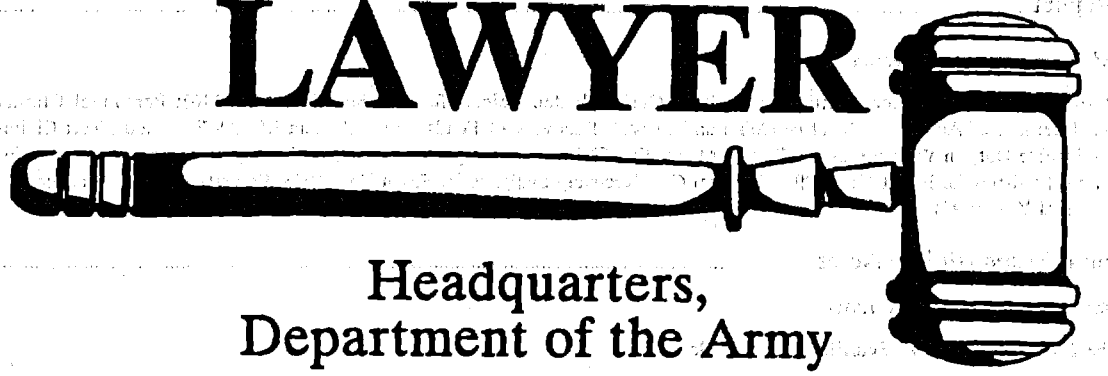
# THE ARMY LAWYER



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# Obesity As a Disability: An Actual or Perceived Problem?

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## Introduction

The Rehabilitation Act of 1973 (RA)[1] prohibits discrimination against disabled employees.[2] Most people picture a disabled person as suffering from a severe physical or mental condition requiring a prothesis, a wheelchair, or psychological therapy; however, the RA protects persons with disabilities from an extensive list of physical, mental, or emotional conditions that "substantially limit" a "major life activity."[3] One of the more controversial topics under the RA in recent years is the condition of obesity as a disability.[4]

Society generally condemns the obese.[5] Positive American role models are nearly always thin and fit. To Americans, excess body fat connotes a lack of personal discipline, detracts from an orderly personal appearance, and brings with it a poor state of health, physical fitness, or stamina.[6] Obesity is commonly considered a voluntary condition, despite evidence to the contrary.[7] Society perceives the obese as careless, lazy, indifferent, incompetent, and weak.[8] More significantly, perhaps, employers often consider obese applicants less employable than their thinner coun-

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[1] The Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 500-04, 87 Stat. 390, 390-94 (codified as amended at 29 U.S.C. §§ 701-97 (1985 & Supp. 1995)).

[2] The language of the RA formerly referred to "handicapped individuals." Congress amended the language in 1992 to "individual with a disability" to make the terminology of the Act more consistent with the Americans With Disabilities Act and with current societal usage. *See id.* § 102(f) (codified at 29 U.S.C.A. § 791 (Supp. 1995)). The change had no substantive effect on the scope of coverage. The terms "disabled," "disability and handicapped," and "handicap" are synonymous. The RA now incorporates the substantive standards of the Americans with Disabilities Act (ADA):

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 & 12210), as such sections relate to employment.

29 U.S.C.A. § 791(g) (Supp. 1995). *See also* McDonald v. Commonwealth of Pennsylvania, Department of Public Welfare, Polk Center, 62 F.3d 92, 95 (3d Cir. 1995) (stating that "[w]hether suit is filed under the RA or under the Disabilities Act, the substantive standards for determining liability are the same (citing Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995)). *See generally* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL, vol. 2, § 902 (defining the term "disability").

[3] These are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996). *See generally infra* notes 36-42 and accompanying text.

[4] We use the terms "obese" and "obesity" in this article, which, we believe, more clearly describe the persons and physical condition involved. We recognize that the National Association to Aid Fat Americans (NAAFA) promotes the use of the descriptive "fat" for both the individuals and the condition.

[5] The term "obese" refers to individuals who are 20% or more above their ideal weight. Garn & Cole, *Do the Obese Remain Obese and the Lean Remain Lean?*, 70 AM. J. PUB. HEALTH 351, 352 (1980).

[6] DEP'T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM, para. 4b (1 Oct. 1986).

[7] *See* Esther Rothblum, *Women and Weight: Fad and Fiction*, 124 J. PSYCHOL. 5, 9-11 (1989). *See generally* Peterson, *Discrimination Against Overweight People: Can Society Still Get Away with It?*, 30 GONZ. L. REV. 105 (1994/1995).

[8] Aaron Epstein, *Fat Discrimination Gets Recognized*, TIMES PICAYUNE, Jan. 9, 1994, at A14.

terparts.[9] These perceptions can lead to discrimination in the workplace against the obese.[10]

The United States population has become more obese over the past generation,[11] increasing the potential number of claims of obesity discrimination. When obesity forms the basis of an employment-related decision, the affected employee may claim disability discrimination under the RA. In this article, we review the legal bases for these claims and the important issues that they raise.

### Overview of Obesity Discrimination Litigation

No federal statute explicitly prohibits employment discrimination on the basis of obesity. Among the states, only Michigan has a broad civil rights law explicitly barring weight bias.[12] The Michigan statute specifically prohibits employers from "[f]ail[ing] or refus[ing] to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of . . . weight."[13] Legislatures in two states, New York and Texas, have specifically refused to enact similar proposed laws.[14]

In the absence of specific legislation weight discrimination, plaintiffs have challenged weight-related employment discrimination under existing state civil or human rights statutes with mixed results. Many courts have simply refused to extend basic human rights coverage to include employment discrimination based on obesity.[15] Others have found that obesity can constitute a disability or protected status under state law only in limited circumstances.[16]

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[9] Numerous studies substantiate the existence of employment discrimination against the obese. The Harvard School of Public Health, the New England Medical Center, and the Harvard Medical School conducted a joint study of 10,000 young people over the course of seven years to determine any social or economic consequences of being overweight. The study concluded that, regardless of socioeconomic origins and aptitude test scores, overweight women were less likely to be married, had lower household incomes, and had higher rates of household poverty than nonoverweight women. Overweight men were only less likely to be married. The study found that the consequences of being overweight were greater than those associated with a variety of other chronic conditions during adolescence, such as spine anomalies, cerebral palsy, profound vision impairment, and congenital heart anomalies. Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENGL. J. MED. 1008, 1008-12 (1993).

[10] In 1987, the NAAFA developed a survey that it mailed to all of its members. The survey inquired about the member's employment history and any instances of either overt or subtle employment discrimination. The survey revealed that the heavier a respondent, the more likely that he or she had experienced job discrimination. Of the respondents who weighed more than 50% above standard table weights, 42% of the men and 62% of the women responded that they been deprived jobs as a result of their obesity. *Results of the NAAFA Survey on Employment Discrimination*, NAAFA EMPLOYMENT UPDATE, at 6-11 (1987).

[11] The percentage of Americans considered obese has risen from 25% in the 1960s to 33% today. Robert Kuczmarski et al., *Increasing Prevalence of Overweight Among US Adults*, 272 JAMA, 205, 209-10 (1994); Jane Osborne Baker, *Comment, The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 949-50 (1982).

[12] MICH. COMP. LAWS § 37.2202(a) (1995). *See also* Epstein, *supra* note 8, at A14. California, New York, and New Jersey courts have recognized obesity as a protected disability under their state human rights laws although it is not specifically enumerated in state law. *See* Cassista v. Community Foods, 7 Cal. App. 4th 1183 (Cal. App. 6 Dist. 1992) (unsuccessful employment applicant at a grocery store weighing 305 pounds who was denied employment because of the employer's perception of the applicant's weight as a handicap was held to be protected by the California Fair Employment and Housing Act); State Division of Human Rights *ex rel.* McDermott v. Xerox Corp., 478 N.Y.S.2d 982 (1984), *aff'd*, 491 N.Y.S.2d 106 (N.Y. 1985) ("gross obesity" is in itself a physical and medical impairment within the meaning of New York's human rights law); Gimello v. Agency Rent-A-Car Systems, Inc., 594 A.2d 264 (N.J. Super. Ct. 1991) (plaintiff's obesity constituted a "real medical" condition qualifying for protection).

[13] The Elliott-Larsen Civil Rights Act of Michigan provides the most expansive protection of any state. MICH. COMP. LAWS § 37.2202 (1979). Some cities have adopted ordinances which seek to protect the rights and opportunities of all city residents, regardless of height, weight or physical characteristic. *See* D.C. CODE ANN. § 1-2521 (1990); SANTA CRUZ, CAL., ORDINANCES ch. 9.83 (1986).

[14] Epstein, *supra* note 8, at A14.

[15] The Pennsylvania Supreme Court has held that a city employee, disqualified for a position solely because of his weight, was not handicapped by reason of obesity under the state's Human Relations Act. Civil Service Commission v. Pennsylvania Human Relations Commission, 591 A.2d 281 (Pa. 1991). The Pennsylvania Supreme Court read the statute so narrowly that obese individuals are effectively denied a remedy under state law for discriminatory treatment. Robin Chodak, Note, *Civil Rights—Handicap Discrimination Law—Pennsylvania Excludes Obesity from Protection Under the Pennsylvania Human Relations Act*, 65 TEMP. L. REV. 623 (1992). *See also* Greene v. Union Pacific Railroad, 548 F. Supp. 3 (W.D. Wash. 1981) (obesity not handicap under state law because it is a mutable condition); Missouri Comm'n on Human Rights v. Southwestern Bell Tel., 699 S.W.2d 75, 75 (Mo. Ct. App. 1985) (obese complainant not protected under antidiscrimination law); Cassita v. Community Foods, Inc., et al., 93 DAILY J. D.A.R. 11399 (Cal. App. Dep't Super. Ct. 1993) (obesity without physiological cause cannot support claim of employment discrimination based on handicap).

[16] *See* Cassista v. Community Foods, 7 Cal. App. 4th 1183 (Cal. App. 6 Dist. 1992) (unsuccessful employment applicant at a grocery store weighing 305 pounds who was denied employment because of the employer's perception of the applicant's weight as a handicap was held to be protected by the California Fair Employment and Housing Act); State Division of Human Rights v. Xerox Corp., 480 N.E.2d 695 (N.Y. Ct. App. 1985) (obesity constitutes disability under state Human Rights law); Oregon State Correctional Facility v. Bureau of Labor and Industries, 98 Or. App. 548 (Or. Ct. App. 1989) (obesity a disability when it substantially limits major life activity or is regarded as disability); Gimello v. Agency Rent-A-Car Systems, 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991) (obesity actual medical condition constituting disability); *Greene*, 548 F. Supp. at 3; (morbid obesity not protected because it is not an immutable condition); *Missouri Comm'n on Human Rights*, 699 S.W.2d at 75 (plaintiff's obesity plus high blood pressure not covered); Philadelphia Electric Co. v. Commonwealth, Pennsylvania Human Relations Comm'n., 448 A.2d 701, 707 (Pa. 1982) (morbid obesity alone not a disability); Civil Service Comm'n v. Pennsylvania Human Relations Comm'n, 591 A.2d 281 (Pa. 1991) (plaintiff's evidence insufficient to establish obesity as a perceived disability).

In the federal sector, plaintiffs historically challenged employers' weight policies under Title VII of the Civil Rights Act of 1964 (Title VII).[17] Because weight discrimination is not an enumerated form of prohibited discrimination under Title VII,[18] plaintiffs had to fashion their challenges to discriminatory weight policies as either gender or race discrimination.

Women plaintiffs were generally successful in challenging weight standards under Title VII whenever an employer's policies singled out women or disproportionately affected them. Several courts found weight restrictions that applied only to female employees violated Title VII's bar on disparate treatment of women.[19] Courts also sustained Title VII challenges to weight policies that adversely impacted upon women.[20] Outside of these limited situations, weight discrimination claims have not fared well in federal courts. The RA, however, provides a more appropriate federal remedy for weight discrimination cases.

### The Rehabilitation Act of 1973

The RA marked Congress's first move toward prohibiting employment discrimination against persons with disabilities.[21] Although the language and logic of the RA are somewhat confusing and amorphous,[22] § 501 of the RA provides the sole remedy for federal employees alleging employment discrimination based on disability.[23] The Americans with Disabilities Act (ADA) of 1990[24] codifies years of case law from the RA and protects private-sector disabled employees. Congress intended that these laws apply consistently.[25] In this article, we apply the definitions and case law under the RA and ADA interchangeably.

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[17] 42 U.S.C.A. § 2000e (Supp. 1995).

[18] The Civil Rights Act of 1964 prohibits discrimination only on the basis of race, color, religion, sex, and national origin. It does not prohibit disability discrimination. *Id.* § 2000e-2.

[19] *See* Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D. D.C. Cir. 1973), *modified*, 567 F.2d (D.C. Cir. 1976) (Title VII prohibits practice of regulating and monitoring weight of female but not male employees); Alpha v. United Air Lines, 26 F.E.P. Cases 607 (S.D.N.Y. 1979) (airlines discriminatory policy in enforcing weight regulations for men and not women violated Title VII).

[20] *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (adverse impact of weight minimum on women).

[21] The RA has been called "the civil rights bill of the disabled." Americans Disabled for Accessible Pub. Transp. (ADAPT) v. Skinner, 881 F.2d 1184, 1187 (3d Cir. 1989) (en banc). Since then, Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12201-12213 (1995), which applies to private-sector employers. Congress intended both Acts to be interpreted consistently. *See* McDonald v. Commonwealth of Pennsylvania, Department of Public Welfare, Polk Center, 62 F.3d 92 (3d Cir. 1995).

[22] Section 501 of the RA of 1973 originally required federal agencies only to adopt affirmative action plans for employment of the handicapped; it contained no private right of action. Congress added an individual cause of action in 1978 by enacting § 505(a)(1) (29 U.S.C. § 794a(a)(1)), which provides employees alleging disability discrimination the same rights and remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. *See* Boyd v. United States Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985).

[23] The courts have struggled with distinguishing § 501 (29 U.S.C. § 791) of the RA from § 504 (29 U.S.C. § 794), which prohibits disability discrimination in programs and activities conducted with federal financial assistance or by executive agencies. Some courts have found that § 501 is the sole remedy for federal employees. *See* Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475, 1478 (10th Cir. 1988), *cert. denied*, 493 U.S. 811, 110 S. Ct. 54 (1989); McGuinness v. United States Postal Serv., 744 F.2d 1318, 1321 (7th Cir. 1984). Other courts have failed to see a distinction and allowed federal employees to proceed under either § 501 or § 504 or both. *See* Taub v. Frank, 957 F.2d 8, 10 (1st Cir. 1992) (deciding a § 504 suit by a federal postal employee and setting forth the elements of a prima facie case under that §); Little v. FBI, 1 F.3d 255 (4th Cir. 1993) (allowing a federal employee to sue employing agency under §§ 501 and 504); Smith v. United States Postal Serv., 742 F.2d 257, 260 (6th Cir. 1984); Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981).

Congress has added to the confusion by amending §§ 501 and 504 with identical provisions that require application of the substantive standards of the ADA to determine violations as follows:

> [T]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of §§ 501 through 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 and 12210), as such § relate to employment.

29 U.S.C.A. §§ 791(g), 794(d) (Supp. 1995).

The confusion recently led one appellate court to avoid the issue of which section applies by finding that resolving this controversy was not necessary to its decision. See Leary v. Dalton, 58 F.3d 748, 752 (1st Cir. 1995) ("[t]he precise relationship between the ADA's liability standards and the sole causation test [in § 504] is not well settled .... We therefore regard the applicability of § 504 and its sole causation test in this federal employment suit as an open question; but one that we need not reach here."). Likewise, this issue is beyond the scope of this article.

[24] Pub. L. No. 101-336, 104 Stat. 328 (codified at 29 U.S.C. §§ 12101-12201 (1995).

[25] *See supra* note 2.

### Handicapped or Disabled?—All the Same

The first issue in a disability case is whether the employee meets the statutory definition of a disabled person. The RA defines a "qualified individual with a disability" as one "who [:]

> (i) has a physical or mental impairment which [sic] substantially limits one or more of such person's major life activities,
>
> (ii) has a record of such an impairment, or
>
> (iii) is regarded as having such an impairment."[26]

This definition begets the following questions: (1) who is a "qualified individual with a disability," (2) what are "impairments" and "major life activities," (3) how much is "substantial," and (4) how, if at all, does obesity fit these definitions?

In its implementing regulation for discrimination complaints by federal employees, the Equal Employment Opportunity Commission (EEOC) defines an individual with a disability as one "[w]ho, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others."[27] Because the procedures and remedies of Title VII apply,[28] an obese employee has the same initial burden of establishing a prima facie case of failure to accommodate a disability as would any other disabled employee.[29]

### Impairment

To be considered "disabled" under the RA, an employee must suffer an "impairment" of a "major life activity." The RA does not, however, include obesity as a protected impairment. The EEOC's regulation implementing the ADA broadly defines impairments, and its encompassing scope can certainly be read to include obesity, as follows:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[30]

The EEOC's expansive definition of impairment cannot be attributed to administrative overextension. The ADA and its implementing regulations are really a consolidation of case law from nearly twenty years of RA litigation. In the appendix to its regulations implementing § 504 of the RA,[31] the Department of Health and Human Services suggested that Congress intended this broad definition as opposed to one limited to traditional handicaps.[32]

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[26] Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 7(8)(B) (codified at 29 U.S.C.A. § 706(8)(B) (Supp. 1995)). This amended definition makes the RA's definition of disabled employed nearly identical to the ADA's definition. *See* 42 U.S.C. § 12102(2) (defining a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8) (Supp. 1995). The EEOC ADA implementing regulation further defines disability as "(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g) (1996). The RA's definition thereby becomes nearly identical to the ADA's definition.

Those who illegally use or become addicted to drugs may look neither to the RA nor to the ADA for protection. The RA specifically excludes from the definition of disabled persons those who use illegal drugs ("the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use") 29 U.S.C.A. § 706(8)(C)(i) (Supp. 1995). Similar language in the ADA's incorporated exceptions provides "the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C.A. § 12114(a) (Supp. 1995).

[27] 29 C.F.R. § 1614.203(a)(6) (1996). Some readers may become a bit confused over the switch in regulations from implementing regulations for the ADA in 29 C.F.R. pt. 1630 to 29 C.F.R. pt. 1614. Part 1630 implements the ADA, which the RA incorporates by its terms. Part 1614 contains the EEOC's regulations for processing *all* federal employee discrimination complaints and therefore also applies to the RA. The courts have not resolved the analytical relationship between the RA and the ADA. The federal courts still struggle with the distinction between §§ 501 and 504 of the RA. *See supra* note 22.

[28] *See supra* note 21.

[29] *See* William v. Widnall, 1996 WL 135137, at 3 (10th Cir. 1996) (finding the appropriate burden under § 501 requires the plaintiff to show "(1) he is a disabled person; (2) he was otherwise qualified apart from his handicap, i.e., with or without reasonable accommodation, he could perform the job's essential functions; and (3) he was terminated under circumstances which give rise to an inference that his rejection was based solely on his disability") (citing Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1386-87 (10th Cir. 1981) and White v. York International Corp., 45 F.3d 357, 361 n.6 (10th Cir. 1995)).

[30] 29 C.F.R. § 1630.2(h) (1996).

[31] Section 504 of the RA, 29 U.S.C. § 794 (1996), prohibits disability discrimination under Federal Grants and Programs. For purposes of defining impairments, the scope of § 504 is identical to that of § 501. *See supra* note 23.

[32] 45 C.F.R. pt. 84, app. A, at 310 (1985).

The Supreme Court also has endorsed this "broad definition" under the RA.[33]

This expansive definition of impairment is still limited in scope, however, and the statutes and implementing regulations do not specifically identify obesity as an impairment. Courts have found that temporary or controllable conditions, often associated with obesity, do not generally constitute an impairment.[34] The EEOC also states in its ADA implementing regulations that a physical characteristic such as weight that is within a normal range and not the result of a physiological disorder does not constitute an impairment.[35] Based on this guidance, the EEOC has argued the inverse—that a person's weight could be an impairment if it is either outside the normal range or the result of a physiological disorder.[36] The EEOC rebuts this argument somewhat in its own interpretive guidance on the ADA, which states that only in rare cases will obesity be considered an impairment. Because obesity is not an enumerated impairment, obese plaintiffs face a formidable hurdle in convincing courts that obesity *does* constitute an impairment under the RA.[37]

### Major Life Activity

An employee who establishes that obesity is an impairment still must demonstrate that the impairment substantially limits a major life activity.[38] Major life activities are functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[39] Again, the EEOC has defined "substantially limits" in its ADA regulations based on years of RA litigation.[40] When in doubt, advocates can refer directly to the cases.[41]

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[33] School Board of Nassau County v. Arline, 480 U.S. 273, 280 n.5 (1986).

[34] McDonald v. Commonwealth of Pennsylvania, Department of Public Welfare, Polk Center, 62 F.3d 92, 96 (3d Cir. 1995) (finding that "[t]he Rehabilitation Act and the Disabilities Act do not apply to the transient, nonpermanent condition that she experienced, and consequently, the notion of accommodation under the statutes does not come into play."); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("[i]ntermittent, episodic impairments are not disabilities.").

[35] 29 C.F.R. § 1630, app. (1996).

[36] Brief for the EEOC at 17, Cook v. Rhode Island (No. 93-1093), 10 F.3d 17 (1st Cir. 1993).

[37] *See* Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) (finding a RA plaintiff must prove a disability covered by the Act and that the plaintiff can "with or without reasonable accommodation . . . perform the essential functions of the position in question." (quoting 29 C.F.R. § 1614.203(a)(6) (1995)).

[38] Interpretive Guidance on Title I of the Americans with Disabilities Act, pt. 1630, app. (1995). The EEOC's Interpretive Guidance on the ADA, page 408, states that the question turns on "(1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the [actual or expected] permanent or long term impact . . . of, or resulting from, the impairment."

[39] 29 C.F.R. § 1630.2(i) (1996).

[40] (1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j) (1996).

[41] *See infra* notes 41-49 and accompanying text for a discussion of substantially limits.

A substantial impairment analysis of the major life activity of working focuses on the employee's restricted performance in a range or class of jobs. An employee who cannot perform the essential functions of one specific job is not "substantially limited" in the major life activity of working.[42] *Groshans v. the Department of the Navy*[43] ably illustrates the concept of how an employee may be foreclosed from one position because of a disability but not be within the definition of an individual with a disability because no substantial impairment of a major life activity exists.

In *Groshans*, the plaintiff employee, Ms. Groshans, suffered from a disorder called anaphylaxis, which caused seizures when she was exposed to certain fumes such as heavy diesel, alcohol, or propellants. She was a contract specialist for the Navy responsible for missile systems contracts. Her office was located at a Navy yard where she was exposed to these dangerous fumes on a daily basis. Until her condition was diagnosed, the Navy had detailed her temporarily to another location away from the Navy yard. After her doctor diagnosed her condition, she refused to return to her permanent work site. The Navy removed her from her position for physical inability to perform the job.

In Ms. Groshans's appeal of the removal, the Navy cited compelling reasons for the need to have the position physically located at the Navy yard. Locating her position elsewhere would have required eighteen other persons to meet regularly at an alternate site. In affirming the removal, the administrative judge found it unnecessary to even consider the reasonableness of an alternate job site accommodation. Because Ms. Groshans was not foreclosed from performing in her area of work generally, but rather only at this one site, she was not a qualified individual with a disability.[44] She was otherwise very healthy—she rode horses, went scuba diving, ran, swam, bowled, and even played on the softball team. To be disabled, an employee must suffer an impairment that substantially limits a major life activity. Ms. Groshans had an impairment, but it did not substantially limit her ability to work generally.[45]

Obese employees have experienced similar difficulties in satisfying the substantial limitation prong of the definition of a disabled individual. In *Nedder v. Rivier College*,[46] the plaintiff alleged that the college removed her from her teaching position because of her morbid obesity (she was five feet six inches tall and weighed three hundred and eighty pounds). The court found that the plaintiff's obesity did not substantially limit the major activities of walking or working. Although her obesity caused her difficulties, those difficulties did not rise to the level of a substantial limitation. She therefore failed to meet the definition of an individual with a disability.[47]

In *Smaw v. Commonwealth of Virginia Department of State Police*,[48] the court faced a similar issue involving an obese police officer. The plaintiff had exceeded maximum weight limitations during most of her nine years as a trooper. Only after she failed a monitored weight-loss program did the Commonwealth demote her to a dispatcher position that required no weight or fitness standard. The court believed that obesity did not qualify as a disability but assumed it did for consideration of the Commonwealth's motion for summary judgment. In granting the motion, the court found that the plaintiff failed to meet the definition of an individual whose disability substantially impaired a major life activity: "disqualification from one particular job does not meet the substantiality requirement of the law."[49]

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[42] *See supra* note 40 (defining the term "substantially limits"). The federal circuit courts that have ruled on the issue all found that an impairment limiting performance in one job does not limit a major life activity. *See* Heilwell v. Mount Sinai Hospital, 32 F.3d 718 (2d Cir. 1994) (asthma exacerbated only in one particular location did not constitute an impairment); Byrne v. Board of Educ., 979 F.2d 560, 565-66 (7th Cir. 1992); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993); Miller v. AT&T Network Sys., 915 F.2d 1404, 1404 (9th Cir. 1990) (adopting district court opinion at 722 F. Supp. 633 (D.Or. 1989)); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985). *Contra* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (finding without analysis firefighters with skin condition were limited in major life activity of working by no beard rule).

[43] 67 M.S.P.R. 629 (1995).

[44] *Id.* at 635-37.

[45] *See also Heilwell*, 32 F.3d at 723 (noting that every circuit to address the issue has ruled "a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working.").

[46] 908 F. Supp. 66 (D.N.H. 1995).

[47] *Id.* at 75.

[48] 862 F. Supp. 1469 (E.D. Va. 1994).

[49] *Id.* at 1474. *See also* Lawrence v. Metro-Dade Police Dep't, 872 F. Supp. 950 (S.D. Fla. 1993) (finding "hammer toes" did not substantially limit police officer's ability to work in area generally).

Proving an impairment that substantially limits a major life activity does not complete the plaintiff's prima facie burden. The RA or the ADA still may not protect an individual whose obesity substantially impairs a major life activity. To be considered a "qualified individual with a disability" under these laws, the obese employee must be able to perform the "essential functions" of the job "with or without reasonable accommodation."

## Essential Functions

One of the greatest misunderstandings about the RA and the ADA is that these laws require an employer to make special accommodations for a disabled employee who simply cannot do the job. They do not. An employee who suffers from an impairment of a major life activity still must prove the ability to satisfy essential functions of the job to meet the definition of a "qualified individual with a disability."[50] A disabled employee who is obese or otherwise disabled must be able to "perform the essential functions of the position in question without endangering the health and safety of the individual or others."[51] A disabled employee

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[50] The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. The determination of whether an individual with a disability is qualified should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position such as possessing the appropriate educational background, employment experience, skills, and licenses. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in RA case law as determining whether the individual is otherwise qualified for the position. *See* 29 C.F.R. § 1630.9, app. (citing Senate Report at 33, House Labor Report at 64-65: Not Making Reasonable Accommodation). The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55. *See* 29 C.F.R. § 1630, app. (1996) (Interpretive Guidance on Title I of the Americans with Disabilities Act).

[51] 29 C.F.R. § 1614.203(a)(6) (1996). *See also* 29 U.S.C. § 12111(8) (1995), which states:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

The ADA implementing regulations at 29 C.F.R. § 1630.2(n) (1996) describe in some detail what constitutes essential functions of a position as follows:

(1) In general, the term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

who cannot perform the essential functions of the job with or without "reasonable accommodation" receives no protection from either the RA or the ADA.[52]

In *McDonald v. State of Kansas Department of Corrections*,[53] the plaintiff was a correctional officer who weighed over 400 pounds when hired and gained more weight over time.[54] Because of health problems related to his obesity, his doctor prohibited him from using stairs, walking more than 100 feet, standing more than fifteen minutes, and bending, squatting, and lifting objects that could not be lifted with one hand. The State of Kansas Department of Corrections reassigned him to light duty temporarily, which eventually lasted over a year. When the plaintiff's doctor reimposed the working restrictions indefinitely, the state removed the plaintiff. The court recognized that some restructuring of a position may be necessary to reasonably accommodate an employee. In this case, however, the employer was not required to consider reasonable accommodation because the plaintiff could not perform the essential functions of a security guard with or without accommodation.[55]

An otherwise qualified disabled employee who rejects or declines an accommodation that would allow performance of essential functions also falls outside the protection of the disability laws.[56] This raises the question of what are the bounds of reasonableness when accommodating a disabled employee—particularly an obese employee?

### Reasonable Accommodation

The three categories of accommodations are as follows: (1) those required to ensure equal opportunity in the application process (e.g., a person with a visual disability or who lacks manual dexterity and needs assistance to fill out an application form), (2) those that enable employees with disabilities to perform the essential functions of the position held or desired, and (3) those that enable employees with disabilities to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.[57] The most common—and litigated—issue concerns reasonable accommodation that allows the employee to perform the essential functions of the position.

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[52] 29 C.F.R. § 1630, app. (1996) (Interpretive Guidance on Title I of the Americans with Disabilities Act). The text proceeds as follows:

> While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.
>
> However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself. This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability. Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions.

*Id. See also* Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) (grocery selectors who could not keep up with new, faster production standards because of a disability were not discharged in violation of the ADA because speed is an essential function of the grocery selector job); Myers v. Hose, 50 F.3d 278 (8th Cir. 1995) (holding that a bus driver with diabetes, hypertension, and chronic heart disease presented danger of losing consciousness while driving and could not perform the essential functions of the position); Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (finding a coding clerk with the United States Attorney's Office with Miniere's disease was not otherwise qualified as she was unable to meet the essential job requirement of coming to work regularly. The court found that an essential function of any government job is an ability to regularly appear for work and to complete assigned tasks within a reasonable period of time); Jackson v. Veterans Admin., 22 F.3d 277 (11th Cir. 1994) (housekeeping aide with rheumatoid arthritis who was absent from work six days out of his first two and a half months was not otherwise qualified because the sporadic and frequent nature of his absences rendered him incapable of performing the essential function of being present at his job and performing daily housekeeping tasks at a specific location). A possible exception to this rule applies when the employer can "reasonably accommodate" the employee by reassignment to a vacant position or restructure the position without causing undue hardship to the employer. *See infra* notes 56-74 and accompanying text.

[53] 880 F. Supp. 1416 (D. Kan. 1995).

[54] The state provided several "accommodations" to the plaintiff because of his weight, including "specially ordered uniforms, a specially ordered reinforced chair, temporary light duty, and acquiescence in plaintiff's use of a modified shake-down procedure for searching inmates." *Id.* at 1419.

[55] *Id.* at 1425. *See also* Lassiter v. Reno, 885 F. Supp. 869 (E.D. Va. 1995) (finding deputy United States Marshall with paranoid personality disorder could not perform essential function of carrying weapon without endangering safety of himself and others).

[56] The text of 29 C.F.R. § 1630.9(d) (1996) is as follows:

> A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

[57] *Id.* § 1630.9, app.

