November 1975

THE ARMY LAWYER

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1975 JAG Conference

Nearly 200 senior judge advocates gathered at the new Judge Advocate General's School in Charlottesville, Virginia, during the week of October 13-17, to attend the 1975 Worldwide JAG Conference. Following registration activities and a reception for conferees on Monday the 13th, Conference business began the following morning with "TJAG Remarks" to the Corps delivered by Major General Wilton B. Persons, Jr., The Judge Advocate General, US Army.

Brigadier General Emory M. Sneeden chaired the events of the opening day. TJAGSA Commandant Colonel William S. Fulton, Jr., gave the welcoming address to conferees. Afterward, a report on Legislation Proposed By Service TJAG's was given by Colonel Wayne E. Alley. Next followed a presentation on Current Litigation Problems by Colonel William H. Neinast. The morning session ended with a report from the Personnel, Plans and Training Office given by Colonel Robert B. Clarke and Lieutenant Colonel Ronald M. Holdaway.

The Honorable Charles Ablard, General Counsel of the Army, was Tuesday afternoon's guest speaker. Thereafter, conferees attended one of seven available workshops: How Do We Defend Our Client: Contract Appeal Process, chaired by Colonel Richard J. Bednar; What's On The Horizon In Procurement, chaired by Lieutenant Colonel Richard E. Mowry; Presidential Limitations—War Powers Resolution, chaired by Major Warren H. Taylor; What If We Go To War—Substantive Developments In The Law Of War, chaired by Major Fred K. Green; "No Fault Divorce Anyone?" . . . And Other New Developments In Providing Total Legal Service For The Soldier, chaired by Captain Mack W. Borgen; Is Trial And Jail The Only Solution? Innovations In The Criminal Process: Diversion, Pre- And Post-Trial, chaired by Captain Fredric I. Lederer; and Civilian Employee Discipline: The Labor Counselor's Role, chaired by Captain M. Scott Magers. In addition to the afternoon seminars, Brigadier General Emory M. Sneeden conducted a Military Judges Meeting, and a briefing on JA Reserve Activities was presented by Lieutenant Colonel James N. McCune. The traditional Conference Banquet was held that evening at Charlottesville's Boar's Head Inn. Dinner music was provided by the Army String Ensemble.

Brigadier General Joseph N. Tenhet opened and chaired the Wednesday session. Lieutenant Colonel Robert F. Comeau reported on the Labor Counselor Program, and Captain Howard M. Bushman discussed the Federal Garnishment Law. Major Paul J. Rice followed with a presentation on Freedom of Information and The Privacy Act. The morning's activities closed with an address by Major General Richard G. Trefry, Assistant Deputy Chief of Staff for Personnel, Department of the Army. Seminars rounding out the program on October 15th included: Leadership Applies To JA's Too—Management For Military Lawyers, chaired by Lieutenant Colonel Dulaney L. O'Roark, Jr.; Preventive Law—Where Are We Going?, chaired by Captain Mack W. Borgen; Blackbirds And Fort Campbell: Environmental Law And The Military, co-chaired by Captains Thomas M. Strassburg and Stephan K. Todd; The Courts Interpret The Law—Current COMA And Supreme Court Decisions And The Impact In The Field, chaired by Captain John S. Cooke; Are We Paying Too Much, Too Easily: Recent Claims Developments, chaired by Colonel Germain P. Boyle; and The JA's Role In Civil Service EEO Program, chaired by Captain M. Scott Magers. The second round of afternoon seminars included, in addition to selected pres-

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entations repeated from the preceding day: How Wide Do We Open Our Files?—Government Information Practices, chaired by Captain Thomas M. Strassburg; NAF Instrumentalities: In A State Of Flux, chaired by Captain Stephan K. Todd; Monday Morning Quarterbacking—Innovative Suggestions In The Mooting Of Trial Errors, chaired by Major Leonard R. Piotrowski; Law Enforcement: Civilian and Dependent On-Post Misconduct, chaired by Major Dennis M. Corrigan; Recent Development In Civil Rights—Sex, chaired by Captain Gregory O. Varo; and Unionization Of Federal Employees—Are Servicemen Next?, chaired by Captain Dennis F. Coupe. The day's activities were topped off with a gala Bicentennial Theme Party in the TJAGSA Auditorium with dance music provided by the 392d Army Band from Fort Lee, Virginia.

The program for Thursday, October 16th, was chaired by Brigadier General Victor A. DeFiori. After General DeFiori's own progress report from USAREUR, conferees heard a MILPERCEN Panel presentation on the Administration of Enlisted Personnel. Following an address by the Honorable Martin R. Hoffmann, Secretary of the Army, an update on the activities of various OTJAG Divisions was presented by Colonel Alley (Criminal Law Division), Mr. Thomas J. Duffy (Procurement Law Division), Captain Robert A. O'Neil (Regulatory Law Office), Colonel Thomas H. Davis (Administrative Law Division) and Mr. Waldemar Solf (International Affairs Division). The afternoon sessions consisted of two seminar periods featuring 15 selected presentations from the previous two days.

Brigadier General Bruce T. Coggins opened and chaired the final day's program. Colonel William S. Fulton, Jr. spoke on CLE Requirements for the Corps and Colonel Barney L. Brannen, Director of the Academic Department, discussed Legal Education at TJAGSA. His remarks are reproduced in this issue of *The Army Lawyer*. Major General Lawrence H. Williams, The Assistant Judge Advocate General, US Army, then delivered his remarks to the Conference. Thereafter, an informal question

and answer session was held between conferees and general officers of the Corps, chaired by Major General Persons. The Judge Advocate General closed the 1975 JAG Conference with his traditional address to the Corps. Those final remarks are planned for reproduction in next month's issue of *The Army Lawyer*.

JAG Conference Tapes

The following tapes of the 1975 JAG Conference are available from the School. Playing time in minutes is indicated. Listing is by tape number.

Due to the inability to transcribe, edit and coordinate clearance for the many oral Conference programs in time for this issue, only those presentations made from prepared texts appear in this month's issue of *The Army Lawyer*. Efforts are presently underway to obtain from selected other speakers edited versions of some presentations of general interest to the Corps for publication in future months. For the many other presentations which may not be printed here, we invite interested individuals to avail themselves of TJAGSA's fine "live" library of 1975 Conference activities. In many instances these media provide more suitable coverage than the printed word, and we endorse their use as an immediate alternative to our limited publications space. We think you will find that they are the next best thing to having been here!

Tapes.

1A. Welcome and Announcements/COL Fulton (11:00).

1B. TJAG Remarks/MG Persons (9:00).

2A. Legislation Proposed by Service TJAG's/ COL Alley (23:30).

2B. Current Litigation Problems/COL Neinast (30:00).

3. Personnel, Promotions, & Policies/COL Clarke, LTC Holdaway (59:00).

4. Address by the General Counsel of the Army/Mr. Charles Ablard (53:00).

5A. Remarks by Ass't JAG for Military Law/BG Tenhet (9:00).

5B. Labor Counsel Program/LTC Comeau (20:30).

5C. Federal Garnishment Law/CPT Bushman (29:30).

6. Freedom of Information & The Privacy Act/MAJ Rice (53:00).

7. Address by the Ass't Deputy Chief of Staff for Personnel, Dep't of the Army/MG Trefry (49:00).

8. Report from USAREUR/BG DeFiori (35:00).

9. Administration of Enlisted Personnel/ Military Personnel Center Panel (34:00).

10. Address by the Secretary of the Army/ Hon. Martin Hoffmann (45:00).

11. JAGO Divisions' Update/COL Alley, Mr. Duffy, CPT O'Neil, COL Davis, Mr. Solf (50:00).

12A. CLE Requirements/COL Fulton (35:00).

12B. Legal Education at TJAGSA/COL Brannen (13:00).

12C. Remarks by the Ass't TJAG/MG Williams (10:00).

13A. Remarks by the Commandant, TJAGSA/ COL Fulton (8:30).

13B. General Officer Panel (Questions & Answers)/MG Persons, MG Williams, BG Sneeden, BG DeFiori, BG Coggins (52:30).

14. General Officer Panel (cont'd)/Same as above (15:00).

15. Address to the Corps/MG Persons (26:00).

Format.

The aforenoted programs are available in three modes of presentation: ¾ inch video cassette, ¼ inch audio-tape reel and standard audio cassettes.

Address for Requesting.

Audio Visual Division, Academic Department, The Judge Advocate General's School, US Army, Charlottesville, Virginia 22901.

Requests.

Due to the limited number of "master" tapes, it is suggested that blank tape stock be forwarded to TJAGSA with each request for material, and dubs will be provided free of charge. As an alternative, the JAG School Bookstore carries a stock of cassettes as follows: 60-minute, $.70; 90-minute, $1.00; 120-minute, $1.75. Those desiring to purchase blank cassettes for duplication need only send a note to the Custodian, TJAGSA Bookstore, indicating the tape to be copied. Checks should be made payable to "Fort Lee Exchange, Branch 1603." However, "master" tapes, when available, may be borrowed for a maximum loan period of 14 days.

Military Legal Ethics: Perjury and the Prosecutor

Remarks to the FBA Ethics Seminar, 10 September 1975 in Atlanta, Georgia, delivered by Lieutenant Colonel Donald W. Hansen, JAGC, Government Appellate Division, USALSA

I was somewhat taken aback to find myself invited to address this group on a matter of legal ethics. My surprise was only exceeded by that of my colleagues in the defense side of the house who view the Government Appellate Division as the original black hat crowd. Nevertheless since the recent decision of *United States* v. *Muniz* [1] applauded government counsel for providing the Court of Military Appeals with documentary evidence that the accused was improperly enlisted into the service, I feel some degree of competence to discuss basic principles of legal ethics. The luster of the compliment by the court was only slightly dimmed by the court's refusal to accept the government's original offer.

Introduction.

