Naval Military Personnel Manual 3630400(1)* which was essentially the same as DEP'T OF DEFENSE, DIRECTIVE 1332.14(H), Homosexual Conduct Policy (effective 28 Feb. 1994) [hereinafter DOD DIR. 1332.14]. This DOD Directive at 1332.14(H)(1)(a) provided in part, "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." The so-called "don't ask/don't tell" policy, which became effective on February 28, 1994, was not involved in this appeal. *Meinhold*, LEXIS 23705, at *3 n.2.

[5] *Id.* at *5-6.

[6] The district court permanently enjoined the DOD "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interfere[d] with the military mission of the Armed Forces of the United States." Meinhold v. Department of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993). On 23 October 1993, the United States Supreme Court stayed this injunction to the extent that it conferred relief on persons other than Meinhold. Department of Defense v. Meinhold, 114 S. Ct. 374 (1993).

[7] *Meinhold*, LEXIS 23705, at *33.

[8] *Id.* at *19.

[9] *Id.* at *22.

[10] *Id.* at *25.

[11] *Id.*

What is *Meinhold's* impact on the current policy? The court specifically refused to apply any of its ruling to the new "don't ask/don't tell" policy.[12] Whatever was the case with the former policy, the plain language and legislative history of the new policy make clear that self-identifying statements of homosexuality trigger the presumption that the speaker engages in acts or has a propensity for doing so, and will result in separation unless the speaker successfully rebuts the presumption.[13]

More importantly, what does *Meinhold* mean to staff judge advocates (SJAs) in the field? *Meinhold* strongly supports the proposition that homosexual acts continue to be a valid basis for discharge from the Armed Forces. *Meinhold* also demonstrates that statements of homosexuality can be the basis for discharge as long as those statements indicate a concrete, fixed, or expressed desire to commit homosexual acts.

Because *Meinhold* does not apply to the new statute, it does not have a direct impact on the cases arising under the new statute. The possibility exists, however, that the Ninth Circuit would rule the same way if faced with a case under the new statute. Accordingly, SJAs and commanders in the Ninth Circuit would be well advised not to rely on self-identification statements alone to support a separation from the military if any other evidence of homosexuality can be obtained through an appropriate investigation. Furthermore, SJAs and commanders in other circuits should consider the holding in *Meinhold* and seek to supplement self-identification statements with evidence of other statements or acts. For example, consider the case of a soldier who reports to the commander that "I am gay." Under the DOD Directives, a commander could consider this statement credible evidence to initiate an investigation and separation.[14] The first step in the investigation process should be a further discussion with the soldier who made the statement. Before questioning the soldier, the commander should first advise the soldier of his or her Article 31 rights.[15] If the soldier invokes his or her rights, the commander should terminate the interview. If the soldier waives his or her rights, the commander should explain the DOD policy on homosexual conduct and the definition of "homosexual" from the Directive.[16] The commander should ascertain that the soldier understands both and should then ask if the soldier acknowledges that he or she is a homosexual as defined by the Directive. If the soldier answers in the affirmative and the commander believes the soldier, that statement would satisfy both the statute as well as the requirement stated in *Meinhold*. Beyond the initial discussion, commanders may conduct a reasonable investigation focused on corroborating the statement of the soldier. All relevant evidence should be presented to the administrative separation board. Whenever possible, board recorders should not rely on self-identification statements alone as a basis for separating a soldier under chapter 15, *Army Regulation* 635-200.[17] Having said this, if there is no other evidence available and the commander has determined the soldier is a homosexual, the board should proceed based on the statement. Lieutenant Colonel Hayden.[18]

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 content of the latest issue (volume 2, number 1) is reproduced below:

Clean Air Act

Reproposal of the Title V Operating Permit Rule

On 29 August 1994, the Environmental Protection Agency (EPA) proposed major changes to the Title V Operating Permit Program Rule (Title V Rule).[19] Most of the proposed changes address when and how an operating permit must be revised to reflect operational changes within the permitted source. Additionally, the EPA is proposing numerous other minor changes to the Title V Rule to correct deficiencies and

[12] *Id.* at *3 n.2.

[13] The new policy, codified at 10 U.S.C.A. § 654, and signed by the President on 30 November 1993, requires separation from service if a member has: "stated that he or she is a homosexual . . . unless . . . [the member] demonstrates that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C.A. § 654(b)(2) (West 1994).

[14] DOD DIR. 1332.14, *supra* note 4, 1332.14(H)(1)(b)(2).

[15] Article 31 rights warnings would be required prior to any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning. UCMJ art. 31 (1984).

[16] DOD DIR. 1332.14, *supra* note 4, encl. 2, para. E, defines a homosexual as, "A person, regardless of sex, who engages in, attempts to engage in, has a propensity or intent to engage in homosexual acts."

[17] DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (17 Sept. 1990).

[18] The views expressed by the author in this article do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

[19] 59 Fed. Reg. 44,459 (1994).

clarify current provisions. The proposed changes to the Title V Rule will not be finalized for several years and, when approved, will be phased into state Title V programs over a period of years. Consequently, the current Title V Rule will remain unchanged for approximately the next four to five years and will not affect the first generation of permits. The Services have prepared joint comments for submission by the Department of Defense (DOD).

Potential Compliance Issues Based on the Current Interpretation of "Source"

Currently, the prevailing interpretation by the EPA regions and states is that each military installation is a single source for the purpose of the Title V Operating Permit Program.[20] This interpretation of the definition of "source" could result in problems for some installations that have in the past viewed individual emissions units on an installation (*e.g.*, each boiler or paint shop) as the "sources" subject to regulation. Consequently, these installations may not have complied with New Source Review (NSR) and Prevention of Significant Deterioration (PSD) program requirements that would have applied had the entire installation been considered the "source" subject to regulation. In pertinent part, the PSD, NSR, and Title V programs all contain a similar definition of "source." The Title V permit application process will force installations to identify past noncompliance and submit compliance plans and schedules. Environmental law specialists should work closely with technical personnel to identify potential compliance issues well before the Title V application deadline. In resolving these issues, we recommend close coordination with the MACOM environmental law specialist and the ELD. Major Teller.

Grounds Maintenance

The DOD has implemented President Clinton's 26 April 1994 memorandum, subject: Environmentally and Economically Beneficial Practices on Federal Landscaped Grounds.[21] The DOD guidance requires replacements and new or extended landscaped areas to use regionally native plants and grasses to the maximum extent feasible on all lands under DOD control. Retrofitting solely to achieve the use of regionally native plants and grasses is unauthorized. Mr. Nixon.

Superfund

Reauthorization

Congress failed to act on Superfund reauthorization which means that nothing changes. Because the DOD uses the Defense Environmental Restoration Account and not Superfund, the failure to reauthorize probably means less to the DOD than it does to the private sector. For now, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and in particular CERCLA § 120, are still in effect and the Defense Environmental Restoration Program will continue unchanged.

Recovery of Oversight Costs

A federal district court in Texas has ruled that the federal government may recover the costs of overseeing remedial actions conducted by private parties.[22] However, the Third Circuit held the opposite in *United States v. Rohm & Haas Co.*[23] The Third Circuit denied oversight costs because the statutory definition of removal did not specifically refer to oversight activities. The district court in *Lowe* rejected that argument, reasoning that the "EPA's oversight of cleanups conducted by liable parties fits squarely within the terms of CERCLA §§ 107(a) and 101(23). Oversight necessarily encompasses the evaluation of all stages of the cleanup process, from the preliminary investigation through final treatment, destruction, disposal or removal of hazardous substances on the site." Mr. Nixon.

Clean Water Act/Safe Drinking Water Act

Reauthorization

For a variety of reasons, it now appears that neither the Clean Water Act nor the Safe Drinking Water Act will be reauthorized in this Congress. The pending legislation would have expanded existing waivers of sovereign immunity, much like the Federal Facility Compliance Act did in 1992. Note that until these laws are changed, the Army's position is that sovereign immunity has not been waived with regard to the payment of penalties for past violations. Fine and penalty cases should be coordinated with the MACOM environmental law specialist and the ELD. Major Saye.

Air Force Environmental Update Course

The ELD has been given several slots for the Air Force Environmental Update Course, 13-15 February 1995, and the Basic Environmental Course, 15-19 May 1995. These excellent courses are held at Maxwell Air Force Base, Montgomery, Alabama, and are free. Installations are responsible for travel and per diem. Requests or inquiries should be directed to: Environmental Law Division, Office of The Judge Advocate General, ATTN: Marie Athey, 901 N. Stuart Street, Arlington, VA 22203-1837. If you have any questions, please contact Ms. Athey at (703) 696-1230 or DSN 226-1230. FAX (703) 696-2531/2940 or DSN 226-2531/2940. Ms. Athey.

---

[20] 40 C.F.R. pt. 70 (1993).

[21] *See* Environmental Law Division Notes, *Ground Maintenance*, ARMY LAW., Oct. 1994, at 57, for details of the President's memorandum.

[22] United States v. Lowe, No. H-92-830 (D. Tex., Sept. 20, 1994).

[23] 2 F.3d 1265 (3d Cir. 1993).

Oil Pollution Act of 1990 (OPA)

The OPA expands the scope of public and private planning and response activities associated with discharges of oil. The OPA amended § 311 of the Clean Water Act (CWA) to require preparation of facility response plans to respond to a worst-case discharge of oil.

On 1 July 1994, the EPA issued its final rule for nontransportation related on-shore facilities.[24] The rule amends 40 C.F.R. part 112 and requires the preparation of a facility response plan by any owner or operator of a nontransportation related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment. According to the rule, a facility is capable of causing "substantial harm" if:

a. it transfers oil over water to or from vessels and has a total oil storage capacity greater than or equal to 42,000 gallons; or

b. its total oil storage capacity is greater than or equal to 1 million gallons, and one of the following is true:

(1) the facility does not have secondary containment for each aboveground storage area sufficiently large to contain the capacity of the largest above ground oil storage tank within each storage area;

(2) the facility is located at a distance such that a discharge could cause injury to fish, wildlife, and sensitive environments;

(3) the facility is located at a distance such that a discharge would shut down a public drinking water intake; or

(4) the facility has had a reportable oil spill in an amount greater than or equal to 10,000 gallons within the last five years.

The EPA defined an "owner or operator" of a facility as "any *person* owning or operating . . ."[25] The term "person" is defined as an "individual, firm, corporation, association, and a partnership."[26] The United States is not included within the definition. However, at 40 C.F.R. § 112.1(c), the rule states that instrumentalities of the federal government are subject to the regulation to the same extent as any other person, with the exception of civil penalties.[27]

Despite the language at 40 CFR § 112.1(c), one can argue that the OPA and its implementing regulation are insufficient, standing alone, to require the preparation of facility response plans by federal facilities due to an inadequate waiver of sovereign immunity. Section 311 of the CWA, the authority for the rule recently promulgated by the EPA, provides at (a)(7) that for purposes of the section, "person" is defined as "an individual, firm, corporation, association, and a partnership."[28] The United States is not included in the definition. Also, because § 311(j)(5) indicates facility response plans are to be required at facilities that, because of their location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters (*i.e.*, waters of the United States) adjoining shorelines, or the exclusive economic zone, an additional question exists concerning whether the EPA can require the plans from facilities that, because of their geographic location, could never be expected to discharge to navigable waterways (despite that they may have a storage capacity of over one million gallons without "adequate" secondary containment).

Nevertheless, the question remains as to whether the general waiver of sovereign immunity contained in the CWA provides authority for the EPA or the various states to require facility response plans. Section 313 of the CWA provides in part that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . respecting the *control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity. . . ."[29] Arguably, to the extent an installation's operations could conceivably result in the discharge of oil to navigable waters, § 313 could be construed as authority for the requirement to prepare facility response plans. However, where the location of an installation or its operations are such that a discharge would not result in the pollution of navigable waters, then authority for not preparing a facility response plan appears to exist. Please note, however, that extreme care should be taken in determining whether a discharge could ultimately reach navigable waters. For example, even though the nearest water body is miles away, a storm drain may be located in such a manner that a discharge could still make its way

[24] 59 Fed. Reg. 34,070-34,136 (1994).

[25] 40 C.F.R. § 112.2 (1993) (emphasis added).

[26] *Id.*

[27] *Id.* § 112.1(c).

[28] 33 U.S.C.A. § 1321 (West 1994).

[29] *Id.* § 1323 (emphasis added).

to water. Also, remember that the concept of "waters of the United States" is *very* broad.[30] Given how broadly the concept is defined, there may be few installations where a facility response plan is not required.

Because no legal requirements for providing a facility response plan under certain circumstances exists, you should coordinate with your local environmental office to determine the status of the plan at your installation. If it has been or is being prepared, examine the requirement to do so. I am available to assist and would appreciate being notified in the event installation officials are cited or otherwise contacted by the EPA for failure to submit a plan. Major Saye.

[30] *See* 40 C.F.R. § 122.2 (1993).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

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.

Tax Note

"Nanny Tax" Amended

On October 22, 1994, President Clinton signed the Social Security Domestic Employment Reform Act of 1994.[1] This legislation changed existing rules on reporting and withholding Social Security taxes that household employees earn in a taxpayer-employer's home. You might recall that this "nanny tax" plagued several early Attorney General nominees. The changes should relax the tax paperwork and withholding burden many taxpayer-employers face.

Under the old "nanny tax," if a taxpayer paid someone (*e.g.*, a child-care provider, housekeeper, yard worker) to work in the taxpayer's home, that person was a domestic service employee. The taxpayer-employer was required to withhold and report this household worker's wages once the wages exceeded fifty dollars in a calendar quarter.[2] When the fifty dollar threshold was reached, the employer filed a quarterly report (*Form 942*) with the Internal Revenue Service, submitting with it the required Social Security tax for both the employer and the employee. The employer also provided the employee and the Social Security Administration with a Wage and Tax Statement (*Form W-2*) at the end of the year.[3]

A new $1000 annual threshold now replaces the fifty dollar per quarter threshold for Social Security taxes on wages

[1] Social Security Domestic Employment Reform Act of 1994, H.R. 4278, 103d Cong., 2d Sess. (1994).