A reasonable accommodation for purposes of job performance is a change in the work environment or in the manner in which duties are accomplished that allows an employee to attain an equal level of performance to that of a similarly situated nondisabled person.[58] The ADA's implementing regulation lists many examples of reasonable accommodations and describes how an accommodation is reached; such accommodations include modified work schedules, acquisition or modification of special equipment, or providing readers or interpreters.[59] To reasonably accommodate a particular employee, an employer may even be required in certain cases to consider reassigning the qualified disabled employee to a vacant position.[60] In the federal government, the employer must consider vacant positions only within the agency and within the activity's commuting area.[61]

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[58] *Id.* § 1630.2; *see also id.* § 1630.9, app. (citing S. Rep. at 35; H. Lab. Rep. at 66).

[59] The EEOC's regulation of federal employee discrimination complaints briefly describes what constitutes a reasonable accommodation.

> (i) Making facilities readily accessible to and usable by individuals with handicaps; and
>
> (ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

*Id.* § 1614.203(c). The implementing regulation for the ADA contains significantly more detail.

> (1) The term reasonable accommodation means:
>
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
>
> (2) Reasonable accommodation may include but is not limited to:
>
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.
>
> (3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

*Id.* § 1630.2(o).

[60] *Id.* § 1614.203(g) states the following:

> When a nonprobationary employee becomes unable to perform the essential functions of his or her position, even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. § 8337 or 5 U.S.C. § 8451.

*See also id.* § 1630.2(o)(2). In the Appendix to § 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.2(o), the EEOC states:

> Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants .... Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

[61] In the Department of Defense (DOD), the "agency" means the specific service or agency (i.e., Army, Navy, Air Force, or Marine services) and does not include other DOD agencies. Brown v. Department of Navy, 53 M.S.P.R. 537 (1992). An agency need not consider reassigning an employee to another part of the country as a reasonable accommodation; the commuting area serviced by the appointing authority is the proper area of consideration. Rivera v. Department of Treasury, EEOC Pet. No. 03950019 (Mar. 9, 1995).

Integrally tied to the reasonableness of every accommodation determination, however, is the issue of undue hardship on the employer.[62] Every accommodation case requires careful review of the specific facts involved; no "set" accommodation can be generalized for any particular disability or job. Just what accommodation is necessary or reasonable and when an accommodation becomes an undue hardship have been the subject of much litigation.[63] In determining whether an accommodation causes an undue hardship on a federal agency, the courts will consider the agency's workforce structure, its mission, its facilities, and perhaps most importantly, its budget compared to the cost of the accommodation.[64]

No clear cut lines between due and undue hardship exist. An accommodation need not cause financial ruin to be considered unduly burdensome,[65] but the courts disfavor a federal agency's argument of undue hardship based on purely financial grounds. Agencies are more likely to succeed in convincing a court that a proposed accommodation causes the agency an undue operational hardship.[66] In one particular case, the employee suffered from a personality disorder of chronic severe depression coupled with obsessive compulsive tendencies. This was a disability that substantially impaired the major life activity of working. The employee's doctor recommended an accommodation consisting of a more structured work environment, close supervision, and regular work hours. Such an accommodation would, however, have caused an undue hardship on the agency because of the nature of the work required from this employee, a senior trial attorney.[67]

Some "accommodations" are simply not reasonable.[68] Because the issue of reasonable accommodation presented such a controversy in the debate over the Civil Rights Act of 1991, Congress decided to establish a specific exception to an RA plaintiff's ability to recover compensatory damages.[69] An employer who makes a "good faith effort" to reasonably accommodate the complaining employee will not be liable for compensatory or punitive damages even if the employer has not actually reasonably accommodated the employee.[70]

Allocating the burdens of proof present a particularly troublesome aspect of litigating the issues of reasonable accommodation

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[62] The ADA prohibits an employer from "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . ." 42 U.S.C.A. § 12112(b)(5)(A) (1995). The EEOC's regulation implementing the ADA states that "[i]t is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 29 C.F.R. § 1630.9 (1996).

[63] *See, e.g.*, Borkowski v. Valley Central School District, 63 F.3d 131, 135 (2d Cir. 1995) (citing the analysis in the various circuits).

[64] 29 C.F.R. § 1614.203(c)(3) (1996), which states as follows:

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

For the ADA definition of undue hardship, *see id.* § 1630.2(p).

[65] *See* Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448 (1991) (noting that, during the debate over the ADA, Congress considered and rejected a provision that would have defined an undue hardship as one that threatened the continued existence of the employer).

[66] *See, e.g.*, McKinney v. Unites States Postal Serv., EEOC Appeal No. 01940021 (Mar. 16, 1995) (finding the agency submitted no evidence that accommodation would interfere with agency operations and thereby failed its burden of proof).

[67] Bolstein v. Department of Labor, 55 M.S.P.R. 459 (1992).

[68] *See, e.g.*, Marino v. United States Postal Serv., 1994 WL 224161 (1st Cir. 1994) (Finding a postal worker with anxiety neurosis who punched his supervisor in the face and head several times after the supervisor had given him several direct orders, which the worker had disobeyed, was not otherwise qualified because no reasonable accommodation had been articulated which would permit him to perform the essential functions of the position. The court rejected as unreasonable as a matter of law the postal worker's proposal that he be isolated from stress-producing situations at work).

[69] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a (1992)), amended the discrimination laws to allow plaintiffs to recover up to $300,000 in compensatory and punitive damages. Punitive damages cannot be recovered against the United States. The law contains an escalating scale of recovery against private-sector employers; only those employers with more than 500 employees during twenty weeks of the calendar year are subject to the $300,000 maximum.

[70] 42 U.S.C. § 1981a(a)(3) (1996).

and undue hardship. One court recently stated, "In view of the lack of any direct statutory guidance, [the courts] have found the assignment of the burdens of production and persuasion particularly difficult as to reasonable accommodation."[71] In the District of Columbia and the Seventh Federal Circuit Courts, a plaintiff must prove (1) a reasonable accommodation that allows performance of the essential functions of the position *and* (2) that the accommodation causes no undue burden for the employer.[72] The burden then shifts to the employer to prove undue hardship. The Fifth and Ninth Federal Circuit Courts seem to place the entire burden on the employer.[73] The Second, Eighth, and Tenth Federal Circuit Courts apparently have compromised between the two extremes, with the Eighth and Tenth Federal Circuit Courts requiring the employee "at all times [to] retain the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his disability."[74]

The RA and ADA protect employees who either have or have a history of an impairment of a major life activity but can perform the essential functions of a position with or without reasonable accommodation and without endangering the safety of themselves or others. The final and most obscure definition of a disabled employee—one who is regarded as having a disability— requires different elements of proof depending on which court applies the law, and it provides a fertile ground for advocacy for the obese plaintiff.[75]

### Perceived Disability under the Rehabilitation Act

Employees "regarded as having such an impairment" are those who:

> ha[ve] a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; ha[ve] a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or ha[ve] none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.[76]

The courts have reviewed the legislative history of the definition and determined that Congress intended to protect people who are denied employment because of an employer's perceptions, regardless of whether those perceptions were accurate.[77] The Senate Report accompanying the bill to amend the RA in 1974 summarizes Congress's intent as follows:

> [T]he new definition clarified the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped . . . [It includes] those persons who do not in fact have the condition which they are perceived as having as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within [the first clause] in the new definition. Members of both of these groups may be subject to discrimination on the basis of their being regarded as handicapped.[78]

Until recently, very few reported cases addressed the issue of perceived disabilities under the RA. In deciding whether an employer regards an employee as having an impairment, the courts have focused primarily on two issues. First, whether the plaintiff's perceived condition would constitute an impairment; and second, whether the employer regarded the impairment's limiting effect on life activities as substantial.

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[71] Borkowski v. Valley Central School District, 63 F.3d 131, 136 (2d Cir. 1995).

[72] *See* Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1538 (1994); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).

[73] *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981); Mantolete v. Bolger, 767 F.2d 1416, 1423-24 (9th Cir. 1985).

[74] *See Borkowski*, 63 F.3d at 136 (the qualified disabled plaintiff must demonstrate the availability of a reasonable accommodation, then the burden shifts to the employer defendant to prove the accommodation is unreasonable or would cause an undue hardship); Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 2279 (1995); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995) (stating, "once the plaintiff makes 'a facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee.") (quoting Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir.1994) (affirming judgment entered in favor of employer under the RA); White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) ("As with discrimination cases generally, the plaintiff at all times bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability.").

[75] 29 U.S.C.A. § 706(8)(B)(iii) (Supp. 1995).

[76] 29 C.F.R. § 1614.203(a)(4) (1996).

[77] *See, e.g.*, E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980).

[78] S. REP. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6389-90.

One of the earliest perceived disability cases involved an apprentice carpenter whose preemployment physical revealed a congenital back anomaly.[79] The defendant, a construction company, refused to hire the plaintiff because the condition made him a poor risk for heavy labor.[80] An orthopedist advised the company that the plaintiff could perform carpenter duties if he kept his back and abdominal muscles in good tone. The company still refused to hire the plaintiff.[81] The plaintiff filed suit in federal district court under the RA.[82]

The defendant employer first attacked the definition of handicapped individual as unconstitutionally vague. Because the *regarded as* definition was added to the RA in a 1974 amendment, the federal district court reviewed the legislative history of the 1974 amendment. The court concluded that "[p]ersons of common intelligence should have fair warning that the term impairment meant any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity."[83] The court further stated that the phrase "is regarded as having an impairment" is self-explanatory and concluded that the defendant employer perceived the plaintiff as being impaired and refused to hire him on that basis.[84]

Other plaintiffs have been less successful in convincing the courts that their employers regarded them as having impairments. In *Torres v. Bolger*,[85] for example, a left-handed postal employee claimed that the United States Postal Service (U.S.P.S.) regarded him as impaired within the terms of the RA. Because the plaintiff had difficulty using his right hand to perform certain mail carrier duties, he was too slow in making his deliveries. The U.S.P.S. terminated the plaintiff for reasons other than his inefficiency in delivering mail. The plaintiff contended that he lost his job because the U.S.P.S. considered his left-handedness to be an impairment.

The federal district court refused to find that the plaintiff qualified as a handicapped individual. It concluded that the U.S.P.S. recognized the plaintiff's left-handedness but merely regarded it as a personal trait and not as an impairment.[86] This case highlights a now clear limitation on perceived disability. An employer must "regard" an employee as having a disability that, if the disability actually existed, would be a recognized impairment of a major life activity and not simply a physical characteristic.[87]

In 1986, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) addressed the issue of whether a federal employee with a fear of heights qualified as a handicapped individual.[88] The plaintiff worked as a utility systems repairer and operator at the National Institute of Environmental Health Services (NIEHS). The job required him to climb stairways and ladders for routine maintenance and emergencies. The plaintiff asked the NIEHS to accommodate his condition, but it refused.

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[79] *E.E. Black*, 497 F. Supp. at 1088.

[80] *Id.* at 1091.

[81] *Id.* at 1092.

[82] The plaintiff's cause of action under the RA was pursuant to § 503, which prohibits handicap discrimination by government contractors. *Id.* at 1090; 29 U.S.C. § 793 (1993).

[83] *E.E. Black*, 497 F. Supp. at 1098.

[84] *Id.*

[85] 610 F. Supp. 593 (D.C. Tex. 1985).

[86] *Id.* at 595.

[87] *See* appendix to 29 C.F.R. § 1630, which clarifies the types of personal characteristics that the EEOC considers not protected by the ADA as follows:

> The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments.

The RA also excludes from the definition of an "individual with a disability" those who allege impairments based on homosexuality or bisexuality; transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs. 29 U.S.C.A. § 706(8) (Supp. 1995).

[88] Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986). Just a reminder—the terms handicap and disability are synonymous. The definition was amended in 1992. *See supra* note 2.

The Fourth Circuit focused on the question of whether the NIEHS regarded the plaintiff as having an impairment that substantially limited any of his major life activities. The Fourth Circuit found that the statutory requirement of a "substantial limitation" indicated "[a]n employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved."[89] Based on this requirement, the Fourth Circuit reasoned that if the NIEHA merely regarded the plaintiff as incapable of satisfying the singular demands of a particular job and not as having a substantial limitation in employment generally then it had not "regarded" him as handicapped under the RA.[90]

The Supreme Court addressed perceived disability in the context of an employer's reaction to an employee's contagious disease in *School Board of Nassau County v. Arline*.[91] The Court discussed at length Congress's intent in amending the definition of "handicapped individual" to include a person the employer regards as having an impairment that substantially limits a major life activity.[92]

*Arline* involved a school teacher fired because of a continued recurrence of tuberculosis. The Court found that the plaintiff was handicapped by virtue of having a record or history of an impairment. The school board responded that it did not penalize the plaintiff for her history of impairment; it fired her because of the disease's contagious effects on school children.

The Court rejected the school board's contagion argument, characterizing the argument as an attempt to justify discrimination based on how the impairment affects others.[93] The Court reasoned that justifying discrimination based on the reaction of others would allow employers to deny jobs to the handicapped because of the "[p]rejudiced attitudes or ignorance of others."[94] The Court examined the legislative history of the RA amendment and found that Congress specifically anticipated and foreclosed this result in the prohibition on perceived discrimination.[95]

In *Arline*, the Court noted that Congress intended to combat the effects of erroneous, but prevalent, perceptions about the handicapped. Congress, therefore, expanded the definition of handicapped individuals to prevent discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."[96] Those protected can be people who do not have the condition they are perceived as having. These persons may suffer no diminishment of physical or mental capabilities, yet the negative reactions of others could substantially limit their ability to work.[97] "The [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."[98]

Many other cases applying the perceived disability definition have likewise involved persons having contagious diseases. In *Harris v. Thigpen*,[99] the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) characterized an asymptomatic HIV-infected prisoner as disabled under § 504 of the RA because the state prison system regarded him as having a physical or mental impairment.[100] The prisoner sued under the RA after the state segregated him from nonseropositive inmates and deprived him of the opportunity to participate in educational, rehabilitative, and recreational activities.[101] The Eleventh Circuit found that the Ala-

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[89] *Id.* at 934.

[90] *Id. See also supra* notes 39-49 and accompanying text for a discussion of "substantially limits."

[91] 480 U.S. 273 (1986).

[92] The original RA did not contain this definition. It was only after the Department of Health, Education, and Welfare attempted to devise regulations to implement the Act that Congress broadened the definition to address a range of discriminatory practices. *Id.* at 278 n.3.

[93] *Id.* at 282.

[94] *Id.* at 284.

[95] *Id.* at 282.

[96] *Id.* at 279 (quoting Southeastern Community College v. Davis, 422 U.S. 397, 405-06 n.6 (1979)).

[97] *Id.* at 283.

[98] *Id.* at 285.

[99] 941 F.2d 1495 (11th Cir. 1991).

[100] *Id.* at 1524.

[101] *Id.* at 1500.

bama correctional system regarded HIV-positive inmates as though they were unable to engage in the major life activities enjoyed by the rest of the prison population.[102] Accordingly, the Eleventh Circuit concluded that the Alabama correctional system could not deprive an HIV-positive inmate opportunities available to other inmates unless the HIV-positive inmate posed a specific danger to another person.

### Perceived Disability and Weight-Related Job Discrimination

An employer's perception of an obese employee also may cause the issue of a perceived disability. For the first time, a federal court extended protection under the RA to a woman denied employment solely because of her obesity.[103] In *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*,[104] the United States Court of Appeals for the First Circuit (First Circuit) decided that the plaintiff, Bonnie Cook, a morbidly obese[105] woman, was perceived as being disabled under the Act.

From 1978 to 1980 and again from 1981 to 1986, Ms. Cook worked as an institutional attendant at the Ladd Center, a residential facility for retarded persons operated by the Rhode Island Department of Mental Health, Retardation, and Hospitals (MHRH). Ms. Cook had a spotless work record. Each time she left the job, she did so voluntarily for personal reasons. During her years in the job, Ms. Cook was "corpulent."[106] In 1988, when she reapplied again for the same position, Ms. Cook, who was five feet two inches tall, had increased in weight to over three hundred twenty pounds.[107]

Ms. Cook took a routine preemployment physical in 1988. Although the evaluating MHRH nurse concluded that Ms. Cook was morbidly obese, the nurse identified no specific limitation that would interfere with the position. The reviewing MHRH physician refused to give Ms. Cook medical clearance unless she reduced her weight below three-hundred pounds.[108] She never lost the weight and also never got the job.

Ms. Cook brought suit[109] in federal district court against the MHRH alleging disability discrimination in violation of the RA[110] and several state statutes.[111] The MHRH responded with a motion to dismiss contending that obesity was not a handicap under the various statutory schemes. The MHRH further argued that, to

[102] *Id.* at 1524. Other courts have concluded that HIV-positive persons are handicapped, at least in part, by virtue of being perceived as handicapped. *See* Leckelt v. Board of Comm'rs of Hospital Dist. No. 1, 909 F.2d 820 (5th Cir. 1990) (hospital officials treated HIV-infected nurse as if he had impairment); Doe v. Centinela Hospital, 1988 WL 81776 at *7 (C.D. Cal. 1988) (HIV-position plaintiff perceived and treated as handicapped by hospital); Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987); *see also* Kohl by Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226, 1236 (W.D. Mo. 1987) (person infected with asymptomatic contagious hepatitis-B virus handicapped in part due to vocational facilities' fear of threat to third parties).

[103] See Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993). Only one previous reported federal case involved a plaintiff who argued that the perceived disability theory applied to his excess weight under the RA. In *Tudyman v. United Airlines*, 608 F. Supp. 739 (D.C. Cal. 1984), an airline refused to hire the plaintiff as a flight attendant because the plaintiff's weight exceeded the company's weight policy. The plaintiff was an avid bodybuilder and was five feet seven inches and weighed one hundred and seventy-eight pounds. The maximum allowable weight under the airline's standards for his height was one hundred and sixty-three pounds. The plaintiff previously had worked for defendant but was terminated because of his weight. The court refused to conclude that the defendant airline regarded the plaintiff as having a physical impairment that limited his major life activities. Instead, the court concluded that the defendant merely regarded plaintiff to be over a certain weight. The court reasoned that, "[f]or the same reason that the failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual. If this were the case, anyone who failed to obtain a job because of a single requirement which may not be essential to the job would become a handicapped individual because the employer would thus be viewing the applicant's failure as a handicap." *Id.* at 741.

[104] 10 F.3d 17 (1st Cir. 1993).

[105] The medical profession considers a weight of 100% or more over the normal for one's height as morbid obesity. *See* MERCK MANUAL 950, 953 (15th ed. 1987).

[106] *Cook*, 10 F.3d at 20 n.1.

[107] *Id.* at 20.

[108] Cook v. Rhode Island, 783 F. Supp. 1569, 1571 (D.R.I. 1992). The MHRH reviewing physician testified at trial that he based his decision on three reasons: (1) the plaintiff's own health risk based on her obesity, (2) the risk plaintiff posed to the retarded residents in emergency situations because of her obesity, and (3) the potential overall cost of Workers' Compensation injuries due to anticipated obesity-related absences of the plaintiff. *See also Cook*, 10 F.3d at 28 n.13.

[109] Ms. Cook sought an injunction and declaratory judgment requiring the MHRH to award her the next available institutional attendant position, with seniority, promotions, and salary increases retroactive to November 1988. *Cook*, 783 F. Supp. at 1571. She also sought back pay, compensatory damages, and attorney's fees. *Id.* at 1571.

[110] 29 U.S.C. § 794 (1993).

[111] R.I. GEN. LAWS §§ 28-5-1 to 28-5-40, 42-87-1 to 42-87-4 (1992 Supp.).

the extent obesity was a handicap, it had accommodated Ms. Cook by agreeing to hire her if she lost the weight. A jury disagreed and the court awarded Ms. Cook, among other things, $100,000 in compensatory damages based on the jury's findings.[112]

The MHRH appealed the judgment to the First Circuit,[113] arguing first that Ms. Cook's morbid obesity did not qualify as a disabling condition because she could simply lose the weight and rid herself of the disabling condition.[114] The MHRH argued next that the RA's protection did not extend to individuals who voluntarily caused or exacerbated their handicaps.[115]

The EEOC filed a brief as *amicus curae* to the First Circuit in support of Ms. Cook.[116] It argued that "[o]besity may be a disability under the Rehabilitation Act if it constitutes an impairment and if it is of such duration that it substantially limits a major life activity or is regarded as so doing."[117] The EEOC stated that each specific obesity claim must be analyzed under RA standards.[118] It believed, however, that the jury correctly concluded that the MHRH regarded Ms. Cook as having an impairment.[119] The impairment was morbid obesity of a sufficient duration and with a significant impact on major life activities.

This case is extremely significant for the federal[120] workplace in several respects. Neither the RA nor the ADA—nor the law's implementing regulations—address directly the question of whether obesity is a disability. In its *amicus curiae* brief to the First Circuit, the EEOC provided the first detailed analysis by the federal government of whether, and under what conditions, the RA covers obesity.[121] It concluded that morbid obesity "of sufficient duration and with a significant impact on major life activities" can constitute a disability even if it is voluntary or mutable.[122]

The First Circuit agreed with all of the EEOC's arguments. The First Circuit dismissed the MHRH's basic premise that an impairment must be immutable to fall under the RA. It noted that the Act applies to a myriad of conditions caused or exacerbated by voluntary conduct such as HIV-positivity. Assuming, *arguendo*, that immutability was required, it concluded that the jury could have found either that the metabolic condition underlying morbid obesity is immutable or that the MHRH treated Ms. Cook as though she had an immutable condition. Therefore, the First Circuit concluded that Ms. Cook's condition could have either constituted an impairment under the RA or was regarded by the MHRH as having constituted an impairment under the RA.

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[112] The RA did not previously provide for the award of compensatory damages against a federal defendant. *See* Marshburn v. Postmaster General of the United States, 678 F. Supp. 1182, 1184-85 (D. Md. 1984) (compensatory damages not available to federal employee under the RA), *aff'd without opinion*, 861 F.2d 265 (4th Cir. 1988). Congress has since amended the RA to allow recovery of up to $300,000 in compensatory damages. *See supra* note 69.

[113] Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993). The appeal came from a bench decision based on the jury's response to special interrogatories. The district court found that the jury had ample evidence from which it could have concluded that Ms. Cook was otherwise qualified to perform satisfactorily in the position. It found the most significant evidence was the uncontradicted proof that the plaintiff had satisfactorily performed all the requirements of the position for nearly eight years of previous employment. The MHRH presented no proof that it had ascertained any evidence to the contrary. The court characterized the MHRH's assumption that the plaintiff lacked qualifications because of her weight as the stereotypical assumptions that Congress intended to prevent with the RA.

[114] *Id.* (The district court addressed in its bench ruling the issue of whether Ms. Cook fit the definition of a person with a disability. It decided that the proof could only support a decision that she was disabled by virtue of being *regarded* as a person with a disability. The MHRH argued that it did not consider Ms. Cook's condition as disabling because it did not consider it immutable. The district court found that ample evidence existed for the jury to conclude that the MHRH treated Ms. Cook's obesity as a continuing condition of indefinite duration which limited her ability to work).

[115] *Id.*

[116] *Id.*

[117] *Id.* at 23.

[118] *Id.*

[119] *Id.*

[120] The defendant was a state agency receiving federal financial assistance and consequently fell under § 504 of the Act. Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 834 F. Supp. 57, 61 (D.R.I. 1992). Although the case concerned those statutory provisions and implementing regulations that specifically apply to recipients of federal financial assistance, the corresponding statutory provisions and regulations applicable to federal agencies under § 501 are essentially identical. *See supra* note 21 and accompanying text.

[121] *Obesity Should be Regarded as Protected Disability, EEOC Says*, 1993 GOV'T EMPLOYEE RELATIONS REP. (BNA), No. 31, at 1078.

[122] Brief for the EEOC at 17, *Cook v. Rhode Island* (No. 93-1093).

The First Circuit next examined whether the jury properly concluded that the impairment substantially limited one or more of Ms. Cook's major life activities and again agreed with the EEOC. The First Circuit noted that the MHRH reviewing physician testified that he "[r]efused to hire plaintiff because he believed that her morbid obesity interfered with her ability to undertake physical activities, including walking, lifting, bending, stooping, and kneeling, to the extent that she would be incapable of working [in the position]."[123] The First Circuit concluded that the examining physician regarded the plaintiff as having an impairment that limited a major life activity such as working.

The First Circuit then considered whether the MHRH regarded the impairment's limiting effect on the plaintiff's major life activities as substantial. The First Circuit concluded that the evidence showed that the MHRH reviewing physician believed that the plaintiff's limitations "[f]oreclosed a broad range of employment options in the health care industry."[124] The First Circuit found that the jury had sufficient evidence to conclude that the MHRH's perception of the plaintiff's impairment was such that the impairment constituted a substantial limitation.

Having determined that the plaintiff was a person with a perceived disability, the First Circuit finally considered whether the jury had sufficient evidence to conclude that Ms. Cook was otherwise qualified for the position. The MHRH argued that she was not otherwise qualified for the position, but it could only point to stereotypes and broad generalizations about obesity to support its conclusion. The First Circuit concluded that, with Ms. Cooks's long satisfactory work record in the same position and her satisfactory physical examination report, the jury had ample uncontroverted evidence to find that she was an otherwise qualified disabled individual under the statute and that she had been refused employment solely because of her perceived disability.[125]

### *Cook* and the Federal Workplace

In *Arline*, the Supreme Court stated that in determining whether a disabled person is otherwise qualified for the position, the courts should defer to "reasonable medical judgments."[126] The MHRH relied on medical judgment—and it lost.[127] The First Circuit faulted the MHRH for not having "[m]ade specific inquiries into plaintiff's physical abilities and instead relied on generalizations regarding an obese person's capabilities."[128] The lesson from this case is that in perceived disability cases—particularly those involving a morbidly obese person—the plaintiff's traditional burden of proving that he or she is otherwise qualified may instead fall on the employer. An employer may be required to put an applicant through a series of diagnostic tests to medically establish that the applicant was not qualified for a particular position.

The *Cook* court's analysis raises another troubling result in the area of perceived disabilities. Under the traditional RA analysis, the plaintiff must be an otherwise qualified individual with a disability who has been subjected to an adverse action on the basis of that disability. The burden then shifts to the defendant to show that it reasonably accommodated the plaintiff's disability or that reasonable accommodation would cause the employer an undue hardship. With perceived disabilities, if the disability is in the eyes of the employer, then there is no actual disability to accommodate, and the defendant employer is deprived of any opportunity to escape liability through accommodation or showing of undue hardship. The First Circuit used this modified analysis and concluded that the court need go no further after it determined that the MHRH declined to hire Ms. Cook solely because of her perceived disability.[129]

What if the employee has an actual impairment, as the First Circuit concluded that Ms. Cook had, but pursues and prevails only on the perceived disability theory? Using the First Circuit's analysis in *Cook*, the employer again may be deprived of the opportunity to escape liability by proving that it reasonably accommodated the employee or that reasonable accommodation was not possible. The First Circuit's modified analysis for perceived disability cases arguably creates a strict liability situation for employers who regard employees as limited in their ability to perform in certain areas.

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[123] *Cook*, 10 F.3d at 25.

[124] *Id.*

[125] *Id.* at 27.

[126] School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 (1987).

[127] The MHRH relied on the medical judgment of its own employee. In *Arline*, the Supreme Court specifically left open the question of whether courts should defer to the reasonable medical judgments of private physicians on which the employer has relied in deciding an applicant is not qualified. *Id.* at 288 n.18. The First Circuit was unimpressed by MHRH's reliance on its own medical authorities.

[128] *Cook*, 10 F.3d at 27.

[129] *Id.* at 28.

*Cook* has served as a catalyst for prospective litigants with all types of conditions or ailments—real or perceived. It also has been a popular topic for legal analysis in periodicals.[130] Weight discrimination and perceived disability claims have become more common in the EEOC[131] and the federal circuits.[132] For morbidly obese people, the First Circuit's decision was a clear victory. Because the decision was based on *perceived* disability and not actual disability from obesity, however, the *Cook* decision is of limited use to the obese plaintiff.[133] Despite *Cook*, plaintiffs have been less than overwhelmingly successful in their attempts to prove actual or perceived obesity discrimination.

## Conclusion

Many courts have refused to fully embrace the First Circuit's rationale in *Cook*. They have required "regarded as" plaintiffs to first prove no actual impairment when their employers nonetheless regarded them as impaired.[134] The federal courts have generally found that the regarded as disabled analysis applies only when the employer perceives the employee as suffering from a substantial impairment of a major life activity.[135] An employer will not be liable for regarding the employee as disabled when the employer considers the obese employee as substantially limited in performing only a particular job or a function that does not substantially limit a major life activity.[136]

Based on *Cook* and the EEOC's support for obesity claims, employers should avoid considering a current or prospective employee's obesity in any employment decision. Obese employees should be evaluated on the merits of their performance. Obviously, supervisors should not make or condone weight-related derogatory comments. Such tasteless acts undermine morale in the workplace even if they would not lead to liability. Additionally, federal employers may be required to afford those who are truly morbidly obese reasonable accommodation.

An employer who concludes that morbid obesity renders a person unqualified for a position must have credible proof of objective facts supporting that conclusion. The employer should anticipate that the EEOC or a court will place the burden on the employer to prove that the person was unqualified.

The RA and the ADA prohibit employment discrimination based on disabilities, actual or perceived. Employers always can take valid administrative actions against employees for misconduct unrelated to a disability and can remove employees who simply cannot do the job. The prudent employer should not, however, rely on a layman's concept of traditional disabilities in determining which employees to accommodate. Neither should an employer look to legalistic burdens of proof for protection from disability discrimination claims. The federal government should practice both the letter and the spirit of the discrimination laws. Sound management practices, implemented with advice and review by counsel, will prevent adverse administrative and judicial decisions under these laws.

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[130] *See, e.g.*, Peterson, *supra* note 7, at 105; Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715 (1994/1995); Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41 (1994); Steven M. Ziolkowski, Comment, *The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After* Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals, 74 B.U. L. REV. 667 (1994).

[131] *See, e.g.*, Vega v. United States Postal Serv., EEOC Pet. No. 05950449 (Dec. 14, 1995) (alleging bad performance evaluation and discipline motivated by morbid obesity); Totten v. United States Postal Serv., EEOC Appeal No. 01945041 (Aug. 23, 1995) (nonselection because of obesity); James v. United States Navy, EEOC Appeal No. 01945240 (Dec. 7, 1994) (remanding to agency allegation of obesity and nicotine addiction as disabilities); Tavarozzi v. United States Postal Serv., EEOC Appeal No. 01930804 (Dec. 10, 1993) (back pain cause by obesity protected); Keown v. Tennessee Valley Auth., EEOC Appeal No. 01943171 (Aug. 24, 1995 (finding actionable allegation that overtime denied based on perceived disability caused by ruptured disk); Kellus v. Runyon, EEOC Request No. 05940470 (June 23, 1994) (rejecting claim of perceived physical and mental disabilities).

[132] *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) (affirming summary judgment against obesity discrimination claim by four hundred and sixty pound prison inmate); Stradley v. LaFourche Communications, Inc., 869 F. Supp. 442 (E.D. La. 1994) (supervisor who was diagnosed with "adjustment disorder with mixed emotional features" could be regarded as disabled and thus meet the ADA's definition of disability since the person who terminated his employment testified that he understood the plaintiff to be suffering from acute anxiety and depression and that the condition made him potentially violent and hostile in the work place); Milton v. Bob Maddox Chrysler Plymouth, Inc., 868 F. Supp. 320 (S.D. Ga. 1994) (a driveablity technician at an automobile repair shop who had his left lung removed due to bronchial cancer and whose employers and coworkers believed the plaintiff had a physical impairment could demonstrate that he was regarded as having a physical impairment substantially limiting a major life activity).