The topic of these remarks—What does a prosecutor do if he believes an essential witness may commit perjury?—presents essentially three questions. First, what responsibility does the prosecutor have to evaluate the truthfulness of his witness' testimony?; Second, may the prosecutor offer evidence which he believes to be untruthful?; and Third, what action should the prosecutor take when he believes the witness will testify falsely?

Before addressing these issues, I would first like to point out the applicability of the Canons of Ethics to the military lawyer.[2] Although not directly alluding to the Canons, *The Manual for Courts-Martial* provides both general and specific rules of conduct for counsel.[3] In addition, by regulation [4] the Secretary of the Army has provided that the violation of the specific rules of conduct prescribed in the *Manual*, the ABA Code of Professional Responsibility, or the Code of Trial Conduct of the American College of Trial Lawyers will be grounds for suspension of counsel. It follows, therefore, that except for unique features of procedure under military law which will be touched upon during this discussion, the ethical considerations for the military trial counsel and the civil prosecutor are the same.

The starting point for this discussion must be to identify the unique position which the public prosecutor occupies. His dual status as an advocate and a representative of the sovereign can be historically traced, in both civilian [5] and military [6] law, to that period of our judicial development in which the public prosecutor was called upon to represent both the accused and the sovereign. This has been translated by both judicial decisions [7] and ethical commands [8] into an admonition that the prosecutor's primary duty is to see that justice is done.

Nevertheless, the public prosecutor is also an advocate, and in the context of a contested trial represents the government in a partisan manner in an adversary proceeding.[9] Thus, the initial inquiry, and undoubtedly the easiest method of avoiding the ethical question, is what construc-

tion will be placed on the words "believe" and "may" set out in our hypothetical? It is an easy "out", and unworthy of the concerned advocate, to assert as justification for his conduct that he can never be certain when a witness is lying, or that when actually faced with an oath, and the potential consequences for a violation thereof, the witness will in fact commit perjury.[10] Under this theory, the prosecutor takes the witness as he finds him, and is free to offer that witness if his testimony is favorable to the prosecution irrespective of his views of the witnesses truthfulness.

Requirement to Judge Credibility.

In addition to risking devastating cross-examination, which may prove fatal to the remainder of his case, such a cavalier attitude toward his witnesses may also invite ethical censure. The first question then is whether the public prosecutor is required to make a personal determination as to the truthfulness of his prospective witness.

In its *Standards Relating to the Prosecution Function*, the American Bar Association seems to anticipate some prejudging of witness credibility on the part of the prosecutor. The standards require the prosecutor to "first determine whether there is evidence which would support a conviction." [11] In exercising his charging discretion, the prosecutor may properly consider his "reasonable doubt that the accused is in fact guilty," [12] and is enjoined "not to bring or seek charges greater in number or degree than he can reasonably support with evidence at trial." [13] Professor H. Richard Uviller of Columbia Law School, in a thoughtful analysis of this issue, has construed these provisions as follows:

> The prosecutor *must* abjure prosecution without probable cause, *should* refuse to charge without a durable prima facia case, and *may* decline to proceed if the evidence fails to satisfy him beyond a reasonable doubt.[14]

Professor Uviller concludes that:

> [W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury.[15]

This analysis nevertheless presupposes some initial weighing of credibility. Interpretation of Canon 7, *A Lawyer Should Represent a Client Zealously Within the Bounds of the Law*, supports this approach to Professor Uviller's analysis. The ethical considerations expressed by the American Bar Association will not permit the prosecutor to close his eyes to indications that his potential witnesses are lying,[16] and he is prohibited from introducing evidence when he "knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." [17] These considerations are enforced by disciplinary rules calling for sanctions when the attorney "knowingly" [18] uses false evidence or perjured testimony, or the prosecutor initiates charges "when he knows or it is obvious that the charges are not supported by probable cause." [19]

Thus it appears that the prosecutor, at his ethical peril, is required to judge the credibility of a prospective witness. Only if he is either satisfied that his witnesses are telling the truth, or that the truthfulness of the conflicting stories is sufficiently in doubt, is the prosecutor able to avoid losing "sleep over his reliance upon the device that the system has constructed for the task of truth seeking, inexact though he knows it to be." [20] The basic premise of the adversary system still presupposes that the search for truth will be enhanced with opposing sides represented by vigorous advocates presenting the best possible case for their respective clients. This applies no less to the government's case than it does to that of the defense.

Proscription Against the Use of False Evidence.

Assuming, therefore, that after due consideration the prosecutor believes that his prospective witness will commit perjury, may he nevertheless utilize that testimony? I fully agree with the commentary accompanying Standard 5.6(a) [21] of the American Bar Association *Standard Relating to the Prosecution Function* which explains:

> It is so elementary that it hardly calls for comment that a prosecutor, in common with all other advocates, is barred from introducing evidence which he knows to be false. This obligation applies to evidence which bears on the credibility of a witness as well as to evidence on issues going directly to guilt. Even if false testimony is volunteered by the witness and takes the prosecutor by surprise rather than being solicited by him, if he knows it is false his obligation is to see that it is corrected.

The disciplinary rule [22] enforcing Canon 7 of the Code of Professional Responsibility proscribes the knowing use of perjured testimony or false evidence.

There is extensive controversy over whether a defense counsel can ethically put a witness on the stand knowing that the witness will commit perjury.[23] In keeping with today's emphasis on scores from the sporting world, one writer concluded that the Canons of Professional Ethics stood 5 to 3 against such conduct.[24] While the score in the "ethics bowl" is not so impressive or final as Lions-21, Christians-0 from the Roman Colosseum, I find that a sufficient ethical condemnation of the practice. I also find myself in agreement with Chief Justice Warren Berger's views which he expressed while sitting as a judge on the Court of Appeals for the District of Columbia:

> Canons 15 and 37 of the American Bar Association are explicit and clear and it is sheer nonsense for anyone to claim that they leave doubt about the tendering of perjured testimony. . . . The proposition that perjury may ever be knowingly used is as pernicious as the idea that counterfeit documents can be fabricated and knowingly offered to the court as genuine. This is so utterly absurd that one wonders why the subject need even be discussed among persons trained in the law.[25]

Where the right of the defense counsel to offer such testimony is claimed [26] on behalf of the accused, as opposed to other defense witnesses, emphasis is placed on the sixth amendment right to counsel, and the principles of confidentiality. However, such principles are not applicable to the prosecutor and given the prosecutor's position as a representative of the sovereign whose function it is to serve the ends of justice, it is not surprising that there is little dispute over his use of perjured testimony.[27] Even assuming a less strict standard for defense counsel:

> [T]he public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged.[28]

I think it is fair to say that all attorneys condemn the prosecutor's action in *Miller* v. *Pate* [29] in presenting a pair of undershorts asserted to be covered with blood similar to that of the victim and different from that of the defendant when in fact the stains were red paint. Such conduct undermines public confidence in both the legal profession and the interests of justice which we serve.

Action Open to the Prosecutor.

Therefore, when the prosecutor believes a witness may commit perjury, he may not offer that witness. And if that witness is indeed essential to his case, as indicated above, the prosecution of that charge should be dismissed. For the public prosecutor who has the discretion to dispose of the case without trial on the merits,[30] the ethical consideration may easily be resolved. In the military, the decision to refer the case to trial or withdraw it is made by the convening authority, not the trial counsel. The trial counsel is, however, required to report the inadvisability of trial to the convening authority when such is appropriate.[31] The convening authority may then dismiss the charges.

The problem for both the assistant prosecutor as well as the military counsel is when their respective supervisors do not concur with their evaluation of the likelihood of perjury or the need for dismissal of the charges. In an informal opinion the American Bar Association Committee on Ethics has expressed the view that in

such circumstances the trial attorney may give due weight to the judgment of his superiors in determining his course of action,[32] but in the event of an irreconcilable conflict the attorney should withdraw.[33]

In the military, where the trial counsel is ordered to undertake the prosecution of an accused, his right of withdrawal may be limited by the order of the convening authority.[34] In the context of a defense counsel being ordered by his military superiors not to pursue a given course of investigation the American Bar Association Committee opined that counsel may not disobey the order.[35] Application of this opinion to the trial counsel would seem to require him to proceed with the prosecution without the untruthful evidence.

When we enter into this area we would normally be speaking of a factual situation in which there is some disagreement as to the ethics issue between the junior and senior prosecutor, or between the trial counsel and the convening authority. With regard to the latter we should recognize the fictional nature of the purported conflict between an attorney and a layman on a matter of legal ethics. In actual fact, it is the staff judge advocate's opinion on the ethics issue being expressed through the convening authority. It is, therefore, no more likely that the military trial counsel would be forced into an unethical situation than his junior counterpart in the local prosecutor's office. But even should this highly unlikely situation arise, once the case has been referred to trial, our military judges have the authority, like their civilian counterparts, to hold evidentiary hearings [36] in which the military trial counsel could raise the ethical issue and have it resolved. It thus appears to this observer that this is more of an academic than practical problem for the military practitioner.

Conclusion.

It is, therefore, my opinion that the prosecutor has an ethical responsibility to evaluate the credibility of his witness, that he may not offer the evidence if he has good reason to believe it is false, and the charges must be dismissed where not supported by otherwise sufficient evidence.