[2] *See* I.R.S. PUBLICATION 926, TAX INFORMATION FOR HOUSEHOLD EMPLOYERS (1994), for more information. The household employer reported the household employee's wages on *I.R.S. Form 942, Employer's Quarterly Tax Return for Household Employees.*

[3] The taxpayer-employer also might be subject to Federal Unemployment Tax Insurance (FUTA) withholding. This threshold is reached when an employer pays $1000 or more in a calendar quarter to one or more domestic employees.

> When the $1,000 unemployment insurance wage threshold is reached in any calendar quarter, the employer must file a report (Form 940) with the IRS at the end of the year, submitting the required tax. In addition, employers of domestic workers must: notify employees who may be eligible for the earned income tax credit of the existence of this credit; withhold income tax if the employee requests it and the employer agrees; file and pay State unemployment insurance tax in each quarter in which the State unemployment insurance wage threshold (equal to the $1,000 Federal threshold in 45 states) is reached; and, in some States, report wages paid to domestic employees to the State for purposes of State income tax.

H.R. CONF. REP. NO. 942, 103d Cong., 2d Sess., 1994 WL 548738 (Leg. Hist.).

earned by domestic service employees.[4] This change is effective for tax year 1994. Payroll taxes paid on 1994 wages will be refunded to the employer when the total wages that an employee receives from an employer are below the $1000 threshold. The taxpayer-employer required to file a *Form W-2* (under the old fifty dollar threshold) must continue to do so. Additionally, this employer must report wages paid for the whole year in the "social security wages" box, even though the employer will receive a refund of any Social Security taxes paid.

The following examples illustrate the amended "nanny tax" rules:

> Example 1. Assume Employer *A* pays domestic employee *R* $500 in wages for calendar year 1994. *A* has been making quarterly payments of the payroll taxes due on these wages. *A* will not be required to make any further quarterly payments of payroll taxes with respect to 1994 that are due on or after the date of enactment of the conference agreement [October 6, 1994]. *A* can obtain a refund of payroll taxes previously paid. Employee *R* will get Social Security credit with respect to the $500 of wages.
>
> Example 2. Assume Employer *B* pays a domestic employee $1500 in wages for calendar year 1994. *B* has been making quarterly payments of the payroll taxes due on these wages. *B* must continue to make quarterly payments of payroll taxes to the remainder of 1994.
>
> Example 3. Assume Employer *A* will pay domestic employee *R* $500 in wages for calendar year 1995. Because the amount of these wages is below the $1000 threshold, *A* is not subject to reporting.
>
> Example 4. Assume Employer *B* will pay domestic employee *S* $1500 in wages for calendar year 1995. Because the amount of these wages is above the $1000 threshold, *B* is subject to reporting.[5]

The Social Security Domestic Employment Reform Act of 1994 also excludes wages paid to domestic employees under age eighteen who are students beginning in 1995.[6]

The Internal Revenue Service is expected to revise *I.R.S. Publication 926, Employment Taxes for Household Employers*, in time for the 1994 filing season. Lieutenant Colonel Hancock.

Veterans' Law Note

USERRA: New Veterans' Reemployment Rights Legislation

A bill entitled the "Uniformed Services Employment and Reemployment Rights Act of 1994" (USERRA) passed both houses of Congress in September 1994 and was signed by the President on 13 October 1994.[7] The USERRA represents the first significant modification in the law of veterans' reemployment rights in more than fifty years.[8]

The purpose of the USERRA is similar to that of prior law in this area: to "assure the citizen-soldier that he or she can

---

[4] I.R.C. § 3121(a)(7)(B) (RIA 1994). The Social Security Domestic Employment Reform Act of 1994 amends subsection 3121(a)(7)(B) to provide that wages (for purposes of tax withholding under I.R.C. § 3102), do not include:

> cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service described in subsection (g)(5)), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year.

The "applicable dollar threshold" is set at $1000 for 1994 and 1995 and will increase in later years automatically in $100 increments. *See* new I.R.C. § 3121(x):

> Applicable Dollar Threshold.-For purposes of subsection (a)(7)(B), the term "applicable dollar threshold" means $1,000. In the case of calendar years after 1995, the Commissioner of Social Security shall adjust such $1,000 amount at the same time and in the same manner as under section 215(a)(1)(B)(ii) of the Social Security Act with respect to the amounts referred to in section 215(a)(1)(B)(i) of such Act, except that, for purposes of this paragraph, 1993 shall be substituted for the calendar year referred to in section 215(a)(1)(B)(ii)(II) of such Act. If any amount as adjusted under the preceding sentence is not a multiple of $100, such amount shall be rounded to the next lowest multiple of $100.

[5] H.R. CONF. REP. No. 842, 103d Cong., 2d Sess. (1994), 1994 WL 58738 (Leg. Hist.).

[6] H.R. 4278 §§ 2(a)(1)(C), 2(a)(3)(B). *See* H.R. CONF. REP. No. 842, 103d Cong., 2d Sess. (1994), 1994 WL 58738 (Leg. Hist.). For example:

> the wages of a student who is 16 years old who also babysits will be exempt from the reporting and payment requirements, regardless of whether the amount of wages paid is above or below the threshold. On the other hand, for example, the wages of a 17-year-old single mother who leaves school and goes to work as a domestic to support her family will be subject to the reporting and payment requirements; she will consequently obtain Social Security coverage with respect to those wages.

Id.

[7] The original House version was H.R. 995, 103d Cong., 1st Sess. (1993) and the original Senate version was S. 843 (1993). The USERRA, the ultimate compromise, is reprinted at 140 CONG. REC. H9117, H9124-H9132 (daily ed. Sept. 13, 1994) [hereinafter USERRA].

[8] The USERRA replaces chapter 43 of title 38, enacted in 1940. *See* 140 CONG. REC. H9117, H9133 (daily ed. Sept. 13, 1994) (statement of Rep. Montgomery) [hereinafter Montgomery Statement].

return to the civilian job held prior to entering military service and can return without loss of seniority."[9] However, the new Act makes changes to, or clarifies several provisions of, the older legislation. The USERRA modifies what military type of service qualifies for protection; what information the soldier must provide the civilian employer about the military service; and how the military service affects certain specific civilian employee benefits (*e.g.*, pensions and health care coverage).[10]

Qualifying Military Service

Under the old law, the protections varied depending on the type of service (*e.g.*, active duty, active duty for training, inactive duty for training) and how long the soldier had been absent for the particular duty. Under the USERRA, a soldier receives the same reemployment and seniority protections regardless of the type of military service so long as the cumulative length of absence from a particular employer by reason of military service does not exceed five years.[11] Certain types of military service (*e.g.*, involuntary call-ups) do not count towards calculating the five-year protected period.[12]

Notice to Employer About Military Service

Under the old law, the employee's obligation to inform the employer of pending military service depended on the type of service. Under the USERRA, all soldiers must provide notice of impending military service whenever possible.[13] Additionally, when a soldier completes military service and seeks reemployment, the new Act provides that the employer may request documentation establishing that the request is timely,[14] that the soldier has not exceeded the five-year cumulative limitation,[15] and that the soldier's character of service was satisfactory.[16] If this documentation does not exist or is not readily available to the soldier, the employer must, however, reemploy the soldier until the documentation becomes available.[17]

Employee Benefits: Health Care[18]

The USERRA now requires civilian employers—on the soldier's request—to maintain the absent soldier (and his or her family) on the employers' health insurance plan for up to eighteen months following departure for military service. If the soldier is gone for thirty or fewer days, the soldier may be required to pay only the normal employee share, if employees are required to contribute. For periods of service exceeding thirty days, the soldier may be required to pay up to 102 percent of the full cost of continuing insurance coverage.[19]

Employee Benefits: Pensions

Under the old law, civilian employers were required to provide returning veterans with pension benefits, both accrual and vesting, so long as those benefits were tied to seniority within the company. Some employers contribute monies, however, to pension funds called "defined contribution plans." These employers are not required by the terms of such plans to contribute anything in any given year, and their contributions may vary depending on the annual earnings of the company. Under the old law, controversy arose as to whether these employer contributions should be considered as an incident of seniority or as current compensation during the year contributed. If considered current compensation, a soldier would not be entitled to the accrual of those contributions made during the soldier's absence. The USERRA indicates that returning soldiers are entitled to all employer contributions actually made during their absence, regardless of

---

[9] *Id.* at H9133.

[10] The new legislation makes changes and clarifications in several other areas as well. For example, § 4311 of the new legislation prohibits any adverse action being taken against a soldier because of military service or the filing of a claim under the Act; § 4312 changes the amount of time a soldier has to assert reemployment rights following discharge from military service; § 4316(c) changes the length of safe haven periods, granted following reemployment, during which the soldier may only be discharged for cause (from one year or six months depending on type of service to one year (if service was less than 180 days), six months (if service was less than 31 days) or no safe haven (if service was less than 31 days)); § 4316 makes allowance for use of accrued employer leave during periods of military service; while §§ 4321 and 4322 provides guidance on filing complaints of alleged violations of the Act with the Secretary of Labor.

[11] USERRA, *supra* note 7, § 4312.

[12] *Id.*

[13] *Id.* § 4312(a)(1), (b). *See also* Montgomery Statement, *supra* note 8, at H9134.

[14] *See supra* note 10 and accompanying text.

[15] *See supra* notes 11 and 12 and accompanying text.

[16] USERRA, *supra* note 7, § 4312(f).

[17] *Id.*

[18] Aside from the specifics of pension and health coverage, the USERRA requires that a soldier departing for qualifying military service will be placed on a statutorily mandated military leave of absence. USERRA, *supra* note 7, § 4316(a), 4316(b)(1). Accordingly, employers will be required to provide absent soldiers with all benefits, both those based on seniority and those not based on seniority, normally provided to employees on nonmilitary leaves of absence. Montgomery Statement, *supra* note 8, at H9134.

[19] USERRA, *supra* note 7, § 4317. CHAMPUS is only available to the dependents of reservists who serve on active duty at least 31 days. Montgomery Statement, *supra* note 8, at H9114.

whether the plan was a "defined contribution plan" or not.[20] Major Peterson.

Family Law Notes

Emancipation for Purposes of Terminating Child Support Obligations

A recent Missouri Court of Appeals decision, *Porath (McVey) v. McVey*, illustrates how difficult resolving all issues that may arise regarding child support can be.[21] In *McVey*, the court wrestled with the question of whether a child's attendance at the United States Military Academy at West Point terminates a parent's child support obligation. This issue of what constitutes emancipation was framed by language in Missouri law providing for emancipation when a child enters the military, or when a child reaches eighteen, unless the child leaves high school and attends an institution of higher learning.[22] If attending an institution of higher learning, the child support obligation is terminated when the child graduates or turns twenty-two, whichever occurs first.[23]

While the issue before the court in *McVey* was framed by statute, the same issue is created in separation agreements that define emancipation for purposes of terminating child support obligations in much the same way as Missouri law. Standard language provisions in many separation agreements prepared in military legal assistance offices around the world likely provide us with many such examples. Given the predisposition towards considering military academies of all services as a college option in many military families, this might be an issue the parties can resolve and address, if brought to their attention.

How did the Missouri court resolve the question? After reviewing the conditions under which a student attends West Point,[24] the court found that the child had entered active duty as the term is used in Missouri law.[25] Consequently, the child was emancipated and the parental obligation to support had terminated. In reaching this conclusion, the court noted that New York and New Hampshire courts had reached a similar result, while an Ohio court had held to the contrary.[26]

Drafting separation agreements that address every possible point of interest or contention is not a realistic possibility. To the extent they can be anticipated, however, gaps that affect money, and particularly family support, should be closed whenever possible. Major Block.

Former Spouses' Protection Act Update

The State-by-State Analysis of the Divisibility of Military Retired Pay, most recently published in the July 1994 issue of *The Army Lawyer*, indicates that military retired pay is divisible in Mississippi *sometimes*.[27] This perspective relies on the Mississippi Supreme Court decision in *Flowers v. Flowers*, which held that while no pension rights vest in a spouse as a result of Mississippi law, Mississippi courts will recognize and divide pension rights based on vesting that occurred while the military member was a domiciliary of another state.[28]

Without expressly overruling *Flowers*, several recent Mississippi cases have signaled a shift away from a title theory of property, used to support the determination that pension rights are personal to the person in whose name they are held, to a presumption in favor of equitable distribution of all assets acquired during the marriage, including pensions.[29] These cases do not rely on a legislative change in Mississippi law, and one of these cases, *Hemsley v. Hemsley*, is particularly noteworthy in that it involves division of military retired pay. A subsequent decision of the Mississippi Supreme Court in September 1994 confirms the court's position on equitable distribution, this time holding that postseparation adultery of a party does not bar equitable distribution.[30]

The decisions of the Mississippi Supreme Court in 1994 suggest that division of military pensions as marital property is now authorized under Mississippi law. Failure of the court

---

[20] *See* Montgomery Statement, *supra* note 8, at H9134-36 (lengthy discussion of pension issue). The problem of employer pension funding apparently delayed the final passage of this legislation for more than a year following passage of the first House version in May 1993.

[21] 20 Fam. L. Rep. 1571 (BNA) (Mo. Ct. App. 1994), [hereinafter *McVey*].

[22] MO. REV. STAT. § 452.340.3 (1993).

[23] *Id.* § 452.340.5.

[24] Some of the factors noted were a cadet's Regular Army status, compensation, and military obligation.

[25] *McVey*, *supra* note 21, at 1572.

[26] *Id.* (citing Zuckerman v. Zuckerman, 546 N.Y.S.2d 666 (Sup. Ct. App. Div. 1989)); Dingley v. Dingley, 433 A.2d 1281 (1981); and Howard v. Howard, 610 N.E.2d 1152 (Ohio Ct. App. 1992)).

[27] *See* Legal Assistance Items, *State-by-State Analysis of the Divisibility of Military Retired Pay*, ARMY LAW., July 1994, at 45.