[133] *See, e.g.*, Nedder v. Rivier College, 908 F. Supp. 66, 75 (D.C. N.H. 1995) ("*Cook* is instructive, yet not dispositive, on the issue of morbid obesity as an 'impairment,' due to the nature of appellate review in that case as well as its underlying merits.").

[134] Hamm v. Runyon, 51 F.3d 721, 726 (affirming district court's summary judgment for the United States Postal Service in alleged perceived disability case involving the major life activity of walking); Chandler v. Dallas, 2 F.3d 1385 (5th Cir. 1993) (city's adverse action towards two drivers, one with 20/60 corrected vision and the second an insulin-dependent diabetic, for failing mandated safety tests was not a sufficient ground for finding that they were regarded as disabled; a limitation in one job does not constitute a substantial limitation of the major life activity of working); Richardson v. William Powell Co., No. C-1-93-528, 1994 WL744512 (S.D. Ohio Nov. 10, 1994) (employer's subjective knowledge of a secretary's degenerative arthritic hip condition that caused her to walk with a noticeable limp was insufficient by itself for the court to find the employer regarded the plaintiff as being disabled).

[135] Smaw v. Commonwealth of Virginia Department of State Police, 862 F. Supp. 1469, 1475 (E.D. Va. 1994); *Nedder*, 908 F.Supp at 75. *See also* Dobre v. National Railroad Passenger Corporation, 850 F. Supp. 284 (E.D. Penn. 1993) (Granting summary judgment against plaintiff alleging perceived disability based on transsexualism, the court found that a "perceived" condition must be one that would constitute an actual protected impairment if it existed.).

[136] *See supra* notes 37-54 and accompanying text.

# TJAGSA Practice Notes

*Faculty, The Judge Advocate General's School*

## *Administrative and Civil Law Notes*

### An Overview and Practitioner's Guide to Gifts

#### *Introduction*

Ethics counselors[1] address issues involving gifts more frequently than other ethics issues in the Army.[2] Questions regarding gifts come from a myriad of sources throughout the Department of Defense. To respond accurately to these questions, ethics counselors must have a firm understanding of the facts surrounding the gifts at issue and a working knowledge of the rules governing gifts from various sources. This article explains the rules and provides a methodology to analyze gift issues correctly.[3] Because ethics rules relative to gifts are punitive, an ethics counselor's accurate advice is crucial.[4]

#### *Sources of Gifts*

When gift issues arise, the first question an ethics counselor should ask is, "Where is the gift coming from?" The answer to this question determines what rules apply and where the ethics counselor should look for those rules.[5] Generally, rules governing gifts concern three different sources: (1) gifts from sources outside the agency, (2) gifts between employees within the agency, and (3) gifts from foreign governments. The following discussion identifies the rules and references germane to gifts from each of these sources and explains the analysis that ethics counselors should apply as issues arise.

#### *Gifts from Sources Outside the Agency*

Rules regulating the giving and accepting of gifts by federal employees exist so that "every citizen can have complete confidence in the integrity of the Federal Government."[6] Public trust is diminished when government employees have unbridled discretion to accept gifts from organizations that seek to affect the employees' official decisions. "The exchange of such gifts give[s] the impression that a government official's decisions are for sale."[7] To avoid this impression, the *Joint Ethics Regulation* (*JER*) has established expansive rules that limit what, and under what circumstances, federal employees may accept gifts from sources outside the agency.

The first general rule that an ethics counselor must know when analyzing a gift from a source outside the agency is that "an employee shall not, directly or indirectly, solicit or accept a gift, . . . [f]rom a prohibited source."[8] A "prohibited source" includes any

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[1] The Department of Defense uses the term "ethics counselor" generally to refer to attorneys appointed in writing to "assist in implementing and administering the [Department of Defense] Component command's or organization's ethics program and to provide ethics advice to [Department of Defense] employees . . . ." DEP'T OF DEFENSE, JOINT ETHICS REG. 5500.7-R, JOINT ETHICS REGULATION (JER), para. 1-214 (Aug. 30, 1993) [hereinafter JER]. "The term 'Ethics Counselor' includes 'agency ethics official' as used by the Office of Government Ethics." *Id. See also* 5 C.F.R. § 2635.102(c) (1995) (further defining agency ethics official).

[2] In a poll taken during the 1995 Ethics Counselors Workshop at The Judge Advocate General's School, United States Army, ethics counselors listed gifts as the most common issue that they address and as the second most commonly misunderstood issue in the Army. The most commonly misunderstood issue involved private organizations.

[3] This guide focuses on gifts from various sources to individual employees. It does not address gifts and donations to the Army or gifts for distribution to individuals. Ethics counselors addressing such issues should refer to *Army Regulations 1-100* and *1-101*, respectively. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983); DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 May 1981); 10 U.S.C. §§ 2601-2608.

[4] *See* DEP'T OF DEFENSE, DIR. 5500.7, STANDARDS OF CONDUCT (30 Aug. 1993); JER, *supra* note 1, ch. 2. Ethics Counselors' advice is dispositive if based on all relevant facts. 5 C.F.R. § 2635.107.

[5] The rules issued by the Office of Government Ethics state that they "are not applicable to enlisted members of the uniformed services." 5 C.F.R. § 2635.103 (1995). By regulation, the Department of Defense has required enlisted personnel to adhere to those rules. *See* JER, *supra* note 1, para. 1-211 (including active duty enlisted members of the uniformed services along with military officers and civilian employees in the definition of "DOD employee"). *See also* 32 C.F.R. § 84.2(l) (1995). As a result, the gift rules discussed in this guide apply equally to Army officers, enlisted soldiers, and civilian personnel, and are punitive under the Uniform Code of Military Justice

[6] 5 C.F.R. § 2635.101(a) (1995).

[7] Ellen Kuszmaul Fujawa, *Do Look a Gift Horse in the Mouth if you Want to Keep your Career*, ARMY LAW., Apr. 1993, at 6.

[8] 5 C.F.R. § 2635.202(a)(1) (1995).

person or entity who is seeking official action by the employee's agency, doing business or seeking to do business with the employee's agency, or conducting activities regulated by the employee's agency.[9] Generally, this includes any entity that has an interest in the performance of Army missions.

The second general rule is that "an employee shall not, directly or indirectly, solicit or accept a gift . . . [g]iven because of the employee's official position."[10] To determine if a gift is offered because of an employee's position, one must ask whether the gift would have been "solicited, offered, or given had the employee not held his position as a Federal employee."[11]

These two general rules appear clear enough; however, they contain broad prohibitions that raise several issues and have numerous exceptions. To ensure a thorough review of the issues raised and the applicable *JER* provisions, ethics counselors analyzing gifts from outside sources should ask four questions. First, is the item offered actually a gift? Second, if the item is a gift, does an exception apply that would allow an employee to accept the gift? Third, would acceptance violate other laws? Finally, even if an exception applies, should the exception be used?

### *Is the Item Offered a Gift?*

The *JER* defines the term "gift" very broadly, to include almost anything having monetary value.[12] However, a gift does not include modest items of food or refreshments not offered as part of a meal.[13] A federal employee may, therefore, accept a cup of coffee or a doughnut from a prohibited source. The following also are not considered gifts: Greeting cards, plaques, trophies, prizes in a contest open to the public, commercial discounts open to the public, anything paid for by the government, and anything for which an employee pays market value.[14] A federal employee may accept anything that is not a gift, regardless of the source. Anything that is a gift, regardless of whether the donor is a prohibited source or whether the gift was given because of the recipient's official position, requires further analysis.

### *If the Item Is a Gift, Does an Exception Apply?*

The *JER* lists more than a dozen exceptions to the two general prohibitions against accepting gifts from outside sources.[15] The most common exception allows federal employees to accept unsolicited gifts valued at $20 or less per occasion.[16] An employee may accept more than one gift from the same source. However, the employee may not accept more than $50 worth of gifts from that source in any calendar year.[17] Other common exceptions allow employees to accept gifts motivated by a personal relationship, discounts or benefits available to the public,[18] and free attendance at certain widely attended gatherings.[19]

Besides considering the exceptions authorized by the Office of Government Ethics—which allow employees to accept some

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[9] *Id.* § 2635.203(d). A prohibited source also includes any person who "[h]as interests that may be substantially affected by the performance of the employee's official duties" or any organization a majority of whose members fit into any part of the definition of a prohibited source. *Id.*

[10] *Id.* § 2635.202(a)(2).

[11] *Id.* § 2635.203(e).

[12] Specifically, a gift includes "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance or other item having monetary value." *Id.* § 2635.203(b). It also includes gifts of training, travel, and reimbursements for such items. *Id.*

[13] *Id.* § 2635.203(b)(1).

[14] *Id.* §§ 2635.203(b)(2) to .203(b)(9).

[15] *See id.* §§ 2635.204(a) to .204(l).

[16] *Id.* § 2635.204(a). If a prohibited source gives a gift to a federal employee who is a "procurement official," then the Procurement Integrity Act and the *Defense Federal Acquisition Regulation* control whether the employee can accept the gift. *See* JER, *supra* note 1, para. 2-300 (requiring procurement officials to follow the gift acceptance restrictions of the procurement integrity statute); 41 U.S.C.A. § 423(p) (West Supp. 1996) (defining procurement official). The procurement integrity statute prohibits procurement officials from knowingly accepting a gratuity or other thing of value from a contractor competing on a contract. *Id.* § 423(b)(2) (West Supp. 1996). The *Defense Acquisition Regulation* defines a "gratuity or thing of value" as "any gift, favor, entertainment, or other item having monetary value." DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. FAC 90-24, para. 3.104-4 (15 Dec. 1994). It does not include "any unsolicited item, other than money, having a market value of $10 or less per event or presentation." *Id.* This means that while federal employees who are *not* procurement officials may accept gifts having a market value of $20 or less, a procurement official only can accept a gift valued at $10 or less. The $10 limitation for procurement officials may cease to exist by January 1997. The 1996 Department of Defense Authorization Act modified the procurement integrity statute so that it no longer refers to "procurement officials" or contains a specific gift prohibition. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304, 110 Stat. 186 (1996). It appears, therefore, that when the new procurement integrity provisions take effect, those individuals formerly referred to as "procurement officials" will be subject only to the *JER*'s $20 gift limitation like other Department of Defense employees. The new provisions will be effective when the new regulations are implemented or by January 1997, whichever comes first.

[17] 5 C.F.R. § 2635.204(a) (1995).

[18] Note that this exception can sometimes be read in conjunction with 5 C.F.R. § 263.203(b)(3), (4), which excludes from the definition of gift bank loans on terms generally available to the public and commercial discounts available to the public or all uniformed military personnel.

[19] *Id.* §§ 2635.204(b), .204(c), .204(g).

gifts from prohibited sources—ethics counselors must consider three additional exceptions authorized by the *JER*. One of these exceptions allows Department of Defense employees to accept unsolicited gifts of free attendance at events sponsored by state and local governments or non-profit civic organizations when the agency determines that its community relations interests will be served by attending.[20] The other two exceptions allow a federal employee to accept educational scholarships or grants[21] and gifts at ship launches and similar ceremonies.[22]

### *Does Acceptance Violate Other Laws and Should an Exception Be Used?*

Even if the *JER* rules and exceptions permit acceptance of a gift from an outside source, a federal employee must refuse the gift if accepting would violate other rules or undermine the integrity of the government. For example, it is illegal for an employee to accept any gift in exchange for official action even if it falls within the $20 gift exception.[23] Employees also must not accept gifts so frequently as to create the impression that outside sources can buy or influence official action. Finally, government employees may never use their official position to solicit gifts.

### *Gifts Between Employees*

Ethics counselors confronted with questions concerning gifts between agency employees must first determine whether the item offered is a gift. The *JER* definition of "gift" used for gifts from outside sources also applies to gifts between employees.[24] Once the ethics counselor determines that the item offered is a gift, the ethics counselor should think in terms of "twos." There are two threshold facts that an ethics counselor must know to analyze these gifts, two general prohibitions governing them, and two exceptions to the general rules.

#### Two Threshold Facts

The relationship between the donor and the recipient of the proposed gift is the first determination that the ethics counselor must make. Is the recipient the donor's supervisor? Are they friends?[25] Is the recipient a higher-paid employee than the donor? Answering these questions and precisely defining the relationship between the employees enables ethics counselors to determine which of the two general rules governing gifts between employees applies to a specific situation.

The second determination that the ethics counselor must make is what prompted the gift. Identifying whether a holiday, military event, or some other occasion triggered the gift enables ethics counselors to determine whether one of the two exceptions to the general prohibitions would allow an otherwise prohibited gift.

#### Two General Prohibitions

The first general prohibition on gifts between employees is that an employee may not *give* a gift[26] nor *solicit* a contribution for a gift to an official superior.[27] This rule applies even if the donor and recipient of the gift are personal friends. The second rule is that an employee may not *accept* a gift from a lower-paid employee[28] *unless* the donor and the recipient are personal friends

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[20] JER, *supra* note 1, para. 2-202(a).

[21] *Id.* para. 2-202(b).

[22] *Id.* para. 2-300c.

[23] 18 U.S.C.A. § 201(b) (West Supp. 1996) (prohibiting a government employee from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty).

[24] The definition includes "any gratuity, favor, entertainment, hospitality, forbearance or other item having monetary value." 5 C.F.R. § 2635.203(b) (1995). It also includes those items listed as nongifts. *Id. See also id.* § 2635.303(a) (1995) (stating that the definition of "gift" is the same for gifts between employees and gifts from prohibited sources).

[25] Frequently, employees in the workplace have personal relationships as well as working relationships with their fellow employees. Some employees developed friendships with their coworkers well before they began working for the federal government. Other friendships have blossomed on the job. No matter when the friendships developed, employees who are friends occasionally will want to exchange gifts. Because these friends also are employees of the federal government, they must adhere to the general rules imposed on gifts between employees.

[26] An employee also may not make a donation toward a gift for an official superior. 5 C.F.R. § 2635.302(a)(1) (1995).

[27] *See* 5 U.S.C.A. § 7351(a)(1)-(2) (West Supp. 1996); 5 C.F.R. § 2635.302(a) (1995). An "official superior" includes, but is not limited to, "an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee." 5 C.F.R. § 2635.303(d) (1995).

[28] 5 U.S.C.A. § 7351(a)(3) (West Supp. 1996).

who are not in a superior-subordinate relationship.[29] The first prohibition concerns gift giving and the second prohibition concerns accepting gifts from lower-paid employees. No *JER* provision prohibits senior employees from giving gifts to junior employees.

## Two Exceptions

Although the rules prohibit employees from giving gifts to their superiors and from accepting gifts from lower-paid employees, two exceptions to these rules exist. First, gifts may be given and accepted "[o]n an occasional basis,[30] including any occasion on which gifts are traditionally given or exchanged."[31] Gifts allowed under this exception include items with an aggregate value of $10 or less per occasion,[32] contributions of food and drink that will be shared in an office by several employees,[33] meals at a coworker's home,[34] and customary gifts brought when invited to a fellow employee's home.[35] If the gift is food or refreshments that will be shared by several employees in an office, someone in the office may solicit voluntary contributions towards the refreshments from other employees. However, no employee may solicit contributions for any other gift given on an occasional basis.[36]

The second exception allows gifts to be given on "special, infrequent occasions."[37] Under this exception, a subordinate may give or donate to a gift for a superior, and the superior may accept a gift from a subordinate or other lower-paid employees, on two types of occasions. First, the rules authorize gifts for "infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child."[38] Second, the rules allow employees to give and to accept gifts on "occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer."[39] The *JER* limits the value of gifts accepted under this exception. A superior may not accept "a gift or gifts from a donating group if the market value exceeds an aggregate of $300,"[40] *and* the superior "knows or has reason to know that any member of the donating group is his subordinate."[41] The *JER* also prohibits employees from soliciting more than $10

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[29] 5 C.F.R. § 2635.302(b) (1995). Generally, the spouse of a superior or higher-paid employee also may not accept a gift from a subordinate employee or from the subordinate employee's spouse. "Gifts to the employee's spouse will be considered a gift to the employee unless there is an independent basis for the gift to the spouse." Information Paper, Army Standards of Conduct Office (Mr. Wentink), subject: Gifts Between Employees, para. 2.d (7 Feb. 1995).

[30] The exception does not expressly define the term "occasional basis;" however, examples published with the exception provide insight into its meaning. The term clearly allows employees to give gifts on holidays like Christmas. *See* 5 C.F.R. § 2635.304(a), example 4 (1995) (authorizing a secretary to give and allowing the supervisor to accept a Christmas gift valued at less than $10). It also allows an employee to bring a supervisor a small souvenir after a vacation. *See id.* example 1 (allowing a supervisor to accept from a subordinate an $8 bag of saltwater taffy purchased while the employee was on vacation at the beach). However, an employee may not give, and a supervisor may not accept, small gifts valued at less than $10 if the gifts are given with some regularity. *See id.* example 2 (prohibiting a subordinate who travels frequently as part of the job from giving and the supervisor from receiving a souvenir after every temporary duty; "gifts given on this basis are not occasional").

[31] 5 C.F.R. § 2635.304(a) (1995). Gift-giving occasions include Christmas, Hanukkah, and birthdays.

[32] *Id.* § 2635.304(a)(1). In this exception, the term "items" specifically excludes gifts of cash. *Id.*

[33] *Id.* § 2635.304(a)(2).

[34] *Id.* § 2635.304(a)(3). Personal hospitality extended under this exception must be "of a type and value customarily provided by the employee to personal friends." *Id.* This does not mean that the donor and the recipient of the hospitality must be personal friends.

[35] *Id.* § 2635.304(a)(4). Customary gifts brought to someone else's home may include a bottle of wine, flowers, or box of candy. The rule does not impose any dollar limit on the value of such gifts. One example listed immediately after the exception specifically permits a superior to bring $15 bottle of wine to his subordinate's house for a dinner party even though its cost is more than the $10 limit imposed on some other gifts given on an occasional basis. *See id.* example 3.

[36] An office Christmas party provides a good basis for explaining how these rules work. An employee may collect contributions for refreshments for the party. A supervisor may contribute to the refreshments and attend the party. A secretary working for that supervisor may buy the supervisor a Christmas plant under $10, and the supervisor may accept the plant. However, the secretary may not ask other office employees for contributions for a Christmas present for the supervisor, and the supervisor may not accept such a Christmas present if the office offers it. *See id.* § 2635.304(c), example 2 (stating that Christmas is an annual event and not an occasion of personal significance which would allow acceptance of a gift).

[37] *Id.* § 2635.304(b).

[38] *Id.* § 2635.304(b)(1).

[39] *Id.* § 2635.304(b)(2). A promotion to a higher grade within a supervisory chain is not an "infrequently occurring occasion" which would allow the exchange of gifts. *Id.* § 2635.304(c), example 3. A promotion to a position outside the supervisory chain, however, is an event that marks the end of subordinate-superior relationship. *Id.* Therefore, subordinates may take up a collection and buy a gift to mark the occasion.

[40] The cost of food, refreshments, and entertainment provided to mark the special, infrequent occasion is not included when determining whether the aggregate value of the gift or gifts exceeds the $300 aggregate limit. JER, *supra* note 1, para. 2-203a.(1).

[41] *Id.* para. 2-203a. A donating group includes all employees contributing to a group gift. If one contributor contributes to two donating groups, then the value of the gifts from the groups with the common contributor "shall be aggregated" as if the gift is from a single donating group. The $300 limit applies to the total value of that gift. *Id.* para. 2-203a(2).

from each employee contributing to the group gift for the superior.[42] The *JER* does not prohibit the employee from voluntarily contributing more than $10 so long as the total value of the gift does not exceed $300.

Collections for the gift must avoid any appearance of coercion so that junior employees are free to give the requested amount, something less than the requested amount, or nothing at all. Ethics counselors should proactively advise in this area to insure that donations are completely voluntary.[43]

Ethics counselors must use their discretion to define the "donating group."[44] Ethics counselors should use a common sense approach that complies with the ethical rules, furthers the goals and principles of ethical conduct,[45] and makes practical sense for the employees involved. Donating groups may not pool their resources to purchase parts of a larger gift such as, but not limited to, the following: individual or separate place settings for a china set, individual or separate golf clubs to make a complete set, or having one group purchase the picture while another group purchases the frame.

### *Gifts from Foreign Governments*

If a gift is from an outside source and the outside source is a foreign government,[46] different rules apply. Article I, section nine, of the United States Constitution states that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[47] Therefore, no employee may accept a gift from a foreign government without the consent of Congress.

Congress has consented to allow employees to accept "gifts" of "minimal value" from foreign governments.[48] Congress defines a "gift" as "a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government."[49] Under this definition, a gift from a foreign government can in-

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[42] *Id.* para. 2-203b. Voluntary contributions for refreshments for the occasion may be solicited as a separate contribution not subject to the $10 limit. *Id.*

[43] JER, *supra* note 1, para. 2-203b. The *JER* does not specify who should solicit contributions for office parties or any office gift; it only requires that people make "voluntary contributions." 5 C.F.R. § 2635.304(c) (1995). Ethics counselors advising individuals on how to collect donations for office parties should, therefore, suggest that someone not in the supervisory chain solicit the contributions. This will avoid improper pressure on those asked to contribute. Additionally, the individual collecting contributions should not keep a list of contributors and must not require contributions of a specific amount. The individual collecting may recommend a specific contribution, but that "recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all." *See id.* § 2635.304(c), example 5 (prohibiting a secretary from informing other employees that they should contribute $5 for a farewell gift to their superior).

[44] *See* JER, *supra* note 1, para. 2-203a.

[45] *Id.* ch. 12.

[46] A "foreign government" includes "any unit of foreign governmental authority, including any foreign national, State, local, and municipal government" or any representative acting on behalf of such units. 5 U.S.C.A. § 7342(a)(2) (1980). One question ethics counselors may face is how to treat a gift from a foreign individual? If the foreign individual is a representative of a foreign government, then ethics counselors should analyze the gift as a gift from the government. If, however, the "foreign individual" is not a representative of a foreign government, then ethics counselors should analyze the gift as one from an outside source. A gift from a foreign individual who is also a Department of Defense employee would be analyzed as a gift between employees.

[47] U.S. CONST. art. I, § 9, cl. 8.

[48] 5 U.S.C.A. § 7342(c)(1)(A) (1980) (stating that Congress consents to "the accepting and retaining by an employee of a gift of minimal value tendered and received as a souvenir or mark of courtesy").

[49] *Id.* § 7342(a)(3). Gifts of foreign decorations and awards are outside the scope of this practitioner's guide. Ethics counselors faced with such gifts should consult 5 U.S.C.A. § 7342(a)(4) (1980), 41 C.F.R. § 101-49 (1995), and DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS (25 Feb. 1995). Gifts of travel from a foreign government also are outside the scope of this guide. Ethics counselors addressing these issues should consult 5 U.S.C.A. § 7342, 31 U.S.C.A. § 1353, and DEP'T OF DEFENSE DIR. 1005.13, GIFTS FROM FOREIGN GOVERNMENTS, para. F.4 & encl. 2, para. 5 (13 Oct. 1988) [hereinafter DODD 1005.13]. Ethics counselors should also refer to *Army Regulation 672-5-1* in Update 15 of the All Ranks Personnel regulation. DEP'T OF ARMY, REG. 672-5-1, MILITARY AWARDS, para. 7-14 (1 Nov. 1990) [hereinafter AR 672-5-1]. *While Army Regulation 600-8-22* superseded *Army Regulation R 672-5-1* in the foreign gifts area, *Army Regulation 672-5-1* still provides some "guidance" that may be useful to those answering questions on gifts of travel.

clude a gift of cash or foreign currency.[50] Minimal value is presently defined as $225 but will likely increase to $245.[51] The effective date of the increase (once approved) will be retroactive to 1 January 1996.[52] Minimal value is tied to the Consumer Price Index and changes every three years. The employee who receives a gift from a foreign government has the burden of proving that the gift is of minimal value.[53]

Foreign governments often present employees with gifts valued at more than the minimal dollar amount. When this happens, Congress allows an employee to accept a gift "when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States."[54] Employees accepting expensive gifts under this principle must do so only "on behalf of the United States and, upon acceptance, [the gift] shall become the property of the United States."[55] Within sixty days of receipt of the gift, Department of Army personnel must report and deposit such gifts with the Personnel Command for use or disposal.[56]

Department of Defense employees sometimes receive gifts from different officials of the same foreign government during the same presentation.[57] Effective 25 March 1996, the *JER* requires that the value of these gifts be aggregated to determine their value.[58] Gifts received at separate presentations, even on the same day or from the same official, are separate gifts and their values are not aggregated.[59] When an employee receives more than one gift at a single presentation, the employee may personally retain all of the gifts up to the minimum value limit.[60] However, any gifts beyond that amount become the property of the United States.

### *Handling of Improper Gifts*

If an employee receives an improper gift from another employee or an outside source or a prohibited source, the employee may either pay the donor the market value of the gift or return the gift to the donor.[61] If it is not practical to return a gift because it is a perishable item, the gift may be donated to charity, shared within the recipient's office, or destroyed.[62] These dispositions require the approval of the employee's superior or ethics counselor.[63] Any employee who returns an improperly accepted gift or otherwise complies with these requirements will not be deemed to have improperly accepted an unsolicited gift.[64] The *JER* specifically

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[50] *See* 41 C.F.R. § 101.40.201-2 (1995) (stating that gifts of "cash, currency, and money, except those with possible historic or numismatic value" shall not be reported to the General Services Administration); *Id.* § 101-49.205 (1995) (requiring that "money, cash, currency, and such intangible gifts as checks, money orders, bonds, shares of stock, and other securities and negotiable instruments not required to be reported to [General Services Administration] . . . be deposited by the employing agency with the Department of Treasury").

[51] 32 C.F.R. § 95.3 (1995). The limit recently increased from $225 to $245. Telephone Interview with Mr. Thomas Feagel, Coordinator of the Army Gifts Program, United States Army Total Personnel Command, Washington, D.C. (9 May 1996).

[52] *See* 41 C.F.R. § 49.001-5 (1995). The effective date of the adjusted figure will be 1 January 1996. The uncertainty on the minimal value amount will cause confusion and provide challenges for ethics counselors and recipients of foreign gifts. For example, what should ethics counselors advise recipients of a foreign gifts that are valued over $225 but less than $245 when the gift is received after 1 January 1996? The authors would recommend delaying taking any action in such cases until the new minimal value amount is determined.

[53] 32 C.F.R. § 95.6(a) (1995); DODD 1005.13, *supra* note 49, para. F.1. Ethics counselors should advise individuals receiving gifts to keep a brief personal record of the circumstances surrounding the presentation of the gift to include the date and place of presentation, the identity of the foreign government, the name and official title of the donor, and a brief description of the gift and its appraised United States retail value. This record will be useful should any questions regarding the gift arise at a later date.

[54] 5 U.S.C.A. § 7342 (c)(1)(B) (1980); DODD 1005.13, *supra* note 49, para. F.2.a.

[55] 5 U.S.C.A. § 7342 (c)(1)(B)(i) (1980).

[56] DODD 1005.13, *supra* note 49, para. F.2 (requiring the gift to be deposited with the Department of Defense component within sixty days). The Army has not yet incorporated into a new regulation the procedures for disposing of foreign gifts. Ethics counselors should, therefore, use the Army procedures formerly contained in *Army Regulation 672-5-1* as guidance for forwarding the gift to the Personnel Command, ATTN: TAPC-PDQ-IP, Alexandria, Virginia 22332-0474. *See* AR 672-5-1, *supra* note 49, para. 7-13b.

[57] The employee's spouse also may receive a gift at a presentation. For the purposes of this rule, "[a] gift from the spouse of a representative or official of a foreign government is deemed a gift from the representative or official. A gift given to the spouse of the DoD employee is deemed a gift to the DoD employee." JER, *supra* note 1, para. 2-300b(1) (C2, 25 Mar. 1996).

[58] *Id.*

[59] *Id.* para. 2-300b(2).

[60] *Id.*

[61] 5 C.F.R. § 2635.205(a)(1) (1995). An employee who does not know the actual market value of an item may estimate its market value by comparing it to the retail cost of similar items of like quality. *Id.*

[62] *Id.* § 2635.205(a)(2).

[63] *Id.*

[64] *Id.* § 2635.205(c).

allows employees to accept gifts and then promptly consult with their ethics counselor. If the employee fully discloses the relevant facts and acts in accordance with the ethics counselor's advice, the employee will be considered to have complied with the gift rules.

Occasionally, ethics counselors will handle gift disposition issues that do not fit within the rules. For example, returning a gift or paying the donor market value is impossible if you cannot identify all of the donors. In these cases, ethics counselors must fashion a practical gift disposition that fits within ethics goals and principles and makes sense to the employee.

Employees receiving a gift worth more than "minimal value" from a foreign government may purchase it.[65] A gift that an employee does not want to purchase must be returned to the donor, retained for official use, or reported to the General Services Administration, Property Management Division, for disposition.[66] The General Services Administration will coordinate the destruction, sale, or interagency transfer of the gift.[67] The General Service Administration deposits any cash gifts received and the proceeds from any sales of gifts in the United States Treasury as miscellaneous receipts.[68]

### *Conclusion*

Rules governing the giving and accepting of gifts are numerous and complicated. Even experienced ethics counselors sometimes find them difficult to interpret and apply. Individuals who do not regularly work with these rules find them almost impossible to understand, and consequently, they sometimes avoid asking questions. Ethics counselors must be proactive. They must regularly train employees on the applicable rules and advise them as issues arise. To do this successfully, ethics counselors must first learn the rules themselves. Major Holly O'Grady Cook, 44th Graduate Course Student, and Major Stephen E. Castlen, Professor of Law.

## *Legal Assistance Items*

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them 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.

### Office Management Notes

### *TJAGSA Legal Assistance Publications*

The Legal Assistance Branch of The Judge Advocate General's School, United States Army (TJAGSA), publishes practice guides, which are available electronically on the Legal Automation Army-Wide System (LAAWS) Bulletin Board Service (BBS), JAG CD-ROM,[69] or in hard copy from the Defense Technical Information Center (DTIC).[70] The branch guides provide valuable references to many areas of legal assistance practice. Several of these publications, including the *Wills Guide*, the *Family Law Guide*, and the *Consumer Law Guide*, include all-state substantive law sections.[71] While useful, these all-state sections largely provide information already available in the *Martindale-Hubbell Law Digests*. The Legal Assistance Branch practice guides, along with the *Martindale-Hubbell Lawyer Referral Service*, have been centrally funded and distributed to the field by the Army Law Library Service (ALLS).

To ensure consistency and reliability of state law references used in the Army Legal Assistance Program (ALAP), future TJAGSA publications will defer to the state substantive law summaries found in *Martindale-Hubbell*. Future TJAGSA legal assistance publications will include only military-specific state law references. Therefore, use of TJAGSA publications will

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[65] 41 C.F.R. § 101-49.101(a) (1995) (explaining that the General Service Administration "will not take custody of gifts and decorations for which recipients have expressed an interest in purchasing").

[66] *Id.* § 101-49.201-1 (1995). *See also* DODD 1005.13, *supra* note 49, encl. 2 (establishing procedures for the receipt and disposition of gifts from foreign governments).

[67] *Id.* §§ 101-49.3, 101-49.4.

[68] *Id.* §§ 101-49.205, 101-49.405.