Footnotes

1. ___USCMA___, ___CMR___ (22 Aug 75).
2. An excellent discussion of this point may be found in Chadwick, *The Canons, The Code, and Counsel: The Ethics of Advocates Before Courts-Martial*, 38 MIL. L. REV. 1, 9-14 (1967). This extended article treates a number of ethical problems faced by the military lawyer, and compares the ethical provisions with Manual rules and sets out the applicable case law. Even a casual reading of the cases cited therein can not help but impress the reader with the concern the Court of Military Appeals has for the ethical conduct of those who practice before military courts. The article is a valuable source of information for the military practitioner and should be considered a basic source on ethical questions in the military.
3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. Ed.), Para. *6a*, *42b*, *c*; *44f*(5); *44g*, *h*; *46b*; *48c*; *72b*, and *151b*(2). [hereinafter cited as Manual].
4. Para. 4-4, Change 14 (31 Oct 74) Army Regulation 27-10 (26 Nov. 68). Para 2-32, Change 12 (12 Dec 73) makes applicable to trials by courts-martial the ABA standards relating to fair trial and free press, the function of the trial judge, and the prosecution and defense function. Taken together, these provisions provide an enforceable code for military practitioners more extensive than that for most civilian counsel.
5. See H. DRUCKER, LEGAL ETHICS 148 (1953).
6. See WINTHROP, MILITARY LAW AND PRECEDENTS 165-166, 196-199 (2d ed. 1920).
7. *E.g.*, Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Valencia, 1 USCMA 415, 418, 4 CMR 7, 10 (1953).
8. *See* Ethical Consideration No. 7-13 to Canon 7, Code of Professional Responsibility, and Standard 1.1(c), ABA Standards Relating to the Prosecution Function (March 1971).
9. Whether the adversary proceeding produces the most objective and rational decisions has recently been questioned. *See* Lind, Thibaut, and Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).
10. When faced with a similar question in the defense context, one speaker expressed the view that he could properly argue facts he knows are untruthful to "avoid assuming the rule of God" as "I am neither God nor judge, I am representing a man whom I *think* has perjured himself." American Law Student Association Lawyer's Problems of Conscience 63 (1953).
11. Standard 3.9(a).
12. Standard 3.9(b) (i).

13. Standard 3.9(e).

14. Uviller, *The Virtuous Prosecutor In Quest Of An Ethical Standard: Guidance From the ABA*, 71 MICH. L. REV. 1145, 1156 (1973).

15. *Id.* at 1159. Professor Uviller concedes however that "if [the prosecutor] has good reason to believe that a witness is lying about a material fact, he should not put the witness on the stand," and that the "ethical obligations of the prosecutor [are] satisfied if he makes known to the court, or the defense, his discovered adverse evidence and defects of credibility in witnesses." *Id.*

16. EC 7–13 provides in pertinent part: "Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

17. EC 7–26.

18. DR 7–102(A) (4).

19. DR 7–103(A).

20. Uviller, *supra*, note 14, at 1159. Professor Uviller's blending of the prosecutor's dual position as advocate and representative of the sovereign deserves extended quotation:

> Although the prosecutor's discretionary powers may be important, and his detached and honorable presence vital, he is not, after all, the sole repository of justice. Thus, I do not believe the system is served by canons which overplay the prosecutor's 'quasi-judicial' role. He is, let us remember, an advocate as well as a minister of public justice, and the due discharge of his many obligations of fair detached judgment should not inhibit his participation in what is, for better or worse, essentially a dialectic process. In our well-guided efforts to imbue the system with flexibility and personal qualities of sympathy, we need not sacrifice the values which may yet inhere in the design of controlled contention. *Id.*
>
> This approach is supported by EC 7–26 which enjoins the advocate to "present any admissible evidence his client desires to have presented unless" the attorney knows it is false.

21. "It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses."

22. DR 7–102(A) (4).

23. *Compare* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966), *with*, Bress, *Professional Ethics in Criminal Trial; A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). The divergent viewpoints of the writers were also reflected in a study of the attitudes of those who practice criminal law. *See* Reichstein, *The Criminal Law Practitioner's Dilemma: What Should The Lawyer Do When His Client Intends To Testify Falsely?*, 61 CRIM. L. CRIM. & POL. SCI. 1 (1970).

24. Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM CRIM. L. QTY 17, 20 (1966). Professor Starr cites language in Canons 15, 22, 29, 32, and 41 prohibiting such conduct, and language in Canons 6, 15, and 37 authorizing it.

25. Burger, *Standards of Conduct For Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 Am. Crim. L. Q. 11, 15 (1966).

26. *See* Freedman, *supra* note 23.

27. *Compare* Freedman, *The Professional Responsibility Of The Prosecuting Attorney*, 55 GEO. L.J. 1030, 1038–39 (1967); *with* Braun, *Ethics In Criminal Cases: A Response*, 55 GEO L.J. 1048, 1059 (1966). The dispute seems to be over whether there is a dual standard for prosecutor and defense counsel. Chief Justice Burger has concluded there is not. *See* Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961) (concurring opinion).

28. Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958).

29. 386 U.S. 1 (1967).

30. Professor Uviller suggests that a refusal to prosecute would not necessarily preclude a prosecutor from recommending acceptance of a guilty plea where an accompanying confession removes his doubts. Uviller, *supra* note 14, at 1157.

31. Para. 44*f*(5), MANUAL. In addition, the "conscious supression of evidence favorable to the defense, inconsistent with a genuine desire to have the whole truth revealed is prohibited." *Id*, para. 44*g*.

32. Informal Opinion No. 1203 (1972).

33. The view was also expressed in the opinion that the requirements of DR 1–103(A) requiring a lawyer "possessing unprivileged knowledge of a violation of DR 1–102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such a violation." *Id.*

34. See Chadwick, *supra* note 2, at 15–19 where the author concludes that the appointed trial counsel owes ethical loyalty to the sovereignty of the United States and not to the convening authority. This conclusion is supported by examination of Article 38 of the Uniform Code of Military Justice which provides that the trial counsel prosecutes his case in the name of the United States. Author Chadwick concludes, in the context of the defense counsel but equally applicable to the trial counsel is that there is no real solution to such disagreements, and that each counsel "must do what he must" in resolving ethical dilemmas.

35. Informal Opinion, No. 1074 (1969). Counsel was advised, however, to make an adequate record of the matter to preserve his clients interests on appellate review. Similar conduct by the trial counsel as well as providing the defense counsel with the information upon which his decision was based is also proper and required. See DR 7-103(B); Para. 44*g*, MANUAL.

36. Article 39(a), UNIFORM CODE OF MILITARY JUSTICE. I had recent occasion to discuss this problem with Colonel (JAGC, Ret) Kenneth A. Howard, former Chief, Trial Judiciary who advised that he had held several such conferences with counsel for both prosecution and defense.

Mandatory CLE: A Report To The Corps

By: Colonel William S. Fulton, Jr., Commandant, TJAGSA
Adapted from remarks made to the 1975 JAG Conference on 17 October 1975.

If you are admitted to practice in Iowa or Minnesota, you must attend continuing legal education programs to the extent of some 15 hours annually or risk suspension from practice. If you are admitted in any of 20 other jurisdictions, you may face similar requirements soon.

Continuing legal education as a means of maintaining the professional competence of the military bar has long been an aspect of service in the Judge Advocate General's Corps—both for judge advocates in full-time active service and for those ready for mobilization in the Army Reserve or Army National Guard. The Judge Advocate General's School has existed on a permanent basis for 25 years. Successful completion of its Judge Advocate Officer Basic Course (now nine weeks) has been required of substantially all officers entering active service in the Corps. The School's Advanced Course, approved by the American Bar Association since 1955, is regarded as essential to the professional development of career judge advocates, and its nonresident or combination resident-nonresident alternatives are prerequisites to promotion in the Reserve forces. Shorter courses, seminars, and conferences—ranging from three days to three weeks—have provided an even closer analogue to the civilian-sponsored CLE programs which have proliferated since World War II. If not strictly mandatory, they have been necessary and certain of them loom larger in importance as the Corps sets about sharpening the expertise in environmental law and civilian personnel law in each judge advocate office.

Continuing legal education requirements for the bars of Minnesota and Iowa were adopted by supreme court rules in April of this year. Iowa's requirement is 15 hours annually beginning 1 January 1976. Minnesota requires 45 hours each three years. For administrative purposes, Minnesota attorneys have been divided into three groups. Those in Class 1 must complete 15 hours between 1 July 1974 and 30 June 1976. Class 2 must complete 30 hours between 1 July 1974 and 30 June 1977; and Class 3, 45 hours between 1 July 1974 and 30 June 1978. Thereafter, 45 hours triennially are required of all. A board or commission of continuing legal education administers these rules, including approval of courses, in each state. The penalty for noncompliance is, after notice and hearing, possible suspension from practice. Each state provides a restricted or inactive status for those lawyers who do not wish to be subject to the continuing legal education requirements. Eight other states reportedly are in advanced stages of considering mandatory CLE. They are California, Idaho, Kansas, Maryland, New Mexico, North Dakota, Washington, and Wisconsin, where the bar recently voted overwhelmingly in favor of a mandatory CLE proposal. Many other jurisdictions have bar committees studying the matter. Among those mentioned as most actively considering mandatory CLE are Alaska, Colorado, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Texas, Utah, and Virginia. One cannot be certain of the accuracy of this enumeration. Keeping abreast of these developments has proved quite a task—especially for the attorney who is absent from the state.

The express and common purpose of each plan is to maintain the professional competence of the bar. Aside from that commonality of purpose, and similarities between the Iowa and Minnesota rules, there are striking differences in

some of the proposals. New Mexico's plan would require 40 hours of CLE each year; California's, 60 hours each five years. These two plans would prescribe certain of the subjects to be taken, too. In New Mexico, four to 12 hours of legislative updates, instruction in legal ethics and certain other subjects presented by Continuing Legal Education of New Mexico, Inc., would be required of everyone. Attorneys participating in the New Mexico specialization plan would be required to attend at least 16 hours of CLE in those fields to which they have limited their practice. The remainder of the 40 hours could be taken in any subject. The California proposal specifies five hours of ethics, three hours on attorneys' due care, and two hours each in at least seven of the 12 other subjects listed in the rule. California's is more truly a relicensing plan, for, the initial license to practice law would be for a five-year period only. Renewal would require either the prescribed 60 hours of CLE or the passing of an attorneys' examination. Public hearings for the bar on the California plan were held in San Francisco and Los Angeles in July. The debates have been described as spirited.