[28] 624 So. 2d 992 (Miss. 1993).

[29] *See* Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994); Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994).

[30] Carrow v. Carrow, 20 Fam. Law. Rep. 1543 (BNA) (Miss. 1994).

to formally overrule prior decisions to the contrary, however, coupled with the strong voice of the court's dissent, and the as of yet silent voice of the state legislature, suggest that this is an issue worth watching. Legal assistance attorneys should annotate their State-by-State Analysis of the Divisibility of Military Retired Pay accordingly. Major Block.

Consumer Law Note

Truth In Lending Act Modifications: High Cost Mortgages/Reverse Mortgages

Despite reports that Congress was immobilized by the contentious Health Care and Crime bill debates, a key piece of consumer protection legislation made its way through Congress. On 23 September 1994, President Clinton signed the "Riegle Community Development and Regulatory Improvement Act of 1994" into law.[31] Included within the regulatory improvement act was a subtitle called the "Home Ownership and Equity Protection Act of 1994." The Act makes two significant changes to the Truth In Lending Act (TILA) which should interest legal assistance attorneys. It places new restrictions on lenders dealing in so-called "high cost mortgages." It also regulates, for the first time, the disclosures required in "reverse mortgages."

"High cost mortgages" under the Act are nonpurchase money loans involving a security interest in the consumer's principle residence.[32] In other words, the Act provides new protection to persons taking out a high cost "second" mortgage on their current home.

The Act defines "high cost" with two cost "triggers." First, the Act applies to loans that have an Annual Percentage Rate (APR) ten percentage points above the Federal Treasury Securities of comparable term.[33] For example, if the current ten-year treasury bond is paying seven percent, the Act's restrictions will apply to ten-year loans with an APR of 17.01% and greater. The alternate trigger relates to closing costs. If the closing costs (points and fees) exceed $400 or eight percent of the loan amount, the Act restrictions apply.[34]

If the Act applies, a number of new disclosures must accompany the loan. The Act gives a modified "cooling-off" period by requiring the lender to give all TILA disclosures to the borrower no less than three days *before* closing the loan.[35] The disclosures also now contain clear warnings to the borrower that the borrower is granting a security interest in the borrower's home.[36] The Act also places some restrictions on permissible loan terms. The loan may not include negative amortization,[37] and may not, under certain conditions, include any prepayment penalty.[38] In addition, the lender may not engage in a pattern of making these loans *without* regard to the ability of the borrower to pay.[39] If the loan is for a home-improvement contract, the loan proceeds must be paid to the contractor and homeowner jointly or to an agreed upon third party (escrow agent).[40]

The thrust of the Act appears primarily to attempt to regulate the practice among some lenders of preying on lower income individuals.[41] Typically, lenders loan money at higher interest rates to borrowers who are poor credit risks. Additionally, some lenders specifically target borrowers that could not qualify for a conventional mortgage using normal loan approval procedures. These lenders charge higher interest rates while advertising "no credit check." When these higher cost loans go into default, the lender perfects the security interest and forecloses on the home. Because of the high interest rate on the loan, the homeowner may recover little or nothing from the foreclosure sale *and* lose the residence! The Act seeks to eliminate these abuses in the credit industry.

The second half of the Act places new restrictions on so-called "reverse mortgages." These contracts allow a person with a fully paid up piece of real estate to cash in on the appreciated value of the property in return for granting a security interest to the lender. These loans are popular among

---

[31] *President Signs High Cost Mortgage, Reverse Mortgage Law*, Consumer Cred. Guide (CCH) No. 692, at 1 (Sept. 27, 1994).

[32] Community Development and Regulatory Improvement (CDRI) Act of 1994, Pub. L. No. 103-325 § 152(a), 108 Stat. 2160, 2190 (to be codified at 15 U.S.C. § 1602(aa)(1) (1994)).

[33] CDRI § 152(a) (to be codified at 15 U.S.C. § 1602(aa)(1)(A)).

[34] *Id.* (to be codified at 15 U.S.C. § 1602(aa)(1)(B)). The Federal Reserve Board may raise the dollar figure on an inflation adjusted basis after the Act has been in effect for two years. *Id.* (to be codified at 15 U.S.C. § 1602(aa)(2)(A)).

[35] CDRI § 152(d) (to be codified at 15 U.S.C. § 1639(b)(1)).

[36] *Id.* (to be codified at 15 U.S.C. § 1639(a)(1)(A-B).

[37] *Id.* (to be codified at 15 U.S.C. § 1639(f)).

[38] *Id.* (to be codified at 15 U.S.C. § 1639(c)).

[39] *Id.* (to be codified at 15 U.S.C. § 1639(h)).

[40] *Id.* (to be codified at 15 U.S.C. § 1639(i)).

[41] *See, e.g.*, 13 NCLC Reports Consumer Credit and Usury Ed. 1 (July/August 1994).

retirees. Typically, the individual contracts to receive cash from the lending institution in return for signing the property over to the lender effective at the death of the borrower.

The Act defines "reverse mortgages" to include loans that become due at death, at the time of transferring the property, or when the borrower ceases to live in the property.[42] The Act places a number of disclosure requirements on the lender.

The Act requires that the lender provide all disclosures at least three days before consummating the transaction.[43] The lender must calculate the APR associated with the transaction using three projected appreciation rates and three different credit transaction models.[44] The appreciation rates are an attempt to let the consumer know how much value the property will accrue between consummation of the loan and the event ending the loan. The three credit models must include a conventional short-term reverse mortgage, a term equaling the actuarial life expectancy of the borrower, and a third method determined by the Federal Reserve Board.

Reverse mortgages are an item of interest to the retired military client. They provide an attractive source of cash with no requirement (during client's lifetime) to pay back the advance. They also may represent the most costly means of borrowing money, depending on the prevailing interest rates, and the life expectancy and credit history of the client. Information about the new disclosure rules may be a fruitful source of preventive law articles. Major McGillin.

Administrative and Civil Law Notes

46th Federal Labor Relations Course

From January 23, 1995 to January 27, 1995, The Judge Advocate General's School will present the 46th Federal Labor Relations Course. Military or civilian attorneys employed by the United States government, who work or are pending assignment in civilian personnel law or labor law, may attend unless they have completed the Judge Advocate Officer Graduate Course in the past three years.

We will discuss a variety of topics related to the law of federal employment. Topics include the hiring classification, promotion, and discharge of employees under current civil service laws and regulations. This will include a discussion of the administrative and judicial appeal routes available to federal civilian employees. We also will address the rights and duties of management and employees under Title VII of the Civil Service Reform Act of 1978.

If you attend the course, bring a copy of your organization's collective bargaining agreement and an example of an actual labor relations or civilian personnel law problem of general interest. Summarize the problem in no more than two pages, removing all information that would identify the employees involved. Tell how you resolved the problem, and include all supporting documentation. We will collect the problems during the opening session, and discuss selected problems in the final seminar. Major Pearson.

Office of Special Counsel Reauthorization Act—More Power for the Merit Systems Protection Board and Arbitrators

On October 29, 1994, President Clinton signed legislation reauthorizing the Office of Special Counsel (OSC) through 1997. The Whistleblower Protection Act of 1989 (WPA) established the OSC as an independent agency but limited its authorization to five years. The OSC Reauthorization Act goes well beyond extending the agency's existence, however. It creates new employee rights and remedies through expanded authority of the Merit Systems Protection Board (MSPB) in actions involving prohibited personnel practices and of arbitrators in the negotiated grievance process. The changes became effective on enactment, meaning that they are now applicable law.

Debate over the OSC Reauthorization Act began in the summer of 1993. Certain members of Congress were not pleased with OSC's performance since 1989. Others were bothered by the MSPB's application of certain provisions of the WPA. By early 1994, the OSC Reauthorization Act had undergone several revisions and was proposed as House Resolution (H.R.) 2970. The President signed version five of H.R. 2970, despite numerous practical flaws and a glaring constitutional defect.

The final OSC Reauthorization Act contains various provisions that are fairly perfunctory and uncontroversial: codification of the MSPB's authority to award attorney's fees into 5 U.S.C. § 1204; extension of the Special Counsel's appointment for up to one year beyond expiration to allow for appointment of a successor; limitations on OSC disclosure of information; and a requirement for the OSC to act on an allegation of a prohibited personnel practice within 240 days and inform an employee at least ten days before terminating an investigation. These changes comprise approximately two written pages. Unfortunately, the OSC Reauthorization Act continues for an additional four pages of radical, controversial, and shortsighted amendments to existing laws.

Employees attempting to prove reprisal for whistleblowing in an individual right of action now receive a type of statutory presumption of reprisal whenever the agency official taking the action knew of the whistleblowing disclosure and took an action in a reasonable time after the disclosure. The individual right of action appellant before the MSPB also has a new "fishing license" not granted elsewhere in law; the MSPB "shall" issue a subpoena whenever the requested information

[42] CDRI § 154 (to be codified at 15 U.S.C. § 1602(bb)).

[43] *Id.* (to be codified at 15 U.S.C. § 1648(a)).

[44] *Id.* (to be codified at 15 U.S.C. § 1648(a)(1)).

"is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence." This allows the individual right of action appellant to request agency disciplinary files on other employees in hope of finding disparate treatment without consideration of the privacy rights of the other employees. Whenever the MSPB finds a prohibited personnel practice motivated a personnel action, either in an individual right of action or in an OSC corrective action, it "shall" award attorney's fees and costs and "can" award medical costs, travel expenses, and "foreseeable consequential damages." The Act places no limit on the amount of consequential damages. Employees of government corporations, such as the Postal Service, are now subject to the individual right of action provisions in the WPA.

Perhaps the most controversial amendment in the OSC Reauthorization Act directs agencies to include certain provisions in their collective bargaining agreements. These required provisions grant an arbitrator authority to issue stays of personnel actions in a grievance proceeding, equivalent to the MSPB authority, and to *order* the agency to take disciplinary action against a supervisor. A supervisor so disciplined can appeal the action through the normal appellate process. The supervisor is not a party to the grievance and has no right to call witnesses, present evidence, or even appear. The supervisor has no meaningful opportunity to respond to the charges or present evidence for consideration. Beyond the obvious issue of minimal due process, this amendment overlooks an obvious practical flaw: the agency must take, but need not defend, the disciplinary action. On the supervisor's appeal to the MSPB, the agency could fail to submit a timely response, allowing the MSPB to reverse. Should the agency satisfy the procedural requirements to defend the action, nothing prevents a deciding official from honestly testifying that the punishment imposed was reached without a meaningful opportunity for the supervisor to respond and without consideration of any *Douglas* factors. A deciding official might even testify that the ordered discipline was unreasonable and unjust, placing the MSPB in the position of reversing the discipline under otherwise applicable law and rules or allowing the unsupported disciplinary action to stand.

Experienced labor counselors easily can foresee the consequences of these amendments. Even for otherwise appealable actions, savvy attorneys *always* will file an OSC complaint alleging that their clients were victims of reprisal for whistleblowing. The MSPB has held that these actions are processed as otherwise appealable actions. However, the OSC complaint brings the appeal within the definition of an individual right of action and opens the door for recovery of consequential damages.

Amend your resource materials to reflect the changes in the OSC Reauthorization Act and do not be caught off guard by its changes. Just be thankful that the MSPB appeal process does not provide for a jury trial! Major Hernicz.

International and Operational Law Note

Recent Army JAG Corps Initiatives to Enhance Human Rights

Training at the School of the Americas

The Army Judge Advocate General's Corps (JAGC) Corps has recently undertaken two significant initiatives designed to enhance human rights training at the United States Army School of the Americas (SOA or School). First, in August of 1994, an Army judge advocate, Major Dennis Cruz-Perez, was assigned to a field grade officer staff position at the SOA. Second, the International and Operational Law Division, Office of The Judge Advocate General, has developed a new three-hour block of instruction designed to teach students how to conduct and institutionalize human rights training in their own militaries.

Initially founded in Panama in 1947, the SOA has been operating at Fort Benning, Georgia, since 1984. The School's mission is to develop and conduct military education and training, using United States doctrine, in the Spanish language for Latin American officers, cadets, and enlisted personnel to achieve a higher level of military professionalism and effectiveness.

The role of the newly assigned School Judge Advocate is to ensure that human rights are emphasized at every level of the training. This includes not only providing human rights training in the classroom, but integrating human rights training tasks into field training activities.

Thus, human rights training is now conducted in three phases at the School: first, the traditional classroom approach of teaching students the rights, duties, and responsibilities of soldiers; second, human rights "lane training" exercises in which realistic human rights scenarios are inserted into standard military training exercises; and third, a new human rights training course.

The new block of instruction developed by the International and Operational Law Division concentrates on the mechanics of how human rights training might be developed and provided to a state's military personnel. The class is patterned on the successful human rights training handbook developed for the Peruvian armed forces in 1992-93, "Ten Commandments for the Forces of Order."[45] Using the Peruvian program as a vehicle for classroom discussion (to include providing the students with a copy of the actual human rights handbook), the School demonstrates how human rights training can be incorporated into a military system.

The development of a new block of instruction that demonstrates to students how human rights can be institutionalized in a military clearly signals a new and dynamic approach to human rights training. Coupled with the addition of a full-time judge advocate to the SOA staff, this initiative signals a clear commitment to place human rights training in the forefront of the curriculum provided by the School of the Americas. Lieutenant Colonel Addicott, International and Operational Law Division, OTJAG.

[45] *See* Addicott & Warner, *JAG Corps Poised for New Defense Missions: Human Rights Training in Peru*, ARMY LAW., Feb. 1993, at 78.

Claims Report

United States Army Claims Service

Policy Note

The Single Contractor Privately Owned Vehicle Pilot Program

This Claims Policy Note amends the guidance found in *Army Regulation (AR) 27-20*,[1] paragraphs 11-24, 11-33, and 11-35; and in *Army Pamphlet 27-162*,[2] paragraph 3-21c. In accordance with *AR 27-20*, paragraph 1-9f, this guidance is binding on all Army claims personnel.