[69] Information about access to the LAAWS BBS or procuring a CD-ROM can be obtained from the LAAWS Project Office. Points of contact, addresses, and phone numbers can be found in the "Current Material of Interest" section of this issue of *The Army Lawyer*.

[70] Information on obtaining TJAGSA materials from DTIC can be found in the "Current Material of Interest" section of this issue of *The Army Lawyer*.

[71] These state law summaries have been prepared and updated with the assistance of Reserve Component judge advocates. Many, but not all, of these judge advocates earn retirement points for their work on these publications.

supplement, rather than duplicate, the state law substantive law summaries available in *Martindale-Hubbell.*

Legal Assistance Branch practice guides will remain deskbook style references to topics of interest to military practitioners. Further, contributions to these guides by Reserve Component members, particularly those working in specialty areas covered by the guides, will continue to be critical to the substantive accuracy and value of these guides. Reserve Component judge advocates (or other interested attorneys regardless of component) who would like to provide updates or supplements to legal assistance publications for retirement points,[72] should contact TJAGSA Legal Assistance Branch for further information.[73] Lieutenant Colonel Block.

### *Army Publications Worth Checking Out*

Any person with experience in legal assistance appreciates that much of our business comes from people in search of information with no idea where to go. And while lawyers do not like to admit it, we frequently do not know where to get answers. This is particularly frustrating when we are sure that the information is at our (or somebody else's) fingertips.

The Army staff in Washington, D.C. provide two publications that offer a wealth of current information on frequently asked legal assistance topics. *Army Families* is published by the Army Families Liaison Office, an office under the Assistant Chief of Staff, Installation Management. A second publication, *Army Echoes*, is produced by the United States Army Community and Family Support Center.

*Army Families*, a quarterly publication, is "distributed worldwide by Army exchanges, commissaries, medical facilities, Army Community Services offices, recruiting brigades, reserve component centers and other family-oriented activities."[74] Topics addressed in recent issues cover a wide spectrum and have included: toll-free numbers to the Veterans Administration for Persian Gulf veterans, the National Highway Traffic Safety Administration for consumer auto safety questions, and the Army Family Liaison Office for quality of life questions. Other features included information on Reserve Component commissary and post exchange eligibility issues, eligibility of abuse victims for compensation,[75] and information to help decipher TRICARE program benefits.

*Army Echoes* proclaims itself as the "Official Bulletin for the Army Retiree." Although primarily distributed directly to retirees on a quarterly basis, it includes information of general interest. For example, recent features addressed TRICARE implementation, Veterans Administration issues, tax law developments, and base closure impacts on services and local communities. Each issue also includes important phone numbers and addresses for information and services.[76] Judge advocates interested in obtaining copies of *Army Echoes* should contact their installation Retirement Services Office.[77]

*Army Families* and *Army Echoes* are but two examples of the great number of available resources that are designed to keep service members and others informed about current issues. An awareness of the many issues addressed by these publications only can make providing answers, and maybe even preventive law efforts, a lot easier. Lieutenant Colonel Block.

## Tax Law Notes

### *Bosnian Tax Relief*

Congress passed, and the President signed, legislation providing tax relief to service members.[78] Although the bill is called "Tax Benefits for Servicemen in Bosnia and Herzegovina," it also provides improvements for other members and may provide increased benefits in the future.

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[72] Members interested in earning retirement points for contributions to TJAGSA publications should apply to the Chief, Army Legal Assistance Division, Washington, D.C. 20310-2200 on DA Form 7206-R. This reproducible form can be found in the back of the current version of *Army Regulation 27-3, The Army Legal Assistance Program.* DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995).

[73] The administrative point of contact for TJAGSA Legal Assistance Practice Guides is Mrs. Gail Krump, telephone numbers: commercial (804) 972-6369 and DSN 934-7115 ext. 369. Mrs. Krump will match the caller with the faculty member responsible for the subject area of the guide(s) in question.

[74] As a potential "family-oriented activity" distribution point, legal assistance attorneys may wish to contact the Army Family Liaison Office at commercial (703) 695-7714, DSN 225-7714.

[75] Points of contact provided for information about transitional compensation for abuse victims are Ms. Shirley Brown or Ms. Eunice Bonner, United States Army Community and Family Support Center, telephone: (703) 325-9390.

[76] For example, phone numbers (usually toll free) are provided for health benefits programs, pay inquiries, records inquiries, locate services, and replacement DD Form 214 or awards and decorations services.

[77] Extra copies of this publication are mailed to each installation retirement services office (RSO). Also worth asking about at the RSO are quarterly *Retirement Services Information Newsletters.* This newsletter provides updates on existing federal programs.

[78] Tax Benefits for Servicemen in Bosnia and Herzegovina, Pub. L. No. 104-117, 109 Stat. 827 (1996).

This legislation provides significant tax relief to service members serving in Bosnia, Herzegovina, Croatia, or Macedonia and receiving hostile fire or imminent danger pay.[79] First, they are treated as if they were serving in a combat zone for tax purposes. Thus, enlisted members can exclude all of the income they earn while serving in those areas. Second, the exclusion for officers serving in a combat zone is increased from $500 per month to the maximum enlisted pay plus hostile fire or imminent danger pay. For 1996, this amount is $4104.90 per month plus $150 imminent danger or hostile fire pay. For 1995, the amount is $4008.60 plus $150. This amount will increase in the future as the result of future increases in pay.

The increase in the amount of the exclusion for officers is a permanent change to the Tax Code.[80] The two areas that are currently combat zones for federal income tax purposes are Vietnam and the Arabian Peninsula area (Operation Desert Storm area). The new change benefits all officers currently serving in a combat zone and those who will serve in future combat zones.

This legislation is retroactive to 21 November 1995. Therefore, service members who already have filed their 1995 income tax returns will need to file an amended return. These service members should wait until they receive an amended W-2 Form from the Defense Finance and Accounting Service. They should have received this form at the end of April.

In addition to the exclusion of pay from gross income for service members serving in Bosnia, Herzegovina, Croatia, or Macedonia and receiving imminent danger or hostile fire pay, two categories of service members are entitled to an extension of time to file and pay taxes. The first category are service members stationed in Bosnia, Herzegovina, Croatia, or Macedonia. The second category are service members performing services outside the United States while deployed away from their permanent duty station. Service members who are in either category have until 180 days after leaving duties in the designate areas to file their income tax returns and pay their taxes. Major Henderson.

### *Entitlement to a Dependency Exemption*

In the case of children of divorced taxpayers, neither parent is entitled to the dependency exemption unless both parents combined contributions are over one-half of the children's support.[81] Additionally, the noncustodial parent must obtain a waiver of the exemption from the custodial parent to claim the dependency exemption.[82]

In *Williams v. Commissioner*,[83] the taxpayer claimed a dependency exemption for all five of his children. The children were in the custody of his former spouse. Although the taxpayer provided approximately $1900 per year in child support during the two years in question, the taxpayer's former spouse was unemployed and received approximately $10,000 per year from federal and state agencies during the same two years. Because the parents did not provide over one-half of the support of the children, the Internal Revenue Service (I.R.S.) disallowed the dependency exemptions for both taxpayers.[84] Further, even if the parents had paid over one-half of their children's support, the petitioner in *Williams* was not entitled to the dependency exemptions because he did not obtain a waiver of the exemption from the custodial parent.[85]

Legal assistance attorneys assisting in the preparation of income tax returns must ensure that a client who is a noncustodial parent seeking to claim children as dependents, not only must obtain a waiver of the dependency exemption from the custodial parent, but also must determine whether the client and the custodial parent combined have provided over one-half of the children's support. Major Henderson.

### *Innocent Spouse Relief*

Generally, taxpayers filing a joint return are jointly and severally liable for any taxes due on that return.[86] Thus, the I.R.S. may seek to collect taxes due on a joint return from either taxpayer. However, if a taxpayer spouse can satisfy the requirements of §

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[79] *Id.*

[80] *Id.* § 1(d).

[81] I.R.C. § 152(e)(1) (RIA 1995).

[82] *Id.* § 152(e)(2).

[83] T.C. Memo 1996-126 (1996).

[84] Treas. Reg. § 1.152-4(a) (as amended in 1979).

[85] T.C. Memo 1996-126 (1996).

[86] I.R.C. § 6013(d)(3) (RIA 1995).

6013(e),[87] he or she can be relieved of such joint and several liability. A spouse who is relieved of joint and several liability is called an "innocent spouse." Typically, the I.R.S. only grants innocent spouse relief when a spouse neither knew nor should have known of the misconduct[88] and only if it would be inequitable to hold him liable, taking into account all the facts and circumstances.[89] In determining whether or not it would be inequitable to hold a taxpayer liable for his spouse's underreporting of income, the I.R.S. and the courts consider an important factor whether the taxpayer benefited from the misconduct.[90] Thus, a taxpayer will not be entitled to innocent spouse relief unless he did not know about the underreporting, had no reason to know about the underreporting, and did not personally benefit from the underreporting.

Two recent cases demonstrate the application of these rules. In *Barnhill v. Commissioner*,[91] Mr. and Mrs. Barnhill reported no income for four years as the result of business losses. Mrs. Barnhill signed the tax returns with her husband, but she neither read nor attempted to read the tax returns prior to signing them.

However, during the years in question Mr. and Mrs. Barnhill improved their residence by adding a 450-square foot addition, a swimming pool, and a spa. These additions cost approximately $100,000. Mr. and Mrs. Barnhill subsequently separated, and Mrs. Barnhill received the improved house in exchange for her release of any claim to Mr. Barnhill's business. She also waived any right to spousal support.

The court held that Mrs. Barnhill was not entitled to innocent spouse relief because, even if she did not know about the underreporting of income during the years in question, she should have known or at least had a duty to inquire. The court further found that it would not be inequitable to hold Mrs. Barnhill liable.

In *Dawson v. Commissioner*,[92] Mr. Dawson's wife embezzled approximately $250,000 from her employer during 1988 and 1989. Mrs. Dawson did not hide this income from her husband. She deposited the money into a joint checking account and her husband had access to this account. Mr. Dawson also assisted Mrs. Dawson in the preparation of the tax returns for the years in question.

Mr. Dawson wrote checks to pay for the cost of a three-car garage addition to their home and purchased a new Ford Bronco. Mr. Dawson also purchased a boat for $7500 and had the interior of the boat improved at a cost of $6187. The Dawsons paid $17,602 to add a computer room over the garage, purchased furniture costing about $16,000, and purchased three more new vehicles. They also took a Caribbean cruise and purchased a motor home for $47,804.

The tax court denied innocent spouse relief for Mr. Dawson because he either knew or should have known that the tax returns were erroneous. Further, because Mr. Dawson personally benefited from the expenditure of the unreported income, it would not be inequitable to hold him liable for the taxes due.

Legal assistance attorneys should ensure that clients filing a joint return fully understand the items on the return and that either taxpayer can be held jointly and severally liable for any taxes due as a result of a joint return. Legal assistance attorneys should be especially careful to advise clients who are in the process of filing for a divorce about joint and several liability. Major Henderson.

## Consumer Law Note

### *Meeting Consumer Law Challenges Head On*

In Greek mythology, the Phoenix was a legendary bird that lived for 500 years then burned to ashes only to rise again from those ashes in a renewed state.

Legal assistance attorneys recognize Phoenix-like traits in many companies that prey on unsuspecting soldiers and other clients. It is not uncommon for a legal assistance office to join forces with an attorney general to battle a company to its knees, only to see it rise again under a new name peddling the same or similar snake oil.

Recently, the Navy discovered that an old nemesis of legal assistance—Traditional Industries—has risen under a new name in a new location.[93] The new firm, apparently operated by one of the principals of the old firm, operates as a "buying club." Typically, the buying or purchasing club seeks to sell the customer the

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[87] *Id.* § 6013(e).

[88] *Id.* § 6013(e)(1)(C).

[89] *Id.* § 6013(e)(1)(D).

[90] H.R. REP. No. 432, 98th Cong., 2d Sess. 1502 (1984).

[91] T.C. Memo 1996-97 (1996).

[92] *Id.*

[93] For a complete description of some of Traditional Industries' history, *see* TJAGSA Practice Notes, Legal Assistance Items, *Photographic Services Company in Contempt of Court-Comply with the Law or Cancel Contracts*, ARMY LAW., Feb. 1992, at 85.

right to make purchases from the club at, supposedly, reduced prices. Many legal assistance clients express varying degrees of displeasure with the "club" once they actually begin to use its services.[94]

The sales pitch is a familiar one. The consumer-victim receives a notice that he or she has won a camera and twelve rolls of film. The notice advises the recipient that there has been an attempt to deliver these items to the consumer's home and seeks to induce the consumer to call immediately. When the consumer calls to arrange for delivery, the telephone contact person tells him or her that the items are not available, but that a company representative is in the area and will take the consumer-victim to dinner. At dinner, the consumer receives a high-pressure sales pitch to join a purchasing club. The up-front cost to join is routinely in excess of $1900. The representative encourages and assists the victim to join by using monthly allotments.

When suspicions arose that buying club scams were in operation again, Navy investigators took quick action. Understanding that the United States mail had been used to make contact with consumer-victims, the Navy involved both the postal inspectors and the local United States Attorney. The United States Attorney sought indictments and seized the business records of some of the firms involved.

In an interesting twist, several of the companies that had records seized began contacting consumers who had already joined purchasing clubs to ask them to come in and sign new contracts, claiming that the originals had been lost. The originals actually had been seized by the United States Attorney!

This "war story" illustrates a number of common themes in dealing with high-pressure sales victims. First, legal assistance offices must have an effective preventive law program. While the three-day cooling off rule (discussed below) is a useful tool, it is limited in scope. The best way to help most of these clients is to prevent them from ever falling victim to scam artist. At a recent legal asistance course at TJAGSA, one Army installation reported considerable success in establishing an effective preventive law program. The installation combined a pocket-sized preventive law card (copied from another installation's submission to *The Army Lawyer*) with an entertaining, soldier-oriented consumer awareness briefing.[95]

Second, legal assistance attorneys should use the Federal Trade Commission (FTC) three-day cooling off rule.[96] The rule gives the customer a three-day unilateral right to cancel the contract when the sale takes place in a qualifying location. The FTC recently clarified the rule by, among other changes, altering the name to reflect that it applies to all sales away from the seller's ordinary place of business.[97] The high-pressure transaction described above, apparently in a restaurant, would qualify.

Third, use a multi-faceted approach to the problem. The Navy attorneys used postal inspectors, as well as resources of the United States Attorney's office. Other possible allies in the fight against scam artists are the state attorney general, the local better business bureau, the Armed Forces Disciplinary Control Board, and, litigation in the civil courts.

Finally, share your experiences. If your installation has a successful attack strategy, prepare a note describing your success and post it on the Legal Assistance Forum of the LAAWS BBS. The best way to beat the scam artists is by networking and hitting them from all sides. Major McGillin.

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[94] The facts related in this article are from a message originating in the Navy Office of the Judge Advocate General. Memorandum, Deputy Assistant Judge Advocate General (Legal Assistance), Office of The Judge Advocate General, Department of the Navy, to Chief, Legal Assistance Division, Office of The Judge Advocate General, United States Army, subject: Consumer Scam Targeting Military Members and Their Families (21 Feb. 1996).

[95] *See* TJAGSA Practice Notes, Legal Assistance Items, *The Fort Riley Preventive Law Program*, ARMY LAW., Nov. 1994, at 39, 40.

[96] 16 C.F.R. § 429 (1995). The FTC recently amended the rule. 60 Fed. Reg. 54,180 (1995). *See also* TJAGSA Practice Notes, Legal Assistance Items, Consumer Law Note; *Door-to-Door Sales*, ARMY LAW., Dec. 1995, at 68, 69 (discussing impact of new FTC rule).

[97] *Id.*

## *What You Absolutely, Positively Need to Know About the Physical Evaluation Board*

### *Introduction*

As the result of career-ending illnesses or injuries, each year the Army separates thousands of soldiers[1] through its physical disability system. This note provides legal assistance attorneys with a framework to better answer general questions about the Army's disability system.

Soldiers often turn to legal assistance attorneys to obtain guidance about this system and what they can do to improve the ultimate outcome of their cases. Legal assistance attorneys face questions like: "Why did the Physical Evaluation Board (PEB) do this?"; "What happens with my case now?"; or "Why am I receiving severance pay instead of medical retirement?"

### *An Overview of the Army's Disability System*

The United States Army Physical Disability Agency (USAPDA) manages the Army's disability system. The USAPDA oversees the Army's three PEBs at Walter Reed Army Medical Center, Washington, D.C.; Fort Sam Houston, Texas; and Fort Lewis, Washington. The PEBs are the administrative boards that determine whether a soldier's disability prevents his or her continued performance in the Army. If the PEB determines that a soldier is no longer fit for duty,[2] and finds that the soldier is eligible for disability benefits,[3] the PEB rates the extent of the soldier's disability.[4] Depending on the severity of the illness or injury, the soldier receives either medical retirement or severance pay.[5] Besides active duty soldiers, the PEB makes decisions for members of the National Guard and Army Reserves.[6] Each PEB has at least one judge advocate assigned to it on a full-time basis. This judge advocate, known as the soldiers' counsel, advises soldiers about the disability process and represents them before the formal PEB.

### *I've been seriously hurt, what happens next?*

The priority for a soldier suffering an illness or injury is to ensure that his illness or injury receives proper medical attention. If the soldier's condition improves to the point that he can function in their military occupational skill (MOS), he is returned to his unit, perhaps with a profile. However, if the soldier's commander or treating physician believes that the soldier is unable to perform his MOS, the soldier is referred to a Medical Evaluation Board (MEB).[7]

The MEB decides whether a soldier's illness or injury prevents him from meeting medical retention standards.[8] The MEB does this by comparing the extent of the soldier's disability with retention standards identified in chapter 3 of *Army Regulation*

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[1] The author obtained the statistics from the United States Army Physical Disability Agency's 23 to 24 January 1996 Presidents Training Session. The results reflect the number of soldiers processed for disability between 1988 and 1995:

1989 - 10,205 soldiers
1990 - 11,307 soldiers
1991 - 12,698 soldiers
1992 - 12,622 soldiers
1993 - 9,747 soldiers
1994 - 8,349 soldiers
1995 - 7,403 soldiers.

[2] DEP'T OF ARMY, REG. 635-40, MEDICAL SERVICES: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION, para. 4-19a(1) (1 Sept. 1990) [hereinafter AR 635-40].

[3] *Id.* paras. 4-19a(3)(A), (B), (C), (D).

[4] *Id.* para. 4-19i.

[5] *Id.* tbl. 4-2.

[6] *Id.* para. 8-1 (as defined in Section II, Explanation of Terms).

[7][8] *Id.* paras. 4-7, 4-8.

[8] *Id.* para. 4-10.

*40-501*.[9] If the MEB decides that the soldier meets retention standards, the soldier returns to duty. If the soldier fails to meet retention standards, the MEB refers the soldier's case to a PEB.[10]

The MEB decides whether the soldier meets retention standards after performing a thorough examination, physical or psychological (and sometimes both). The MEB documents the soldier's medical problems, defines the limitations imposed by the disability, and explains how the disability affects the soldier's ability to perform duties required of his MOS.

### *What is the PEB?*

The PEB is the administrative body that decides whether a soldier is fit for continued service. If the PEB determines that a soldier is no longer fit for duty—and the soldier is eligible for disability benefits—the PEB then decides what benefits, if any, the soldier receives.

A PEB is composed of at least two field grade officers and one doctor.[11] The PEB process consists of two separate boards. The first board, called the informal PEB, makes its decisions based strictly on the soldier's medical and personnel records.[12] A soldier does not appear before the informal PEB. If the results of the informal PEB do not satisfy the soldier, the soldier can demand a formal PEB with or without personal appearance.[13] The formal PEB is the soldier's opportunity to present evidence, testimony, and documents in support of the case.

### *When is a soldier unfit for duty?*

A soldier is unfit for duty when one or more physical and mental disabilities prevent him from performing the reasonable duties of his grade, rank, and MOS.[14] Unfortunately, no bright-line rule exists to determine exactly when a soldier becomes unfit. The PEB makes the decision on fitness by balancing the extent of a soldier's disability—as shown through objective medical and performance evidence—against the MOS requirements. Typical medical evidence used by the PEB includes the narrative summary (NARSUM) written by the MEB, the soldier's profile, history and treatment of the injury or illness, referrals to doctors and sick call, and type and frequency of medication. Performance evidence includes statements from the soldier's command, personnel records, promotions, awards, and adverse personnel actions.

The decision of fitness is subjective. Soldiers performing duties may be found fit for duty, even though suffering from a serious illness or injury. Exactly what makes a soldier unfit varies not only among MOSs but also among soldiers within a particular MOS. For example, two soldiers, one an infantryman and the other a supply clerk, have identical knee injuries. The finding that the infantryman is unfit does not mean that the supply clerk, or even another infantryman with the same injury, also would be considered unfit.

### *How can the PEB find me fit for duty considering my restrictive profile?*

Some soldiers may have restrictive profiles that prevent them from going to the field or taking a PT test. Because of the profiles, their commands may prevent the soldiers from going to schools, impose more restrictive duty limitations, and assign them duty outside of their MOS. These soldiers often wonder how the PEB can find them fit for duty. Although a restrictive profile and command-imposed duty restrictions are important factors, the PEB does not focus solely on those factors when deciding fitness for duty. The PEB looks at the soldier's injuries to decide whether, and to what extent, the disability affects the soldier's ability to perform the requirements of the MOS. If the PEB decides that the injuries are not severe enough to prevent performance of the MOS, the soldier is found fit for duty. To be found unfit, the soldier must demonstrate that the disability, and not other factors—such as an overly limiting profile or dissatisfaction with the Army—are what actually prevents performance of the MOS.

### *What happens if I am found fit for duty?*

Soldiers found fit for duty by the PEB return to their units to continue to perform their duties. Soldiers still have the protection of their profiles and any duty limitations imposed by those profiles. Soldiers have the option of appealing the findings of the PEB while they continue to serve with their units. If their physical or mental conditions worsen, they can go through the disability process again. While serving on active duty, there are no limits on the number of times a soldier can go through the disability process.

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[9] DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (30 Aug. 1995).

[10] AR 635-40, *supra* note 2, para. 4-13a.

[11] *Id.* para. 4-17b.

[12] *Id.* para. 4-20.

[13] *Id.* para. 4-20c(5).

[14] *Id.* para. 4-19d(2).

*I was found unfit by the MEB so how can the PEB find me fit for duty?*

The MEB and the PEB are separate boards. These two boards consider different information and make distinct decisions. The MEB does *not* decide whether a soldier is fit for continued duty. An MEB decides whether a soldier has an injury or disease and documents the extent of that injury. The MEB then decides if the injury or disease is severe enough to cause the soldier to fall below medical retention standards as identified in chapter 3 of *Army Regulation 40-501*. The MEB refers those soldiers who fall below retention standards to the PEB. Failing to meet retention standards does not mean that a soldier is unfit for duty.

A PEB makes the decision of whether a soldier can adequately perform the requirements of his grade, rank, and MOS. It alone decides fitness for duty by balancing the extent of a soldier's illness or injury against his ability to perform the requirements of his MOS.[15]

*How does the PEB decide the percentage of disability?*

If the PEB finds that a soldier is unfit, and the soldier is eligible for disability benefits, the PEB rates the severity of the soldier's injuries using the Veterans Administration Schedule for Rating Disabilities (VASRD), as modified by appendix B of *Army Regulation 635-40*.[16] The VASRD lists hundreds of physical and mental disabilities and rates these disabilities using objective medical criteria. Depending on the severity of the illness or injury, the PEB rates a soldier from zero to one hundred percent disabled.

*How does the PEB decide who receives severance pay and who receives medical retirement?*

The severity of the injury determines whether a soldier receives medical retirement and severance pay. Soldiers rated with a zero, ten, or twenty percent disability will be separated from the service with severance pay. Compute severance pay in the following manner:

Monthly Base Pay x 2 x Years of Service (to 12 Years)[17]

Soldiers with twenty or more years of active federal service, or possessing a disability rated at thirty percent or more, receive medical retirement.[18] Medical retirement is either permanent or temporary depending on whether the soldier's disability is likely to change.[19]

*I suffer from a disability listed in the VASRD. Does that mean I will be found unfit and rated by the PEB?*

Just because a soldier has a disability listed in the VASRD, this does not mean that the PEB will find him unfit and medically discharge him from the Army. Before a soldier is eligible to be medically separated from the Army, the soldier must show that he is unable to perform the duties of his MOS and that this inability to perform is a direct result of a documented disability.[20]

*What happens if I have more than one disability?*

If the PEB finds me unfit as the result of one of my disabilities, does that mean all of my disabilities are unfitting and will be rated by the PEB? Before the PEB rates a soldier suffering from multiple disabilities, the soldier must show that each condition prevents her from performing the requirements of her MOS.[21] For example, a soldier suffering from a bad knee and a bad back must be able to show that each condition, independent of the other, prevents her from performing the MOS requirements.

*Will I receive treatment for my disability after my expiration of term of service?*

Soldiers going through the disability process (or those who think they may have a disability) facing an imminent separation due to an expiration term of service (ETS), should contact the PEB Liaison Officer (PEBLO) at their treating hospital. The PEBLO will coordinate with the soldier's treating physician and if the physician agrees that the soldier's condition warrants an MEB paperwork is completed extending the soldier's ETS.[22] This

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[15] *Id.*

[16] *Id.* para. 4-19i.

[17] 10 U.S.C. § 1212(a) (1996).

[18] *Id.* § 1201.

[19] AR 635-40, *supra* note 2, para. 4-19h.

[20] *Id.* para. 3-1c.

[21] *Id.* para. 4-19f(4) (*but compare* para. 3-1b.).

[22] *Id.*

allows the soldier additional time to receive treatment and go through the disability process if necessary.

*I want to stay in the Army, but reclassify to a new MOS. Is the PEB the right place for me?*

The PEB cannot reclassify a soldier to a new MOS. The PEB is limited to finding a soldier fit or unfit within their MOS. If unfit, the soldier is separated from the service. If fit, the soldier returns to her old unit in the same MOS. Soldiers wanting to reclassify should seek out and appear before an MOS Medical Retention Board (MMRB).[23] The soldier's command conducts the MMRB at the unit level. Further guidance on the MMRB process is found in *Army Regulation 600-60*.

*I am going before a formal PEB. What should I do?*

Soldiers begin preparing for their formal PEB by contacting their counsel, usually over the telephone, prior to the hearing. A judge advocate assigned to the PEB, known as the "soldiers' counsel," represents most soldiers before the PEB. However, soldiers have the option of being represented by service organizations such as the Disabled American Veterans or they can obtain private counsel at their own expense.[24] Soldiers using the soldiers' counsel, or a representative from a service organization, normally meet their counsel or representative for the first time one business day prior to the formal hearing. This is an opportunity to go over the soldier's case and discuss any last minute questions.

On the day of the hearing, soldiers report to the president of the PEB wearing a Class A or Class B uniform. The PEB informs the soldiers of their rights; including the right to make sworn or unsworn statements,[25] rights under the Privacy Act,[26] and the right not to make any statements relating to the origin or aggravation of the injury.[27] Board members may question only those soldiers under oath.[28]

During the formal PEB, in response to questions from the board members and his representative, the soldier should expect to do most of the talking. Soldiers should anticipate questions relating to how the injury occurred, treatments received, medication, and limitations that the disability imposes. At the formal hearing, the PEB has the soldier's medical records, portions of his personnel file, and statements from the soldier's command concerning duty performance. The PEB uses all of this information in its decision-making process.

Following questioning by the board members and the soldier's representative, the soldier has one last opportunity to address the board members and has the option of making a brief statement. Only the board members are present during deliberations. Once the board members reach a decision, the soldier returns to the hearing room where she is informed of the decision. The average formal PEB lasts approximately an hour and a half.

*Can I appeal the decisions made in my case?*

At each phase of the disability process, the soldier can appeal the decisions made in his case. Soldiers disagreeing with the informal PEB normally appeal to the formal PEB.[29] The formal PEB is a de novo review of the soldier's case. Based on the evidence presented at the formal hearing, a PEB can change the findings of the informal PEB in any way that it deems appropriate.[30] This means that a soldier found unfit for duty by the informal PEB can be found by the formal PEB fit for duty, have the disability percentage increased, decreased, or even be separated without benefits.

Soldiers dissatisfied with the decisions of the formal PEB can appeal, in writing, to the USAPDA.[31] The USAPDA can modify the finding of a PEB by lowering as well as increasing a rating.[32] If a modified, the soldier can appeal to the Army Physical Disability Appeal Board (APDAB).[33] Once the USAPDA or the

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[23] DEP'T OF ARMY, REG. 600-60, PHYSICAL PERFORMANCE EVALUATION SYSTEM (31 Oct. 1985).

[24] AR 635-40, *supra* note 2, para. 4-21h(1).

[25] *Id.* paras. 4-21e(1)(B), (D).

[26] 5 U.S.C. § 552(a)(7) (1974).

[27] 10 U.S.C. § 1219 (1962).

[28] AR 635-40, *supra* note 2, para. 4-21e(1)(B).

[29] *Id.* para. 4-21a.

[30] *Id.* para. 4-21r(2).

[31] *Id.* paras. 4-21t, 4-22.

[32] *Id.* para. 4-22e.

[33] *Id.* para. 4-22f(2).

APDAB make a final decision, if the soldier is not satisfied, the next appeal is to the Army Board for Correction of Military Records.[34]

*The PEB says my condition existed prior to service. How can this be? I never suffered from this condition before I came into the Army.*

Physical or mental disabilities that make a soldier unfit may have existed prior to entering the service (EPTS). Causes of EPTS disabilities include hereditary or congenital defects or injuries with an inception before entering service.[35] The soldier is separated from the Army without disability benefits if the PEB deems a soldier's injuries to EPTS and his condition has not been permanently worsened by service with the Army.[36]

It is possible for a soldier to possess a physical or mental disability and never experience a problem until he faces the stresses of Army life. The physical and emotional stress of Army training can cause a latent condition to appear or an old injury to worsen to the point that the soldier is no longer able to function in his MOS.

To rebut a finding of EPTS, a soldier must either present persuasive medical evidence that the condition did not exist prior to entering service, or provide medical evidence documenting that service with the Army permanently worsened a pre-existing condition.[37]

*Are there any special rules for Reservist?*

In addition to showing that the soldier's illness or injury is in the line of duty, a Reserve Component (RC) soldier on orders for thirty-days or less must also show that his disability was the proximate result of military training.[38] This requires the soldier to point to a specific aspect of military training or duty that directly caused the injury. For example, a RC soldier on two weeks training hurts his back when he slips and falls at an off-post movie theater. While his injury may be in the line of duty, it is not the proximate result of training unless he shows that he was performing Army duties at the time of the accident.

There are additional disability regulations specific to RC soldiers. Those RC soldiers with twenty "good years" toward a reserve retirement who are awarded severance pay by the PEB must choose between retirement at age sixty or severance pay when the PEB makes its decision.[39]

Injuries or illnesses that take a long period to develop (for example heart disease causing a heart attack while training) are usually considered EPTS disabilities. An RC soldier can overcome this if the soldier shows that the disability occurred as the result of an unusually stressful condition.[40]

*Although I put my papers in for retirement, may I change it to a PEB to get a medical retirement?*

Soldiers separating from the Army for reasons other than a disability, whose careers have not been interrupted by a physical or mental disability, are usually not eligible for medical separation. In this situation, the PEB finds these soldiers to be "Fit by Presumption."[41] The "Fitness by Presumption" rule is a legal fiction that prevents soldiers who have continued to perform their duties until separation from receiving disability benefits.