Indeed, proposals to require continuing legal education of all members of the bar inspire debate. The American Law Institute-American Bar Association Committee on Continuing Professional Education has co-sponsored (with various state bars and other agencies) a series of four regional conferences to foster discussion of the merits and alternatives. Among the questions suggested to conferees were the following: Is CLE the best way to ensure a minimum level of professional competence? How can we ensure high standards by those conducting CLE programs? What quantity (number of hours) of CLE is adequate to meet the individual lawyer's requirement? Since compulsory attendance doesn't guarantee learning, are additional requirements—such as testing—necessary? What kinds of courses should qualify: Only those on substantive law subjects, or those subjects related to law practice such as accounting or psychology? Should all lawyers within the jurisdiction be subject to the requirement (what about corporation counsel, federal agency lawyers, the JAG officer or other attorney in government work outside the state, the law professor, the judge)? Should other activities besides attending CLE programs qualify for credit, such as lecturing to groups of lawyers or laymen, authorship, in-house training programs within a law firm, attending bar conventions, or self-study?

Whether or not all of these questions have been answered, or answered to the satisfaction of everyone, the mandatory CLE movement is under way. While Canon 6 and Ethical Consideration 6-2 of the Code of Professional Responsibility provide a legitimate rationale, much of the current impetus seems to come from that force known generally as consumerism. The consumer movement is having its impact on other aspects of the delivery of legal services as well. But the point here is that more than one legislature has moved in the direction of requiring continuing education or periodic relicensing, or both, for a whole host of licensed occupations and professions, the law included. The bar, however, regards itself as being more properly subject to regulation by the courts than by the legislature. Accordingly, it is setting its own house in order under court rules rather than run the risk of legislative requirements.

Nor is "relicensing" necessarily a novel concept for the bar. Certainly it is not new in those states where one's entitlement to practice entails an annual contribution to a clients' security fund or disclosures as to his method of accounting for client's funds. Mandatory CLE had an earlier appearance, too, as an ingredient of some states' specialization plans.

The prospect of mandatory CLE has significant implications for the military bar; indeed, for all federal lawyers. There are approximately 4100 of us in one uniform or another, and perhaps three or four times that number in civilian attorney positions with the government. Of the 1600 Army judge advocates in active service, perhaps half are able to attend courses or conferences at The Judge Advocate General's School during the year. A few are able to attend civilian-sponsored CLE programs, such as the prosecution and defense courses at Northwestern University, or bar association meetings. Others can attend command-sponsored CLE, typified by the excellent programs conducted

within United States Army, Europe, in recent years. Even so, it is unfortunately true that many members of the Corps may not be able to complete 15 hours (much less a larger number) of formal CLE in any one year due to remote geographical locations, lack of official travel and registration fee funds, or individual circumstances as to accrued leave and personal funds. Despite the existence of our sister schools, the Air Force Judge Advocate General's School and the School of Naval Justice, and the Civil Service Commission's new Legal Education Institute, the situation is equally bad if not worse for the other uniformed and civilian government attorneys.

Are we—who were competitively selected for our positions, annually evaluated by our senior partners and sometimes our clients, and whose CLE programs lead the pack in responsiveness to the needs of the bar and educational value—to risk disbarment because the civilian bar has less quality control over its members?

Several organizations are alert to and concerned with mandatory CLE requirements as they impact on federal lawyers. Besides the services themselves, these include the Judge Advocates Association and the Federal Bar Association. Their efforts to keep abreast of developments and influence the course of events are coordinated through a "Joint Committee of Government Attorneys on Recertification Requirements" which includes representatives of both associations, the Army, Navy, and Air Force, the Department of Justice, and the Civil Service Commission.

In July, the Joint Committee adopted the following resolution:

> "The status of non-resident members of the Bar, otherwise in good standing, should not be jeopardized because of an inability to complete resident continuing legal education courses. Rather than according them waivers or exemptions, such non-resident members of the Bar should be afforded the opportunity to complete out-of-state programs or courses acceptable to the appropriate accrediting body."

Later that month, the same resolution was approved by the Executive Committee of the Federal Bar Association. Besides conducting an excellent panel program ("Recertify—or Lose Your Lawyer's License") at its annual meeting in October, the FBA is attempting to make its views known through committees in each of its chapters. The Judge Advocates Association functions through its own committee and its state chairmen.

Through its contacts with certain of the committees previously mentioned, membership in the nationwide Association of Continuing Legal Education Administrators, and representation at national bar meetings and the regional ALI-ABA conferences noted, The Judge Advocate General's School has been able to monitor the mandatory CLE movement. On behalf of the Corps, the School is engaged in two distinct but related efforts. One involves the accreditation of the School's courses. The other addresses important provisions that ought to be contained in state CLE rules to enable adequate and meaningful compliance by members of the state bar serving (normally outside the state) as military or civilian government lawyers.

Minnesota's Board of Continuing Legal Education already has agreed to accredit all of the School's courses provided that information as to the courses and their content is periodically furnished by the School. We are in contact with the Iowa Commission on Continuing Legal Education and hopeful of achieving the same result there. For its communications with states that are contemplating, but have not yet adopted, mandatory CLE rules, the School is preparing a brochure descriptive of its status, programs, faculty, and facilities. These communications will address not only approval of the School's own courses, but as well the other continuing military legal education programs available to members of the Corps and other military lawyers. In that connection, we hope that our personnel and financial resources will permit us to increase our contribution to programs outside the School where needed.

When it seems appropriate to do so, the School is also pointing out certain features that ought to be considered for inclusion in any man-

datory CLE requirements. The following are some examples:

—There should be no requirement that all or any portion of the CLE be completed within the state. Frankly, there is little likelihood that any well-informed bar or court would adopt such a rule. To do so would ignore the excellent quality of programs presented through the ABA's National Institutes, and overlook the nationwide character of such organizations as ALI-ABA, the Practicing Law Institute, the National College of District Attorneys, and the several facilities for judicial education, as well as the regional nature of many other existing CLE organizations. New Mexico's proposed rule, with its requirement for four to 12 hours of subjects prepared by its own state bar CLE agency comes closest to this. However, the wording of the rule seems to contemplate that the instruction will be available in remote localities through audiotape or videotape, and therefore could be exported to absent members.

—Similarly, compliance with requirements for the pursuit of a prescribed number of hours in specified subjects would be unreasonably difficult (and for the most part impossible) for lawyers absent in the military service. Reviews of recent legislation and several aspects of professional responsibility are the most likely of such requirements. Indeed, we include some of this in our courses, but only in relation to the substantive law being taught and the purpose of the particular course. Interestingly enough, the consensus of legal educators seems to be that ethics is a subject best taught in the context of other subjects rather than as a separate course.

—Automatic recognition (accreditation) of all courses taught by ABA-approved law schools and organizations represented by members of the Association of Continuing Legal Education Administrators is a provision which commends itself. This would avoid a great deal of the administrative burden (and consequent expense) which will otherwise befall the state's CLE board and the CLE seminars involved. Granted that quality control of CLE is essential if the professional competence of the bar is to be maintained, our observations indicate that the programs of such organizations are of the highest quality available and are most likely to remain so.

—Besides a blanket recognition of courses conducted by organizations such as those mentioned above, the state's rule should permit recognition of other "courses, institutes, seminars, programs, or any other method of education, including correspondence courses, video tape seminars, or audio cassette programs." The words in quotation are from a draft of the proposed Kansas rule and are especially important if the rule is to apply to judge advocates serving in Turkey, Iran, Thailand, Iceland, Eniwetok, and aboard roving naval vessels.

—A provision for carrying forward excess credits from one period to the next is important and eminently fair. Military-sponsored CLE courses tend to be much longer and encompass more hours than do civilian-sponsored courses. Perforce, factors of travel costs and availability of time away from the office make repetitive attendance more difficult. The shorter the state's CLE accounting period (*e.g.*, Iowa's one year), the more important a provision for carrying forward excess credits earned in one period towards satisfaction of the requirement in the next. If nothing else, the fact that longer courses more likely to be truly educational, rather than merely informational, justifies this.

—Finally, the rule must make possible the retention of good standing by the absent judge advocate who, for justifiable reasons, simply has been unable to complete the prescribed number of hours within the specified period. Both Iowa

and Minnesota rules permit suspension only after notice and, if requested, hearing. If applied with appropriate understanding, they will permit the result needed for the judge advocate whose circumstances of service sometimes will preclude compliance with the state's rule, but whose professional competence is not really in question.

The School has suggested provisions such as those above to a committee of the American Bar Association's Section of General Practice, which is at work drafting a model state CLE rule. Such provisions will make possible the continued recruitment and retention of qualified attorneys for the armed forces. The failure to include them would not measurably enhance the special competence of that bar that serves the armed forces. Certain of these recommended provisions would make it possible for the 4400 active reserve lawyers to maintain their competence as judge advocates, too. For, in order to do so, they must frequently attend the continuing legal education courses conducted by this or similar schools.

The School will continue to monitor developments within the states. It will follow through in communicating with those state bars that have, or seem likely to have, a mandatory CLE rule with a view to (a) approval of our courses, and (b) suggesting rule provisions which will best enable our far-flung Corps to comply.

Judiciary Notes

From: U.S. Army Judiciary

1. Recurring Errors and Irregularities.

September 1975 Corrections by ACMR of Initial Promulgating Orders:

a. Failing to set forth the proper command designation and failing to reflect that the convening order had been amended in the authority paragraph of the order—one case each.

b. Failing to set forth the number of previous convictions considered in the sentence paragraph—(if no previous convictions were considered, then so state).

c. Failing to show the accused's correct social security number.

d. Failing to show that trial was by military judge alone by including words "By Military Judge" after the word "sentence."

e. Failing to show in the order that the accused was tried for an "additional charge" and its specifications.

SJA offices in the field should assure that the following matters are accomplished:

a. If an accused indicates that he intends to retain civilian counsel on the Request for Counsel Form, the name and address of such counsel should be forwarded to the Office of the Clerk of Court as soon as possible.

b. In order to expedite the appellate process, the accused's receipt for the ACMR decision, or a certificate of attempted service of the decision, should be forwarded to the Clerk's office as soon as possible.

c. SJA's are reminded to advise the convening authority that if the approved sentence is different than that recommended by the SJA, the convening authority should include a personal statement in the record explaining the reasons for his action. This is in compliance with the recent USCMA decision of *United States v. Keller*, No. 29,343, ____USCMA____, ____CMR____(8 September 1975).