On November 1, 1994, an event claims offices worldwide have long been waiting for, occurred. On that date, the Single Contractor Privately Owned Vehicle (POV) Pilot Program began. This program will allow claims services and field claims offices to greatly enhance their POV recoveries. If you have not reviewed your POV recovery procedures recently, be sure to read the Personnel Claims Note in the October 1992 issue of *The Army Lawyer* to refresh your memory.

In 1991, the United States Army Audit Agency (USAAA) audited POV recovery procedures and found that recovery was poorly done. The USAAA recommended, among other things, that the Military Traffic Management Command (MTMC) develop a POV shipping program that used a single contractor who would be responsible for claims. The MTMC concurred and developed this pilot program. The concept of operation is that only POVs shipped to and from the following sites will come under this program: in the United States (1) St. Louis (Pontoon Beach, Illinois), (2) Dallas, and (3) Baltimore; in Germany (1) Baumholder, (2) Wiesbaden, (3) Mannheim, (4) Grafenwoehr, (5) Kaiserslautern, (6) Schweinfurt, (7) Boeblingen, and (8) Spangdahlem. Shipments of POVs that do not originate and end with any of these sites do not come under this program and any recovery action taken must be done under our present system which can involve multiple responsible carriers. For example, a POV shipped from Dallas to Mannheim or shipped from Grafenwoehr to Baltimore will come under the single contractor program; however, a POV shipped from St. Louis to Hawaii, or Boeblingen to Oakland will not. To ensure that you have a POV that is a part of the single contractor program look at the *DD Form 788* to see if both the origin and destination sites are from the above listed cities.

At present, the new single contractor, American Auto Carriers, will continue to use the *DD Form 788*. However, the contractor has indicated a desire to create a new inspection form which it will submit first to the MTMC for review and concurrence. The United States Army Claims Service (USARCS) will be given an opportunity to comment on the proposed form. Yet, there is some good news regarding the use of the *DD Form 788*. First, it will be used only twice during the shipment: at the origin vehicle processing station when the shipper drops off the POV and a joint inspection is conducted, and again at the destination vehicle processing station when a joint inspection is done with the shipper before releasing the POV. Second, the *DD Form 788* will indicate the origin and destination sites so claims personnel can determine if the POV is a part of the program. The contractor will use an internal inspection form to allocate liability among his subcontractors.

The following information is provided to assist you in asserting recovery demands against the single contractor:

1. No demand will be asserted if recovery potential is $25 or less.

2. For POV claims that do not fall within this program, no demand will be asserted if recovery potential is less than $100, except that claims involving loss of items from inside the vehicle, (*e.g.*, theft of tool boxes, infant seats, seat covers, first aid kits, jacks, jumper cables, and radios and other audio equipment) will be pursued regardless of amount of recovery.

3. All field claims offices will assert recovery demands. United States Army Claims Service, Europe (USACSEUR), will continue to assert POV recoveries for its area of responsibility.

4. The single contractor is American Auto Carriers, 188 Broadway, Woodcliff Lake, New Jersey 07675. Demands will be sent to this address. The contract is for a two-year period with two one-year option periods.

5. The demand will consist of a *DD Form 1843* (be sure to change the number "120 days" found in the bold print instructions just above blocks 10 and 11 to "90 days"), the *DD Form 788* or commercial equivalent, a *DD Form 1844*, and supporting documentation (*e.g.*, estimate of repair).

6. European field claims offices will prioritize assembly of POV recovery files, handling claims for $2000 or more first, and will forward them to

[1] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990).

[2] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989)

USACSEUR on the thirtieth day after payment to the claimant for recovery action. The USACSEUR will prioritize action on these files handling claims of $2000 or more first. Action to prioritize recovery files will occur regardless if the POV recovery files are under the single contractor program or the old POV program.

7. A non-European field claims office will prioritize recovery action on the claims, handling claims of $2000 or more first. Action to prioritize recovery files will occur whether the POV recovery files are under the single contractor program or under the old POV recovery program.

8. When a field claims office determines that the contractor is liable and within ninety days a satisfactory settlement cannot be reached or the contractor does not respond, the complete claim file will be forwarded with a transmittal letter to the contracting officer administering the contract requesting offset. The transmittal letter can be "modeled" on the DPM letter to the local contracting officer requesting offset. Aside from telling the contracting officer to offset the contractor, it will tell the contracting officer that any checks received from the contractor made payable to the Treasurer of the United States along with the file will be sent to the USARCS, *not to the field claims office*. Additionally, in this transmittal letter the field claims office will tell the contracting officer that if any money is withheld from accounts payable to forward to the USARCS a copy of the collection voucher to verify that it was credited to the correct appropriation number. Be sure to include this number in the transmittal number. (I recommend that the claim file be sent certified mail return receipt requested). The contracting office administering this single contractor program is MTMCEA, Contracting Division, Bldg. 42, Room 705A, Military Ocean Terminal, Bayonne, New Jersey 07002-5302.

9. The shipper/claimant has the right to settle the claim directly with the contractor.

a. At the origin turn-in facility the shipper and the contractor will conduct a joint inspection of the POV using *DD Form 788* or an approved contractor form. The contractor will provide the shipper a legible copy of the inspection form and a copy of the Vehicle Claims Instructions sheet which explains the shipper's rights to file a claim for damage or loss.

b. The original copy of the inspection form will accompany the POV. The contractor cannot use the original copy to record damages incurred at transship points.

c. The contractor will use the original inspection form and the shipper's copy to conduct a final joint inspection at the destination pickup facility. The shipper will retain the copy given to him at turn-in and the contractor will retain the original inspection form.

d. The contractor assumes full liability for all loss and damage, except where the contractor can prove absence of fault or negligence, or the loss or damage arose out of causes beyond the contractor's control (*e.g.*, the ship sinks through no fault of the contractor).

e. The contractor may correct deficiencies occurring while the POV is in the custody of the contractor, but the contractor must notify the shipper and a contracting officer's representative (COR) in writing of any corrected deficiencies made to the POV. Deficiency is not defined, but probably allows the contractor to make repairs to the POV at his expense.

f. At the time of the final joint inspection, the shipper may choose to settle the claim directly with the contractor. The shipper will be provided with another Vehicle Claims Instructions sheet which he or she will be required to sign. The pertinent clause in the contract states:

> At the time of the final joint inspection the customer may, at his discretion and option, choose to settle the claim directly with the Contractor. The service member will be provided another Vehicle Claims Instructions, explaining his rights under the contract. At this time the customer will be required to sign the Vehicle Claims Instructions signifying he understands his rights and chooses to settle the claim with the Contractor.[3]

The original of the signed Vehicle Claims Instructions sheet will be maintained in the contractor's file; a copy will be given to the shipper, and a copy will be given to the COR.

g. All other recovery procedures, to the extent they are not changed by this note, remain in effect.

10. The Vehicle Claims Instructions informs the shipper of two options: (1) file a claim against the government, or (2) file a claim against the contractor. It also tells the shipper that, absent some

[3] See Appendix B for a complete reproduction of the instruction sheet provided to the shipper.

type of fraud, settlement with the contractor is final and a later government claim can be denied. However, another pertinent clause in the contract states:

> If the customer chooses not to settle with the Contractor, or finds additional damages not annotated during the joint file inspection, the customer will file the claim with the local field claims office.[4]

This clause indicates that the claimant could not only file an original claim with the contractor, but also file a second claim against the government for later discovered damage not claimed against the contractor when the claimant settled with the contractor. Field claims offices must evaluate such second claims to determine if compensation is warranted or the claim should be denied. Ask if the later discovered damage should have been discovered at time of the final inspection. If the claimant has settled with the contractor, it will be difficult to seek recovery from the contractor as the contractor will argue that the claim is settled and that the contractor has no further liability. Field claims offices will have to show that the later discovered damage for which the government compensated the claimant could not have been discovered by the exercise of due diligence on the part of the claimant. Claimants are instructed to notify the field claims office and the contractor of later discovered damages in writing as soon as possible. In the letter the claimant has to explain why the damage was not discovered during the final inspection at the pickup point. Nothing precludes the claimant from asking the contractor to reconsider the settlement in light of later discovered damage. *Regardless, field claims offices should ask the claimant if he or she has an offer from, or has settled, with the contractor.*

11. As a preventive law measure, field claims offices should publish in their local bulletins and newspapers the importance of the initial and final inspections of POV shipments.

12. Entering data in the Personnel Claims Management Program claims record will be extremely important. Tracking POV recovery data will be required, not only to report to the Army Audit Agency, but to determine the success of the single contractor program. A variety of agencies will request POV vehicle recovery data. When recording recovery data for a POV claim under the single contractor program, use the "NON-GBL RECOVERY" data screen group in the claim record. In the "Contractor" field enter the following code that will represent the contractor; "POVAAC." Enter a "N" in "Ex Cov" field and use the remaining data fields to reflect demands, deposits, and offsets as appropriate. In the "PAYMT-DENIAL-TRNSFR-RECON" (Transactions) data screen group in the claim record, use the code "TV" to reflect that you transferred the claim file. The "TV" transaction code is for transferring claims files to the Military Sealift Command for recovery. Until the USARCS can create a new transaction code for this specific type of POV recovery, this transaction code will be used.

The Single Contractor Pilot Program has long been anticipated. Claims procedures probably will have some "glitches" to work out as recovery actions are initiated, but now claims offices will have a much easier time determining who is liable for the damage to a claimant's POV. Hopefully, this program will prove successful, and it will be expanded to all POV shipments. Until then, for those claims that do not fall in the Single Contractor POV Pilot Program, keep trying to determine who is liable and assert demands on those carriers. Lieutenant Colonel Kennerly.

Appendix A

This appendix contains the pertinent claims clauses contained in the contract. They are reproduced here to clarify the preceding discussion.

C.6. CONTRACTOR LIABILITY/CLAIMS

C.6.1. The Contractor is responsible for and will not hold the Government liable for any loss or damage to POVs or their accessories while the vehicle is in the Contractor's care, custody and control. The Contractor shall, at its own cost and expense, defend any suits, demands, claims or actions in which the United States might be named as co-defender of the Contractor, arising out of or as a result of the Contractor's performance of work under this contract, whether or not such suit, demand, claim or action arose out of or was the result of Contractor's negligence. This shall not prejudice the right of the Government to appear in such suit, participate in a defense, and take such action as may be necessary to protect the interest of the United States. Nothing in the above provisions shall in any way limit other remedies available to the Government as provided by law, or in any way waive any of the rights of the Government as provided by law.

C.6.1.1 For vehicles shipped between the three (3) CONUS service sites and Germany, the Contractor is liable for any and all damages, expenses and/or loss of the vehicle from the time the vehicle is turned in by the customer until the vehicle is delivered to the customer at destination.

[4] See Appendix A for pertinent claims clauses contained in the contract.

C.6.1.2 For all other POVs, the Contractor is fully liable for loss, damage, and/or expenses incurred from the time of turn-in by the customer till pickup by the carrier or from time of delivery by a carrier till receipt by the customer.

C.6.1.3 For Germany POVs not in the movement program between the three (3) CONUS service sites and Germany, the Contractor is fully liable for the POV loss/damage during the off-load from and loading onto the carrier, and during transportation of the POV on the carrier. Contractor liability for inbound POVs shall include all Contractor operation of the POV and extend until the POV is accepted by the customer. Contractor liability for outbound POVs shall include all Contractor operation of the POV and extend until the POV has been parked in the Government provided storage area at POE/POD (Bremerhaven), with the engine off, emergency brake engaged, and all doors locked.

C.6.2 CLAIMS

C.6.2.1 The Contractor shall be responsible for correcting any deficiencies occurring while the POV is in the custody of the Contractor. The Contractor will notify in writing the customer and Government COR of any corrected deficiencies made to the POV. Any claims for loss, damage or destruction to a POV or loss or damage to its accessories, for which there is liability against the contractor under the provisions of the contract, will be processed against the contractor as described below:

C.6.2.1.1 At turn-in facility the customer and Contractor will conduct joint inspection of the vehicle using DD Form 788 or Contractor provided and U.S. Government approved equivalent form.

C.6.2.1.2 If during the joint inspection a dispute occurs, the Contractor will immediately notify the Government COR for verification.

C.6.2.1.3 The Contractor will provide the customer a legible copy of the annotated form used during the inspection, (1st copy). In addition, the Contractor will provide the customer a copy of the Vehicle Claims Instruction explaining the customer's rights to file for damages and/or loss.

C.6.2.1.4 The Contractor will place original copy of inspection form along with other shipping documents into a shipping envelope in the glove compartment of the POV. Motorcycles will have the shipping envelope firmly attached to the seat.

C.6.2.1.5 The Contractor will not use the original copy of the joint inspection form to record damages incurred at transship points.

C.6.2.1.6 The Contractor will use the original joint inspection form and the customer's 2nd copy to conduct final joint inspection with customer at destination pick up point. The original copy of the inspection form will be maintained by the Contractor as part of his official files and the 2nd copy returned to the service member upon completion of the joint inspection.

C.6.2.1.7 Contractor liability under this contract will be in accordance with the FAR clause 52.247-22 for Transportation Contractors (freight, other than HHG). The Contractor assumes full liability for all loss and damage, except where the Contractor can prove absence of fault or negligence, or that loss or damage arises out of causes beyond the Contractor's control. The measures of liability are: (1) for loss, the depreciated replacement cost (blue book retail cost); and (2) for damages, the full value of repair.

C.6.2.1.8 If during the final joint inspection a dispute occurs between the Contractor and customer, the Contractor will immediately notify the COR for verification.

C.6.2.1.9 Discrepancies annotated between the original and final joint inspection will be annotated on the DD Form 788 or approved commercial form and a copy provided to the COR by the Contractor.

C.6.2.1.10 At the time of the final joint inspection the customer may, at his discretion and option, choose to settle the claim directly with the Contractor. The service member will be provided another Vehicle Claims Instructions, explaining his rights under the contract. At this time the customer will be required to sign the Vehicle Claims Instructions signifying he understands his rights and chooses to settle the claim with the Contractor. A copy of the signed Vehicle Claims Instructions will be maintained in the contractor's files, a copy provided to the customer, and a copy provided to the COR. The contractor shall provide a monthly report annotating monies settled with the customer for claims and submit a report to the COR.