The soldier overcomes the "Presumption of Fitness" in one of two ways. First, soldiers show that because of the disability, they have been unable to perform the duties of their office, grade, or MOS for a long period of time.[42] Second, soldiers can overcome the presumption if their injuries occur immediately prior to, or while processing for, separation.[43] The PEB construes this rule vary narrowly. To avoid being caught by the "Presumption of Fitness Rule" soldiers should initiate their PEB hearing before submitting their retirement papers.

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[34] *Id.* para. 2-12.

[35] *Id.* para. 3-3a.

[36] *Id.* para. 4-19e(4).

[37] *Id.* para. 4-19e(3).

[38] *Id.* para. 8-3a.

[39] 10 U.S.C. § 1206(1) (1996).

[40] AR 635-40, *supra* note 2, para. 8-3c.

[41] *Id.* para. 3-2b.

[42] *Id.* para. 3-2b(2)(A).

[43] *Id.* para. 3-2b(2)(B).

### *Conclusion*

At best, the Army's physical disability process is a confusing, obscure aspect of military law. However, thousands of soldiers go through this process each year. Therefore, legal assistance attorneys must have a basic understanding of this system so that they may better assist their clients through this physically and emotionally trying experience. Captain James R. Julian, Soldiers' Counsel at the Fort Sam Houston Physical Evaluation Board from April 1993 to May 1994.

## *Relief and Review: The Case of Major General G. K. Warren*

> *Major General Warren, commanding the Fifth Army Corps, is relieved from duty, and will at once report to Lieutenant General Grant, commanding Armies of the United States. By command of Major General Sheridan.*[1]

So effectively ended the military career of Major General Gouverneur K. Warren, and so he began his long and melancholic search for reversal of the relief from duty and professional vindication. This note briefly examines both the circumstances of the relief from duty of Major General Warren and the subsequent reviews. This examination provides a glimpse at the conduct of the professions of arms and law in the Army of the nineteenth century.

Major General Warren was relieved of command of the Union Army's Fifth Corps by Lieutenant General Philip A. Sheridan on 1 April 1865, eight days before the end of the Civil War.[2] His relief occurred at the battle of Five Forks, near Petersburg, Virginia, and was based on four alleged failures in command.[3] In brief, they were that Warren failed to: (1) move aggressively and in sufficient force to seize White Oak Road, (2) move rapidly to prevent the escape of Confederate infantry in the vicinity of Dinwiddie Court House, (3) exert himself to move his Corps as quickly as possible, and (4) exert himself to inspire confidence in his troops.[4]

The relief from duty ruined Warren and incensed the soldiers of Fifth Corps.[5] It led Warren to seek review of the relief, a quest which took seventeen years with untimely, mixed success. How did Warren, "Savior of Little Round Top,"[6] come to be relieved when the war was almost won? Did his acts or omissions at Five Forks warrant relief? Did he receive a fair and impartial review of the relief?

Examination of the record of proceedings of the Court of Inquiry, convened in 1879, and other materials suggests that Warren was relieved not because of any failure in command at Five Forks, but because of his command philosophy and personality traits manifested long before April 1865. These traits, fueled by personal animosity between Warren and Sheridan, were the real basis of the relief. Impartial reports of Warren's actions at Five Forks provide little basis to support the relief from duty action. Indeed, the findings of the Court of Inquiry vindicated Warren, but the subsequent legal review by The Judge Advocate General and the action by the Army Chief of Staff, General W. T. Sherman, mooted the vindication.

### *The Road to Five Forks*

In many respects, Warren was representative of Civil War federal officers. An 1850 graduate of the United States Military Academy, his graduation second in his class earned him a commission as a second lieutenant in the Corps of Engineers.[7] He spent nine years surveying the west and intermittently participating in campaigns against hostile Indians.[8] In 1859, he was ordered to West Point as a Professor of Mathematics.[9] When the Civil War broke, Warren volunteered for duty in the field. His first service was with Duryee's Zouaves, the 5th New York Volunteer Infantry Regiment, as a lieutenant colonel of the Regiment.[10]

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[1] 3 SHELBY FOOTE, THE CIVIL WAR, A NARRATIVE 874 (Random House, New York 1974).

[2] Warren was the only high-ranking commander in the history of the Army of the Potomac summarily relieved in the field for failures in leadership. Edward Longacre, *Gouverneur K. Warren, A Personality Profile*, CIVIL WAR TIMES, Jan. 1972, at 11.

[3] The allegations, referred to as "imputations," were first identified generally in General Sheridan's report of the battle, but not stated with specificity until the Court of Inquiry. Gouverneur K. Warren, Defendant, *Report of the Court of Inquiry*, 1-22 (Government Printing Office, Washington, D.C. 1883) [hereinafter Report].

[4] *Id.* at 1, 2, 17, 18.

[5] J.H. Stine, *History of the Army of the Potomac*, 704-12 (Gibson Brothers, Washington, D.C. 1893).

[6] Longacre, *supra* note 2, at 11.

[7] *Id.* at 12.

[8] *Id.*

[9] *Id.*

[10] *Id.*

Warren served with distinction at Big Bethel—near Hampton, Virginia, in the Peninsula Campaign, and at Second Bull Run, Antietam, and Fredericksburg.[11] In less than two years, he became the colonel, then brigadier general, of the Regiment.[12] When the Army consolidated its engineer departments, Warren became Chief Engineer of the Army of the Potomac.[13] It was in that position that he accompanied the Army to Gettysburg. There, on 3 July 1864, he was scouting Little Round Top when he noticed Confederate troops massing for an attack. Immediately deducing that Little Round Top was decisive terrain, he directed the 140th New York Regiment to defend the hill. When Regimental commander Colonel Patrick H. O'Rorke balked at holding the hill without orders, Warren said, "Never mind that, Paddy . . . I'll take the responsibility."[14]

General Meade, commanding the Army of the Potomac, was so impressed with Warren's action at Gettysburg that he promoted him to Major General and gave him command of Second Corps and later Fifth Corps.[15] Warren was an effective and deliberate, yet cautious, corps commander.[16] He was hesitant at Spotsylvania and The Wilderness, and conservative at The Crater.[17] His caution, and his concern for the welfare of soldiers made him popular with his men[18] but increasingly distant from the philosophy of "the Western Generals"—Grant, Sherman, and Sheridan—who advocated accepting massive casualtie to end the war more quickly.[19] Warren's genuine horror at mounting casualties is reflected in his oft-quoted remark about the slaughter at Cold Harbor: "For thirty days now, it has been one funeral procession after another past me, and it is too much! Today I saw a man burying a comrade and, within half an hour, he himself was brought in and buried beside him. The men need some rest . . . ."[20]

Perhaps Warren himself needed some rest. Seriously wounded at least three times, Warren became increasingly profane and disrespectful to peers and superiors.[21] Warren felt no compulsion to follow Meade's orders when he disagreed with them,[22] and engaged in several public shouting matches with Meade. During the Wilderness Campaign, Meade suggested that Warren "cooperate" with General Sedgwick. Warren responded:

> You are the commander of this Army and can give orders and I'll obey them, or you can put Sedgwick in command and he can give the orders and I will obey them, or you can put me in command and I will give the orders and Sedgwick will obey them, but I'll be Goddamned if I'll *cooperate* with Sedgwick or anyone else.[23]

On more than a few occasions, Meade noted his displeasure with Warren in dispatches.[24] Grant, who early in 1864 remarked that he would make Warren commander of the Army of the

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[11] *Id.*

[12] *Id.* at 13.

[13] *Id.*

[14] Bruce Catton, *The Army of the Potomac: Glory Road*, 293 (Doubleday and Co. Garden City 1952).

[15] Longacre, *supra* note 2, at 13.

[16] Warren was cautious even before taking command of a corps. At Gettysburg, he supported Meade's decision not to pursue Lee: "[W]e saved the country for a time and . . . had done enough; . . . we might jeopardize all we had done by trying to do too much." Foote, *supra* note 1, vol. 2, at 576.

[17] Longacre, *supra* note 2, at 14-16. For more information on the battle of The Crater, *see* DEP'T OF ARMY, UNITED STATES ARMY COMMAND AND GENERAL STAFF COLLEGE, C610 TERM I SYLLABUS/BOOK OF READINGS, THE EVOLUTION OF MODERN WARFARE, 237 (Aug. 1995).

[18] For example, at the Wilderness, Warren urged Meade to cancel the attack scheduled for 30 November 1863, thereby avoiding disaster and convincing his soldiers that he "had done the army as solid a service . . . as he performed five months ago at Little Round Top." Foote, *supra* note 1, vol. 2, at 876.

[19] Regarding the strategy of attrition, *see, e.g.*, Russell F. Weigley, *American Strategy from Its Beginnings Through the First World War, in* MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 432, 432-35 (Peter Paret ed. 1986).

[20] ROBERT LECKIE, NONE DIED IN VAIN 595 (Harper Collins, New York 1990)

[21] Longacre, *supra* note 2, at 18.

[22] Stine, *supra* note 5, at 705.

[23] RICHARD O'CONNER, SHERIDAN THE INEVITABLE 249 (Bobbs-Merrill, New York 1953).

[24] Stine, *supra* note 5, at 705.

Potomac "if anything happened to Meade," began to have misgivings about Warren as the year progressed.[25] Warren had celebrated explosions of temper in incidents involving engineers and cavalry. One of his targets, at Spotsylvania in May 1864, was General Philip Sheridan, an Irishman also known for his temper—and his ability to harbor a grudge.[26] Given Warren's caution and outbursts, Grant gave Meade standing authority to relieve Warren, which was transferred to Sheridan at Five Forks.[27]

### *The Battle and the Relief from Duty*

The Battle of Five Forks was one of the last major battles of the war. Initiated on 29 March 1865, the Union attack by two corps was designed to collapse Confederate General Robert E. Lee's right flank and cut off Confederate escape routes south of Petersburg.[28] Sheridan attacked deep with his cavalry, intending to envelope Lee, but Lee countered with Pickett, who stopped Sheridan on 31 March at Dinwiddie Court House.[29] Sheridan believed that he could shatter Pickett's defenses if he could attack quickly with massed reinforcing infantry. Meade gave Sheridan, then commander of all cavalry of the Army, operational control of the Fifth Corps. Sheridan's plan was to attack immediately, exclaiming that, "This battle must be fought and won before the sun goes down! What I want is the Southern Railway!"[30] Unfortunately for both Warren and Sheridan, Fifth Corps was not in position to attack quickly, and a day past before Five Forks fell to Union forces. On 16 May 1865, Sheridan made his report of the battle, observing that, "General Warren did not exert himself to get up his corps as rapidly as he might have done; and his manner gave me the impression that he wished the sun to go down before dispositions for the attack could be completed."[31]

Warren's version of the battle—and his relief from duty—is found in his letter to the President, in which he requested appointment of a Court of Inquiry:

> Early in the morning of April 1, 1865, the Fifth Army corps was detached from the left wing of the Army of the Potomac, under Major General Meade, where it had previously been, and, joining with the command of Major General Sheridan, fought with him at the Battle of Five Forks, where we won a victory remarkable for its completeness. After the close of the battle, while at the head of my Army Corps, directed by me through the continuance of the battle, and led by me at the final assault, in which latter my horse was fatally shot, with several thousand prisoners, twelve battle standards, and a battery of artillery in our hands, with no armed foe in sight, I received, about 7 p.m., a written order from General Sheridan relieving me, and directing me to report in person to General Grant. The order came without any official reason, nor had there been any real discordance between us. Surprised, I sought General Sheridan and asked him what it meant; to which his reply was, "Obey the order!" I proceeded at once to General Grant, ten miles distant. He told me that he had given General Sheridan the authority to relieve me if he thought necessary, but gave no reason for its use on this occasion.[32]

William Swinton, war correspondent for the *New York Tribune*, was present at Five Forks and provided an independent account of Warren's actions at the close of the battle:

> The Confederates were now completely entrapped. Held as in a vise by the cavalry which enveloped their whole front and right, stung them with a biting fire, and charged at the signal of the musketry of the infantry, they now found a line of battle sweeping down on their rear . . . . From the rear Warren swept down toward the White Oak Road, Crawford taking four guns; and, simultaneously, the cavalry from the front charged upon this road with restless impetuosity. The whole center was now carried, as the left had been before,

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[25] Longacre, *supra* note 2, at 17.

[26] *Id.*

[27] Grant authorized Sheridan "to relieve General Warren if, in his judgment, it was for the best interests of the service to do so" (and Sheridan claimed that the order was unsolicited). Stine, *supra* note 5, at 704.

[28] Leckie, *supra* note 20, at 629-635; Foote, *supra* note 1, vol. 3, at 861-80.

[29] Leckie, *supra* note 20, at 631.

[30] *Id.* at 632.

[31] Stine, *supra* note 20, at 705.

[32] Headquarters, Dep't of Army, Report of The Judge Advocate General, subject: Application of General Warren to the Secretary of War, 23 (18 Nov. 1879).

and the Confederates, pressed front, flank and rear, mostly threw down their arms. Having gained the White Oak Road, Warren changed front again and advanced westward to continuously take in flank and rear whatever hostile force still continued to hold the right of the Confederate line . . . . When the infantry, greatly elated at their success, but somewhat disorganized by marching and fighting so long in the woods, arrived before his new line, they halted and opened an untimely fusillade, though there had been orders not to halt. Seeing this hesitation, Warren dashed forward, calling to those near him to follow. Inspired by his example, the color-bearers and officers all along the front sprang out, and, without more firing, the men charged at the *pas de course*, capturing all that remained of the enemy. The history of the war presents no equally splendid illustration of personal magnetism. Warren led the van of the rushing lines; his horse was fatally shot within a few feet of the breastworks, and he himself was in imminent peril when a gallant officer, Colonel Richardson of the 7th Wisconsin (old Iron Brigade), sprang between him and the enemy, receiving a severe wound, but shielding from hurt the person of his beloved commander . . . . Brilliant as the victory was, it was won without great sacrifice of life, the losses of the cavalry being but a few hundred, and those of the infantry, 634 killed and wounded.[33]

### *The Long Quest for Redress*

Warren complied with the relief, but immediately requested redress of the action. On 9 April 1865, he requested "a full investigation" of his relief. General Grant replied by letter, stating, "It is impossible at this time to give the court and witnesses necessary for the investigation."[34] Despite numerous requests for an inquiry, none was conducted by the Army. Commencing in 1866, Warren repeatedly petitioned, to no avail, to the Secretary of War to review the circumstances of the relief. He was joined in his quest for vindication by many veterans of Fifth Corps, who wrote letters to their representatives in Washington, D.C. and to the press. Indicative of the sense of the veterans was a letter published in the *New York Tribune*, in which it was written:

> We can forgive Sheridan for the injury of an act performed in a moment of excitement, but to persist in it for seventeen long years, preferring to crush a brother officer rather than to admit an error is not an honorable course for a brave man to pursue. The old Fifth Corps will stand by their commander, and whether he receives tardy justice or not, he has the sympathy and love of the men he once led in battle.[35]

It was not until 1879, however, that President Rutherford B. Hayes directed the convening of a Court of Inquiry under the Articles of War to review the facts and circumstances of the relief.[36] After three years of intermittent proceedings, the court issued its findings, concluding that the relief of Warren was unjustified and improper. The court reviewed each of the four substantive allegations against Warren, finding not only that the evidence failed to support any of them, but that the evidence established that Warren acted properly and effectively at Five Forks.[37]

As to Sheridan's allegation that Warren deliberately delayed his advance in conformity with his wish to let "the sun . . . go down before dispositions for the attack could be completed," the court found no evidence that Warren ever uttered the remark.[38] To the contrary, the court concluded that the actions of Warren "do not appear to have corresponded with such wish, if he ever entertained it."[39] Ironically, Warren died three months before the court announced its findings. Soured and embittered, he was buried without military honors in accordance with the directions in his will.[40]

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[33] Stine, *supra* note 20, at 704.

[34] Report, *supra* note 3, at 23.

[35] Longacre, *supra* note 2, at 20.

[36] Report, *supra* note 3, at 59.

[37] *Id.* at 1-22.

[38] *Id.* at 17.

[39] *Id.*

[40] Longacre, *supra* note 2, at 19.

Publication of the court's findings were not the end of the matter, however. The President of the Court, Brigadier General C.C. Augur, requested a legal review of the proceedings by The Judge Advocate General (TJAG), Brigadier General David G. Swaim.[41] The legal review by the TJAG criticizes both the procedure and proceedings of the court. The procedural criticism is particularly extraordinary in that the court was served by judge advocates who represented the interests of the government and of the major parties throughout the pendency of the proceedings. General Sheridan, who testified under subpoena on several occasions,[42] was represented by judge advocate Major Asa Bird Gardiner, the Army's premier trial lawyer of the late nineteenth century.[43] Warren, General Grant, and several other witnesses had civilian and military counsel.[44] The court was convened by the President of the United States, held in Washington over a three-year period, and subject to intense media coverage.[45]

Yet, when the report of proceedings reached TJAG, he found "serious procedural flaws" in the court itself.[46] The legal review even questions the authority of the President to have convened the court under the Articles of War. While the review concedes that the Attorney General of the United States opined otherwise on behalf of the President, TJAG concludes that the findings of the court "mean nothing" and are "ulterior proceedings."[47]

Although apparently never previously alleged or suggested, TJAG refers to the "criminal negligence" and "disobedience of orders" by General Warren, and suggests that Warren should have been court-martialed.[48] As to the lack of evidence supporting Warren's relief, TJAG adopts the testimony of General Sheridan on this point as part of his legal opinion: "That it was not my purpose to antagonize the Fifth Corps nor to make the officers . . . or the men of Fifth Corps feel bad. They had won a great victory and I wanted to say just as little about the incidents connected with the victory as I possibly could."[49]

The Judge Advocate General criticized the substance of the proceedings in the most direct fashion. Without saying that the court's decision was not supported by the evidence of record, the review simply says that the court was wrong and concludes the review by writing, "The act of General Sheridan in relieving General Warren from command was the exercise of a discretion with which he was clothed, and in so doing there is nothing to show that he was actuated by other than patriotic and justifiable motives."[50]

On 15 July 1882, General Sherman, General of the Army (Chief of Staff), endorsed the record of proceedings, concurring with the TJAG's "elaborate review."[51] Significantly, the endorsement thoroughly addresses an issue reflected neither in the record nor in the review—the legal authority of Sheridan to relieve Warren. Perhaps the issue was raised outside the proceedings, or perhaps Sherman, a lawyer himself, felt it necessary to address the issue for sake of completeness.[52] After conceding that corps commanders were appointed by the President and that there was no evidence that President Lincoln authorized Warren's relief, Sherman observed that Grant, who had done so, "possessed the absolute confidence of the President and was vested with every power necessary to success."[53] Sherman traces the devolution in authority from Grant to Sheridan, and notes that the action was never disturbed by Presidents Lincoln or Johnson.[54]

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[41] Report, *supra* note 3, at 23; Brigadier General David G. Swaim holds the ignominious distinction as the only TJAG ever court-martialed while in office. *See* Major General Thomas H. Green, *History of The Judge Advocate General's Department*, ARMY LAW., June 1975, at 13, 16 ("General Swaim was suspended from rank and duty for a period of twelve years, pursuant to sentence of court-martial, he having been found guilty of improper conduct in a business transaction.").

[42] General Sheridan testified under subpoena before the court, and, in writing, requested—and received—representation throughout the proceedings because they "made me practically a respondent." PHILIP H. SHERIDAN, THE PERSONAL MEMOIRS OF P.H. SHERIDAN 376-77 (Da Capo Press, New York 1992).

[43] Major Gardiner, awarded the Medal of Honor for valor with the New York Militia at Gettysburg, represented the Army in several consequential cases in the 1870s and 1880s. His most notable prosecution was of the TJAG, Brigadier General David G. Swaim, in 1884. *See* Green, *supra* note 41.

[44] Report, *supra* note 3, at 56.

[45] *Id.* at 54-9; Sheridan, *supra* note 42, at 377; Longacre, *supra* note 2, at 14-20.

[46] Report, *supra* note 3, at 26-58.

[47] *Id.* at 57.

[48] *Id.* at 56-8.

[49] *Id.* at 57.

[50] *Id.* at 58.

[51] *Id.* at 59.

[52] Sherman "read for the bar" and practiced for a time in Leavenworth, Kansas (*see* historical marker in downtown Leavenworth, Kansas).

[53] Report, *supra* note 3, at 60.

[54] *Id.* at 59-60.

After a succinct review of the evidence, Sherman concludes that Warren's tactical handling of Fifth Corps was "unskillful" and that "General Sheridan was perfectly justified in his action in this case, and he must be fully and entirely sustained if the United States expects great victories by her armies in the future."[55] In commenting on the deference he accorded Sheridan in the instant matter, Sherman offered strong general commentary on relief in combat:

> It would be an unsafe and dangerous rule to hold the commander of an army in battle to a technical adherence to any rule of conduct for managing his command. He is responsible for *results*, and holds the lives and reputations of every officer and soldier under his orders as subordinate to the great end—victory. The most important events are usually compressed into an hour, a minute, and he cannot stop to analyze his reasons. He must act on the impulse, the conviction, of the instant, and should be sustained in his conclusions, if not manifestly unjust. The power to command men and give vehement impulse to their joint action is something which cannot be defined by words, but it is plain and manifest in battles, and whoever commands an army in chief must choose his subordinates by reason of qualities which can alone be tested in actual conflict.[56]

Despite the legal review and Sheridan's eloquent endorsement, the relief of Warren appears harsh and unwarranted—particularly when done eight days before the end of the war. A psychological autopsy of Warren might establish that he suffered from stress or battle fatigue, explaining his emotional outbursts, but his command at Five Forks was within acceptable bounds. In a matter so filled with controversy, perhaps the only opinions that really matter are those of Warren's soldiers. Their position seems clear: "[T]here is no man who fought under Warren but will say he possessed the love and esteem and confidence of the rank and file of the Fifth Corps."[57] Lieutenant Colonel Marc L. Warren, Student, Command and General Staff College, Fort Leavenworth, Kansas.

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[55] *Id.* at 60.

[56] *Id.*

[57] Stine, *supra* note 5, at 706.

# USALSA Report

*United States Army Legal Services Agency*

## *Clerk of Court Notes*

*Office of the Clerk ofCourt, United States Army Judiciary*

### Rates of Courts-Martial and Nonjudicial Punishments

The rates of Courts-martial and nonjudicial punishment for the first quarter of fiscal year 1996 are shown below.

### Rates per Thousand

First Quarter Fiscal Year 1996; October–December 1995

| | ARMYWIDE | | CONUS | | EUROPE | | PACIFIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|---|
| GCM | 0.42 | (1.68) | 0.42 | (1.69) | 0.54 | (2.18) | 0.43 | (1.73) | 0.00 | (0.00) |
| BCDSPCM | 0.14 | (0.57) | 0.16 | (0.62) | 0.14 | (0.54) | 0.12 | (0.49) | 0.00 | (0.00) |
| SPCM | 0.02 | (0.57) | 0.02 | (0.09) | 0.00 | (0.00) | 0.00 | (0.00) | 0.00 | (0.00) |
| SCM | 0.10 | (0.40) | 0.11 | (0.45) | 0.07 | (0.27) | 0.08 | (0.33) | 0.00 | (0.00) |
| NJP | 16.23 | (64.92) | 16.68 | (66.70) | 14.98 | (59.92) | 19.49 | (77.94) | 17.49 | (69.96) |

Note: Based on average strength of 501,317. Figures in parenthesis are the annualized rates per thousand.

## *Environmental Law Division Notes*

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 3, number 7, dated April 1996, is reproduced below.

### Editor's Note

Major Joe Saye has retired from the Army. To replace him, Captain Silas DeRoma joined the ELD on 1 April 1996 and will be handling issues involving the Clean Water Act, the Safe Drinking Water Act, water rights policy, legislation, and Reserve Component. Captain DeRoma may be reached at (703) 696-1648 (commercial), 426-1648 (DSN), and his electronic mail address is deromasi@otjag.army.mil. Ms. Fedel.

### Reserved Water Rights

In the western United States, the doctrine of prior appropriation controls the rights to surface water and in some cases ground water. This doctrine, originating in mining camps during the California Gold Rush, is based on the principle of "first-in-time, first-in-right." A water user who is senior in time has a superior right, *vis-à-vis* more junior users, to use a quantity of water appropriated for a specific beneficial use. This right is recorded with a state agency and is a matter of public record. When the water right holder stops applying the water to the beneficial use for a certain period of time, the right may be lost. Such rights can be extremely valuable and frequently are the subject of litigation.

Federal reservations are usually able to assert significant water rights that are superior both in quantity and priority-in-time to rights held by surrounding private water right holders. Further,

these unique rights cannot be lost through disuse. The federal government may assert these powerful and controversial water rights on the basis of a court-made legal principle often referred to as the "*Winters* Doctrine," named after a 1908 United States Supreme Court decision involving an Indian reservation in Montana.[1] When many federal reservations, including a number of Army installations, were withdrawn from the public domain, little or no thought was given to water rights. Correspondingly, many treaties, statutes, and executive orders reserving withdrawn public lands for specific federal purposes are completely silent on the issue of water rights. The *Winters* Doctrine allows a federal reservation (including military reservations) to assert a priority date—a date that the reservation was created—and to claim a necessary area of land to fulfill the purpose of the reservation. Such rights may be referred to either as "*Winters* rights" or "reserved water rights."

Although the *Winters* Doctrine initially strictly applied to specific quantities of surface water, court decisions since the 1970s have expanded the *Winters* Doctrine to include ground water and instream flows (that is, a level in a stream needed to fulfill some purpose, as opposed to a precise quantity). The Army is asserting substantial reserved water rights claims currently at Fort Huachuca, Arizona, as part of the Gila River General Stream Adjudication. It is likely that other military installations located in the western states will also have the opportunity to assert *Winters* rights as more rivers undergo similar general stream adjudications. Installation environmental law specialists (ELSs) who believe that their installations may be affected by impending water rights adjudications should contact Captain Stanton immediately at DSN 426-1230. Captain Stanton.

### Texas Initiative to Begin

The first meeting of the Texas Initiative Environmental Partnering Group between Department of Defense, Coast Guard, and National Aeronautic and Space Agency installations in Texas and the Texas Natural Resource Conservation Commission (TNRCC) was be held in Austin on 30 April 1996. The purpose of the "Texas Initiative" is to coordinate compliance and legal issues for air, water, solid and hazardous waste, Base Realignment and Closure program, restoration, and pollution prevention.

The meeting included working groups on various media, as well as a presentation by the legal working group. Participants reviewed an update of the Edwards Aquifer Initiative. Legal and environmental engineer representatives from Fort Hood and Forces Command attended. An environmental trade fair sponsored by TNRCC followed the meeting. The meeting represented an opportunity to foster continued cooperation and progress in the areas of environmental compliance and enforcement. Major Howlett.

### *Army Regulation 200-3* Revision

The Army Environmental Center is tasked with revising and updating *Army Regulation 200-3, Natural Resources: Land, Forest, and Wildlife Management.*[2] The ELD will serve on a working group this summer to accomplish this task. Although the draft regulation will be staffed for comment through command channels prior to implementation, I would like to consolidate suggestions and comments from installation and major Army command ELSs to address your concerns. Please send comments, via electronic mail, to ayrestho@otjag.army.mil, prior to 18 June 1996. Major Ayres.

### United States Fish and Wildlife Service Adopts Interim Guidance to Prioritize Listing Actions Under the Endangered Species Act

On 11 March 1996, the United States Fish and Wildlife Service (FWS) announced that it has adopted an interim policy to prioritize listing actions under section 4 of the Endangered Species Act.[3] Congress enacted a moratorium on issuing final listings of protected species and final critical habitat designations in April of 1995. The FWS states that it is issuing this interim guidance to best allocate its limited resources once the moratorium is lifted and the listing program is revived. The following tiers list, in descending order, show how listing actions must be prioritized:

> Tier 1: Emergency listing of species facing imminent risk of extinction.
>
> Tier 2: Final decisions on proposed listings of species facing high-magnitude threats.
>
> Tier 3: New proposed listings of species facing high-magnitude threats.
>
> Tier 4: New proposed listings of species facing moderate or low-magnitude threats.
>
> Tier 5: Critical habitat determinations and new proposed delistings or reclassifications

Because many installations have resident candidate species, installations should be prepared to respond quickly to proposed listing actions by the FWS when, and if, the congressional moratorium is lifted. Major Ayres.

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[1] Winters v. United States, 207 U.S. 564 (1908).

[2] Dep't of Army, Reg. 200-3, Natural Resources: Land, Forest, and Wildlife Management (28 Feb. 1995).

[3] Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651 (1996).

### Supreme Court Grants Certiorari on Endangered Species Act Case

On 25 March 1996, the United States Supreme Court granted certiorari on a United States Court of Appeals for the Ninth Circuit (Ninth Circuit) decision in *Bennet v. Plenert*[4] involving the Endangered Species Act (ESA). A brief synopsis of the Ninth Circuit's decision can be found in the December 1995, issue of *Bulletin* (Volume 3, Number 3).[5] The Ninth Circuit's opinion relied on the "zone of interests test" in ruling that ranchers and irrigation districts lacked standing to sue under the ESA because they asserted no interest in preserving endangered species. The Ninth Circuit found that the plaintiffs' interest to gain greater access to water rights rested solely on economic and recreational uses. These uses were found to compete with the two endangered and listed species of fish dependent on the water. Major Ayres.

### Fine Reporting Policy for Environmental Law Specialists

A fresh turnover of environmental law specialists and the recent discovery of discrepancies in installation reporting practices requires review of the Department of Army policy on reporting enforcement actions through the environmental and legal chains of command.

Each installation is required by regulation to initiate several reporting sequences, regardless of an environmental law specialist's judgment of the substance or legal sufficiency of the alleged infraction. The regulation requires the following:

a. The installation commander (IC) must notify the major Army command (MACOM) immediately on receipt of any of the following: an enforcement action (ENF), a notice of violation (NOV), a notice of noncompliance (NON), a compliance order or agreement, a Federal Facility Compliance Agreement, or knowledge that the installation is or will be out of compliance with applicable federal, state, regional or local environmental law or regulations.[6] The MACOM will then have forty-eight hours to report this information to the United States Army Center for Health Promotion and Preventive Medicine (USACHPPM);

b. The installation must then, within five days of receipt, forward the actual NOV or agreement to USACHPPM.[7]

c. The IC must provide written notice of the NOV or agreement through its own command channels within fourteen days[8]

d. The installation must forward, within forty-five days of receipt, through command channels "a plan of corrective action, including compliance milestones, cost estimates, and the 1383 report project numbers."[9]

Many of these procedural requirements will be executed by an installation's environmental office. However, installation environmental law specialists must be aware of the requirements and ensure their accomplishment. Obviously, environmental law specialists will only be able to perform the functions if they are immediately notified by whomever receives the NOV. Environmental specialists should be aware that when a regulator wishes to issue a NOV to your installation, the NOV could be sent to the environmental office, the office of the staff judge advocate, the garrison commander's home or office, or the IC's home or office, or possibly the site of the alleged violation(s). For this reason, it is critical that environmental law specialists ensure that all potential recipients are aware of the regulatory reporting requirements and notify environmental law specialists immediately. This typically requires the environmental law specialist to visit the environmental office on a regular basis to foster a close working relationship with the environmental program personnel.