SJA Reviews and *United States v. Goode*

A Note From The Government Appellate Division
By: Captain Gary F. Thorne, Government Appellate Division, USALSA

In a case that portends far-reaching implications for SJA reviews, the Court of Military Appeals, in *United States* v. *Goode*, 23 USCMA 367, 50 CMR 1 (1975), set forth a prospective

rule, applicable after May 15, 1975, which places a specific burden on defense counsel and could largely eliminate the issue of the adequacy of the SJA reviews's from appellate review. In *Goode*, subsequent to trial and prior to final action, the convicted party went AWOL in violation of his pretrial agreement which provided in part:

> It is expressly agreed by the accused that he will not commit any act of misconduct between the date of trial and the date of the convening authority's action. Any such misconduct will void this pretrial agreement and authorize the convening authority to approve any sentence adjudged and not suspend the same. *Id.* 23 USCMA at 368, 50 CMR at 2.

Notation of his AWOL was absent from the SJA review, but the review advised the convening authority to approve the sentence adjudged, which was greater than that in the pretrial agreement. The convening authority *was* advised orally of the subsequent misconduct. The USCMA, however, found this a violation of the accused's right to rebut adverse matters from outside the record which are used to void an agreement and increase the sentence. Since the accused was never advised that the subsequent misconduct would be used by the SJA and the convening authority to void the pretrial agreement and impose the greater adjudged sentence, the court found error.

The USCMA, however, went further and noted the continuing errors alleged in reviews on appeal. The court then invoked a prospective rule requiring a copy of all SJA review's to be *served on counsel* for accused, "with an opportunity to correct or challenge any matter he deems erroneous, inadequate or misleading, or on which he otherwise wishes to comment." *United States* v. *Goode*, 23 USCMA at 370, 50 CMR at 4. The language used by the court seems to indicate that it was referring to any errors that might be contained in a review, and not merely those errors analagous to the omission in the *Goode* case itself. In a number of cases previously heard by the USCMA the judges have asked questions concerning the participation of the defense counsel in the post-trial review process.

However, at least one panel of the Court of Military Review views *Goode* in a more restrictive light. In *United States* v. *Austin*,No. 9868 (ACMR 9 June 1975), that panel spoke to *Goode* even though the review was prepared prior to the 15 May effective date of the *Goode* rule. The court, relying on the facts in *Goode*, limited the application of that case to circumstances where "adverse matters from outside the record" were in question and the accused was not given an opportunity to rebut that matter. The *Austin* court said that the *Goode* procedure "should not be used to excuse the failure of the staff judge advocate to comply with his legal responsibility of accurately summarizing the evidence and providing the convening authority with adequate guideposts to determine the guilt or innocence of the accused." The government's appellate position continues to be that *Goode* was meant to encompass all errors in the SJA review—requiring the accused's counsel to either note alleged errors or waive them—and that *Austin* is too restrictive a reading of *Goode*.

While *Goode* indicates that a failure of the defense counsel to comment on the review "normally" will be deemed a waiver of any error contained therein, that interpretation is open to some doubt. Prior to *Goode*, the test was whether the error would have had a "substantial influence on the decision of the convening authority." *United States v. Samuels*, 22 USCMA 238, 46 CMR 238 (1975). Under this test, the USCMA held, *e.g.*, there was a defective review where the accused was convicted of assault whereby grevious bodily harm was intentionally inflicted, but the convening authority was advised the accused was convicted of assault with intent to commit murder. *United States v. Boyd*, 23 USCMA 90, 48 CMR 598 (1974). The *Goode* decision would seem to eliminate those errors which would not have a "substantial influence on the convening authority," but it is not at all certain that the USCMA would apply *Goode* to a case which might have that influence—*i.e.*, advising the convening authority that the accused had pleaded guilty whereas it was, in fact, a contested case. Whether the USCMA would refuse

to apply *Goode* or hold defense counsel to be inadequate is open to question, but it seems certain that the present members of the court would find some way to avoid *Goode*. Regardless of the ultimate restrictive or expansive interpretation of *Goode*, reviews should be prepared with due care and cover all areas to which reviews were always intended to relate.

Like other court-created rules, such as *Burton* and *Dunlap*, *Goode* raises a number of latent problems which were not addressed by the USCMA because of the unusual nature of the rule announced without the benefit of pleadings, argument, or consideration of the ramifications or implementations of the rule. The discussion which follows is designed merely to point out those problems which are surfacing, so that the reader will at least be aware of potential pitfalls. The absence of any case law on the subject renders definitive answers impossible at this time.

Written proof of service of the review on defense counsel must be in the record and, if that counsel desires to make no comment, a form so stating should also be incorporated into the record. The appendix to this article contains three forms presently used to reflect proof of service and possible defense responses—they are simply offered as examples. Some of the examples contain a statement that additional time beyond the five days for counsel to comment on the review may be requested by the defense and will constitute a waiver of the *Dunlap* requirements should the additional time extend the post-trial review period beyond 90 days. It must be remembered that Footnote 1 in *Goode* says compliance with the *Goode* rules does not extend the 90-day period in cases subject to the rule established in *Dunlap v. Convening Authority*, 23 USCMA 135, 48 CMR 751 (1974). Any such delay must originate with the defense and must be in writing to avoid litigation on appeal.

Where service of the review on defense counsel is impossible due to leave or other such circumstances, the government should be sent, with the record, a written explanation of why such service was impossible. It *may* be proper to serve the review on a counsel other than the one who acted at trial where the latter attorney is truly unavailable. Whether the counsel reading the review must enter into a complete attorney-client relationship with the accused or can simply comply with *Goode* by examining the review in light of the record is presently before the Court of Military Review in *United States* v. *Iverson*. There the review and action was completed at a post different from the trial forum due to disqualification of the reviewers. The review was given to *a* defense counsel at the second post who never entered into any attorney-client relationship with the appellant. Moreover, the appointment of the reviewing counsel was informally done by his Chief of Military Justice. Iverson claims on appeal that the review had to be returned to his trial defense counsel for review under *Goode*.

If Iverson's position is sustained, there will be further problems raised when a trial defense counsel is unavailable to complete the *Goode* review, for a new attorney-client relationship may have to be established before that review can be completed—which could be frustrated by an accused's refusal to enter into the relationship, thereby delaying trial action. This will further complicate the *Goode-Dunlap* clash. Perhaps out of an abundance of caution, the review should be returned to the original defense counsel, or action delayed (up to the 90 day limit), if possible, to permit the original defense counsel to examine the review. However, *Iverson* presents three basic questions: 1) Can substitute counsel be appointed, and under what circumstances? 2) What procedure is required to appoint substitute counsel? and 3) What is the scope of counsel's duties?

A partial answer appears in *United States* v. *Maslinski*, No. 11471 (ACMR 29 September 1975). There the defense counsel's term of service had expired and the review was served on no one. The court found a *Goode* violation and returned the case for a new review and action. Thus, for now at least, the review must be served on someone, and it probably is best to appoint new counsel for the appellant rather than giving it to *any* defense counsel. However, one should ensure that appellant is satisfied with the appointed counsel so a later claim that counsel was forced on him will not be heard.

One area of concern is presented when the review is served between the 86th and 89th day of a confinement case, thus creating a *Dunlap* problem. The prosecution seems bound by *Goode* to now view *Dunlap* as an 85 day trial rule, with five more days (perhaps working days) for the defense to consider the SJA review. Can defense counsel waive the five days and act under *Goode* in less time, thus assisting the prosecution in complying with *Dunlap?* It obviously can, but surely will not when taking the full five days creates a *Dunlap* problem for appeal. In such cases, the prosecution may have to violate *Goode*, and move for final action before the five days expire. It is the position of the Government Appellate Division that since *Goode* is prophylactic in nature, and court-created, it is still subject to the harmless error rule of Article 59(a), Uniform Code of Military Justice. Thus, if the review is in fact fully adequate and correct, the failure to comply with *Goode* is nonprejudicial error. If the choice is dismissal under *Dunlap* or violation of *Goode*, the latter course seems more appropriate. However, the Court of Military Review in *United States* v. *Cates*,No. 11362 (ACMR 29 September 1975), sent a review back for compliance with *Goode* without testing for prejudice. The problems are complicated should this be done, and the SJA is well advised not to get caught with a review being completed within a time frame that might trigger *Dunlap*.

Where a *Dunlap* problem is imminent, it becomes particularly important to know whether the *Goode* five-day rule means straight time or just working days. There is an argument that where *Goode* and *Dunlap* clash, straight time should be used since *Dunlap* applies such a counting method against the government. Furthermore, the USCMA has indicated in *United States* v. *Quinones*, 23 USCMA 457, 50 CMR 476 (1975), that it expects counsel to be working more than a 40 hour week, to include weekends where necessary. This approach would support an argument that *Goode* invokes a straight five day rule.

However, both the Court of Military Review and the Court of Military Appeals operate under rules providing that orders they issue with time periods involved will run from the day after issuance and that when the prescribed time is less than seven days, Saturdays, Sundays and holidays are excluded. This "working days" rule might also be applicable when computing the five-day period under *Goode*. Then the day service of the review is made on defense counsel would not be counted and neither would any Saturday, Sunday or holiday. Until the issue is resolved the SJA should operate under the working day rule to avoid litigation.

When a case must be sent to another post for review and action or delayed pending return of defense counsel, who is responsible for mailing and processing times? Is it part of the usual *Dunlap* period or will it constitute an exception to extend the government's post-trial processing time where there is confinement? Again, where necessary, the government must make a record that *clearly* reflects what happened so when these issues arise on appeal, the factual setting is not in controversy.