C.6.2.1.11 If the customer chooses not to settle with the Contractor, or finds additional damages not annotated during the joint final inspection, the customer will file claim with the local field claims office.

C.6.2.1.12 The customer will submit for claims processing the 2nd copy of DD Form 788 or approved commercial inspection form, and copies of all documents used in settling his previous claim with the Contractor to the local field claims office.

C.6.2.1.13 The local claims office will file a demand directly with the Single POV Contractor for claims paid by the U.S. Government. The initial demand will consist of a DD Form 1843 (Demand on Carrier/Contractor ATT#16 or Commercial Equivalent), the DD Form 788 or Commercial Equivalent, a DD Form 1844 (Claims Analysis Chart ATT.#17 or Commercial Equivalent) and supporting documentation.

C.6.2.1.14 The Contractor will have 90 days from date of demand request in which to respond to the claims office.

C.6.2.1.15 The Contractor will provide to the COR a copy of the reply to the claims office along with a copy of the initial claims demand request package.

C6.2.1.16 Upon receipt of a Contractor's reply disputing the demand request, the Claims Office may submit a request to the MTMC Contracting Officer to recover funds under terms of the contract.

C.6.2.2 A complete package of the claims demand will be forwarded to the MTMC Contracting Officer.

Appendix B

This appendix reproduces the instruction sheet that the shipper will be given at vehicle turn-in and again at destination pickup.

VEHICLE CLAIMS INSTRUCTIONS TO BE GIVEN TO THE MEMBER

1. Important Information on Filing a Claim for Damage to Your Vehicle:

a. These instructions provide information on how to file a claim for loss or damage to your vehicle during a Government-sponsored shipment. READ THESE INSTRUCTIONS CAREFULLY TO UNDERSTAND WHAT YOU MUST DO!

2. You have two (2) options in filing a claim. You can elect to file your claim with the Government or you can file your claim with the company that shipped your vehicle. Carefully read all of these instructions before deciding which claim to file.

3. If you decide to file a claim with the Government, you must:

a. Carefully and completely list any loss and all damages to your vehicle on your vehicle shipping document, DD Form 788 or Commercial Equivalent. You should have two (2) copies: one you received at your initial turn-in inspection and the second one that should be given to you by the Military Traffic Command Vehicle Processing Center or by the company which shipped your vehicle. List all loss and damage in item #13, column 1, of the DD Form 788. The inspector for the company which shipped your vehicle will record his agreement or disagreement in item #13, column 2. You should then sign item 15 accepting you vehicle. DO NOT RELY ON A REPRESENTATIVE OF THE COMPANY THAT SHIPPED YOUR VEHICLE TO LIST LOSS OR DAMAGE FOR YOU. MAKE SURE YOU HAVE LISTED ALL LOSSES, DAMAGES, OR DESTRUCTION TO YOUR VEHICLE BEFORE YOU LEAVE THE PICKUP POINT. Almost all damages can be found at this inspection. Inspect your vehicle very carefully because it will be difficult for you to prove that damage you discover after accepting your vehicle occurred during shipment instead of while the vehicle was in your possession. If, however, you discover damage after you have left the pickup point, YOU MUST IMMEDIATELY NOTIFY THE MILITARY CLAIMS OFFICE (See para. 3b) AND COMPANY THAT SHIPPED YOUR VEHICLE IN WRITING! Be sure to describe in detail the damage discovered and why it was not discovered at the final inspection at the pickup point. Failure to do this may result in no payment for this damage.

b. File your claim at the Military Claims Office where you are stationed or the Military Claims Office nearest where you discovered loss or damage to your vehicle. Claims personnel will furnish to you the necessary claims forms and instructions on how to fill them out.

c. You are responsible to prove ownership of your vehicle, that the loss or damage you are claiming occurred during the Government-sponsored shipment, and the value of the damages. Claims personnel can explain any questions you have, especially about estimates of repair to support the value of the damages to your vehicle and if depreciation will be applied in determining the amount of any payment you might receive. If you have to have repair work done to your vehicle before you leave the port or its surrounding community, make sure that the mechanic who fixes your vehicle writes on the repair bill what he repaired or replaced, how much it costs, and how he thought the damage occurred (*e.g.*, did the damage occur during shipment and if so how).

d. If you have insurance on your vehicle that covered the vehicle in transit, you MUST file and settle a claim with the insurance company prior to settling a claim with the Government. You may be required to submit a copy of your insurance policy or lack thereof (*e.g.*, cancellation notice).

e. Should you file a claim with the Government, you are required to notify the Military Claims Office of any offer of settlement or denial of liability by any third party (*e.g.*, an insurer, company that shipped your vehicle).

f. ALTHOUGH YOU HAVE TWO (2) YEARS FROM THE DATE YOU TAKE DELIVERY OF YOUR VEHICLE AT THE PORT OR INLAND PICKUP POINT TO FILE YOUR CLAIM, DO NOT WAIT. Failure to file within this two (2) year period will result in denial of your claim. Early filing helps the Military Claims Office resolve any questions that might come up about your claim that could delay any payment due you, and it helps them in recovery efforts against the shipping company.

4. If you decide to file your claim with the company that shipped your vehicle, either at the pickup point or later, you must comply with the following procedures:

a. Carefully and completely list any loss and all damages to your vehicle on the DD Form 788 or commercial equivalent. Do not rely on the inspector of the company that shipped your vehicle to do this for you.

b. Submit your claim to the shipping company. The company will review your claim and determine an amount that they will pay you.

c. You may accept or reject the settlement amount offered. If you accept, absent some kind of fraud, that will usually mean final action on your claim. If you should discover at a later time that your loss or damage was greater than what you accepted to settle your claim, you can ask the shipping company if they will honor an amended claim. Keep in mind that a claim settled with the company that shipped your vehicle will almost always result in denial of any later claim filed with the Government.

5. Contact your nearest Military Claims Office if you have any questions concerning filing a claim for loss or damage to your vehicle.

Affirmative Claims Note

Common Errors in Affirmative Claims Files

In files sent to the USARCS Affirmative Claims Branch, field offices make several common errors in asserting and pursuing their affirmative claims. These errors can negatively affect the government's prospects for recovery.

On discovering a claim that can be asserted on behalf of the government, claims personnel should notify all parties involved. A notification letter should be sent to all injured parties, their civilian attorneys, each injured party's insurance company, all tortfeasors, their civilian attorneys, and each tortfeasor's insurance company. If the tortfeasor is an employee of a company owned by a parent corporation, also provide notice to the parent corporation. In other words, let every interested individual and business know that the government has a claim. This should be done even if the injured party's attorney has signed a representation agreement. Claims personnel should advise the injured party's attorney of the notification made.

Even if the amount of the government's claim has not yet been determined, claims personnel should notify all interested parties of the claim. The notification letter should state that the amount of the claim has yet to be calculated, but further information will be forthcoming. Once claims personnel receive a final billing statement, they should advise all interested parties of the final amount of the claim.

Claims personnel must obtain billing statements from all military treatment facilities that provided care to the injured party. If the injured party continues to receive medical care at government expense, the recovery judge advocate/attorney should delay settlement or should consider this in negotiating a settlement of the government's claim if delay is not appropriate.

In some cases, claims personnel properly notify the parties of the government's claim, but fail to take any further action. Claims personnel should review each file at least every sixty days and take appropriate follow-up action. This will ensure that no file is overlooked and no statute of limitations expires before the recovery judge advocate/attorney takes final action on the file.

Claims personnel often overlook the injured party's own insurance as a possible source of recovery. If an individual is injured in an automobile accident, claims personnel should investigate whether the injured party has medical payments or personal injury protection coverage. This should be done whether the injured party was in his or her own car or not. If such coverage exists, it may be an additional source of recovering the government's claim.

Oftentimes, despite timely and proper notice from claims personnel, the insurance company still settles with the injured party without satisfying the government's claim. State insurance laws often require insurers to negotiate with all claimants before disbursing insurance proceeds. Consequently, claims personnel should continue to pursue the government's claim with the insurance company. The recovery judge advocate/attorney also should research state law to determine if any other recourse against the insurance company exists.

To avoid paying the government's claim, an insurance company may argue that the injured party already has signed a release. Case law has clearly established, however, that a release from the injured party does not prevent the government from pursuing its claim. Claims personnel need to advise the insurance company of this and continue to aggressively pursue the government's claim. If the insurance company still refuses to negotiate with the government, claims personnel may file a complaint with the State Insurance Commissioner. In appropriate cases, the recovery judge advocate/attorney may refer the case for litigation after coordination with the local United States Attorneys' Office.

By properly asserting and pursuing affirmative claims, field offices will ensure that timely and appropriate action is taken on every claim. Ultimately, this will increase the amount of recoveries that field offices collect and directly benefit the Army's Affirmative Claims Program. Captain Park.

Personnel Claims Note

Describing a Lost or Damaged Item

On September 29, 1994, members of the carrier industry met with MTMC officials and representatives of the military claims services. The purpose of this Military Personnel Property Symposium was to bring together members of the carrier industry and the MTMC to discuss issues of mutual concern. One issue raised for discussion was a request by the carrier industry to have claimants provide more information on *DD Form 1844* when claimants describe their lost or damaged items. The military claims services agreed to emphasize this request with their respective claims offices.

Although this request is not new, field claims offices have tended not to require more detailed descriptions of lost or damaged items from claimants. *Department of Defense Form 1844*, block 7, Lost or Damaged Items, directs the claimant to "describe the item fully, including brand name, model and

size. . . ." Field claims offices should instruct claimants orally and in their claims instructions to provide more descriptive details, especially for major appliances—such as audio equipment, video equipment, washers, dryers, and refrigerators. This descriptive information should include what is stated on the *DD Form 1844* and, where possible, provide the model number for the major appliance.

Sometimes the claimant may not have or cannot provide this information (*e.g.*, missing items, mail-in claim). In these situations, field claims offices have to decide if such information is needed to adjudicate the claim and conduct successful recovery.

Requiring this additional information should not burden claimants and will provide claims offices with better information to determine the accuracy of purchase prices, replacement costs, and correct amounts to pay the claimant for these items. The military claims services requested, in return, that the carriers list make and model numbers on the inventories. In a February 1992 message to its field offices, the MTMC changed the Tender of Service, Appendix A, DOD 4500.34R (Personnel Property Traffic Management Regulation), to require that carriers list and identify by make, model, and serial number, when this information is visible on the outside of the items, televisions, stereo components, computer hardware, video camera recorders, and video cameras. Lieutenant Colonel Kennerly.

Labor and Employment Law Notes

Labor and Employment Law Division, OTJAG

Statute of Limitations for FLSA Claims

After the 23 May 1994 decision *Matter of: Joseph M. Ford—FLSA Overtime—Limitations Period*,[1] the Comptroller General will apply a two-year statute of limitations (three years for willful violations) to all Fair Labor Standards Act (FLSA)[2] backpay claims. The prior limitation period was six years; therefore, this decision has an immediate effect on backpay claims brought under the FLSA.

Before retiring from his Air Force position as a Fire Inspector, Mr. Ford submitted a claim under the FLSA for six years of overtime pay. The Air Force agreed to pay some, but not all, of the overtime backpay. Among other issues, the Air Force contended that backpay was appropriate only for the period beginning two years before the claim was filed. This position was contrary to earlier Comptroller General decisions,[3] but it ultimately prevailed.

The General Accounting Office has general authority to settle claims against the United States under 31 U.S.C. § 3702(b)(1), which provides that claims must be received within six years of the accrual date "except . . . as provided in this chapter or another law." The issue in Mr. Ford's case was whether the Portal to Portal Pay Act of 1947, as amended, was such "another law" because it provides that a "cause of action" under the FLSA shall be forever barred unless commenced within two years (three years for willful violations) after it accrues.[4] In deciding that the Portal to Portal Pay Act constituted an exception to the six-year general claims limitation period, the Comptroller General reversed its earlier position that "a limitation on claims expressed in terms of judicial actions should be distinguished from administrative proceedings to adjudicate the same claims."[5] Because limitations in the Portal to Portal Pay Act were expressed in comprehensive terms (applying to "any action . . . to enforce any cause of action for . . . unpaid overtime compensation" under the FLSA), allowing the continuation of the six-year limitation would be inconsistent with congressional intent "to subject federal employees to the same limitation period applicable to other FLSA claimants."[6] Major Davis.

The MSPB Revises Prevailing Party Definition

To receive attorney's fees in an action before the Merit Systems Protection Board (MSPB or Board), an appellant must be

[1] B-250051, 1994 WL 201742 (Comp. Gen., May 23, 1994).

[2] Fair Labor Standards Act of 1938, *amended by* 29 U.S.C.A. 201-19 (West 1994).

[3] *See* Federal Firefighters, B-216640.7, 68 Comp. Gen. 681 (1989); Henry G. Tomkowiak, et al., B-223775, 67 Comp. Gen. 247 (1988); Transportation Sys. Center, B-190912, 57 Comp. Gen. 441 (1978).

[4] 29 U.S.C.A. § 255(a) (West 1985).

[5] B-250051, 1994 WL 201742 (Comp. Gen., May 23, 1994).

[6] *Id.*

a "prevailing party" in the matter contested.[7] Until recently, the MSPB had required a showing that the appellant had "substantially prevailed," or prevailed on a significant portion of claims, to be a prevailing party.[8] Under a revised test announced in *Ray v. Health and Human Services*, the MSPB will find that "an appellant who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement, is the prevailing party."[9]

The facts in *Ray* involve a convoluted history of his retirement, return to service, downgrade, re-retirement, settlement, attempt to revoke the settlement for incompetence, and, finally, attempt to recover attorney's fees. The interesting aspect of the decision is that it was obvious that Mr. Ray was not entitled to fees—even under the Board's liberalized standard. The Board could have simply denied the petition for review, thereby affirming the administrative judge's denial of fees.[10] Instead, it reopened the appeal on its own motion and seized the opportunity to create a new test for fees in unnecessary dicta.