Additionally, the ELD asks that the installation environmental law specialists comply with the following additional reporting requirements so that enforcement actions can be simultaneously tracked up the legal chain of command.

First, immediately report to the MACOM environmental law specialist any NOV that assesses a fine. All enforcement actions in which fines have been assessed are tracked by the ELD, regardless of the amount or their legal sufficiency. Provide, within seven days, a written notification to the MACOM environmental law specialist and the ELD describing the alleged violation(s), the installation's position on the action, and the intended plan of negotiation or opposition. This reporting requirement applies only

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[4] No. 95-813, 1996 U.S. Lexis 2157, 64 U.S.L.W. 3639 (S. Ct. Mar. 25, 1996).

[5] *See also*, USALSA Report, *Environmental Law Division Notes, Endangered Species Act Enforcement*, ARMY LAW., Jan. 1996, at 95.

[6] DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 12-7(a) (23 Apr. 1990).

[7] *Id.* para. 12-7(b).

[8] *Id.* para. 12-7(c).

[9] *Id.* para. 12-7(d).

to the assessment of punitive fines, not administrative fees. However, the "fee" should be reported if it is actually a veiled fine. Veiled fines typically are assessed under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, or the underground storage tank portion of the Resource Conservation and Recovery Act. In many cases, the regulator has conceded that sovereign immunity prevents assessment of a fine and makes the semantic change to achieve the same result.

Second, report NOVs to the MACOM that, while not containing a stated fine, are deemed serious because a fine will likely result, the case has potential off-post impact, or the case may attract media coverage. The MACOM environmental law specialist should be able to determine whether its gravity and substance merit an informal report to the ELD.

Third, notify the MACOM environmental law specialist of all significant activity in all open ENFs. Send, by the fifteenth day of each month, a detailed summary of the status of all active ENFs to the MACOM environmental law specialist.

Finally, pursuant to *Army Regulation 200-1*,[10] all environmental agreements must be forwarded through MACOM environmental law specialists to the ELD for legal review prior to signing by the IC. Environmental agreements, for the purposes of this subchapter, include but are not limited to: consent orders, consent agreements, compliance agreements, memorandums of agreement, memorandums of understanding, interagency agreements, federal facility agreements, and federal facility compliance agreements. Captain Anders.

## The EPA Clarifies Federal Facilities' Right to Confer with the EPA Administrator

The EPA recently promulgated a final rule that amends the supplemental practice rules for administrative assessment of civil penalties for violation of the Resource Conservation Recovery Act (RCRA) and clarifies the consultation rights of federal facilities.[11]

The new rule became effective on 18 March 1996, and adds a new subpart to § 22.37. The new subpart provides that no administrative order or decision issued on appeal by the Environmental Appeals Board (EAB) to a federal facility will become final until the head of the affected agency has had the opportunity to request conference with the EPA Administrator. The request must be made in writing within thirty days after the EAB decision or order.

The Federal Facility Compliance Act (FFCA) amended RCRA to authorize the EPA and other regulators to issue administrative enforcement orders, including the imposition of administrative fines and penalties.[12] The FFCA provides, however, that the federal facility has the right to confer with the EPA Administrator before any such enforcement order becomes final.[13]

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits,[14] and the Supplemental Rules of Practice Governing the Administrative Assessment of Civil Penalties under the Solid Waste Disposal Act,[15] establishes the respondent's adjudication process. After the respondent's timely request for a hearing pursuant to RCRA § 6992d(a)(3), a hearing officer (an administrative law judge (ALJ)) will hear the case under the procedures prescribed in the Administrative Procedures Act. Unless an appeal is taken to the EAB within forty-five days after service of the decision on both parties, the initial decision of the ALJ becomes the final decision of the EAB. If an appeal is taken, the EAB will receive oral argument and written briefs and issue a final decision as soon as possible. The purpose of the new rule is to square this administrative procedure with the statute, which guarantees a respondent federal facility the right to consult with the EPA Administrator before the order becomes final.

The new rule contains three subsections. In § 22.37(g)(1), the existing procedure is reiterated. In § 22.37(g)(2), the head of the affected federal agency (i.e., the Secretary of the Army) is explicitly permitted the right, following receipt of the EAB ruling, to request a conference with the EPA Administrator. The request must be made in writing within thirty days of receipt of the EAB opinion, and a copy of the request must be served on all parties of record. The Administrator's decision, following the conference, becomes the EPA's final order pursuant to the FFCA. The third subsection, § 22.37(g)(3), gives notice that filing of a motion for reconsideration of the EAB's decision under § 22.32 will not toll the running of the thirty day request period for conference with the Administrator.

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[10] *Id.* paras. 6-3(a)(4), 12-6(d).

[11] Hazardous Waste, Technical Revision for the Federal Facility Compliance Act of 1992 Amendments, 61 Fed. Reg. 11,092 (1996) (to be codified at 40 C.F.R. pt. 22.37(g)).

[12] 42 U.S.C § 6961(b)(1) (1992).

[13] *Id.* § 6961(b)(2).

[14] 40 C.F.R. pt. 22 (1995).

[15] *Id.* § 22.37.

The primary impact of the new rule is to the respondent's rights when negotiating dispute resolution language with the EPA in consent agreements. The following dispute resolution procedures, that have been agreed to by the EPA in Army Comprehensive Environmental Response, Compensation, and Liability Act inter-agency agreements, are typical dispute resolution provisions. First, both parties must make reasonable efforts to resolve the dispute at the project manager level, including the installation submitting written notice of the dispute, the information relied on, attempts to resolve the dispute, and impacts should it not be resolved by the EPA project manager. If the project managers still cannot reach a resolution within a specified period, the installation may elevate the dispute to the Dispute Resolution Committee (DRC), on which the EPA and the installation will each have a member. If the DRC cannot unanimously resolve the dispute, the installation can elevate the dispute to the EPA Senior Executive Committee (SEC), consisting of the EPA Regional Administrator and the Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health (DASA (ESOH)). If the SEC cannot unanimously resolve the dispute, the DASA (ESOH) may elevate the dispute to the EPA Administrator who will meet with the Secretary of the Army and expeditiously issue the final decision on the matter.

Recently, EPA counsel in several EPA regions refused to enter into compliance agreements in which the dispute resolution language specifically provides for the EPA Administrator decision-making authority. One region claimed that an unproduced "regional policy document" forbids the practice. Another region claimed that "guidance given from the region" was that, due to the small likelihood of a dispute ever reaching that level, counsel was instructed not to agree to that provision. One region staff attorney recently refused to even allow a dispute to reach the regional administrator, stating that, "It is not within my authority to obligate the Regional Administrator to anything." These assertions are suspect, considering the substantial authority permitting the Secretary of the Army's conference rights with the EPA. In addition to RCRA § 6961(b)(2), Executive Order 12088 provides this right, as does the EPA's own 1988 federal facilities enforcement policy document, the "yellow book," which sets out the same dispute resolution procedure as that outlined above.[16]

While EPA counsel have failed to articulate any basis for departing from this authority, recent practice shows that they may attempt to make the administrator conference right another part of the negotiating process when it should constitute one of our few undeniable due process rights. The latest rule is simply another arrow in the quiver when asserting the Army's right to seek conference with the EPA Administrator. Captain Anders.

### *KFC Western, Inc. v. Meghrig* Reversed

The United States Supreme Court reversed a United States Court of Appeals for the Ninth Circuit (Ninth Circuit) ruling[17] that would have allowed a private cause of action to recover the prior cost of cleaning up toxic waste that does not continue to pose an imminent and substantial endangerment to human health or to the environment.

In *KFC Western, Inc. v. Meghrig*, the Court held that KFC Western had failed to meet two requirements of the RCRA imminent hazard citizen suit provision.[18] First, the Court stated that the language of § 6972(a)(1)(B), which permits a private party to bring suit against persons "who have contributed or who are contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment," clearly requires that the endangerment or threat of endangerment be present at the time that the action is brought.

Second, the Court found that the statute's remedy language, which allows the courts to "order such person to take such other action as may be necessary," cannot be used to expand the specifically enumerated remedies also listed. The Court stated that these remedies, that include restraining any person who has contributed or who is contributing to the contamination, constitute "elaborate enforcement provisions." The Court based this determination on the "elementary canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[19]

The Court pointed also based its decision on the determination that the RCRA's primary purpose is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste. The opinion relies substantially on the differences between the RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[20] The Court stated that the CERCLA's explicit cost recovery provisions and statute of limitations demonstrate that Congress intended to exclude cost recovery actions from the RCRA by the absence of similar provisions therein.

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[16] ENVIRONMENTAL PROTECTION AGENCY, EPA FEDERAL FACILITIES COMPLIANCE STRATEGY, § B.1.f. (1988).

[17] Meghrig, et al. v. KFC Western, Inc., No. 95-83, 1996 U.S. LEXIS 1955, 64 U.S.L.W. 4135 (March 19, 1996).

[18] Solid Waste Disposal Act, as amended, 42 U.S.C. § 6972 (1984).

[19] *Meghrig*, 1996 U.S. LEXIS 1955, at *13.

[20] 42 U.S.C. § 9601 (1994).

The decision is an important one because it will prevent private parties from obtaining cost recovery relief where the CERCLA's petroleum exclusion or statute of limitations provisions apply. Ms. Fedel.

## *Litigation Division Notes*

### Rules of Engagement for Litigating Civilian Personnel Cases in Federal Court

#### *Introduction*

Passage of the 1991 Civil Rights Act continues to inundate the entire system with litigation from the administrative process to the federal district courts. For example, in 1995, the Equal Employment Opportunity Commission (EEOC) received about 88,000 complaints of illegal discrimination based upon race, gender, national origin, religion, age or disability.[21] The number of complaints is up about 42% from the 62,000 complaints registered in 1990.[22]

Research on employee rights indicates that the public believes that neither corporations nor the federal government are doing enough to protect the rights of women, minorities, the disabled, or older workers.[23] Furthermore, the 1991 Civil Rights Act, in certain cases, affords the plaintiff the right to demand compensatory damages, and as a result, the right to a jury trial on demand.[24] A national database shows that 86% of jury eligible adults believe minorities are often discriminated against because of their race.[25] Consequently, it is likely that jurors will enter the jury box with a mind set that places a much tougher burden on the government in employment discrimination cases even though the plaintiff has the legal burden of proof.

This note is a continuation in a series of notes and articles written by the Civilian Personnel Law Branch of the Litigation Division. It encapsulates the Title VII litigation process into three rules of engagement (ROEs) for the installation labor counselor and the Department of the Army litigation attorney, from the initial filing of a federal district court complaint through the trial on the merits. The ROEs are designed to foster a team concept throughout the litigation process. The components of the ROEs are: (1) preparation, (2) cooperation, and (3) litigating to win.

#### *The Army's Role*

Labor counselors represent the Secretary of the Army in an aggressive and professional manner in federal court in conjunction with the Department of Justice and the United States Attorney's Offices, who are statutorily charged with representing the United States in all litigation. If labor counselors and litigation attorneys concentrate on the three subject areas of the ROEs, the Army will enter every phase of the litigation better prepared, more organized in all aspects of trial practice, and in the best position to prevail on either dispositive motions or at trial. The plaintiffs' bar litigates to win and attempts to take advantage of both the sheer size (*the bureaucracy*) of the United States government and the logistical problems involved in defending an employment discrimination lawsuit. Practicing the ROEs will enable the labor counselor and the litigation attorney to work as a trial team with the United Sates Attorney in all phases of Title VII litigation, to include motion practice, discovery, and trail if necessary.

#### *Use of Dispositive Motions*

The use of dispositive motions, such as a motion for summary judgment[26] or a motion to dismiss,[27] in employment law practice is one of the first areas where the labor counselor can apply the ROEs.[28] To prevail on a dispositive motion means to achieve success for the Army without expending great expense and time in preparing for and conducting a jury trial.[29] Alternatively, motions can be used to dispose of portions of the case to

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[21] Kristin Downey Grimsley, *EEOC Chief Voices Frustration Over Case Backlog, Budget Cuts*, WASH. POST, Feb. 11, 1996, at A4.

[22] *Id.*

[23] Rick R. Fuentes & Dan R. Gallipeau, *Jurors' Perceptions of Employment Litigation: Jury Trials for Employment Discrimination Lawyers*, ABA VIDEO LAW SEMINARS, at 109, (1993).

[24] Under prior law, there was no right to a jury trial under Title VII of the Civil Rights Act of 1964 (Title VII), The Age Discrimination in Employment Act (ADEA), or the Rehabilitation Act. Section 102 of the 1991 Civil Rights Act, however allows for compensatory damages (and therefore a jury trial on demand) in all Title VII cases and in Rehabilitation Act cases except where the employer demonstrates good faith efforts to make reasonable accommodation. Compensatory damages are still unavailable in ADEA cases. Under § 102 of the 1991 Civil Rights Act, where a plaintiff seeks compensatory damages, either party may demand trial by jury and the court shall not inform the jury of the damage limitations.

[25] *See id.*; Fuentes, *supra* note 23, at 109.

[26] FED. R. CIV. P. 56.

[27] *Id.* 12.

[28] The limited scope of this note does not allow for an in-depth discussion of every area that the ROEs can and should be used. These ROEs should be used from the preparation of a quality litigation report, including a proposed answer that specifically deals with every sentence of the plaintiff's complaint, which continues through the specifics discussed in this note.

[29] *See* James E. Macklin, *Summary Judgment Motions in Discrimination Litigation: A Useful Tool or a Waste of Good Trees?*, ARMY LAW., Nov. 1995, at 12.

narrowly tailor the issues of the case for discovery and for trial. A well-written and well-researched dispositive motion can be used in lieu of an answer as a means to avoid the quagmire of discovery.

The first ROE, *preparation*, is the key to an aggressive motion practice. The preparation of a winning dispositive motion commences with a quality and timely litigation report submitted to the litigation attorney in accordance with *Army Regulation 27-40*.[30] The most critical portion of the litigation report is a well-prepared statement of facts with supporting documents coherently organized.

An installation's labor counselor must have ready access to all resources required to complete the statement of facts, to include the civilian personnel office, the equal employment opportunity office (EEO), the plaintiff's coworkers, and all other witnesses. The litigation attorney must rely heavily on the labor counselor to discover and communicate the key facts of alleged discriminatory events that lead the plaintiff to file the lawsuit. Ideally, the litigation attorney should be able to lift the statement of facts from the labor counselor's litigation report and place the statement of facts in the first section of the memorandum in support of the government's motion. In the majority of cases disposed of by motion for summary judgment or by motion to dismiss, the trial judge will parallel the government's statement of facts in preparing the judge's order. Therefore, it is essential that the statement of facts is flawless.

The second ROE, *cooperation* between the litigation attorney and the labor counselor, becomes vital when a dispositive motion requires additional documentation. For example, it is often necessary to submit affidavits in support of a summary judgment motion. Many times, a clear, concise affidavit can replace volumes of an administrative record and focus the court on the important issues to a ruling in the Army's favor. The difference between winning and losing a dispositive motion can depend on a single affidavit from a witness in the field. The time consuming drill of drafting, redrafting, and honing an affidavit requires cooperative teamwork and open lines of communication between the labor counselor and the litigation attorney.

The third ROE, *litigating to win*, flows throughout the dispositive motion process. Of course, the motion is never filed unless there is a good faith basis to believe the Army will prevail; however, when the judge sets a dispositive motion for oral argument, the litigate to win rule is foremost.[31] A well researched, organized, and written motion prepared with a "litigate to win philosophy," coupled with an aggressive, articulate argument can lead to victory. Additionally, witnesses are sometimes required at a motion hearing, and the labor counselor's assistance in obtaining and helping prepare witnesses for the hearing is all part of litigating to win. An oral argument cannot be successful without the assistance of the labor counselor providing a well-prepared litigation report, assisting in obtaining affidavits, providing any additional documentation requested, and assisting in preparing witnesses.

### *Discovery*

In federal sector employment discrimination cases, there is extensive documentation available in the form of witness statements, EEO files, and, in the typical case, a transcript with supporting documentation from the Department of Defense Office of Complaints Investigation. These documents are available in most employment discrimination cases due to the Title VII requirement that a plaintiff exhaust administrative remedies before filing suit in federal district court. Nevertheless, most courts will allow discovery to commence immediately in the form of interrogatories, requests for production, requests for admissions, and depositions. The scope of discovery is incredibly broad under the *Federal Rules of Civil Procedure* (*FRCP*). Information can be obtained regarding any nonprivileged matter relevant to any portion of the complaint reasonably calculated to lead to the discovery of admissible evidence.[32]

The ROEs of *preparation* and *cooperation* are imperative in the discovery process. Of all the phases in litigation, the discovery phase is probably the most intensive for the labor counselor. Without preparation and cooperation, discovery can lead to severe problems, not the least of which is sanctions under *FRCP 11*. The labor counselor must be knowledgeable of the *FRCP*, the local rules, and the individual judge's standing on the rules.

When discovery requests are received, whether they are in the form of interrogatories, requests for the production of documents, or requests for admissions, the Army has thirty days to respond under *FRCPs 33*, *34*, and *36*. Because the labor counselor has the most familiarity with the case and has access to the custodian of the records or the individual who can answer an interrogatory, the litigation attorney will rely on the labor counselor to provide the initial proposed responses and production. Preparation is involved in providing timely, accurate, quality responses. Cooperation is essential because it is inevitable that the litigation attorney will request additional documents or supplemental answers and, without significant cooperation, discovery will not be complete. Further, *FRCP 26* requires continued supplementation of all production and information throughout the litigation process.

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[30] *See generally* DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION (19 Sept. 1994).

[31] "Litigating to win" should not be confused with the philosophy of "winning at all costs." As government attorneys, both the litigation attorney and the labor counselor are committed to seeking justice, not just victory.

[32] FED. R. CIV. P. 26(b).

A prime example of the ROEs of preparation and cooperation in action is the witness list that must be provided under *FRCP 26(a)*. The labor counselor should provide an exhaustive list of potential witnesses including current addresses, duty positions, social security numbers, and summaries of each witnesses expected testimony. A well prepared witness list pays huge dividends at trial. The cooperation is apparent when the labor counselor continues to update the witness list with current addresses and duty positions of the witnesses up to the date of trial. Unfortunately, witnesses die, change stations, leave government service, and many times are not located at the installation from which the case arose. The preparation of an exhaustive witness list that is constantly updated will ensure that the Army has all necessary witnesses at trial and that they will be allowed to testify. If prospective witnesses are not included on the witness list provided to the court, the judge may not allow them to testify, which can prove devastating to the Army's case.

The ROE *litigating to win* begins with a discovery strategy that fits the case theory and serves as a road map for the case. Because *FRCP 33* allows a maximum of twenty-five interrogatories and *FRCP 34* may restrict requests for production of documents that are not relevant, the careful drafting of interrogatories and specific requests for production must fit the theory of the case. The idea underlying discovery is to learn about information to which you do not already have access. Thus, the *litigate to win* ROE is entrenched in well-structured interrogatories and requests for the production of documents. There is no need to waste one of your questions asking for information that you already have. Therefore, the labor counselor must assist the litigation attorney in determining what they specifically need to know in addition to the information already compiled in the administrative process.

The same litigate to win mentality should apply to depositions. Under *FRCP 30(a)(2)(A)*, parties are limited to ten depositions. Frequently, the local rules further limit the number of depositions. For example, the local rules in the Eastern District of Virginia limit the number of depositions to five. Thus, deciding who should be deposed must fit in the theory of the case. One purpose of the deposition is to pin the adverse witness down in the specific areas you wish to develop for trial that fit your theory of the case. Defending favorable witnesses at depositions also is a time to ensure we are operating under the litigate to win philosophy. This is a perfect time to begin to prepare your witnesses for trial and ensure that they only answer what is asked. Defending a deposition is just as important as taking a deposition. A litigate to win mentality will ensure that the theory of the case is woven through out the depositions in preparation for trial.

*Trial Preparation and Trial*

A jury trial in federal district court is a litigator's dream; however, the desire to litigate must always be tempered with the obligation to seek justice and to be open to compromise and settlement.[33] When the decision has been made to litigate the case, following the ROEs will allow the labor counselor and the litigation attorney to represent the Army in a professional, effective, and aggressive manner.

The labor counselor plays an important role in the entire trial, but the preparation phase of litigation is when the labor counselor's assistance is essential. By the time of trial, the labor counselor has already participated in the administrative phase of the case, prepared a litigation report, and handled a myriad of discovery requests. Therefore, the labor counselor is an invaluable asset and resource when it is time to finalize the theory of the case.

The trial is normally located in the federal district court closest to the labor counselor and the respective installation.[34] The labor counselor is normally very familiar with all of the witnesses, the administrative record, and the command from which the case originates. Therefore, the labor counselor can assist the litigation attorney in preparing the pretrial statement for the court, which usually includes the witness list, exhibit lists, the statement of the case, and the Army's legal basis for a claim of no discrimination. The pretrial statement is an extremely important document because it provides a road map of the case for the trial judge and is typically the primary document the judge will review prior to trial.

During the preparation phase, the labor counselor also plays a valuable role in preparing witnesses for trial with the litigation attorney. Because of an already existing relationship with witnesses, the labor counselor often acts as a liaison between the witnesses and the litigation attorney. When senior management officials, senior officers, and senior noncommissioned officers are required to travel to a trial, a well organized team approach to preparation can make or break the trial, not to mention a command's ability to continue functioning in the absence of these personnel. The labor counselor can assist by familiarizing the witnesses with the exhibits and giving them a broad overview of the areas they will be questioned on at trial while the litigation attorney prepares the witness for his or her own litigation style and familiarizes the witness with the courtroom. If the witnesses are comfortable with the labor counselor and with the litigation attorney, their confidence will be projected to the jury.

[33] As painful as it may be, even though all the trial preparation is done and witnesses are at the courthouse, the Army must remain open to settlement offers at all times.

[34] This, of course, is not true for cases arising out of overseas activities. These cases are normally litigated in the United States Federal Court for the Eastern District of Virginia, which is referred to as the "Rocket Docket." As the name implies, nothing short of blood spilled by counsel in the presence of the trial judge will gain a continuance. The labor counselor's assistance in trial preparation for these cases is even more essential given the incredible amount of coordination that is required to locate witnesses, arrange travel, and locate documents at the last minute. In these cases, it is often very helpful for the labor counselor to obtain funding from the command and travel to the Litigation Division several days in advance of trial to assist in preparation. *See* Victor Gold, *The Rocket Docket*, WASHINGTONIAN, Nov., 1995, at 49.

Voir dire is an essential part of a Title VII jury trial. The extent of voir dire varies from jurisdiction to jurisdiction; however, a labor counselor can greatly assist the litigation attorney when it comes to questions to ask or answers to look for from the jury questionnaires. A decision that seems simple such as whether a military witness should appear in uniform when testifying can depend on the voir dire, and the decision made can aid victory or ensure defeat. The labor counselor's advice is critical and always a force multiplier.

The second ROE, cooperation, is critical at the trial phase. The labor counselor and the litigation attorney must develop a relationship of open communication that will lead to cooperation in all phases of a trial and a successful result. This relationship should be one of cooperation, mutual respect, and a team approach to litigation.[35]

This cooperation must flow from the trial team to everyone involved in the trial. Commanders, directorate heads, and witnesses must understand that the case is tied to their organization and without cooperation their organization can be disadvantaged at trial. For example, when the litigation attorney informs the labor counselor that fifteen witnesses need to be at trial, the labor counselor must be able to convince the command to pay for witness travel to win the case. Cooperation leads to positive trial results.

Cooperation begins during trial preparation and continues during the actual trial. A trial never goes as planned—the litigation attorney will need another witness, an exhibit clarified, or an area of the law researched during the course of the trial. The labor counselor must be ready to act on requests in the middle of a trial. A jury watches everything the trial team does and a lack of organization and flexibility will be noticed by the jury. The jury must remain confident in the presentation throughout the trial.

The third ROE, *litigate to win*, is followed by employing a mobile, aggressive, and flexible approach to the litigation. Plaintiffs' counsels, generally seeking a total of one million dollars in compensatory damages, attorney fees, frontpay, backpay, and injunctive relief, will litigate to win at all costs. In representing the United States, the federal court looks to government counsel to take the high ground and to be the experts in Title VII. The court relies on the government's representations concerning all facets of the litigation, including discovery, the facts, the law, and trial practice. Litigating to win does not translate into win at all costs, but it does mean being an expert in all areas of employment discrimination law. To win, the Army must put the most prepared and professional trial team in the courtroom just as the Army leadership places the most professional and well trained and equipped soldiers on the battlefield. If we litigate to win, we will win!

### *Conclusion*

In a Title VII trial, the labor counselor and litigation attorney must remember three simple ROEs: (1) *preparation*, (2) *cooperation*, and (3) *litigate to win*. These three ROEs will prove invaluable and be the key to success in Title VII litigation. The ROEs can be used throughout the entire process of Title VII litigation. Litigation attorneys depend on the labor counselors and their expertise at every phase of the litigation. The Army's defense of employment discrimination cases is no different from a private sector law firm that establishes a trial team for every case. Because the Army's trial team is often spread out geographically, the three simple ROEs, if followed, will enable Army counsel to represent the Army in the most professional, effective, and aggressive manner possible. Captain Caldwell and Captain Fair.

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[35] The lead attorney on any given case varies depending on the arrangement between the Assistant United States Attorney (AUSA) and the litigation attorney. Many times, the AUSA will assume the role of lead counsel; however, the AUSA may want the litigation attorney to be the lead counsel and may not even sit at counsel table for the trial.

# Claims Report

*United States Army Claims Service*

## 1996 Claims Video Teleconference Schedule

The United States Army Claims Service (USARCS) Claims Video Teleconferences are presented every other month and are designed to instruct and assist claims personnel in the field. All field claims personnel are encouraged to participate to the maximum extent possible.

**Claims Video Teleconference Schedule for 1996**

| Date | Time | Focus of Instruction |
|---|---|---|
| 4 Jun 96 | 1300-1500 | Personnel Claims & Recovery (Affirmative Claims, Part II, Property Claims) |
| 29 Aug 96 | 1215-1400 | Tort Claims |
| 22 Oct 96 | 1400-1600 | Personnel Claims & Recovery |
| 3 Dec 96 | 1400-1600 | Tort Claims |

**Installations Receiving Live Claims Video Teleconference Broadcasts**

| *TRADOC Installations* | *FORSCOM Installations* |
|---|---|
| Fort Benning | Fort Lewis |
| Fort Bliss | Fort Hood |
| Fort Gordon | Fort Bragg |
| Fort Huachuca | Fort Riley |
| Fort Jackson | Fort Carson |
| Fort Knox | Fort Drum |
| Fort Leavenworth | Fort Stewart |
| Fort Leonard Wood | Fort Campbell |
| Fort McClellan | Fort Irwin |
| Fort Rucker | Fort Polk |
| Fort Sill | Fort McPherson |
| Fort Eustis | |

| *MDW Installation* | *MEDCOM Installation* |
|---|---|
| Fort George G. Meade | Fort Sam Houston |

All times are Eastern times. If your video teleconference center is in the Central, Mountain, or Western Time Zone, then please adjust the time for your location.

Claims personnel from installations not receiving a live USARCS Claims Video Teleconference broadcast are invited to do one of the following:

1. Travel to the closest on-line video teleconference broadcast center to view a live broadcast. For example, claims personnel who work in the Washington metropolitan area are encouraged to attend live broadcasts at Fort Meade. Likewise, claims personnel from Fort Lee and Fort Monroe can attend the live broadcast at Fort Eustis. Claims offices that will receive live broadcasts should extend invitations to claims personnel from nearby claims offices not receiving live broadcasts.

2. Arrange for an "audio hookup." Each one of the video teleconference centers hosting a live broadcast has the capability of connecting one or more telephonic hookups to the live claims video teleconference broadcast. An audio hookup will enable claims personnel, from their own offices, to listen to and verbally contribute to the video teleconference without seeing the broadcast. Interested claims offices should coordinate with an on-line video teleconference center several days in advance, then telephone the on-line center at least five to ten minutes before the start time of a broadcast to join through an audio hookup.

3. Request a videotape of any Claims Video Teleconference by sending a blank 120 minute standard VCR videotape to USARCS, ATTN: Administrative Officer, 4411 Llewellyn Avenue, Fort Meade, MD 20755-5360. Please ensure that you specify which broadcast you are requesting. For example: Oct 95: Personnel Claims & Recovery (Basic Recovery Procedures), and, Dec 95: Tort Claims (Claimant Interviews, State Law Books, and Foreign Claims Commissions/Deployments).

The POC for this program is the USARCS, Executive, at DSN 923-7009, ext. 202, or (301) 677-7009, ext. 203. Lieutenant Colonel Millard.

## *Personnel Claims Note*

**Replacement of Active and Inactive China and Crystal**

As the USARCS becomes aware of companies that repair or replace personal property, we will provide you with the names of such companies. Please add the following companies to your list.

Atlantic Silver and China
7405 N.W. 57th Street
Tarmarac, Florida 33319
Phone (305) 720-4559
Fax (305) 720-4577

Replacements, Limited
P.O. Box 26029
1089 Knox Road
Department XL
Greensboro, North Carolina 27420
Phone (800) 737-5223

These companies specialize in replacing active and inactive patterns in sterling silver, china, and crystal. Replacements, Lim-

ited also specializes in collectibles—figurines and painted plates. If field claims offices have identified other such companies, fax the name, address, phone number, and areas of specialty to USARCS. The next update of the USARCS Specialty Replacement and Repair Guide will incorporate new companies. Lieutenant Colonel Kennerly.

### Recovery of Funds by the Atlanta RSMO—Revisited

In the March 1995 *The Army Lawyer*, the USARCS told claims personnel that the Atlanta Regional Storage Management Office (RSMO) would recover funds against nontemporary storage (NTS) contractors located in their area. Field claims offices were to send all files requiring recovery action against such NTS contractors to this RSMO. The categories of files include:

a. All direct deliveries out of NTS when no other third parties were involved;

b. Other deliveries out of NTS when another third party was involved such as a GBL carrier but only after USARCS settled the carrier's liability claim;

c. Incidents of unusual occurrences, fire or flood in an NTS warehouse when no other third party was involved such as a GBL carrier or and insurer; or

d. Liability owed by a bankrupt warehouse or one that no longer does business with the Government.

I revisit this program to remind all field offices about the importance of forwarding appropriate files to the Atlanta RSMO. In the near future, USARCS will evaluate this program to determine if it warrants expansion to other RSMOs. Lieutenant Colonel Kennerly.

## *Tort Claims Note*

### Actionable Duty in Worksite Injury Cases

#### *Introduction*

Due to continuing budget constraints involving the military department, more thought will be given to contracting for services previously performed by soldiers and civilian employees of the Department of Defense. Examples of such services are contracts for cleaning commissaries and hospitals, driving military vehicles, and maintaining buildings. Contractors performing these services provide less direct supervision to their employees and may produce more worksite injury cases and potential tort liability for the United States. To properly investigate and evaluate such claims, claims officers should follow the already extensive case law on the subject—the well developed defenses both in federal and state law and the criteria for holding the United States liable for worksite injuries.