If defense counsel comments on the review, the question then is what action the SJA should take. Rather than rewriting the initial review to answer counsel's comments, the better policy seems to dictate that the comments and the initial review both be forwarded to the convening authority without amendment. This allows the convening authority to review the entire matter without defense counsel claiming a revamped review still contained errors or that a revamped review was not returned to the defense for further comment. Also, *Goode* provides that "[P]roof of such service, together with any such correction, challenge or comment which counsel may make, shall be made a part of the record of proceedings." It would also be helpful if the convening authority notes in his action that he has considered those matters raised by defense.

A related problem involves submitting the record of trial to the defense prior to or simultaneously with, service of the review. There are numerous cases on appeal claiming that no effective post-trial action can be taken by trial defense counsel unless an authenticated copy of the record is also available to that counsel. This error is raised in the context of the defense opportunity to submit an Article 38(c) brief to the

convening authority, but seems equally applicable to the *Goode* rule.

As to Article 38(c) briefs, the Court of Military Review is split as to whether an authenticated record is necessary for defense counsel. *United States* v. *Noren*, 40 CMR 228 (ACMR 1973); *aff'd. on other grounds*, 23 USCMA 212, 49 CMR 1 (1974); *contra United States* v. *Wormley*, No. 431296 (ACMR 10 February 1975). To avoid potential litigation, the review should not be served until an authenticated record is presented to defense counsel.

If *Goode* is liberally applied to all review errors, the burden on the defense counsel is obvious. *Goode* may effectively preclude the initial raising of SJA review errors on appeal, since any error not commented on by the defense is waived and any error commented on is submitted to the convening authority for consideration. Since the defense is expected to comment on all errors, the review and comments together constitute a complete picture for the convening authority to review and, absent plain error, precludes the claim before appellate courts of prejudice due to errors or omissions in the review. Whether this result follows *Goode* remains to be seen, but for counsel in the field and SJA's, the proper procedure assures a complete record of trial to pursue the appellate implications of *Goode*.

APPENDIX

The three example forms which follow may be used to indicate proof of service of the SJA review on defense counsel.

Example 1:

Attached for your consideration is a copy of the post-trial review in the above named case. If you have any rebuttal, comments, corrections or other matters you wish to be considered by the Convening Authority before he takes action, request you submit those in writing to the Staff Judge Advocate, Headquarters, 3d Armored Division, Drake Kaserne, within five days of service of this post-trial review.

_____

Chief, Criminal Law

CERTIFICATE OF SERVICE
Record of Trial and Post-Trial Review
United States v. _____

I hereby acknowledge receipt for my examination of a copy of the post-trial review in the above named case. I understand that I have an opportunity to rebut, correct or challenge any matter I deem erroneous, inadequate or misleading, or to comment on any other matter, and that my comments will be appended to the post-trial review. I also understand that my comments must be delivered to the Staff Judge Advocate Office at Drake Kaserne within five days of this service for them to be considered by the Convening Authority. If I am unable to complete this within five days, I will provide, within that time, a written request for delay in submitting the record of trial to the Convening Authority for action. I also acknowledge that failure to provide any reply or request for delay within the five days will be deemed a waiver of any error in the review.

_____

Defense Counsel

Example 2:

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing review, pursuant to *United States* v. *Goode*, (the detailed defense counsel) (the individual military counsel) (the civilian counsel) for the accused, at _____ hours _____, 1975.

_____

Chief, Military Law Division

Example 3:

_____

Date

I acknowledge receiving a copy of the Staff Judge Advocate Review in this case on the date shown above.

I understand that this copy of the Review has been served upon me to provide the accused in this case with an opportunity to correct or challenge any matter he deems erroneous, inadequate, or misleading, or on which he otherwise wishes to comment.

I also understand that if I fail to take advantage of this opportunity within five days from the above date, the Staff Judge Advocate will present this case to the convening authority for the latter's action.

I understand that the five-day period specified above may only be extended for good cause shown, in writing, to the Staff Judge Advocate within the initial five-day period. I understand that if the five-day period is extended for good cause shown at the request of the defense, the delay thus occasioned from the beginning of the sixth day until the defense comments are presented to the Staff Judge Advocate will be chargeable to the defense and not to the Government.

_____

Defense Counsel

To indicate what, if any, response has been made by trial defense counsel, the following forms may be employed:

Example 1:

Five days having elapsed since service of the review on counsel for the accused, the review is hereby submitted for your consideration.

_____ Counsel for the accused has submitted no matters for your consideration. A form of action to accomplish my recommendation is attached for your signature.

_____ Counsel for the accused has submitted the attached matters for your consideration. I have reviewed said matters and in my opinion, they are adequately covered in the review or warrant no further discussion. My recommendation remains the same and a form of action to accomplish said recommendation is attached for your signature.

_____ Counsel for the accused has submitted the attached matters for your consideration. I have reviewed said matters, and my discussion concerning them is contained in a supplement attached hereto. A form of action to accomplish my recommendation, as modified in said supplement, is attached for your signature.

_____, 1975 _____

Staff Judge Advocate

Example 2:

MEMORANDUM
FOR RECORD: _____ 1975

SUBJECT: Post Trial Review in the Case of _____

A copy of the post-trial review in the case of _____ was served on the defense counsel on the date indicated on the Inclosure 1 and as of this date, no response has been received.

_____

Chief, Criminal Law Division

Example 3:

I have received a copy of the staff judge advocate review in the case of _____ and there are no comments, correction, or other matters I wish to raise for consideration by the convening authority.

_____ 1975 _____

Defense Counsel

Again, these examples are just that, and have neither been approved by The Office of The Judge Advocate General nor tested in appellate litigation.

The Client in Common

A Note From The Defense Appellate Division
By: Captain Anthony J. Siano, Defense Appellate Division, USALSA

As the recently reconstituted United States Court of Military Appeals breathes life into the assumption of the United States Supreme Court that "the military court system will vindicate servicemen's rights" [1], greater emphasis must be placed on the appellate stage of the military criminal client's case. The maxim that one must try cases with one eye on appeal has particular validity in the military justice system where appellate review is mandatory in most serious cases [2] and readily available in all others.[3] Yet, even as trial defense counsel heed this maxim, their efforts can be constrained by the restriction of their attorney-client relationship to the trial (and preaction post-trial) level of a given case.[4] The way to overcome this handicap and to assure each client a full measure of appellate justice is by cooperation and interaction between trial and appellate defense counsel.

While the dispersion of courts-martial jurisdictions makes appointment of trial defense counsel as appellate counsel rarely possible,[5] there does exist in every case a privileged relationship between trial and appellate defense counsel which should be developed in order to pursue fully every avenue of appellate review.[6] Further, the trial defense counsel is under a continuing ethical obligation to protect the client's opportunity to a meaningful appeal.[7] Complimenting these responsibilities are those of appellate defense counsel to review fully and thoroughly the case in order to represent properly the client before the appellate courts [8] and to assist trial defense counsel, upon their inquiry, with the preparation of legal issues for presentation at trial.[9]

Independent post-trial action by the trial defense counsel can take two directions to protect a client's interests: those directed toward amelioration of sentence [10] and those laying the foundation for effective appeal.[11]

Sentence ameliorating actions can include preparing the client for the post-trial interview,[12] advising the client on the specifics of his future (*e.g.* terms of confinement or retraining[13]), drafting clemency petitions [14] and requests for deferment of sentence.[15] In appropriate cases, these actions allow the counsel to utilize to maximum benefit the positive elements of the client's military record and personal background. Further, these actions give the client a measure of positive reinforcement of self-worth at a time when such support is most necessary to rehabilitation.[16]

Laying the foundation for effective appeal can also be independently undertaken by trial defense counsel. While extensive pretrial preparation and vigorous litigation of every viable issue at trial are the best "appeal-preparing" techniques, many other actions can be taken, post-trial, on the client's behalf.[17] The advice to the client of his appellate rights [18] is a rudimentary tool, even though the decision to elect counsel on appeal rests with the client.[19] The trial defense counsel can use his understanding that even the simplest cases can present viable appellate issues [20] to impress upon the client the importance of appellate counsel. Also, by assisting the client with the request for appellate review,[21] counsel can succinctly draw attention to errors in the case. Further, the Court of Military Appeals holding in *United States v. Goode* [22] gives trial defense counsel five days, as a matter of right, to confront and rebut matters placed in the post-trial review which may be erroneous, inadequate or misleading.[23]

Most important of the trial defense counsel's appellate tools is the Article 38(c) brief. This brief, containing "such matters as [defense counsel] feels should be considered in behalf of the accused on review" [24] becomes part of the entire record for appellate purposes and can be used to reinforce and supplement the motions made and positions taken at trial. As to both legal and factual issues, this brief should be the final step in the defense strategy pursued at trial.[25]

Appellate defense counsel will develop and build upon the defense strategy at trial in their representation of clients before the Army Court

of Military Review and the United States Court of Military Appeals. In cases where contact with trial defense counsel is impractical or not possible, or where the issues are squarely presented in the record, appellate counsel will rely heavily on the above-discussed actions used by trial defense counsel. In many cases, diligent examination of the trial transcript and allied papers, together with communications with the client, provide a sufficient factual basis for appellate representation.

Yet, there are an increasing number of cases where appellate defense counsel should include trial defense counsel in his appellate research. When a case has sensitive or confidential aspects, transmittal in the Request for Appellate Review or an Article 38(c) brief may not be satisfactory.[26] Also, in several areas of litigation, ongoing contact and interaction between trial and appellate defense counsel is desirable, if not a prerequisite, to adequate appellate representation.[27]

In the area of post-trial delay, the trial record presents little more than the time period taken. Development of the facts necessary to litigate this issue (facts pertaining to defense actions after trial, the quality and quantity of court-reporting equipment and personnel, and the effects of a staff judge advocate's office policies, directives and guidance in a given case) will require close cooperation of trial and appellate defense counsel. In questions such as personal jurisdiction and sanity, which may be raised for the first time on appeal,[28] the trial defense counsel may have better, if not sole, access to the supporting matter needed for a successful appeal. Affidavits from supporting parties, documentary matter and background information are all areas in which trial and appellate defense counsel should collaborate.