The Board previously has held that the prevailing party concept in the civil rights attorney fee statute applies to attorney fee awards under 5 U.S.C. § 7701.[11] The Board's revised test in *Ray* is based on the "recent" Supreme Court cases under the civil rights attorney fee statute, *Texas State Teacher Ass'n. v. Garland Independent School District*[12] and *Farrar v. Hobby*.[13] In *Garland*, the Court held that a party "prevails" if successful in achieving some of the benefit sought in bringing suit sufficient to materially alter the parties' legal relationship to one another.[14] In *Farrar*, the Court held that the prevailing party inquiry turns on whether the actual relief "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." The technical or de minimis nature of the victory is part of the determination of what constitutes a reasonable fee.[15]

Based on this guidance, the Board established a three-part test for determining whether a party may recover fees under § 7701: the party must obtain an enforceable judgment against the agency, or enforceable relief through a settlement agreement; relief is significantly due to initiation of MSPB proceeding; and attorney fees were incurred in a reasonable amount.[16] Mr. Ray did not satisfy the test because his settlement agreement with the agency did not benefit Ray or materially alter the parties' legal relationship; it simply embodied the terms of the relationship that already existed between Mr. Ray and the agency. Ms. Harvey.

---

[7] 5 U.S.C. § 7701(g) provides that the Board "may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice. . . ."

[8] McWilliams v. Department of Treasury, 51 M.S.P.R. 422 (1991).

[9] 64 M.S.P.R. 100, 103 (1994).

[10] *See* 5 C.F.R. § 1201.113(b) (1994).

[11] Hodnick v. Federal Mediation & Conciliation Serv., 4 M.S.P.R. 371, 375 (1980).

[12] 109 S. Ct. 1486 (1989).

[13] 113 S. Ct. 566 (1992).

[14] *Garland*, 109 S. Ct. at 1493-94.

[15] *Farrar*, 113 S. Ct. at 573, 576.

[16] Ray v. Health and Human Servs., 64 M.S.P.R. 100, 103-05 (1994).

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

Army Regulation (AR) 608-18 *(Family Advocacy)*
(Reporting Child and Spouse Abuse)

Army Rule 1.14
(Client under a Disability)

Army Rule 1.6
(Confidentiality of Client Information)

Military Rules of Evidence 502 and 511(a)
(Privileged Information)

United States Attorneys' Manual, *paragraph 9-2.161(a)E*
(Subpoenaing Attorneys)

Army lawyers must report patterns of abuse and domestic violence that amount to continuing crimes to prevent imminent death or bodily harm. Lawyers are permitted to disclose other spouse and domestic violence, but must resist improper attempts to obtain client information.

Army lawyers often receive information about child abuse and other domestic violence. Our clients include abusers, victims, friends, relatives, neighbors, and health care workers who could be violating state reporting laws or *AR 608-18*[1] by failing to report the violence. When are attorneys *ethically required to resist* attempts to obtain information, *ethically permitted to reveal* information, and *ethically required to report* that information?

The answers are not easy. Our ethical requirement to protect client information yields only to prevent imminent bodily harm or death. A multitude of reporting laws in the fifty states, *AR 608-18*, military evidence law, the Army's Rules of Professional Conduct for Lawyers,[2] and the facts determine the outcome in each case. This article discusses three unfortunately common factual situations and provides research sources[3] needed by Army attorneys to resolve them ethically.

Confidentiality of Client Information

To solve the mystery of an unexplained infant fatality, Army criminal investigators wanted to study legal assistance client appointment records and to interview paternity and support clients. That request was denied because attorneys cannot ethically release client appointment books or other client information.[4] The name, address, and telephone number of a legal services client are "secrets."[5] A client's identity, whereabouts, and the subject matter of a consultation—information received in the course of representation—are protected against disclosure.[6]

Client Information

Army Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) [future crimes and] (c) [lawyer's claim or defense] . . . .
>
> . . . .
>
> (d) An Army lawyer may reveal such information when required or authorized to do so by law.[7]

The ethical duty not to reveal "information relating to representation of a client" is distinct from, and broader than, con-

---

[1] DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, para. 3-10, (18 Sept. 1987) [hereinafter AR 608-18].

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

[3] *See generally* Peter C. Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through An "Ethical" Rule*, 2 GEO. J. LEGAL ETHICS 485 (1988); Survey Project, *Confidentiality*, 3 GEO. J. LEGAL ETHICS 113 (1989); John R. Przypyzny, *Public Assault on the Attorney-Client Privilege: Ramifications of* Baltes v. Doe, 3 GEO. J. LEGAL ETHICS 351 (1989); Anne L. McBride, *Deadly Confidentiality: AIDS and Rule 1.6(b)*, 4 GEO. J. LEGAL ETHICS 435 (1990).

[4] CENTER FOR PROFESSIONAL RESPONSIBILITY, ABA, ANNOTATED RULES OF PROFESSIONAL CONDUCT 89 (2d ed. 1992) [hereinafter ABA ANNOTATED RULES].

[5] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 1287 (1974); *but see* Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 18 (1989) (considering confidentiality only, Major Ingold's position is that information whether the client has appeared for an appointment may be released, especially when the "client" was a "no-show").

[6] AR 27-26, *supra* note 2, rule 1.6.

[7] *Id.*

fidentiality that arises under either agency or evidentiary principles. In the law of agency, an agent owes a fiduciary duty to the principal not to disclose the principal's confidences and secrets. In the law of evidence, an attorney's confidential communications and work product are free from compulsory disclosure.

The attorney-client privilege applies not only to matters communicated in confidence by the client, but to all information relating to the representation, whatever its source. The attorney-client privilege attaches to communications concerning representation, even if representation is never undertaken.[8] When a prospective client consults a lawyer in good faith to obtain legal representation or advice, a duty of confidentiality may arise under Army Rule 1.6 even though the lawyer performs no legal services for the would-be client and declines the representation.[9]

Evidence developed as a consequence of a breach of the attorney-client relationship may not be used to convict the client. In *United States v. Ankeny*, the Court of Military Appeals (COMA) upheld the reversal of a conviction based on evidence directly derived from an attorney's breach of the attorney-client relationship.[10] The COMA cited Military Rule of Evidence (MRE) 511(a),[11] which states that privileged matters, disclosed without an opportunity for the holder of the privilege to claim the privilege, is inadmissible.

Imminent Death or Substantial Bodily Harm

The Client Who Wanted to Kill His Ex-Wife

A legal assistance client, unusually upset over his alimony obligations, the involuntary division of his retired pay, and his ex-wife's social life, told his attorney that he had a gun which he would use to kill his former wife. The legal assistance attorney told his supervisor, and they decided to report the threat to the police and to warn the ex-wife.

Some states' bars rules *permit*, but do not require, such a disclosure. When an Army lawyer learns that a client intends serious prospective criminal conduct, however, Army Rule 1.6(b) *requires* disclosure of that information.

Army Rule 1.6(b) states:

> A lawyer *shall reveal* such [client] information to the extent the lawyer reasonably believes necessary to prevent the *client* from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.[12]

Army Rule 1.6 differs from the American Bar Association (ABA) Model Rule after which it was generally patterned:

> Army Rule 1.6 attempts to resolve this dilemma [between prevention of harm and protection of the client] by removing discretion and mandating disclosure . . . . The ABA Model Rule instead gives the attorney discretion to reveal information relating to a client's intention to commit an offense involving imminent death or substantial bodily harm.[13]

A 1965 ABA opinion[14] held that a lawyer must be satisfied "beyond a reasonable doubt" before disclosing the client's intent to commit a crime. However, under Army Rule 1.6(b), two levels of analysis should be conducted before lawyers decide whether or not they must disclose. First, they must form a "belief" about the client's intent, ability, and capacity to commit the criminal act. Is the client "likely" to commit one of the specified criminal acts? Second, what (a) information does the lawyer (b) reasonably believe (c) is "necessary to prevent the client" from committing one of the specified criminal acts? The former standard, generally followed before the era of the ABA Model Rules, was "beyond a reasonable doubt." Army Rule 1.6(b) does not require that exceedingly difficult level of attorney inquiry and satisfaction.[15]

The client's death threat in this second case clearly met the exception. This differs from the first situation, where the "bodily harm" exception did not apply—the death already had occurred.

---

[8] VIII WIGMORE, EVIDENCE §§ 2292, 2304 (McNaughton rev. ed. 1961).

[9] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990).

[10] 30 M.J. 10, 13 (C.M.A. 1990).

[11] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 511(a) (1984) [hereinafter MCM].

[12] AR 27-26, *supra* note 2, rule 1.6 (emphasis added).

[13] Ingold, *supra* note 5, at 19.

[14] ABA Comm. on Prof. Ethics and Grievances, Formal Op. 314 (1965).

[15] *See also* Ingold, *supra* note 5, at 19 n.117.

Mandatory Disclosure Under Army Rule 1.6(b) Applies Equally to Defense Clients, Legal Assistance Clients, and the Army as a Client

Mandatory disclosure under Army Rule 1.6(b) depends on neither the attorney's duty position nor the client's status. The rule applies across the board whenever attorneys have information gained while representing individual military justice clients, individual legal assistance clients, and the Army. The defense lawyer faced with disclosing an individual client's future crime, however, obviously was the primary concern when Army Rule 1.6(b) was drafted. Although for unknown reasons, Army Rule 1.6(b) focuses only on a *client* as the one likely to commit a criminal act; there are no specific references to others such as victims of abuse and stalking, family members, and coworkers.

A Decision Not to Disclose Should Not Be Subject to Reexamination

What are the disciplinary consequences to a lawyer if the "wrong" decision is made? Although our clients have expectations of confidentiality, undoubtedly, no one wants to see child abuse or other serious crimes committed. Take comfort in realizing that there can be no "wrong" answers in this area. "The lawyer's exercise of discretion not to disclose information under . . . Rule 1.6(b) should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."[16] Furthermore,

> [a]n attorney may give intensive study to the codes and rules and standards. Many hours may be devoted to ethical training and education in professional responsibility. But in the end a personal code of morality and decency is the most perfect answer to performing in the highest standard of the profession. The personal code will enable the lawyer to decide on an ethical stance to take when faced with a question of action to be taken.[17]

Reporting Spouse Abuse: Client Under a Disability

The Spouse Abuse Victim

In a third situation, a legal assistance client's husband frequently threatened her, sometimes displaying a gun. The fearful client—a past victim of domestic violence—was intimidated, yet clearly instructed her attorneys not to tell anyone about her fear of her husband.[18]

The disclosure exception of Army Rule 1.6(b) did not apply because the *client* was not the one likely to commit any future crime.[19]

A lawyer advising a client impaired by domestic violence or abuse should attempt to maintain a normal attorney-client relationship[19] and should hesitate to reveal information about the abuse or the client's condition until the client authorizes this disclosure. This requires making a serious, noncoercive attempt to persuade the client to authorize reporting the abuse. Usually suggesting that the client meet with trusted third persons is helpful. If the client agrees, the client's relatives or mental health professionals can assist the client to appreciate that the seriousness of the problem requires reporting.[20]

If these efforts to obtain consent from a client fail, protective action by the attorney may, nevertheless, be ethically appropriate—even against the impaired client's directions.[21] In extreme cases, an attorney may have no choice but to treat the spouse abuse as a continuing, future crime and to make a proper report to authorities.

Reporting Child Abuse

> One of the most distinctive attributes of child abuse is the ongoing nature of the crime. It is a pattern of behavior; the longer the abusive behavior continues, the more severe is the damage to the child. Child abuse is not simply a crime which occurs at a single point in time and then ceases; it is a *past, present* and *future* crime.[22]

The Army's family advocacy regulation generally *requires* individuals to report suspected child abuse, except for attor-

---

[16] AR 27-26, *supra* note 2, para. 7i.

[17] Arthur J. Goldberg, *The Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics*, 129 MIL L. REV. 11, 27 (1990).

[18] In spouse abuse (in contrast to child abuse) cases, *AR 608-18* places a reporting duty only on installation law enforcement personnel and physicians, nurses, and other medical personnel. AR 608-18, *supra* note 1, para. 3-10.

[19] AR 27-26 *supra* note 2, rule 1.14, comment (client under a disability).

[20] Attorneys are reminded that military law does not recognize a doctor-patient privilege.

[21] ABA ANNOTATED RULES, *supra* note 4, at 241 (limited disclosure of the client's condition may be authorized when taking protective action).

[22] Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 246 (1987).

neys,[23] who are given *discretion* to report. "A military lawyer has *no obligation* to make a report of spouse or child abuse that comes to his or her attention as a result of a privileged communication *unless the communication clearly contemplates the commission of a future crime.*"[24] Army lawyers are permitted (but not required) to report past child abuse, even against their clients' wishes. Unless the child abuse has truly ceased, however, Army lawyers may treat it as a continuing, future crime which they are ethically required to report. When an attorney doubts a client-abuser's intent or the likelihood of future abuse, the attorney should consult a trained health care professional.[25]

Court Orders, Search Warrants, and Attorney Subpoenas

In a situation involving a past crime—such as the first case involving the unexplained death of a baby—investigators might decide to seek a *final order* compelling release of the information from an attorney.[26] The Army lacks special procedures for search warrants and subpoenas involving attorneys and their records. However, the Department of Justice Criminal Division considers several elements before seeking to subpoena an attorney: the subpoena cannot seek peripheral or speculative information; all reasonable attempts to obtain the information from alternative sources have failed; the reasonable need for the information outweighs the potential adverse effects on the attorney-client relationship; and the information sought is not protected by a valid privilege.[27]

An initial (not final) order for client information, in the nature of a search authorization or subpoena, might be issued by a military magistrate, an Article 15-6 investigating officer, an Article 32 officer, a convening authority, or a board of inquiry. The lawyer would be forced to invoke the privilege, unless the client had authorized a waiver,[28] until required to comply with the *final* order of a court or other tribunal of competent jurisdiction, after appeals have been exhausted.[29]

---

[23] "Every soldier, employee, and member of the military community will report information about known and suspected cases of child abuse to the RPOC [report point of contact] or the appropriate military law enforcement agency as soon as the information is received. (But see appendix D regarding privileged communications)." AR 608-18, *supra* note 1, para. 3-9.