#### *Actionable Duty*

Actionable duty is an obligation in common law to act with care to avoid injuring another's person or property. This is the threshold question in any tort claim. Without an actionable duty, there can be no liability. In most jurisdictions, the existence of duty is regarded as a question of state law. State law should be reviewed for the analysis used to determine whether a duty exists or not. In most states, the analysis takes one of two forms: (1) evaluating the foreseeability of injury to another,[1] or (2) referring to public policy that encourages or discourages the conduct at issue.[2] Regardless of the analysis, when an actionable duty is determined, the common finding is the existence of a relationship between the parties.

#### *Defining Independent Contractors*

It has long been a general rule under the Federal Tort Claims Act (FTCA) that the United States is not responsible for the negligent acts or omissions of *independent contractors*. This is explicit in the FTCA's definition of "federal agency,"[3] and it is implicit in the FTCA's proscription that the waiver of sovereign immunity extends only to employees of federal agencies of the United States[4] in its definition of "employee of the Government"[5] and in its statutory standard of liability.[6]

The legislative history on the exclusion of contractors from the FTCA's waiver of sovereign immunity is sparse. Most of the committee hearings on this issue and the drafting of the committee reports occurred in 1942 during the 77th Congress. These reports did not specifically address the reason for the exclusion or

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[1] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[2] Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334 (1976).

[3] "Federal agency . . . does not include any contractor with the United States." 28 U.S.C. § 2671 (1995).

[4] *Id.* § 1346(b).

[5] "'Employee of the government' includes officers or employees of any Federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 315, 502, 503, 504 or 505 of title 32 (for claims arising on or after 29 December 1981), and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently, in the service of the United States, whether with or without compensation." *Id.* § 2671.

[6] "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674.

why it was grafted on to the definition of "federal agency" rather than appended to the definition of "employee."[7] It has been suggested that Congress intended not a distinction based on common law principles of agency but a generic distinction between the federal government and private entities and between state and local governmental bodies acting for the federal government pursuant to contracts. This could also explain why the definition of "federal agency" includes "corporations primarily acting as, instrumentalities or agencies of the United States" (that is, distinguishing federal government corporations from private business corporations).[8] Indeed, the current FTCA language is very similar to the original enactment when "federal agency" included government corporations and excluded contractors.[9] The breadth of this distinction has been clarified by the identification of an extensive list in the United States Code of wholly-owned and mixed-ownership government corporations.[10] The distinction also has been established by a long line of federal court decisions, which have held, even in the context of government-owned contractor-operated activities, that for a private corporation to become an instrumentality of the United States, it must be a "constituent part" or so "incorporated into the Government structure as to become instrumentalities of the United States."[11] The sensibility of the distinction is based on the unique relationships between the general government and its contractors, a relationship which often has no equivalent in the private sector.

### *Redefining Independent Contractor*

However, as contractors assume more and more heretofore military responsibilities, long-held assumptions about the clarity of the independent contractor distinction may be questioned more and more. Even so, it is worth noting that the FTCA's exclusionary language uses the broad term "contractor" rather than "independent contractor," which suggests that Congress did not intend to apply the common law concepts distinguishing "employees" or "servants" from "independent contractors." Rather, Congress intended "federal agency" to be limited to official components of the federal government. This distinction is implied by the FTCA's textual references to "federal agency," which seems to apply only to official components regardless of the extent of supervision that the United States may exercise over a contractor's operations.[12]

Contrary to this, however, is the use of the word "includes" in the definition of "employee," which suggests that persons who do not clearly fall within one of the three categories mentioned in the definition may nevertheless be covered by the term. Therefore, the threshold consideration in the investigation of worksite injury cases becomes the extent of control or the right of control that the federal government exercised or retained over the tortfeasor in the performance of the contract. Such control or supervision, while it may not necessarily render a contractor a federal agent, can still result in the contractor or its employees becoming a federal *employee* under principles of respondeat superior according to the law of the state in which the claim arose even though the FTCA excludes "any" contractor from being a federal *agency*.

### *The Supreme Court's View*

United States Supreme Court decisions clarify that a party with whom the federal government has a contractual relationship is an "independent contractor" and not a "federal agency" or "employee."[13] The Supreme Court views contractors and federal agencies and employees as mutually exclusive relationships. Otherwise, a contractor could be an employee of the United States without being an employee of a federal agency—an argument that failed in *Logue v. United States*.[14] The Court in *Logue* and *United States v. Orleans*[15] held that whether one is a contractor or employee is a matter of *federal* law,[16] and that determination depends, at least in part, on the right to control the details of per-

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[7] *See* S. Rep. No. 1196, 77th Cong., 2d Sess. (1942); H. Rep. 2245, 77th Cong. 2d Sess. (1942); Hearings on H.R. 5373 and H.R. 6463 before House Committee on the Judiciary, 77th Cong., 2d Sess. (1942). For guidance as to whether an entity is a "federal agency," *see* Mendrala v. Crown Mfg. Co., 955 F.2d 1132, 1136 (7th Cir. 1992), in which the court listed five factors to consider in making this determination: the federal government's ownership interest in the entity, its control over the entity's activities, the entity's structure, the federal government's involvement in its finances, and the entity's function or mission.

[8] Department of Justice, *The FTCA's Contractor Exclusion and Related Issues*, TORTS BRANCH MONOGRAPH 2-3 (June 1992).

[9] P.L. 79-601, sec. 402(a), 60 Stat. 842, 28 U.S.C. §941(a) (1946 ed.).

[10] 31 U.S.C. § 9101 (1995).

[11] *See, e.g.*, United States v. New Mexico, 455 U.S. 720 (1982); United States v. Boyd, 378 U.S. 39 (1964).

[12] 28 U.S.C. §§ 2672, 2679(a), 2680(a) (1995).

[13] Logue v. United States, 412 U.S. 521 (1973); United States v. Orleans, 425 U.S. 807 (1976).

[14] 412 U.S. 521, 530 (1973).

[15] 425 U.S. 807 (1976).

[16] *Logue*, 412 U.S. at 528; *Orleans*, 425 U.S. at 814-15.

formance and whether the contractor's day-to-day operations are supervised by the federal government.[17]

In *Logue*, federal prisoners were housed in a state jail, which was contracted to house federal prisoners and required to follow the rules, regulations, and standards of treatment of federal prisoners, but which itself was not physically supervised by the United States. Representatives of the federal government only had the right to enter the jail at reasonable times to inspect. In *Orleans*, the Court concluded that the necessity of complying with extensive federal regulations, policies, and procedures did not give the Office of Economic Opportunity the power to supervise a federally-funded local agency or program.[18] Absent such supervision or right of control, an entity is not a "contractor with the United States," and the United States is not liable for the torts of that private commercial entity. The United States Courts of Appeals have generally followed *Logue* and *Orleans*.[19]

### *Employee of Contractor or United States?*

Although a contract with a private commercial entity complying with the *Federal Acquisition Regulations* may lead to the tentative conclusion that the entity is strictly a contractor, an assessment must be made whether the individual tortfeasor was, for purposes of FTCA liability, an employee of the United States or an employee of the contractor. This is required because FTCA liability is premised on private person liability according to state law under the respondeat superior doctrine.[20] The status of the tortfeasor as a federal employee is *sine qua non* of liability under the FTCA.

The federal courts have pursued the employee line of inquiry in several cases such as National Guard civilian caretakers, a private physician hired to be an aviation medical examiner, a designated airworthiness representative, and a physician operating under a contract with the Public Health Service.[21] The federal courts consistently have interpreted "employee" to mean the conventional master-servant relationship as understood in common law agency doctrine thus distinguishing "employee" from "independent contractor."[22]

Questions that must be answered to determine the existence of a master-servant relationship are:

(1) The extent of control that an employer may exercise over the details of the work?

(2) Whether the worker is engaged in a distinct occupation or business?

(3) The nature of that occupation?

(4) Whether the work was usually done under the supervision of the employer or by a specialist without supervision?

(5) The skill required in a particular occupation?

(6) Whether the employer or worker supplied the tools, equipment, and place of work?

(7) The length of time the worker was employed?

(8) Whether the worker was paid by time or by the job?

(9) Whether the parties believed they were creating a relationship of master-servant?[23]

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[17] *Orleans*, 425 U.S. at 815-16.

[18] *Orleans*, 425 U.S. at 817-18.

[19] *See, e.g.*, Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981); Larsen v. Empresas El Yunque, Inc., 812 F.2d 14 (1st Cir. 1986); Leone v. United States, 910 F.2d 46 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991); Merklin v. United States, 788 F.2d 172 (3rd Cir. 1986); Wood v. Standard Products Company, 671 F.2d 825 (4th Cir. 1982); Cavazos v. United States, 776 F.2d 1263 (5th Cir. 1985); Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); Savic v. United States, 918 F.2d 696 (7th Cir. 1990); Bernie v. United States, 712 F.2d 1271 (8th Cir. 1983); Letnes v. United States, 820 F.2d 1517 (9th Cir. 1987); Lilly v. Fieldstone, 876 F.2d 857 (10th Cir. 1989); Cole v. United States, 846 F.2d 1290 (11th Cir. 1988).

[20] Laird v. Nelms, 406 U.S. 797 (1972).

[21] Levin v. United States, 381 U.S. 41 (1965); *Leone*, 910 F.2d at 46; Charlima, Inc. v. United States, 873 F.2d 1078 (8th Cir. 1989); *Wood*, 671 F.2d at 825.

[22] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[23] *Leone*, 910 F.2d at 46; Lurch v. United States, 719 F.2d 333 (10th Cir. 1983); Walker v. United States, 549 F. Supp. 973, 975 (W.D. Okla. 1982).

The federal government's contractual retention of various rights and the exercise of contractual rights, such as the right to inspect or have safety inspectors present, to order work to be stopped because of unsafe practices by the contractor, or to require added safety measures, have been held not to constitute sufficient control over a contractor to create an employment relationship. There must be affirmative control or direction by the United States over the contractor employees, and the "operative detail" of the work. In other words, the United States must exercise control over the process of achieving the end result before FTCA liability will attach to the United States.[24] This rationale has been applied even in instances where the plaintiffs have attempted to apply Good Samaritan theories of liability because the contractor usually retains the primary responsibility for work safety under the contract—an undertaking that the government does not assume absent affirmative negligence. If the government has gone so far as to carry out safety inspections, the courts usually distinguish between its *right* to do so, which it usually has under the contract, and its *duty* to do so, which it usually does not have under prevailing state law. Such efforts are typically considered to be for the protection of the government's interests, such as to assure itself of the contractor's performance in the manner required by the contract.[25]

### *Discretionary Performance Exception*

Even if there is evidence of negligence, the discretionary function exception has been successfully interposed to insulate the United States from FTCA liability. In cases involving judgment such as the selection of even an incompetent contractor, the decision to delegate safety responsibilities to a contractor, the decision about what, if any, safety requirements to impose on a contractor, and the conduct of government employees in policing a contractor's compliance with safety requirements, the federal courts have been reluctant to find an agency relationship between the United States and the contractor or the contractor's employees.[26]

When it appears that the discretionary function exception does not apply because the violation of government safety standards or regulations, the claims investigator should consider whether the safety requirements were mandatory or advisory guidelines. The claims investigator also should consider whether any specific mandatory directives were imposed on federal employees, as opposed to the contractor, with respect to these requirements.[27]

### *The Nondelegable Duty Exception Imposing FTCA Liability on the United States*

The federal courts have recognized exceptions to the general rule that the government is not responsible for the torts of an independent contractor and its employees.[28] The exceptions currently include: (1) vicarious liability for the negligence of the independent contractor where the government had the duty to protect the claimant or his class from the particular harm suffered, (2) when the duty may not be delegated to an independent contractor, and (3) when an inherently dangerous activity is undertaken (in these cases, strict liability applies for negligently failing to take reasonable precautionary measures even though the independent contractor may also have been directly, affirmatively negligent). Taken together these exceptions amount to the *nondelegable duty doctrine*.[29] These exceptions have eroded the federal government's usual strong position in worksite injury cases.

Because the FTCA does not waive the federal government's immunity to strict liability, federal courts that have adopted the nondelegable duty doctrine typically rely on applying state law under the FTCA's private person standard of liability. This has been done in jurisdictions where state labor laws require safe places to work or impose health and safety standards. Some courts have declared such statutes to be a form of strict liability and thus inapplicable under the FTCA. Others have distinguished their application on the ground that the federal government was not *in charge* or *in control* of the premises even when they were government-owned facilities, and others have interpreted them to be a form of vicarious liability, also inapplicable under the FTCA.

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[24] Restatement (Second) of Torts, sec. 414.

[25] Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977); Jeffries v. United States, 477 F.2d 52 (9th Cir. 1973); Market Insurance Company v. United States, 415 F.2d 459 (5th Cir. 1969). *See also* Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); Grogan v. United States, 341 F.2d 39, 43 (6th Cir. 1965) about the distinction between the right and the duty to inspect a contractor's performance and safety practices.

[26] Fortney v. United States, 912 F.2d 722 (4th Cir. 1990); Gowdy, 412 F.2d at 525; Lipka v. United States, 249 F. Supp. 213 (N.D. N.Y. 1965), *aff'd on other grounds*, 369 F.2d 288 (2d Cir. 1966), *cert. denied*, 387 U.S. 935 (1967); Totten v. United States, 806 F.2d 698 (6th Cir. 1986); Shuman v. United States, 765 F.2d 283 (1st Cir. 1985); In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), *cert. denied* by Konizeski v. Livermore Labs, 108 S. Ct. 1076 (1988); In re Agent Orange Product Liability Litigation, 818 F.2d 187 (2d Cir. 1987); Tracor/MBA, Inc. v. United States, 933 F.2d 663 (8th Cir. 1991); and Pershing v. United States, 736 F. Supp. 132 (W.D. Tex. 1990).

[27] *Totten*, 806 F.2d at 698; *Shuman*, 765 F.2d 283 (1st Cir. 1985); United States v. Varig Airlines, 467 U.S. 797 (1984); Galvin v. Occupational Safety and Health Administration, 860 F.2d 181 (5th Cir. 1988); Gaubert v. United States, 111 S. Ct. 1267 (1991); and Berkovitz v. United States, 486 U.S. 531 (1988).

[28] 41 Am. Jur. 2d *Independent Contractors* §§ 24, 48 (1968). For a review of state law on the employer's lack of duty to contractor employees, *see* King v. Shelby Rural Electric Cooperative Corp. 502 S.W.2d 659 (Ky. 1973).

[29] This doctrine arises out of *Restatement (Second) of Torts*, chapter 15, topic 2, sections 416-29 (rules imposing liability on non-negligent employer for negligence of independent contractor). *See also* W. Prosser, *The Law of Torts* (4th ed. 1971); Keeton, Dobbs, Keeton & Owen, *The Law of Torts*, sec. 71, at 511 (5th ed. 1984).

The nondelegable duty doctrine has been more widely applied to the FTCA in jurisdictions where the *Restatement (Second) of Torts* has been adopted. The Department of Justice considers these instances a perversion of *Logue* and *Orleans* because the terms of the FTCA waiver of sovereign immunity should take precedence and preclude the application of a state law doctrine that is no more than a form of strict or vicarious liability. Theoretically, federal court decisions applying the nondelegable duty can be reconciled with the FTCA's requirement of proof of negligence by the United States because their version of the nondelegable duty theory requires an independent act of negligence by the United States (usually failure to ensure that safety precautions were taken). Nevertheless, where this doctrine has been applied, it shifts to the contractor's duty to provide a safe place to work for the contractor's employees to the United States. This can occur even though the United States does not have any liability under state law for its own negligence and under the terms of the contract it has reasonably entrusted the safe performance of the work to a contractor.

The nondelegable duty doctrine creates the legal fiction of enough federal supervision to convert a contractor or its employees into federal employees without being a federal agency. Although the United States Supreme Court and most of the lower federal courts have rejected the doctrine for those reasons,[30] the Third, Fifth, Ninth and Eleventh United States Circuit Courts of Appeals have embraced the doctrine in selected portions.[31] Their doing so was made easier by evidence of direct negligence by federal employees. Even in jurisdictions where the doctrine has been adopted and applied under the FTCA, there must be a factual finding of a particular harm or an inherently dangerous activity for which the federal government has a nondelegable duty to prevent harm or to protect others from harm.

### *State Workers' Compensation Schemes*

When the claimant has been a contractor employee, the United States has been successful in some jurisdictions in cloaking itself with the immunity of the state workers' compensation scheme in which the contractor has passed on the cost of state imposed worker's compensation premiums to the United States. Thus, to hold the United States liable would require double payment, which some state laws reject on policy grounds because the employer has the state imposed responsibilities for the safety of its employees, and thus, liability is limited according to the state workers' compensation scheme.[32] In other states, the federal courts have gone beyond this general policy to include the United States in the statutory workers' compensation scheme by giving it "statutory employer" status immunity. This has been successful in those jurisdictions where the owner of the property on which the work occurred or the general contractor who engaged independent contractors shared the immediate employer's statutory immunity from suit by virtue of payment of workers' compensation benefits to the injured employee. To take advantage of this defense, the work must be part of the government's regular business. Because the defense is purely a creature of state law, there is no consistency in its application even within the same federal circuits, only half of which have applied it to the United States in FTCA litigation.[33]

### *Liability Assessment Considerations*

Assuming there is evidence of negligence committed solely by a federal employee, the claim will be processed under the appropriate statute and chapter of *Army Regulation 27-20*. If there is evidence of negligence by both the United States and a contractor, claims officers must be familiar with the applicable law to assess whether there is joint and several liability and whether

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[30] Logue v. United States, 412 U.S. 521 (1973); Berkman v. United States, No. 91-3037 (4th Cir. 1992); Flynn v. United States, 631 F.2d 678 (10th Cir. 1980); Alexander v. United States, 605 F.2d 828 (5th Cir. 1979); Gibson v. United States, 567 F.2d 1237 (3rd Cir. 1977); Page v. United States, 350 F.2d 28 (10th Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); Jeffries v. United States, 477 F.2d 52 (9th Cir. 1973); Maltais v. United States, 546 F. Supp. 96 (N.D. N.Y. 1982), *aff'd*, 729 F.2d 1442 (2d Cir. 1983).

[31] McCall v. United States Dept. of Energy, 914 F.2d 191 (9th Cir. 1990); Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989); Toole v. United States, 588 F.2d 403 (3rd Cir. 1978); McGarry v. United States, 549 F.2d 587 (9th Cir. 1976), *cert. denied*, 434 U.S. 922 (1977); Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); and Thorne v. United States, 479 F.2d 804 (9th Cir. 1973). Recently, the United States Court of Appeals for the Ninth Circuit in effect overruled *Thorne* by holding the United States could not be held liable for the contractor's failure to take special precautions when engaged in an inherently dangerous activity although in dicta it stated the United States could be liable under section 414 of the *Restatement (Second) of Torts* if federal inspectors were aware that nonconductive shoes were not worn by contractor employees. *See* Yanez v. United States, 63 F.3d 870 (9th Cir. 1995).

[32] Littlefield v. United States, 927 F.2d 1099 (9th Cir. 1991) (Nevada law); Lathers v. Penguin Industries, Inc., 687 F.2d 69 (5th Cir. 1982) (Texas law); Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) (maritime law); Eustler v. United States, 376 F.2d 634 (10th Cir. 1967) (Utah law); Lipka v. United States, 249 F. Supp. 213 (N.D. N.Y. 1965) (New York law); *Page*, 350 F.2d at 28.

[33] Izard v. United States, 946 F.2d 1492 (10th Cir. 1991) (Oklahoma law); Wilcox v. United States, 910 F.2d 477 (8th Cir. 1990) (Missouri law); Pendley v. United States, 856 F.2d 699 (4th Cir. 1988) (Virginia law); Jones v. United States, 773 F.2d 1002 (9th Cir. 1985) (Nevada law); McCorkle v. United States, 737 F.2d 957 (11th Cir. 1984) (Georgia law); Griffin v. United States, 644 F.2d 846 (10th Cir. 1981) (Kansas law); Roelofs v. United States, 501 F.2d 87 (5th Cir. 1974), *cert. denied*, 423 U.S. 830 (1975) (Louisiana law).

the parties can be considered joint tortfeasors and whether the United States or the contractor has a right of contribution or indemnity. Under the FTCA, common law and state law where the claim arose controls the sharing of legal liability between various tortfeasors.

If the claim arose outside of the United States and the Military Claims Act does not apply, the United States will be liable only for its negligence on a proportionate basis for all claims occurring on or after 1 September 1995.[34] If the Foreign Claims Act does not apply, the liability of the United States is determined by the law of the place where the claim arose.[35]

In the absence of contractual indemnity, the common law permitted indemnity, or the shifting of the entire burden of liability from one defendant to another in limited situations such as where a defendant's negligence was passive or its liability purely vicarious. In essence, when one defendant's fault was far greater than another's, then the defendant whose fault was greater bore liability at common law.[36] The burden could not be shifted at common law, and the common law did not recognize the right of contribution among joint tortfeasors.[37] These common law principles were disposed of when many states judicially adopted the doctrine of joint and several liability in which one tortfeasor may be liable for all damages regardless of its level of fault.[38] Public policy supports joint and several liability where other tortfeasors are insolvent or immune from suit by the claimant (usually, the claimants immediate employer). Most states have moved away from the common law *all-or-nothing remedy* through the judicial recognition of some form of contribution or the legislative adoption of some version of the Uniform Contribution Among Joint Tortfeasors Act, which permits an equitable apportionment of damages among culpable tortfeasors.

If the facts support the conclusion that the tortfeasors are successive, not jointly liable, it may be possible to sever and apportion the damages and to settle the claim independent of the contractor.[39] Where the tortfeasors are jointly liable, damages are divided under most state schemes either according to the proportion of fault (majority view)[40] or strict pro rata assessment (minority view) regardless of the proportion of fault. If the tortfeasors are jointly liable, some states permit nonsettling defendants to take a credit or pro tanto reduction for amounts paid by other settling or adjudged defendants.[41] Many jurisdictions calculate this in a way favorable to the plaintiffs by first deducting the settlement amount before reducing for the proportion of the plaintiff's negligence, if any.[42] Many contribution statutes preclude contribution from a defendant who has already settled in good faith. Conversely, they also limit the rights of settling defendants to receive contribution from other parties. One common feature of such statutes is that no right of contribution exists unless the settling defendant secures a release of the other party from whom contribution is sought.[43]

In cases where another tortfeasor has been adjudged or settled prior to the claimant presenting a claim or settling with the United States, it will be important to review the judgment, the stipulation entered before judgment, or the settlement documents to determine whether the United States has already been released in fact or as a matter of law.[44] If the United States has not been released, then consider the amount of the settlement, whether it can be used to reduce the potential value of the claim against the United States, and whether the potential exists for the United States to assert or to be the target of a claim for contribution.

There will be situations and jurisdictions where another tortfeasor will be immune from suit (for example, a state or the

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[34] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 3-8a(3)(d) (1 Aug. 1995) [hereinafter AR 27-20].

[35] *Id.* para. 10-10b.

[36] Prosser & Keeton, *The Law of Torts*, at 314-44 (5th ed. 1984).

[37] *See, e.g.*, United States v. Yale-New Haven Hospital, 727 F. Supp. 390 (D. Conn. 1990); Boys and Girls Clubs of Chicago v. United States, 855 F. Supp. 975 (N.D. Ill. 1994) (Indiana law).

[38] *See* Coney v. J.L.G. Industries, 97 Ill.2d 104, 454 N.E.2d 197 (1983). The Department of Justice position is that the imposition of the doctrine is a form of punitive damages (*See, e.g.*, Barron v. United States, 654 F.2d 644 (9th Cir. 1981)) and is not considered viable in light of *Molzof v. United States*, 112 S. Ct. 711 (1992), in which the Court held the United States could be liable for punitive damages if recognized by the common law in the prevailing state.

[39] *Yale-New Haven Hospital*, 727 F. Supp. at 390.

[40] *See* Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883 (Colo. 1983) (for a good compendium).

[41] Whatley v. Armstrong World Industries, Inc., 861 F.2d 837 (5th Cir. 1988), *citing* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Hunter v. Sperry Top Sider, Inc., 630 F. Supp. 1244 (E.D. Mich. 1986).

[42] Scott v. Cascade Structures, 673 P.2d 179 (Wash. 1983).

[43] *See* Uniform Contribution Among Joint Tortfeasors Act, § (2)(d); Restatement (Second) of Torts, sec. 886A, cmt. f; Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985) (Louisiana law); Rose v. Associated Anesthesiologists, 501 F.2d 806 (D.C. Cir. 1974) (D.C. law).

[44] Barrett v. United States v. State of New York, 668 F. Supp. 339 (S.D. N.Y. 1987); United States v. Texas, 143 U.S. 621 (1892); Hill v. United States v. State of Tennessee, 453 F.2d 838 (6th Cir. 1972); Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979)..

plaintiff's employer). Therefore, indemnity or contribution will not be available to the United States unless expressly permitted by the contract.[45] The contract should be carefully reviewed to ascertain whether it contains language identical to or similar to that employed in *United States v. Seckinger*.[46] Such language[47] creates a contractual cause of action in indemnity or contribution, regardless of state law regarding joint tortfeasors or even the contractor's immunity under the state worker's compensation statute should the claimant be a contractor employee. Federal common law will be followed because the contract is formed under the authority of federal law, the relationship is federal in character, and there is a need for the uniform treatment of federal contractors.[48] The so-called "Seckinger Clause" in federal contracts has been interpreted as permitting a form of proportional fault in which the United States is liable only for its own negligence, and the contractor shall indemnify the United States on the basis of comparative negligence when the claimant has been injured as the result of the negligence of both. Therefore, it is imperative that in any claim arising out of a worksite injury or death that the contract be promptly obtained and reviewed, and that the claims investigation include an assessment of whether the contractor employees met the applicable standards of performance.[49]

### *Notice Procedures*

Regardless of whether the contractor may be primarily liable, the claims officer should send written notification of the claim to the contractor and request that the contractor honor its contractual obligation to the United States or accept its share of joint liability. The claims officer should also provide the contractor a copy of the claim, inform the contractor of the factual and legal basis for the request for indemnity or contribution, and advise the contractor of the limited period in which the United States can pursue such actions.[50] The claims officer should also inform the claimant of the identity of the contractor and its insurer and provide a copy of the contractor notification and the contract.

If the contractor appears to be primarily liable, the defense of the claim should be tendered to the contractor or its insurer in writing. The claimant should also be encouraged to sue or pursue a claim against the contractor under state law. If it appears the United States is primarily liable, consideration should be given to a direct settlement with the claimant, unless the contract specifies that the contractor is responsible for damages that occur as a result of fault or negligence without regard to whether the tortfeasor is or is not the United States. The claims officer must review the contract to ascertain whether it provides for the United States to be held harmless and for the contractor to assume liability. In those circumstances, the claims officer should tender the defense of the claim to the contractor, requesting that the contractor assume the burden of settling the claim. If that fails, the contracting officer can be asked to withhold funds due the contractor under the terms of the contract. It is not necessary that a tort claim actually be paid under *Army Regulation 27-20* before funds can be withheld. If withholding is not appropriate or permissible, the claim will be processed under the applicable tort claims statute and *Army Regulation 27-20*.

If the United States shares in the liability and the contract does not provide for the contractor holding harmless the United States, the claims officer must review state law to evaluate whether pursuit of the contractor is appropriate although that may still be possible if the contract contains the previously discussed "Seckinger Clause."

If the United States is solely liable, there is no reason to pursue the contractor unless the contract expressly provides that the contractor will hold the United States harmless regardless of who committed the negligence. If the United States has paid the contractor for worker's compensation or other insurance premiums and the claimant is a contractor employee, the United States also may be able to deduct such insurance payments from any tort claim settlement.

Generating a dialogue between the multiple parties is the key to obtaining indemnity or contribution from the contractor. The claims officer should offer to cooperate with the contractor in the investigation of the claim. Information that is discoverable can be shared on a qualitative basis, that is, with a view toward obtaining the contractor's participation in the settlement. Where the United States is the primary tortfeasor, the claimant and the contractor are usually content to negotiate through the claims of-

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[45] United States v. Texas, 143 U.S. 621 (1982); Barret, *supra*; Hill v. United States v. State of Tennessee, 453 F.3d 838 (6th Cir. 1972), Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979).

[46] 90 S. Ct. 880 (1970).

[47] Contractor "shall be responsible for all damages to persons or property that occurs as a result of his fault or negligence in connection with the prosecution of the work." *Id.*

[48] Crocker-Citizens National Bank v. United States, 320 F. Supp. 673 (E.D. Cal. 1970).

[49] *See, e.g.*, Standards of the Occupational Health and Safety Administration (29 C.F.R.); *United States Army Corps of Engineers Manual 385-1-1*; American National Standards Committee.

[50] 28 U.S.C. § 2415 (1995).

[51] Barrett v. United States v. State of New York, 668 F. Supp. 339 (S.D. N.Y. 1987), where the United States was permitted to implead the State of New York even though the injured party had released the New York and could not bring a direct action.

ficer. If the contractor is willing to allow the claims officer to negotiate its interest, that is preferred, provided there is agreement on the respective shares of liability and offers, close communication between the two, and the contractor is kept abreast of the negotiations. Such actions will help maximize the amount or share the contractor is willing to contribute to a settlement. If a multiple party settlement cannot be reached and it is in the best interest of the United States to reach its own compromise settlement, particular attention must be paid to the scope of the language in the settlement agreement to ensure it clearly expresses the intent of the parties to release only the United States, or all tortfeasors, and to preserve whatever right of contribution the United States may have under state law.[51]

There will also be situations when the contractor will file a claim against the United States seeking indemnity or contribution. Such claims are valid if permitted by state law because the liability of the United States is that of a private person. However, the claimant must receive a final judgment and then meet the administrative filing requirements of the FTCA.[52] The United States would be able to assert the same defenses against the contractor as it could against the injured party such as immunity under a state worker's compensation statute, the Federal Employee's Compensation Act, or the incident to service doctrine.[53]

*Conclusion*

In summary, the federal government usually does not have liability for the negligence of contractors under the FTCA. For liability to attach to the United States, there must be sufficient control of the contractor employee to create a master and servant relationship with the United States. Therefore, the factual investigation of worksite injury cases must address the control issue if there is no evidence of affirmative negligence by the United States. Claims officers should also research state law to ascertain whether, and under what circumstances, the nondelegable duty doctrine has been applied either in private party litigation or under the FTCA. If there is evidence of shared liability with the contractor, the contract and state law must be reviewed to assess possible defenses for the United States, and whether and on what grounds the contractor may be pursued, either directly by the claimant, or for indemnity or contribution by the United States. Where that is appropriate, prompt and proper notification of the various parties is essential to create the basis for a possible multiparty settlement. Mr. Wilson.

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[52] United States v. Yellow Cab Co., 340 U.S. 543 (1951); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Williams v. United States, 352 F.2d 477 (5th Cir. 1965); Johns-Manville Sales Corp. v. United States, 690 F.2d 721 (9th Cir. 1982).

[53] Colombo v. Johns-Manville Corp. v. United States, 601 F. Supp. 1119 (E.D. Pa. 1984); Armstrong v. A.C. & S., Inc., 649 F. Supp. 161 (W.D. Wash. 1986); Marisposa v. United States, 798 F.2d 364 (9th Cir. 1986).