In the area of extraordinary relief [29] it is the appellate defense counsel who will have to assist a trial defense counsel who finds newly-discovered evidence, fraud on the court or other prejudicial error after final action.[30] Appellate defense counsel must also be available to the trial defense counsel in the latter's pretrial preparation.[31] Counsel have been, and are encouraged to draw upon the legal research done by appellate defense counsel on many varied topics.[32] By this pretrial association, the counsel can develop more persuasive legal authorities to support each element of his trial strategy, and can prepare both the record and appellate counsel for the often-occurring appellate stage of the case.

The trial and appellate representation of the military justice client is an area requiring particularly close cooperation between trial and appellate counsel. When fully developed by both counsel this cooperation assures each client in common the greatest protection of his individual rights.

Footnotes

1. Schlesinger v. Councilman, 43 U.S.L.W. 4432, 4438.
2. UNIFORM CODE OF MILITARY JUSTICE, Art. 66 [hereinafter cited as UCMJ; codified in 10 U.S.C. §§ 801-940].
3. UCMJ, Art 67.
4. Army Reg. No. 27-10, para. D-2.d (12 December 1973).
5. *Compare* Footnote 4, *supra*, with ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.2 (1968).
6. Army Reg. No. 27-10, para. D-2.d (12 December 1973); Ltr, JAGJ 1953/9959, 24 December 1953.
7. *See* Anders v. California, 386 US 738, 774 (1967), *reh. denied* 388 U.S. 924; ABA STANDARDS, THE DEFENSE FUNCTION § 8.2 (1968) Note, *Attorney's Negligence: The Belated Appeal*, 2 VALPARAISO L. REV. 141 (1967).
8. Army Reg. No. 27-10, para. D-3a(1) (12 December 1973); ABA STANDARDS, THE DEFENSE FUNCTION § 8.4 (1968); Standing Operating Procedures, Defense Appellate Division, paras. 2, 4, 5 (January 1975).
9. Shaw, *The Article 38c Brief: A Renewed Vitality*, THE ARMY LAWYER, June 1975, at 26; *Inter-Corps Relationships for JAG Defense Counsel*, THE ARMY LAWYER, February 1974, at 12.
10. See Shaw, *Post-Trial Duties of Defense Counsel*, THE ARMY LAWYER, October 1974, at 23.
11. *Id.*
12. *See*, U.S. Dep't of Army Pamphlet No. 27-10, MILITARY JUSTICE HANDBOOK: THE TRIAL COUNSEL AND THE DEFENSE COUNSEL, para. 78 (August 1969); *The Advocate*, December 1969 at 5.
13. *See* Army Reg. No. 190-37 (15 July 1972) and U.S. Dep't of Army Pamphlet No. 15-1.
14. *See* Army Reg. No. 190-36 (17 December 1971); *The Advocate*, January-February 1972 at 10.

15. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 48*k*(4), 70*d*(4), 88(f) and (g); Army Reg. No. 27-10, para. 2-30. *See* United States v. Daniels, 19 USCMA 511, 42 CMR 113 (1970).
16. *See* DA Pam 27-10, para. 78, note 12, *supra*.
17. *See* note 10, *supra*.
18. Shaw, *Requests For Appellate Defense Counsel: Its Uses and Abuses*, THE ARMY LAWYER, May 1975, at 20.
19. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-7.
20. *E.g.*, United States v. Holland, 23 USCMA 442, 50 CMR 461 (1975).
21. DA Pam 27-10, para. 78e, note 12, *supra*.
22. 23 USCMA 67, 50 CMR 1 (1975).
23. 23 USCMA at 370, 50 CMR at 4.
24. UCMJ, Art. 38(c).
25. *See* United States v. Fagnan, 12 USCMA 192, 30 CMR 192 (1961); note 10, *supra; The Advocate*, October 1970 at 13.
26. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4.
27. Horton, "Professional Ethics of the Military Defense Counsel," TJAGSA Thesis (April 1958).
28. United States v. Johnson, 23 USCMA 104, 48 CMR 665 (1974); United States v. Washington, 45 CMR 550 (ACMR 1972).
29. UCMJ, Art. 73; DA Pam 27-10, para. 78f, note 12, *supra*.
30. *Id.*
31. Shaw, note 9, *supra*.
32. *Id.*

The Waiver Swamp

A Note From the Contract Appeals Division
By: Captain Paul B. Haseman, JAGC, Contract Appeals Division, USALSA

When a contract is default terminated for failure to make timely delivery and the contractor wishes to escape the harsh consequences of the termination, two basic defenses are available. The contractor may assert that the failure to deliver was excusable or that the delivery schedule was waived by the government. Because the government cannot technically waive any rights, waiver in this case is more properly characterized as an election by the government to accept late performance. 47 Comp. Gen. 170 (1967) This article deals with this concept of waiver and the procurement attorney's role in dealing with it.

Because the defense of waiver never arises unless a default termination for untimely delivery is either threatened or executed, an initial look at the rights of the contracting parties in the area of timeliness is appropriate. The contractor has a right under a supply contract to make deliveries which the government must accept if the deliveries are timely. If the deliveries are not timely, the government, in turn, can cut off this delivery right by exercising its own right to terminate under the Default Clause, ASPR 7-103.11(a)(i). When the government does not immediately exercise its termination right, the first step is taken on a path that may lead to waiver of the delivery schedule. The first step is easily taken because, generally, some time passes after the delivery date is missed before the government takes action. This period may be characterized as either forbearance or waiver. If the period is one of forbearance, the Contracting Officer retains the power to effectively default terminate the contract. If the period is one of waiver, then the government may not properly default terminate the contract until after a new delivery schedule is reinstated in the contract. It is critical, therefore, to understand the distinction between waiver and forbearance in order to better protect the government's contract rights.

Waiver Elements.

Characterization of the post-delivery date period as forbearance or waiver depends upon both government intent and contractor reliance. Intent may be expressed as in the dispatch of a "cure notice" or, more commonly, it may be implied by an examination of the total conduct of the government following the missed delivery date. Consequently, the sum of active and passive government action is a key element in find-

ing waiver. *H.N. Bailey and Associates*, 449 F.2d 376, 196 Ct.Cl. 166 (1971). If the government acts so as to encourage the contractor to continue performance, a constructive election to waive may result.

However, the second element, reliance, is also necessary to a finding of waiver. *Devito v. United States*, 413 F.2d 1147, 188 Ct.Cl. 979 (1969). Reliance by the contractor normally takes the form of incurring costs in continued performance of the contract. These two elements, government action and contractor reliance, must be present to establish waiver.

Forbearance.

A reasonable forbearance period is allowed the government after the missed delivery date because the government is required to carefully determine if default termination is proper (not excusable) and, even if proper, to determine if default termination is desirable in light of the practical and policy considerations outlined in ASPR 8–602.3. *Precision Products, Inc.*, ASBCA No. 14284, 70-2 BCA ¶8447. However, forbearance can easily become waiver. If more than a reasonable time passes without default action, the delivery schedule may be taken to be waived. APP 8–602.3(c). This passive failure to act within a reasonable time was the basis for the Court of Claims finding waiver in *DeVito*. In that case, the Army followed the special coordination requirement of APP 8–602.3(a) for contracts involving guaranteed loans, progress payments or advance payments. For an unexplained reason, the coordination documents languished at a higher headquarters for over a month. During this period, the contractor continued performance and incurred reliance costs in trying to overcome the difficulties that had caused it to default on the delivery schedule. This failure of the government to take reasonable prompt action was found to induce reliance as surely as any affirmative action the government could have taken. Under these facts, the court had little difficulty finding waiver.

In the same vein, the government should take no action inconsistent with forbearance if default termination rights are to be preserved. Certain acts by the government consistent with forbearance should not induce reliance on the part of the contractor. The most common act of forbearance is the issuance of a "show-cause" letter which normally contains a disclaimer of intent to waive. Although not required for a termination for default in delivery (ASPR 7–103.11(a)(i)), such show-cause letters are useful in determining excusability and showing the intent of the government at the time the letter was written. Although subsequent inconsistent acts can negate such express intent, a show-cause letter lends credence to a position of forbearance when the intent might otherwise be questioned. If default is contemplated a show-cause letter could be issued contemporaneously with the missed delivery date. A show-cause letter issued an unreasonable time after default will have little effect, as the government can be shown to have waived its right to enforce the delivery schedule, a right which cannot be resurrected by a late show-cause letter.

Two other common government acts, determination of progress or ability to perform through the use of conferences, and routine inspections have been found not to induce reliance or otherwise negate prior express intent to forbear. *H.N. Bailey and Associates, supra; Precision Products, Inc., supra.* Likewise, the continued presence of government personnel in a contractor's plant after default in delivery has been found not to induce reliance. *Switlik Parachute Co., Inc.*, ASBCA No. 18476 decided 18 June 1975.

However, even with a show-cause letter and routine inspections, waiver *may* be found if the government takes no further action for an unreasonable time and then default terminates. *Cadillac Gage Co.*, ASBCA No. 18416, 75–1 BCA ¶11, 210.

The forbearance period can vary in duration depending in large part upon the activity of the contractor and the complexity of the termination procedure that the government must follow. *H.N. Bailey & Associates, supra.* If the contractor stops performance after the missed delivery date, a forbearance period of long duration is less likely to waive the government right to terminate. However, if the contractor is actively pursuing contract performance, silence

by the government is more likely to create an environment of detrimental reliance. *DeVito, supra; Cadillac Gage Co., supra.* In this situation, the forbearance period must necessarily be as short as possible. The government must either terminate promptly or elect to forgo the delivery schedule. In the abandonment situation, where it is unlikely that the contractor will perform further on the contract, timeliness in default termination is less critical because of the absence of contractor reliance. Nevertheless, if the government does not act, the contractor could again revive its performance relying on the government inaction. In either situation the longer the forbearance period, the greater the risk of contractor reliance and possible waiver. Prudence dictates promptness; if prudence also dictates careful consideration of a default decision, then an express intent of forbearance is appropriate practice.