[24] *Id.* app. D, para. D-4.

[25] Stuart, *supra* note 22, at 249-51.

[26] AR 27-26, *supra* note 2, rule 1.6 comment. *See generally* Paul Marcotte, *Disclosure Compelled: John Doe Waived Attorney-Client Privilege with Trip to Sheriff*, A.B.A. J., Dec. 1990, at 39; Richard L. Fricker, *Doing Time: Fight over Fee Disclosure Lands Five Lawyers in Tulsa Jail*, A.B.A. J., Feb. 1990, at 24.

[27] DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, para. 9-2.161(a), subpara. E (1992). *Compare id. with* ABA ANNOTATED RULES, *supra* note 4, Model Rules of Professional Conduct, Rule 3.8(f) (Special Responsibilities of a Prosecutor). At the ABA 1990 midyear meeting, the ABA House of Delegates amended Rule 3.8 by adding a new section (f) limiting prosecutors' subpoenas of lawyers and new commentary. The amended text of ABA Model Rule 3.8 now provides:

> The prosecutor in a criminal case shall:
>
> ....
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information reasonably sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.
>
> Comment
>
> ....
>
> Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The prosecutor is required to obtain court approval of the issuance for the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.

Id. at 397-98, 598.

Army Regulation 27-26, effective 1 May 1992, *did not* incorporate subsection (f) of amended ABA Model Rule 3.8. Courts-martial are ephemeral and do not spring into existence until charges have been referred. The Uniform Code of Military Justice and the *Manual for Courts-Martial* have no particular pretrial procedure for occasions when a trial counsel would like to obtain "prior judicial approval after an opportunity for an adversarial proceeding."

[28] *See* MCM, *supra* note 11, MIL. R. EVID. 502 (defining attorney-client privilege).

[29] AR 27-26, *supra* note 2, rule 1.6 comment.

Almost every reported case shows attorneys resisting initial attempts to invade their clients' confidentiality.[30] Mr. Eveland.

Army Rule 8.3
(Reporting Professional Misconduct)

An Army lawyer must report professional misconduct that raises a substantial question regarding a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Army Rule 10.1
(Enforcement)
Army Regulation 27-1
(Judge Advocate Legal Service)

The Judge Advocate General is responsible for the preliminary screening of ethical violations by Army lawyers in the Judge Advocate Legal Service and all lawyers practicing before Army courts.

Army Regulation 27-1
(Judge Advocate Legal Service)

Supervisory lawyers will forward credible evidence of misconduct involving matters of significance to the military practice of law to the Standards of Conduct Office (SOCO), Office of The Judge Advocate General.

The Judge Advocate General (TJAG) is responsible for initiating preliminary screening inquiries (PSIs) into allegations of professional impropriety lodged against members of the Judge Advocate Legal Service or civilian attorneys practicing before Army courts. However, not every allegation leads to a PSI; only (1) "credible evidence" that raises (2) a "substantial question" regarding a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects will be forwarded to SOCO by supervisory lawyers.[31]

As a rule, supervisory lawyers analyze an ethical complaint using a two-step process: First, is the allegation credible? Second, if the allegation is credible, does it amount to a serious offense? If the answers to both questions are "yes," the SOCO routinely issues a memorandum, for TJAG, tasking a senior supervisory judge advocate (normally the senior judge advocate of a major Army command (MACOM)) to conduct a PSI into the allegations.

The "credibility check" procedures outlined above were exercised recently in the two professional conduct cases reported below. In neither case did the complaint result in a PSI being conducted. Both cases were closed by the supervisory judge advocates prior to PSIs because the allegations were not sufficiently credible to warrant further action.

The following two cases deal with four ethics issues:

(1) The formation and duration of an attorney-client relationship.

(2) The legal and ethical obligations owed by a second attorney to respect an existing attorney-client relationship.

(3) The ethical rule that requires an attorney to advise an unrepresented person to seek legal advice.

(4) The special ethical responsibilities placed on a trial counsel to assure that an *accused* (a) is advised of both the right and the procedure to obtain counsel, and (b) is provided a reasonable opportunity to obtain counsel. Mr. Eveland.

Army Rule 4.3, Comment
(Dealing with Unrepresented Person)

A lawyer should not give advice to an unrepresented person other than to get a lawyer.

Army Rule 3.8
(Special Responsibilities of a Trial Counsel)

A trial counsel shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights. A trial counsel shall make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel.

Army Rule 4.2
(Communication with Person Represented by Counsel)

A lawyer shall not communicate with a person represented by another lawyer without authorization of law or the other lawyer's consent.

Military Rules of Evidence 305(e)
(Notice to Counsel)

The lawyer for a suspect or accused must be notified before questioning when the questioner knows or reasonably should know that a lawyer has been appointed or retained.

---

[30] *See generally* Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 927-34 (1992) (attorney's duty to invoke the privilege).

[31] *See generally* DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 7-3c (15 Sept. 1989) (this procedure is in the approved revised regulation pending publication); *see also* Prof. Resp. Notes: *Supervisory Judge Advocates' Closure of Unfounded and Minor Cases*, ARMY LAW., Sept. 1994, at 51; AR 27-26, *supra* note 2.

In the first case, Captain *B*, a defense counsel, complained that trial counsel had questioned her client without permission. After the trial counsel's supervisor conducted a credibility check, the matter was dropped as not warranting a PSI.

Criminal investigators questioned Specialist *A* regarding allegations that group sex videos were being made at her military installation. Although she was not read her Article 31 rights, her statements revealed that she had engaged in consensual oral sex with one officer. Because of the numerous military suspects, there were not enough local United States Army Trial Defense Service (TDS) lawyers for every witness, victim, or potential suspect. After the questioning, Specialist *A* conferred by phone with Captain *B*, a TDS lawyer stationed at a geographically distant installation. Specialist *A* and Captain *B* did not have a face-to-face meeting until three months later. Neither Captain *B* nor anyone else from TDS recalled advising lawyers at Specialist *A*'s installation of the representation, even though somehow the Article 32 investigating officer learned of the representation and called Captain *B* one month after Captain *B* had spoken with Specialist *A*.

Specialist *A* (after speaking with her TDS lawyer, Captain *B*) temporarily departed her unit to attend a military school for two months. Sometime during that period, Captain *B* unsuccessfully telephoned the unit to notify Specialist *A* that Captain *B*'s superiors had assigned her to be Specialist *A*'s lawyer. After Specialist *A* graduated from the military school, she finally called Captain *B*, who advised her that because the command was only going to give her a letter of reprimand, "You won't need me any more."

Two more questioning sessions occurred after Specialist *A* initially talked with Captain *B*. First, criminal investigators, and, next, two trial counsel questioned Specialist *A* about her sexual involvement with the one identified officer, as well as others. Although criminal investigators suspected that Specialist *A* was lying when she denied sexual involvement with anyone other than the first officer, they declined to advise her of her Article 31 rights, on the ground that she was a mere victim and not a suspect. The trial counsel told Specialist *A* that she was suspected of sodomy and read her Article 31 rights. Specialist *A* then signed a waiver.

Captain *B* found out about the questioning. She and her Senior Defense Counsel complained to the installation's Chief of Military Justice, who assured them that it had been a mistake, and that the trial counsel simply did not know that Specialist *A* had a lawyer.

The trial counsel's supervisor conducted a "credibility check," and placed witnesses under oath. Both trial counsel emphatically denied that Specialist *A* had ever mentioned that she was represented by Captain *B* or that she had even talked to an attorney. They both assured their supervisor that they would have stopped the interview immediately if Specialist *A* had mentioned that fact. Both asserted that they were very surprised to learn later that Specialist *A* had talked with Captain *B*.

The supervisor then placed Specialist *A* under oath. Specialist *A* insisted that she had told the two trial counsel that she "had a lawyer, but . . . wasn't sure if she was still my lawyer, if I was supposed to talk to her about this." Specialist *A* stated that although both trial counsel were present when she told them she had a lawyer, she was not sure that she mentioned Captain *B* by name.

The supervisor determined that Specialist *A* was very confused about her relationship with Captain *B*, and was unsure of ongoing representation because "she didn't know anything about the case." He concluded that when Specialist *A* spoke to Captain *B* after graduating from the school, Captain *B* knew very little about the case and told her client to call if "something else came up." He also was "convinced beyond doubt" that Specialist *A* never mentioned to the trial counsel that she was represented by Captain *B*.

The supervisor's report noted that Specialist *A* went to the trial counsel, on the initiative of the Social Work Services Program, for consideration under the Victim Assistance program. This occurred before any "criminality came to light," when Specialist *A* was seen as a vulnerable, confused young woman. The supervisor's recommendation, which the SOCO approved, was that the case be closed without formal investigation.

Army Rule 4.3, Comment (Dealing with Unrepresented Person)

A lawyer should not give advice to an unrepresented person other than to get a lawyer.

In the second case, Captain *X* represented Sergeant *Z*, a military policeman (MP) under investigation for adultery and fraternization. Private *Y*, also an MP, had made a sworn statement to criminal investigators that she had sexual intercourse with Sergeant *Z*. Private *Y* called Captain *X*'s one-person office requesting an attorney.

When Captain *X* recognized that Private *Y* was the complaining witness against his client, Sergeant *Z*, he told her that he would arrange for alternate counsel and questioned her about the case. Private *Y* told Captain *X* that she was in trouble for making a false official statement. She said that she had lied to criminal investigators when she said that she had sexual intercourse with Sergeant *Z*. Captain *X* subsequently used the information he learned from Private *Y* to her disadvantage, but to the advantage of his client, Sergeant *Z*.

The TDS Regional Defense Counsel (RDC) conducted a "credibility check" because of his concern that Captain *X*'s conduct in discussing the case with the complaining witness violated Army Rule 4.3, forbidding a lawyer from giving advice to an unrepresented person, other than to get a lawyer. Private *Y* told the RDC that she did not consider the information concerning the false official statement to be privileged, as she intended to freely relate it to anyone.

The RDC found no ethical violations, because Captain *X* had promptly told Private *Y* that he could not advise *her*—he already was representing Sergeant *Z*, whose interests conflicted with hers. However, Captain *X* did fail to recognize the significance of speaking with an unrepresented person.

The RDC relayed the information to the Chief, TDS (the designated senior supervisory judge advocate), who sought the SOCO's approval not to open a PSI. The SOCO agreed and no PSI was initiated.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component GOLO Course

NEW! The Judge Advocate General's School recently scheduled a Reserve Component General/Senior Officer Legal Orientation Course for 1 February to 3 February 1995. Prerequisites for attending are the grade of brigadier general or above and accompanying Chiefs of Staff. Reservations should be made directly through ATRRS (course number 5F-F3). This course is designed to acquaint senior Army Reserve and National Guard officers with the legal responsibilities and issues that they will encounter. Specific topics include administrative and civil law, criminal law, operational and international law, and contract law.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
6-8 Jan 95	Long Beach, CA 78th LSO Hyatt Regency Long Beach, CA 90815	AC GO RC GO Int'l-Ops Law Ad & Civ GRA Rep	MG Nardotti BG Cullen MAJ Martins MAJ Hossbach LTC Menk	MAJ John C. Tobin Best, Best & Krieger P.O. Box 1028 Riverside, CA 92502 (714) 229-3700
21-22 Jan 95	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Gray BG Sagsveen LCDR Winthrop MAJ Pendolino Dr. Foley	LTC Matthew L. Vadnal 6th LSO Bldg. 572 Seattle, WA 98199 (206) 281-3002
18-19 Feb 95	Chicago, Il 214th LSO Cdr's Conference Room Ft. Sheridan, IL 60037	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Nardotti BG Lassart LTC Crane LTC Krump LTC Menk	MAJ Ronald Riley 18525 Poplar Ave. Homewood, IL 60430 (312) 443-4550
25-26 Feb 95 split training w/Denver	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third Street Salt Lake City, UT 84114	AC GO RC GO Crim Law Ad & Civ GRA Rep	BG Magers BG Sagsveen MAJ Barto MAJ Pearson LTC Hamilton	LTC Edward O. Ogilvie 1584 East Parkridge Dr. Salt Lake City, UT 84121 (801) 575-1650
25-26 Feb 95	Denver, CO 87th LSO Fitzsimmons AMC, Bldg.820 Aurora, CO 80045-7050	AC GO RC GO Crim Law Ad & Civ GRA Rep	BG Lassart MAJ Barto MAJ Pearson COL Reyna	LTC Karl E. Hansen P.O. Box 6124 Aurora, CO 80045-6124 (303) 361-1208

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
4-5 Mar 95	Columbia, SC 120th ARCOM Univ of SC Law School Columbia, SC 29208	AC GO RC GO Crim Law Ad & Civ GRA Rep	MG Gray BG Sagsveen MAJ Winn MAJ Hernicz LTC Menk/CPT Storey	MAJ Dana Wendt 120th ARCOM Bldg. 9810, Lee Rd. Fort Jackson, SC 29207 (803) 751-6152
10-12 Mar 95	Dallas/Fort Worth 1st LSO Stouffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	AC GO RC GO Int'l-Ops Law Crim Law GRA Rep	MG Gray BG Sagsveen LCDR Winthrop MAJ Burrell LTC Hamilton	COL Richard Tanner 401 Ridgehaven Richardson, TX 75080 (214) 991-2124
11-12 Mar 95	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG Huffman BG Cullen MAJ Whitaker MAJ Ellcessor LTC Menk/CPT Storey	CPT Robert J. Moore 10th LSO 550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
18-19 Mar 95	San Francisco, CA 5th LSO Sixth Army Conference Room Presidio of SF, CA 94129	AC GO RC GO Ad & Civ Crim Law GRA Rep	MG Nardotti BG Sagsveen, BG Lassart, BG Cullen MAJ Peterson LTC Bond COL Reyna	MAJ Joe Piasta 717 College Avenue Second Floor Santa Rosa, CA 95404 (707) 544-5858
1-2 Apr 95	Indianapolis, IN National Guard	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Huffman BG Cullen MAJ Diner MAJ Kohlman LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349
7-9 Apr 95	Orlando, FL 174th LSO Airport Marriott 7499 Augusta National Dr. Orlando, FL 32822	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	MG Nardotti BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Avenue Suite 423 Fort Lauderdale, Fl 33301 (305) 357-7600
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO/ OH ARNG	AC GO RC GO Ad & Civ Crim Law GRA Rep	 BG Lassart MAJ J. Frisk MAJ Wright COL Reyna	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP	ACTION OFFICER
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	COL Larry Craven BG Cullen MAJ Hughes MAJ Martins Dr. Foley Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471
19-21 May 95 (Armed Forces Day is 20 May)	Kansas City, MO 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67120	AC GO RC GO Contract Law Ad & Civ GRA Rep	MG Gray BG Lassart MAJ Causey MAJ Jennings LTC Menk LTC Keith H. Hamack HQ, Fifth U. S. Army Attn: AFKB-JA Fort Sam Houston San Antonio, TX 78234 (210) 221-2208 DSN 471-2208

Notes from the Field

Automating Your Correspondence

Are you crunched for time? Too many clients wanting too many letters drafted? Not enough support staff to help you run to the copy machine and copy your finished letter for the client, the client file, the reading file, and the redacted version the boss just requested for "unusual" matters? If your office is anything like the office where I work, then you are faced with having to do more work with less time, with even less support staff. The dream of practicing law fades further into the distance as you struggle with a jammed copy machine, with eight clients waiting to be seen.