## *Affirmative Claims Notes*

### Update on Property Damage Recovery Deposits

On 10 February 1996, Congress passed and the President signed The National Defense Authorization Act for Fiscal Year 1996. Among its many provisions is an amendment to Title 10, United States Code. A new provision, § 2782, Damage to real property: Disposition of Amounts Recovered, provides that "amounts recovered on behalf of the United States for damage to real property under the jurisdiction of the Secretary of a military department or, . . . the Secretary of Defense shall be credited to the account available for the repair or replacement of the real property at the time of recovery."

This amendment should greatly enhance affirmative claims recovery efforts for damage to real property in that any recovered funds go into the installation's local account. Before this amendment, recovery of such funds were deposited into the Miscellaneous Receipts Account of the General Treasury. Ms. Jedlinski.

### Affirmative Claims Statistics for Fiscal Year 1995

In appropriate cases, Army claims offices and services worldwide pursue claims to recover the costs of medical care provided to beneficiaries and the cost to repair or replace damaged or lost government property. In Fiscal Year 1995, claims offices and services collected $12,094,786 in medical care claims, of which $7,041,601 was deposited into the operations and maintenance accounts of military treatment facilities (MTFs). They also collected $911,714 in property damage claims.

With the agreement of local MTFs, judge advocate offices can use part of their recoveries to fund positions for medical claims clerks and recovery attorneys. With assistance from other claims office personnel, these individuals would pursue claims primarily for medical care provided at the local MTF. Currently, twenty-one judge advocate offices have funded from their affirmative claims recoveries positions for medical claims clerks. However, only three offices have MTF-funded positions for recovery attorneys.

The following charts list the number and dollar amount of medical care and property damage claims each claims office or service asserted and recovered in fiscal year 1995. Major Park.

### Medical Care Recovery Statistics for Fiscal Year 1995

| SJA CLAIMS OFFICE | #AST | $AST | #REC | $REC | $ to |
|---|---|---|---|---|---|
| Madigan AMC | 312 | 545,266 | 180 | 235,561 | 213,020 |
| Presidio Monterey | 101 | 1,061,387 | 94 | 196,937 | 54,674 |
| Fort Irwin | 36 | 208,768 | 29 | 79,092 | 41,608 |
| Fort Huachuca | 157 | 223,549 | 98 | 316,306 | 250,103 |
| Fort Carson | 722 | 567,974 | 762 | 399,777 | 266,678 |
| Fitzsimons AMC | 12 | 20,015 | 12 | 13,324 | 6,485 |
| White Sands | 29 | 63,731 | 26 | 33,623 | 29,562 |
| Fort Riley | 475 | 1,488,321 | 281 | 226,068 | 193,387 |
| Fort Sill | 725 | 910,949 | 633 | 531,379 | 382,420 |
| Fort Bliss | 288 | 794,661 | 260 | 329,811 | 184,709 |
| Fort Hood | 871 | 1,115,236 | 879 | 963,387 | 640,487 |
| Brooke AMC | 211 | 256,799 | 418 | 597,683 | 412,004 |
| Fort Polk | 279 | 191,669 | 201 | 500,177 | 107,498 |
| Fort Leonard Wood | 60 | 149,405 | 62 | 121,081 | 77,629 |
| Fort Leavenworth | 158 | 963,455 | 80 | 261,423 | 39,217 |
| Fort McCoy | 4 | 9,720 | 0 | 0 | 0 |
| Fort Ben Harrison | 1 | 3,335 | 7 | 28,621 | 3,335 |
| Fort Knox | 331 | 906,597 | 230 | 975,569 | 446,400 |
| Fort Campbell | 783 | 1,250,168 | 719 | 573,854 | 472,642 |
| Redstone Arsenal | 147 | 266,702 | 109 | $61,552 | $40,869 |
| Fort McClellan | 66 | 94,175 | 80 | 137,217 | 60,470 |
| Fort Rucker | 213 | 422,787 | 114 | 132,915 | 46,468 |
| Fort Benning | 323 | 400,646 | 271 | 368,647 | 257,406 |
| Fort Stewart | 285 | 499,337 | 259 | 312,523 | 118,566 |
| Fort McPherson | 27 | 68,234 | 31 | 34,535 | 5,538 |
| Gordon/EAMC | 416 | 668,588 | 336 | 299,311 | 260,236 |
| Fort Jackson | 390 | 332,826 | 328 | 261,669 | 169,264 |
| Fort Bragg | 1,082 | 1,035,383 | 788 | 624,482 | 355,505 |
| Fort Lee | 184 | 291,253 | 159 | 263,434 | 148,906 |
| Fort Eustis | 308 | 308,308 | 282 | 296,787 | 189,218 |
| Fort Belvoir | 204 | 128,316 | 160 | 86,983 | 60,383 |
| MDW (Fort Myer) | 18 | 15,106 | 61 | 59,099 | 41,898 |
| Walter Reed AMC | 125 | 394,799 | 76 | 144,266 | 144,266 |
| Fort Meade | 198 | 209,399 | 185 | 217,287 | 138,779 |
| Carlisle Barracks | 1 | 1,098 | 2 | 1,329 | 1,329 |
| Aberdeen Proving | 36 | 17,773 | 30 | 49,709 | 12,991 |
| Fort Dix | 5 | 26,703 | 8 | 33,081 | 0 |
| Fort Monmouth | 61 | 255,548 | 22 | 46,172 | 41,803 |
| Fort Hamilton | 5 | 5,868 | 2 | 142,117 | 0 |
| West Point | 175 | 391,488 | 86 | 216,481 | 142,189 |
| Fort Devens | 0 | 0 | 5 | 7,603 | 0 |
| Fort Drum | 353 | 286,923 | 172 | 152,356 | 75,318 |
| Fort Wainwright | 50 | 41,060 | 27 | 22,421 | 22,421 |
| Bayonne | 0 | 0 | 0 | 0 | 0 |
| Fort Buchanan | 1 | 196 | 1 | 1,331 | 1,331 |
| USACS-EUR | 231 | 1,225,462 | 301 | 1,434,320 | 643,678 |
| Fort Clayton | 1 | 1,000 | 0 | 0 | 0 |
| Brussels | 11 | 4,316 | 13 | 38,381 | 23,377 |
| The Netherlands | 2 | 200 | 1 | 100 | 100 |
| USAFCS Korea | 28 | 169,420 | 29 | 80,932 | 80,932 |
| USA Hawaii | 163 | 272,867 | 170 | 133,034 | 133,034 |
| USA Japan | 12 | 51,993 | 10 | 51,039 | 3,468 |
| TOTALS | 10,676 | $18,618,779 | 9,089 | $12,094,786 | $7,041,601 |

## Property Damage Recovery Statistics for Fiscal Year 1995

| SJA CLAIMS OFFICE | #AST | $AST | #REC | $REC |
|---|---|---|---|---|
| Fort Lewis | 6 | 9,120 | 10 | 8,043 |
| Madigan AMC | 1 | 1,919 | 1 | 1,079 |
| Presidio Monterey | 5 | 6,583 | 5 | 6,583 |
| Fort Irwin | 3 | 4,412 | 2 | 2,206 |
| Fort Huachuca | 3 | 42,640 | 0 | 0 |
| Fort Carson | 6 | 162,446 | 8 | 4,050 |
| Fitzsimons AMC | 0 | 0 | 0 | 0 |
| Rocky Mountain Arsenal | 6 | 7,497 | 6 | 5,761 |
| White Sands | 0 | 0 | 0 | 0 |
| Fort Riley | 23 | 24,039 | 21 | 26,051 |
| Fort Sill | 18 | 16,585 | 13 | 38,354 |
| Fort Bliss | 6 | 1,028 | 10 | 2,893 |
| Fort Hood | 11 | 22,166 | 11 | 22,816 |
| Fort Sam Houston | 2 | 1,053 | 1 | 150 |
| Corpus Christi | 0 | 0 | 0 | 0 |
| Fort Polk | 6 | 4,257 | 6 | 30,145 |
| Fort Leonard Wood | 2 | 44,433 | 2 | 18,933 |
| Fort Leavenworth | 5 | 44,610 | 4 | 7,080 |
| Rock Island | 9 | 2,462 | 6 | 2,048 |
| Fort McCoy | 4 | 10,664 | 5 | 12,107 |
| Fort Ben Harrison | 0 | 0 | 2 | 12,550 |
| Tank-Auto Cmd | 0 | 0 | 0 | 0 |
| Fort Knox | 7 | 12,534 | 7 | 31,308 |
| Fort Campbell | 12 | 141,950 | 25 | 2,927 |
| Redstone Arsenal | 17 | 11,274 | 7 | 3,801 |
| Fort McClellan | 0 | 0 | 0 | 0 |
| Fort Rucker | 1 | 4,536 | 0 | 0 |
| Fort Benning | 19 | 92,320 | 13 | 15,693 |
| Fort Stewart | 1 | 1,582 | 1 | 1,582 |
| Fort McPherson | 0 | 0 | 0 | 0 |
| Fort Gordon | 1 | 467 | 0 | 0 |

| SJA CLAIMS OFFICE | #AST | $AST | #REC | $REC |
|---|---|---|---|---|
| Fort Jackson | 13 | 13,590 | 7 | 8,300 |
| Fort Bragg | 4 | 4,838 | 1 | 2,330 |
| Fort Lee | 3 | 5,675 | 2 | 3,175 |
| Fort Eustis | 4 | 737 | 5 | 1,436 |
| Fort Belvoir | 3 | 8,900 | 3 | 5,814 |
| MDW (Fort Myer) | 4 | 6,372 | 8 | 11,719 |
| Walter Reed AMC | 0 | 0 | 0 | 0 |
| Fort Meade | 7 | 1,669 | 4 | 1,486 |
| Fort Detrick | 8 | 5,768 | 6 | 1,873 |
| Fort Ritchie | 3 | 1,967 | 4 | 2,381 |
| Carlisle Barracks | 4 | 28,459 | 3 | 26,158 |
| Aberdeen Proving | 0 | 0 | 0 | 0 |
| Fort Dix | 1 | 100 | 1 | 100 |
| Fort Monmouth | 0 | 0 | 0 | 0 |
| Fort Hamilton | 3 | 674 | 5 | 3,415 |
| West Point | 11 | 4,917 | 10 | 4,842 |
| Watervliet Arsenal | 0 | 0 | 0 | 0 |
| Fort Devens | 0 | 0 | 0 | 0 |
| Fort Drum | 8 | 44,500 | 3 | 2,024 |
| Fort Wainwright | 0 | 0 | 0 | 0 |
| Bayonne | 0 | 0 | 0 | 0 |
| Fort Buchanan | 3 | 3,425 | 3 | 3,425 |
| Picatinny | 2 | 7,077 | 2 | 7,077 |
| USACS-EUR | 209 | 535,556 | 205 | 460,173 |
| Fort Clayton | 0 | 0 | 0 | 0 |
| Mons (SHAPE) | 0 | 0 | 0 | 0 |
| USAFCS Korea | 147 | 131,382 | 126 | 97,115 |
| USA Hawaii | 0 | 0 | 2 | 5,632 |
| USA Japan | 21 | 15,057 | 16 | 4,662 |
| 10ASG Okinawa | 5 | 2,417 | 5 | 2,417 |
| TOTALS | 637 | $1,493,657 | 587 | $911,714 |

*Standards of Conduct Office, OTJAG*

# The Tale of an Attorney's Scurrilous Personal Notes

*Army Rule 1.4(a)*
*(Communication: Promptly Complying with Client's Reasonable Requests for Information)*

*Army Rule 1.16(d) (Surrendering Papers to a Client when Terminating Representation*

*Army Rule 1.7 (Comment)*
*(Conflict of Interest: Loyalty to a Client)*

*Army Rule 8.4(c)*
*(No Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation)*

*An attorney cannot withhold or conceal case information from a client. An attorney must comply with a client's reasonable requests for information. An attorney must surrender to a client all information that relates to a lient's case or to the attorney's representation. However, an attorney may normally withhold purely personal memoranda made for his or her own protection because such memoranda involve the personal and professional relationship with a client not a client's legal matters*

An occasionally angry and combative client mailed a request for copies of "all papers" in his file to his Army attorney, Captain Coarse. The client's official file contained some of Captain Coarse's personal handwritten notes made during hot phone calls with the client. Captain Coarse's notes were lewd and crude. Captain Coarse and his supervisor wanted an informal advisory opinion whether they really had to give copies of everything to the client, especially Captain Coarse's raw and earthy memos. Would it be ethical, they asked, to withhold Captain Coarse's expletives and impolite descriptions from the client?

## *An Attorney's Loyalty Requires Honestly Communicating Information*

Loyalty is an essential element in the lawyer's relationship with a client."[1] "Lawyers must promptly comply with their clients' reasonable requests for information."[2] Sometimes information can be withheld from a client when, for example, it is classified or when a client might act imprudently if given the information.[3] The language permitting limited withholding is entirely new to the *Army Rules*[4] and their source, the *American Bar Association Model Rules*.[5] Withholding information from a client never was permitted under prior American Bar Association ethics standards. However, keeping information from a client could be interpreted as dishonesty, fraud, deceit, or misrepresentation and therefore violate *Army Rule 8.4 (Misconduct).*

## *Disclosing Information About the Attorney's Representation*

"A lawyer must disclose [to a present or former client] all information which may bear on the quality of his or her representation."[6] A California case held that the state "work product" statute never was intended to shield an attorney's work product *from the lawyer's own client* when the client sues the lawyer. The California court had "strong ethical public policy considerations for concluding that the client has an absolute right of access to all work product generated by his attorney in representing the client's interests." The court stated that a "title theory" would be an improper basis for denying discovery of an attorney's work product.[7]

"A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and

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

[2] *Id.*, Rule 1.4 (Communication).

[3] *Id.*, Rule 1.4, Comment.

[4] *Id.*

[5] MODEL RULES OF PROFESSIONAL CONDUCT. (1983).

[6] Elaine Reich, *Beg Your Pardon,* ABA JOURNAL, at 120 (Oct. 89).

[7] Platt v. Superior Court of San Diego County, 214 Cal. App. 3 (4th App. Dist. 1989).

which the client may reasonably expect will be preserved by the lawyer."[8] If the case is over or the lawyer has been fired, then, under *Army Rule 1.16(d)*, he or she must promptly surrender all papers and property to which the client is entitled.[9] *Army Rule 1.16(d)*, although clear, does not offer clear examples to guide lawyers.

*Massachusetts*

At least one state's rule attempts to explain a client's rights. Massachusett's *Disciplinary Rule 2-110(A)(4)*, for example, covers routine issues but does not get to the issue of an attorney's insulting memoranda:

> An attorney must make available to a former client, within a reasonable time following the client's request for his or her file, the following:
>
> (a) All papers, documents, and other materials the client supplied to the attorney. The attorney may at his or her own expense retain copies of any such materials.
>
> (b) All pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the attorney's actual cost for these materials, unless the client has already paid for such materials.
>
> (c) All investigatory or discovery documents for which the client has paid the attorney's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The attorney may at his or her own expense retain copies of any such materials.
>
> (d) If the attorney and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the attorney's work product (as defined in paragraph (f) below) for which the client has paid.[10]

*Restatement (Third) of the Law Governing Lawyers*

The American Law Institute (ALI) has tentatively approved the draft *Restatement (Third) of the Law Governing Lawyers* which states:

> §58. Documents Relating to a Representation
>
> (1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.
>
> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist not to do so.
>
> (3) Unless the client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client, or former client, at an appropriate time, and in any event promptly after the representation ends, originals and copies of documents possessed by the lawyer relating to the representation.
>
> (4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 55(1) [concerning liens].[11]

*Attorneys May Keep Personal Files*

Attorneys routinely organize files and create memoranda, especially for their own protection.[12] Such memoranda involve the attorney-client relationship but not the client's legal matters.

*No Ethical Requirement to Deliver Purely Personal Notes to a Client*

Ethically, Captain Coarse did *not* have to give up his purely personal notes to his client. Those personal notes, no matter how crude, documented the attorney-client relationship but not any of

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[8] ABA Informal Op. 1384 (1977).

[9] AR 27-26, *supra* note 1, Rule 1.16 (Declining or Terminating Representation) *Army Rule 1.16(d)*'s provision that a lawyer may retain papers relating to a client to the extent permitted by law invokes the common law retaining lien for unpaid legal fees and has no application to Army lawyers.

[10] ANNOT. LAW OF MASS., Sup. Jud. Ct. Rule 3:07, DR 2-110(A)(4) (Lawyers' Coop. 1994).

[11] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §58 (Tentative Draft Nos. 2-7, 1989-94).

[12] Organize files to reflect the flow of activities. Every shred of documentation, including informal notes on scraps of paper, may be important. Ineffective Counsel Assistance, 30 AM. JUR. TRIALS 668 (1983).

his client's legal matters. Captain Coarse's notes were not part of his work product created on the client's behalf. The personal notes had not been given to him by the client. They had not been served on him by any other party. They were not part of any court's pleadings or papers, and they were not part of any investigation conducted on the client's behalf.

*Different Result Involving Litigation*

The outcome would be different had Captain Coarse been a party to litigation alleging misconduct or incompetence. Then, *all* memoranda would be discoverable even when made for the attorney's own use and protection. In litigation, nearly everything is discoverable that *might* lead to relevant evidence. However, Captain Coarse was not himself a party to the litigation involving his client. Therefore, because Captain Coarse was not at that time obligated to comply with discovery rules or a court order to produce documents, he could ethically withhold his personal memoranda from his client.

*An Attorney's Personal Notes Do Not Belong in a Client's Official File*

The best advice is to avoid Captain Coarse's situation from the start. Attorneys should not place raw, personal notes in a client's official file. If personal notes do get into a client's official file, they should be removed as part of routine file maintenance.

*Communicate Professionally*

It never hurts to send a client a formal letter summarizing phone conversations and advice—especially when the client either misunderstands or refuses to accept legal counsel. An attorney can add an extra, professional touch by immediately transcribing rough, handwritten notes and mailing them to the client in a letter. However, an attorney is only human, and should take a cooling off period when he or she becomes angered by something the client said. Settle down before writing that letter! Mr. Eveland.

# CLE News

## 1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

## 2. TJAGSA CLE Course Schedule

**1996**

**July 1996**

| | |
|---|---|
| 1-3 July: | Professional Recruiting Training Seminar |
| 1-3 July: | 27th Methods of Instruction Course (5F-F70). |
| 8-12 July: | 7th Legal Administrators' Course (7A-550A1). |
| 8 July-13 September: | 140th Basic Course (5-27-C20). |
| 22-26 July: | Fiscal Law Off-Site (Maxwell AFB) (5F-12A). |
| 24-26 July: | Career Services Directors Conference. |
| 29 July-9 August: | 137th Contract Attorneys' Course (5F-F10). |
| 29 July-8 May 1997: | 45th Graduate Course (5-27-C22). |
| 30 July-2 August: | 2d Military Justice Managers' Course (5F-F31). |

**August 1996**

| | |
|---|---|
| 12-16 August: | 14th Federal Litigation Course (5F-F29). |
| 12-16 August: | 7th Senior Legal NCO Management Course (512-71D/40/50). |
| 19-23 August: | 137th Senior Officers' Legal Orientation Course (5F-F1). |
| 19-23 August: | 63d Law of War Workshop (5F-F42). |
| 26-30 August: | 25th Operational Law Seminar (5F-F47). |

**September 1996**

| | |
|---|---|
| 4-6 September: | USAREUR Legal Assistance CLE (5F-F23E). |
| 9-11 September: | 2d Procurement Fraud Course (5F-F101). |
| 9-13 September: | USAREUR Administrative Law CLE (5F-F24E). |
| 16-27 September: | 6th Criminal Law Advocacy Course (5F-F34). |

**3. Civilian Sponsored CLE Courses**

**1996**

**June 1996**

| | |
|---|---|
| 6 & 7, UT: | 6th Annual Conference on State and Federal Appeals, Austin, TX |

**July 1996**

| | |
|---|---|
| 21-26, APA: | 31st Annual Seminar/Workshop New Orleans, LA |

For further information on civilian courses, please contact the institution offering the course. Addresses of sources of CLE courses are as follows:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa,AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

ALIABA: American Law Institute-
American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

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

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744 (800) 521-8662.

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King
Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227.

LSU: Louisiana State University
Center of Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482 (612) 644-0323
in (MN and AK).

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

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

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

PLI: Practising Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

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

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

**4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates**

| Jurisdiction | Reporting Month |
|---|---|
| Alabama** | 31 December annually |
| Arizona | 15 September 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 | 30 days after program |
| Kentucky | 30 June annually |
| Louisiana** | 31 January annually |
| Michigan | 31 March annually |
| Minnesota | 30 August triennially |
| Mississippi** | 1 August annually |
| Missouri | 31 July annually |

| Jurisdiction | Reporting Month |
|---|---|
| Montana | 1 March annually |
| Nevada | 1 March annually |
| New Hampshire** | 1 August annually |
| New Mexico | prior to 1 April annually |
| 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** | 30 days after program |
| Rhode Island | 30 June annually |
| South Carolina** | 15 January annually |
| Tennessee* | 1 March annually |
| Texas | 31 December annually |
| Utah | End of two year compliance period |
| Vermont | 15 July biennially |
| Virginia | 30 June annually |
| Washington | 31 January triennially |
| West Virginia | 31 July annually |
| Wisconsin* | 1 February annually |
| Wyoming | 30 January annually |

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer.*

# 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 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, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

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. These publications are for government use only.

### Contract Law

| | |
|---|---|
| AD A301096 | Government Contract Law Deskbook, vol.1, JA-501-1-95 (631 pgs). |
| AD A301095 | Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 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 Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).

AD B164534 Notarial Guide, JA-268-92 (136 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A297426 Wills Guide, JA-262-95 (517 pgs).

AD A268007 Family Law Guide, JA 263-93 (589 pgs).

AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A289411 Tax Information Series, JA 269-95 (134 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A275507 Air Force All States Income Tax Guide, April 1995.

**Administrative and Civil Law**

AD A285724 Federal Tort Claims Act, JA 241-94 (156 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A298443 Defensive Federal Litigation, JA-200-95 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A298059 Government Information Practices, JA-235-95 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-92 (45 pgs).

**Labor Law**

AD A303539 The Law of Federal Employment, JA-210-96 (312 pgs).

AD A291106 The Law of Federal Labor-Management Relations, JA-211-94 (430 pgs).

**Developments, Doctrine, and Literature**

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

**Criminal Law**

*AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

*AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

*AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

**International and Operational Law**

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

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

**The following United States Army Criminal Investigation Division Command publication also is available through DTIC:**

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

*Indicates new publication or revised edition.

**2. Regulations and Pamphlets**

a. *The following provides information on how to obtain* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

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.

b. 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 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.

c. 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.**

*(1)* Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

*(2)* 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.

*(3)* Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield,

VA 22161. You may reach this office at (703) 487-4684.

(4) Air Force, Navy, 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, Maryland 21220-2896. You may reach this office by telephone at (410) 671-4335.

**3. The Legal Automation Army-Wide Systems Bulletin Board Service**

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic online information service (often referred to as a BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS Online Information Service, 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) Access to the LAAWS On-line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 134.11.74.3 or Domain Names laawsbbs@otjag.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D),

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps,

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues,

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: OIS Sysop
9016 Black Rd., Ste 102
Fort Belvoir, VA 22060-6208

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud (9600 or more recommended).

Novelle LAN setup: Server = LAAWSBBS (Available in NCR only)

TELNET setup: Host = 134.11.74.3 (PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 134.11.74.3

Host Name = laawsbbs@otjag.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

*(1)* From the Main (Top) menu, choose"L" for File Libraries. Press Enter.

*(2)* Choose "S" to select a library. Hit Enter

*(3)* Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

*(4)* Choose "F" to find the file you are looking for. Press Enter.

*(5)* Choose "F" to sort by file name. Press Enter.

*(6)* Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

*(7)* Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

*(8)* Once your file is highlighted, press Control and D together to download the highlighted file.

*(9)* You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

*(10)* The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

*(11)* Once you have completed all the necessary steps to down load, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An X should appear.

(h) Click on the "List Files" button.

(i) When the list of file appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(m) From here your computer takes over.

(n) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress , or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. 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 or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

### 4. 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 | May 1996 | A Listing of Legal Assistance Resources, May 1996. |
| ALLSTATE.ZIP | January 1996 | 1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995. |
| 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. |
| BULLETIN.ZIP | January 1996 | 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. |
| CHILDSPT.ASC | February 1996 | A Guide to Child Support Enforcement Against Military Personnel, February 1996. |
| CHILDSPT.WP5 | February 1996 | A Guide to Child Support Enforcement Against Military Personnel, February 1996. |
| DEPLOY.EXE | March 1995 | Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file. |
| FTCA.ZIP | January 1996 | Federal Tort Claims Act, August 1994. |
| FOIA1.ZIP | January 1996 | Freedom of Information Act Guide and Privacy Act Overview, September 1995. |
| FOIA.2.ZIP | January 1996 | Freedom of Information Act Guide and Privacy Act Overview, September 1995. |
| 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. |
| JA200.ZIP | January 1996 | Defensive Federal Litigation August 1995. |
| JA210DOC.ZIP | May 1996 | Law of Federal Employment, May 1996. |
| JA211DOC.ZIP | May 1996 | Law of Federal Labor-Management Relations, May 1996. |
| JA231.ZIP | January 1996 | Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text. |
| JA234.ZIP | January 1996 | Environmental Law Deskbook, Volumes I and II, September 1995. |
| JA235.ZIP | January 1996 | Government Information Practices Federal Tort Claims Act, August 1995. |
| JA241.ZIP | January 1996 | Federal Tort Claims Act, August 1994. |
| JA260.ZIP | January 1996 | Soldiers' & Sailors' Civil Relief Act, January 1996. |

| NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| JA261.ZIP | October 1993 | Legal Assistance Real Property Guide, March 1993. |
| JA262.ZIP | January 1996 | Legal Assistance Wills Guide, June 1995. |
| JA265A.ZIP | January 1996 | Legal Assistance Consumer Law Guide—Part I, June 1994. |
| JA265B.ZIP | January 1996 | Legal Assistance Consumer Law Guide—Part II, June 1994. |
| JA267.ZIP | January 1996 | Uniform Services World wide Legal Assistance Office Directory, February 1996. |
| JA268.ZIP | January 1996 | Legal Assistance Notarial Guide, April 1994. |
| JA271.ZIP | January 1996 | Legal Assistance Office Administration Guide, May 1994. |
| JA272.ZIP | January 1996 | Legal Assistance Deployment Guide, February 1994. |
| JA274.ZIP | March 1992 | Uniformed Services Former Spouses Protection Act Outline and References, November 1992. |
| JA275.ZIP | August 1993 | Model Tax Assistance Program, August 1993. |
| JA276.ZIP | January 1996 | Preventive Law Series, December 1992. |
| JA281.ZIP | January 1996 | 15-6 Investigations, November 1992 in ASCII text. |
| JA301.ZIP | January 1996 | Unauthorized Absences Programmed Text, August 1995. |
| JA310.ZIP | January 1996 | Trial Counsel and Defense Counsel Handbook, May 1995. |
| JA320.ZIP | January 1996 | Senior Officer's Legal Orientation Text, November 1995. |
| JA330.ZIP | January 1996 | Nonjudicial Punishment Programmed Text, August 1995. |

| NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| JA337.ZIP | January 1996 | Crimes and Defenses Deskbook, July 1994. |
| JA422.ZIP | May 1996 | OpLaw Handbook, June 1996. |
| JA501-1.ZIP | March 1996 | TJAGSA Contract Law Deskbook Volume 1, March 1996. |
| JA501-2.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 2, March 1996. |
| JA501-3.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 3, March 1996. |
| JA501-4.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 4, March 1996. |
| JA501-5.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 5, March 1996. |
| JA501-6.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 6, March 1996. |
| JA501-7.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 7, March 1996. |
| JA501-8.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 8, March 1996. |
| JA501-9.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 9, March 1996. |
| JA506.ZIP | January 1996 | Fiscal Law Course Deskbook, May 1996. |
| JA508-1.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 1, 1994. |
| JA5082.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 2, 1994. |
| JA508-3.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 3, 1994. |
| 1JA509-1.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 1, 1994. |

| NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| 1JA509-2.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 2, 1994. |
| 1JA509-3.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 3, 1994. |
| 1JA509-4.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 4, 1994. |
| 1PFC-1.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| 1PFC-2.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| 1PFC-3.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| JA509-1.ZIP | January 1996 | Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993. |
| JA509-2.ZIP | January 1996 | Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993. |
| JA510-1.ZIP | January 1996 | Sixth Installation Contracting Course, May 1995. |
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| JAGBKPT1.ASC | January 1996 | JAG Book, Part 1, November 1994. |
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Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

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, SSG Aaron P. Rasmussen, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

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### 5. *The Army Lawyer* on the LAAWS BBS

*The Army Lawyer* is now available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

1. Access the LAAWS BBS "Main System Menu" window.

2. Double click on "Files" button.

3. At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

4. At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

5. At the "File Listing" window, select one of the files by highlighting the file.

   (a) Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

   PKUNZIP.EXE
   PKZIP110.EXE
   PKZIP.EXE
   PKZIPFIX.EXE

   (b) For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

6. Click on "Download Now" and wait until the Download Manager icon disappears.

7. Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

   For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

8. Type "dir/w/p" and your files will appear from that directory.

9. Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

   PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), above contains the instruc-

tions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

## 6. Articles

The following information may be useful to judgeadvocates:

Chris Hilson & Ian Cram, *Judicial Review and Environmental Law—Is There a Coherent View of Standing?*, 16 L. S. 1 (1996).

James Podgers, *The World Cries for Justice*, 82 A.B.A. J. 52 (1996).

Ronald J. Rychlak, *The Lighter Side of the Green Movement: The Three Stooges as Early Environmentalists*, 48 OKLA. L. REV. 35 (1996).

Lieutenant Colonel Dennis Shepherd & Major Pat Lendemann, *The Joint Ethics Regulation: Know It or Get Buried by It*, 23 THE REPORTER 6 (1996).

Colonel Morris A. Tanner, Jr., *Sexual Harassment: The Search for a Standard*, 23 THE REPORTER 2 (1996).

Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. MIAMI INTER-AM. L. REV. 489 (1995).

Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249 (1996).

Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZA L. REV. 1 (1995).

## 7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail through the TJAGSA IMO office at godwinde@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

## 8. 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.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

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* U.S.C.A. Constitution

Amendments: 5, 6, 7 to 14(2), 14 to End

Supp. Pamphlets for Amendments: 1 to 3, 4, 5, 6, 14

* U.S.C.A. Title 18

Rules: 1 to 11, 12 to 17.1, 32 to 42, 43 to End

Volumes: 371 to 470, 700 to 1080, 1361 to 1950, 1951 to 2310, 2311 to 3000, 3001 to 3330, 4121 to End

Supp. Pamphlets: 4121 to End (1994), 700 to 1080 (1995), 1951 to 2310 (1995)

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* U.S.C.A. Title 22

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* U.S.C.A. Titles 23 and 24

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Rules: 1 to 11, 12 to 16, 17 to 25, 26 to 37, 38 to 50, 51 to 53, 54 to 56, 57 to 60, 61 to 71, 71a to End, 701 to End, Supreme Court/Claims Court/Court of International Trade, Appellate Procedures/Temporary Emergency Court of Appeals

Pamphlets: Rules Part I (1995), Part (1995)

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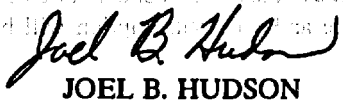

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