You can obtain some measure of relief from the strain on resources, however, by automating your correspondence. I prepared a WordPerfect macro which will, with a few key strokes, spell check a document, save it to disk, and, when required, print one original, one client copy, one client file copy, one reading file copy, and a redacted copy. Without having to leave my desk, I simply pull the copies off of my printer, hand a copy to the client, and put the rest in the "to be filed" bin. Time saved: at least five minutes, for every new letter produced. What follows are the macro keystrokes required to perform these functions I just described. You may modify the macro as desired to add, change or delete features. To produce this macro you need to be familiar with WordPerfect.

In your WordPerfect editing screen, press ^F10 (where ^ is the key labeled "CTRL" and F10 is the "F10" function key). This starts the Macro definition process. Now type ALTP (where ALT is the key labeled "ALT," and P is the "P" key). This will be name of your macro. You are now asked to describe the Macro. I call mine "4 copies." After you hit "enter," the Macro definition begins. Now hit "enter" again, to end the definition. What you have done is opened a file called ALTP, which you will now call up by hitting ^F10 again. You are now told that ALTP already exists. Type the digit 2. This brings you to the macro editing screen. You must now enter the text, codes and keystrokes EXACTLY as shown on the reprinted WordPerfect Macro at the end of this note (with the exception of the little underlined "o" between regular text; this symbol represents a space between words and is put in automatically when you hit the space bar). If you miss anything, the macro will not work right. To get at some of the commands, you must hit ^PgUp (hold the CTRL key down while hitting the PgUp key) which brings a menu of commands. Scroll through, and hit "enter" when you find the appropriate command. For commands that do not appear in this menu (like {Spell}, you simply use the regular WordPerfect command (*i.e.*, for {Spell}, hit the F2 key). Certain other commands, like {Enter}, {Home}, and {Up} are accessed by typing ^V first, then the desired key. If you do not type the ^V first, these keys will do what they normally do, without becoming a part of the macro. Please refer to your WordPerfect documentation under the heading of "Macro editing" for more guidance. You may need to experiment a bit. When finished copying the four WordPerfect Marco, hit "exit" (F7) to save the macro. Finally, be sure the documents for which you use this macro are prepared with such use in mind. For example, if you want to redact social security numbers, you will need to insert "SSN:" in front of any such numbers as you type your document if you later want the number redacted.

If you are unable to get this macro to work, I can send a copy of the macro already prepared. You can then just copy it onto your hard drive in the appropriate directory, and you will be ready to go. Simultaneously press ALTP to invoke the macro. Just send a *new* and *unused* (I do not want to risk catching any viruses) 3.5" diskette to the following address and I will return it with the macro:

Gunter Filippuci
ATTN: AERJA-SLC-LA/IL
Southern Law Center (Mannheim)
Unit 29901, Box 23
APO AE 09086

Gunter Filippuci, Attorney—Advisor.

Appendix

```
{DISPLAY OFF}
{Spell}3 {Enter}
{Home}{Home}{Up}{Page Up}

{Save}{PAUSE}
{Home}{Home}{Up}{Page Up}

{Print}1
{Home}{Home}{Up}
{Enter}{Up}{Format}25.25{Enter}{Enter}{Enter}{Enter}
{Format}133{Exit}{Bold}{Font}17
{Underline}CLIENT{Format}134{Exit}{Enter}{Format}251{Enter}{Enter}
{Enter}{Enter}
{Print}1
{Replace}n{UP}CLIENT{Del}{Del}{Del}{Del}{Del}{Del}{Del}{Del}
{Search}FILE{Search}{Print}1
{Word Left}{Typeover}READING{Typeover}{Print}1

{CHAR}1~Do you want a redacted version of this document? (Y/N)~
{CASE}{VARIABLE}1~~y~yes~Y~yes~n~no~N~no~~

{LABEL}no~{Home}{Home}{Up}{QUIT}

{LABEL}yes~{TEXT}redact~What is the name you wish to redact? ~
{ON NOT FOUND}{GO}next~~
{Search}{VARIABLE}redact~{Search}
{CALL}Delete~
{Bold}***REDACTED*** {Bold}
{LABEL}another~{Search}{Search}
{CALL}Delete~
{Bold}***REDACTED*** {Bold}
{GO}another~

{LABEL}next~{TEXT}second~what is the next name you wish to redact? ~
{Page Up}{Page Up}{Up}
{ON NOT FOUND}{GO}delete SSN~~
{Search}{VARIABLE}second~{Search}
{CALL}delete~
{Bold}***REDACTED*** {Bold}
{LABEL}again~{Search}{Search}
{CALL}delete~
{Bold}***REDACTED*** {Bold}
{GO}again~

{LABEL}Delete~{Word Left}{Del Word}{RETURN}
{LABEL}Delete~{Word Left}{Del Word}{RETURN}
```

```
{LABEL}delete SSN~
{ON NOT FOUND}{GO}redacted~~
{Page Up}{Page Up}{Up}{Search}SSN:{Search}{Word Right}{Del Word}
{Bold}***REDACTED*** {Bold}
{Search}SSN:{Search}{Word Right}{Del Word}
{Bold}***REDACTED*** {Bold}

{LABEL}redacted~
{ON NOT FOUND}{GO}print~~
{Search Left}reading{Search}{Word Left}
REDACTED{Del}{Del}{Del}{Del}{Del}{Del}{Del}

{LABEL}print~{Page Up}{Page Up}{Up}{Print}1{RETURN}{QUIT}
```

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: 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

1995

9-13 January: 1995 Government Contract Law Symposium (5F-F11).

10-13 January: USAREUR Tax CLE (5F-F28E).

23-27 January: 46th Federal Labor Relations Course (5F-F22).

23-27 January: 20th Operational Law Seminar (5F-F47).

6-10 February: 128th Senior Officers' Legal Orientation Course (5F-F1).

6-10 February: PACOM Tax CLE (5F-F28P).

6 February-14 April: 136th Basic Course (5-27-C20).

13-17 February: 59th Law of War Workshop (5F-F42).

13-17 February: USAREUR Contract Law CLE (5F-F15E).

27 February-3 March: 36th Legal Assistance Course (5F-F23).

6-17 March: 134th Contract Attorneys' Course (5F-F10).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 1st Procurement Fraud Course (5F-F101).

3-7 April: 129th Senior Officers' Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs' Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators' Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers' Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-Fl4).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

March 1995

1-3, ESI: Contracting with Foreign Governments, Washington, D.C.

3, ESI: Contract Accounting Systems for Small Businesses, Denver, CO.

6-8, ESI: Managing Information Systems Projects, Washington, D.C.

7-10, ESI: Negotiation Strategies and Techniques, Dallas, TX.

8-10, ESI: Continuous Improvement and Total Quality Management, Washington, D.C.

13-17, ESI: Operating Practices in Contract Administration, Washington, D.C.

13-17, ESI: Managing Projects in Organizations, Washington, D.C.

13-17, ESI: Risk Management, London, England.

14-17, ESI: Business Process Reengineering, San Diego, CA.

16-17, GWU: Best-Value Source Selection, Orlando, FL.

17, ESI: Sole-Source Contracting, Washington, D.C.

20, GWU: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

20-24, GWU: Construction Contracting Law, Washington, D.C.

20-24, ESI: Project Leadership, Management, and Communications, Washington, D.C.

21-24, ESI: Source Selection: The Competitive Proposals Contracting Process, Washington, D.C.

27, ESI: Federal Acquisition Regulation (FAR) Update, Washington, D.C.

27-28, GWU: Bonds and Insurance, Washington, D.C.

27-31, ESI: Scheduling and Cost Control, London, England.

28-31, ESI: Managing Cost-Reimbursement Contracts, Washington, D.C.

28-31, ESI: Procurement Management, Washington, D.C.

29-30, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

30-31, GWU: Government Contract Claims, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1994 issue of *The Army Lawyer*.

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
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 triennually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 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 A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 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 A280725 Office Administration Guide/JA 271(94) (248 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 A283734 Consumer Law Guide/JA 265(94) (613 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 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 A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

*AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

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

*AD A283503 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 and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 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 judge advocates 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 dedicated 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 by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and the 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 currently is 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 asked 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
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
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.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
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.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
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 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officer's Legal Orientation Deskbook, January 1994.
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.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.

FILE NAME	*UPLOADED*	*DESCRIPTION*
JA506-1.ZIP	May 1994	Fiscal Law Course Deskbook, Part 1, May 1994.
JA506-2.ZIP	May 1994	Fiscal Law Course Deskbook, Part 2, May 1994.
JA506-3.ZIP	May 1994	Fiscal Law Course Deskbook, Part 3, May 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	March 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

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 and Operational 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)

December VTC Topic (to be determined)

5 December	1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM
7 December	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.

5. Articles

The following information may be of use to judge advocates in performing their duties:

> Jeffrey S. Wolfe, *The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731 (1994).
>
> James W. Houck, *The Commander in Chief and United Nations Charter Article 43: A Case of Irreconcilable Differences?*, 12 DICK. J. INT'L L. 1 (1993).
>
> Comment, *DNA Databases: The Case for the Combined DNA Index System*, Vol. 29 WAKE FOREST L. REV. 889.

6. 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.

7. The Army Law Library Service

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, United States 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:

Judge Advocate, HQ, V Corps, Unit 25202, APO AE 09079, has the following material:

- United States Code Annotated:

  Title 11, 4 volumes, 544 to End

  Title 18, 3 volumes, Rules 1 to 17.1

  Title 26, 6 volumes, 1 to 500

  Title 28, 10 volumes, 1332 to 2254

  Title 29, 1 to End

  Title 33, 4 volumes, 1 to End

  Title 43, 2 volumes, Public Lands 1 to End

  Title 45, 1 volumes, 1 to 51

- Constitution Amendments, 3 volumes, 7 to 14

- American Jurisprudence 2d, volumes 1, 2, 33, 34, 34A, 69

- Commerce Clearing House (State Personal IncomeTax Forms), volumes 2, 3, 4

- United States Tax Reporter, volumes 1-5, 7-8., 10-14 and 16

- West Military Justice Reporter, bound volumes 1-31

- Court-Martial Reports, volumes 1-16, 17-20, 22-50 and 2 copies of volume 27, Index 1-25, 26-50

- United States Supreme Court Reports, volumes 1-11, 12-21, 22-30, 31-35, 37-40, 51-50, 51-59, 60-69, 70-80, 81-91, Index: A-B, C-D, E-H, I-M, N-R, S-Z

Division Law Library USA Engr. Div. SW, 1114 Commerce St., Dallas, TX 75242, Attn: Patsy Knight, commercial (214) 767-2564.

- CCH NLRB Decisions from 1960-1993

- Tiffany Real Property, updated 1992

- BNA Environmental Reporter, Volume 1-24

Subject Index

The Army Lawyer
January 1994—December 1994

Author Index

The Army Lawyer
January 1994—December 1994

Index of Legal Assistance Items

The Army Lawyer
January 1994-December 1994

Index

Policy Memorandum From The Judge Advocate General

The Army Lawyer

January 1994—December 1994

Practicing Professional Responsibility—POLICY MEMORANDUM 95-1, DAJA-SC, 3 October 1994, Oct. 1994, at 4.

Ethics Counselors and the Army Standards of Conduct Program—POLICY MEMORANDUM 95-2, DAJA-SC, 3 October 1994, Oct. 1994 at 5.

Training and Mission Support Between Active and Reserve Component Judge Advocates—POLICY MEMORANDUM 95-3, DAJA-ZA, 3 October 1994, Oct. 1994, at 7.

Use of the Technical Channel of Communications—POLICY MEMORANDUM 95-4, DAJA-ZA, 3 October 1994, Oct. 1994, at 8.

After Action Reporting Policy—POLICY MEMORANDUM 95-5, DAJA-IO, 3 October 1994, Oct. 1994, at 9.

Relations with News Media—POLICY MEMORANDUM 95-6, DAJA-ZA, 3 October 1994, Oct. 1994, at 12.

Environmental Law Program—POLICY MEMORANDUM 95-7, DAJA-ZA, 3 October 1994, Oct. 1994, at 13.

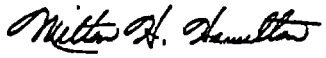
Intelligence Law—POLICY MEMORANDUM 95-8, DAJA-IO, 3 October 1994, Oct. 1994, at 14.

*U.S. Government Printing Office: 1994 — 386-699/00009

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
07604

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 073338-000