Waiver.

As already noted, waiver arises under a myriad of circumstances. No discussion can cover all the possible variations. At the same time, it is worthwhile to review some of the more common affirmative actions which have been found to encourage continued contractor performance. The procurement attorney should bear in mind that the total conduct of the government must be analyzed. Thus, an express intent to forbear complete with disclaimers of waiver may be outweighed by affirmative government acts of encouragement which induce reliance.

The most sure method to induce reliance is a direction by the Contracting Officer to continue performance. Of a lesser degree would be urging or encouraging the contractor to continue to perform. In this vein, the acts of the Contracting Officer's representative (COR) can induce the reliance to continue to perform. *New Jersey Mfg. Co., Inc.*, ASBCA No. 15216, 72-1 BCA ¶9420. However, encouragement is not an absolute key to waiver. Words such as "do your best" or the normal presence of government personnel at the contractor facility carrying out routine duties will not be encouragement to the degree that reliance is a reasonable consequence. Another indication of intent to waive is the issuing of a change order or modification to the contract specifications *after* technical default. *Wickes Industries, Inc.*, ASBCA No. 17376, 75-1 BCA ¶11,180. Negotiations of aspects of the contract may also be affirmative acts, however, this is an uncertain area with cases on both sides of the issue. *Switlik Parachute Co., supra.* Another commonly held affirmative act is a request by the government for the contractor to submit a proposal for an equitable adjustment to a changed specification. *Wickes, supra.*

A final indication of intent to waive is acceptance of late deliveries. Accepting contract items during a period when default termination is possible is a clear indication that the government condones the late deliveries. However, there are variations on this theme. For example, acceptance of minor delinquencies on initial deliveries under a contract calling for installment deliveries will not waive the government's right to terminate on later delinquencies. *Woodside Screw Machine Co., Inc.*, ASBCA No. 6936 1962 BCA ¶3308. At the same time, a pattern of allowing late deliveries is an affirmative act upon which the contractor can reasonably rely. *Methode Electronics, Inc.*, ASBCA Nos. 12886 & 12916, 68-1 BCA ¶7065. Similarly, acceptance of a late "first article" with knowledge that the contractor cannot possibly meet the production delivery schedule is an affirmative act which can reasonably induce reliance. *Heat Exchangers, Inc.*, ASBCA No. 9349, 1964 BCA ¶4381. Note in this case that the affirmative act is prior to the actual delinquency in the production delivery schedule. It should be further noted that the mere fact of government acceptance of a late first article will not, by itself, waive the production delivery schedule. Constructive or actual knowledge that the production schedule cannot reasonably be met is necessary. Therefore, the Contracting Officer should affirmatively notify the contractor that acceptance of a late first article will not waive the production delivery schedule if meeting the production schedule is still reasonably possible. Additionally, tender of goods after delivery default should not be confused with acceptance of late deliveries. Tender of goods after a missed delivery date but prior to

receipt of a default termination notice, mailed before tender, will not, by itself, negate the subsequent termination. *Nuclear Research Associates, Inc.*, ASBCA No. 13563, 70-1 BCA¶8237. If the tender of delinquent goods is accepted by the government in carrying out its obligation to mitigate damages, waiver will not arise. *Methode Electronics, Inc., supra; United Microwave Co., Inc.*, ASBCA Nos. 9420 & 9629, 65-1 BCA ¶4641. Finally, the delivery of nonconforming goods is a separate and proper basis for a default termination irrespective of a waived delivery schedule. *Tenney Engineering, Inc.*, ASBCA No. 18832, 75-1 BCA ¶11,249 *Phil Rich Fan Mfg. Co., Inc.*, ASBCA No. 122770, 71-1 BCA ¶8694; ASPR 7-103.11(a)(ii).

Unfortunately, the facts that lead to waiver quite often are not timely presented to the procurement attorney. Although the procurement attorney participates in default terminations, it is commonplace for the Contracting Officer to consider the failure to meet the delivery schedule as a contract administration problem about which legal advice is unnecessary. Because of the requirements of ASPR 8-602.3, the Contracting Officer may rightfully prefer to get deliveries under the contract, even if late, rather than default terminate a contractor and reprocure from another source. In these circumstances, the Contracting Officer may *forbear* from default termination for a short period as a matter of reasonable expectation of adequate, albeit late, performance. *H.N. Bailey & Associates, supra.* Similarly, the Contracting Officer might chose to ignore the delivery schedule and wait for deliveries even though they be much later than originally contemplated. These contract administration decisions without resort to legal counsel may expose the government to an open-ended contract that cannot be enforced. The procurement attorney must be ready to advise the Contracting Officer of the pitfalls of benign forbearance and urge the Contracting Officer to seek counsel when a possible waiver situation develops. The attorney should not limit his participation to resurrecting foundering contracts; rather, the attorney should be alert to prevent the waiver situation from arising and, if such waiver is intended, to properly advise the Contracting Officer on its possible consequences.

The Way Out Of The Swamp.

Once the government has waived the delivery schedule, the contract may not be default terminated until time is again made "of the essence" by the reinstatement of an enforcible delivery schedule. *DeVito, supra.* Reinstatement is accomplished by bilateral agreement or unilateral direction of the Contracting Officer. A bilateral contract modification is, of course, the better method, but as a practical matter is often not possible. In these circumstances, resort to unilateral contract modification is necessary.

Unilateral reinstatement of the delivery schedule must meet the standard of reasonableness. In short, the new schedule must be possible of performance. Furthermore, the delivery schedule must take into account the actual situation and performance capabilities of the specific contractor. *DeVito, supra; Wickes Industries, Inc., supra.* It should be noted that unilaterally resetting the delivery schedule does not foreclose communication with the contractor as to reasonable delivery dates. Such communication is encouraged. However, as discussed below, the Contracting Officer cannot rely on contractor statements and ignore other facts available at the time the new schedule is established. Similarly, the Contracting Officer would be well advised to document the basis for the new delivery schedule in the event reasonableness is later brought into issue.

The standard of reasonableness can be very strict. For instance, where a Contracting Officer unilaterally resets the delivery schedule in accord with contractor statements as to an expected delivery date, the Court of Claims reversed the ASBCA and held that the Contracting Officer could not rely on the contractor statements if the Contracting Officer knew or should have known them to be optimistically self-serving. *International Telephone and Telegraph Corp. v. United States*, No. 230-72, decided 22 Jan 1975. However, the court suggested in a footnote that the standard of reasonableness might be relaxed upon a showing of bad faith by the contractor in negotiations

with the government on a new delivery schedule. *ITT, supra* (note 11).

One exception has arisen allowing default termination without resetting the delivery schedule by contract modification. The exception was based on an attempt by the government to set a new delivery schedule by bilateral agreement. The bilateral modification was returned unsigned with a counter-proposal by the contractor. The government did not expressly adopt the counteroffer or insert it into the contract. Instead, the government waited until both its proposal date and the contractor's counter-proposal date had passed and then default terminated the contract. This action on the government's part was held to be reasonable and the contract properly terminated. *R.E. Atckison, Inc.*, ASBCA Nos. 15896, 15905, 72-1 BCA ¶9421. Some cases such as *L.W. Foster Sportswear Company, Inc.*, ASBCA Nos. 5754 *et al*, 1962 BCA ¶3364, have characterized this method of termination as waiting a reasonable time for deliveries. However, this is not a third method to default terminate a contract after the government waived the delivery schedule. Although the facts show the government action to be reasonable, the standard is much too loose in determining what is a reasonable period to wait for deliveries. Neither the Contracting Officer nor the procurement attorney should rely on the few cases incorporating peculiar fact situations such as those in *Atckison*. The Contracting Officer should set a new delivery schedule through contract modification.

Summary.

In summary, waiver may arise as the result of a conscious government choice or as a result of a forbearance period that became a waiver as a result of passive or affirmative government acts that encouraged the contractor to continue performance. The procurement attorney should be prepared to provide advice under either circumstance. Likewise, the procurement attorney should understand that once waiver arises, default termination for failure to make timely delivery is no longer available. Timeliness cannot be enforced until a new delivery schedule is reinstated by proper contract modification. Only then are the respective rights of the contract parties restored and time again made of the essence.

Legal Assistance Items

By: Captain Mack Borgen, Administrative and Civil Law Division, TJAGSA

1. Items of Interest.

Family Law-Illegitimate Children-Entitlement to Government Benefits. In most cases the issue of paternity arises in the context of an attempt by the mother or by a state or county agency to obtain support or monies from the putative father. The administrative processing of paternity claims against a servicemember is to be done in accordance with Army. Reg. 608-99, "Paternity Claims," 2 February 1967. Illegitimacy issues arise also in terms of the child's right to receive certain government or government-related monies or other emoluments. The definition of "dependent" with regard to a member of a uniformed service (and thus elibility for legal assistance) is found at 37 U.S.C.A. §401, *as amended* Pub. L. 93-64, Title I, §§103,104, July 9, 1973, 87 Stat. 148. The United States Code is riddled, however, with other sections defining "child" and, specifically, defining under what circumstances an illegitimate child may claim under the government program in question. *See, e.g.* 10 U.S.C.A. §1477(b)(4)(5)(Death gratuity); 38 U.S.C.A. §101(4)(Title 38 Veterans' Benefits including Dependency and Indemnity Compensation but excepting Chap. 19 (Insurance)); 38 U.S.C.A. &701(3)(NSLI); 38 U.S.C.A. §765(8)(SGLI-VGLI).

A very fine opinion of the Comptroller General recently focused upon the rights of an illegitimate child under 5 U.S.C.A. §5582(b) in a settlement action for a deceased Department of the Army civilian's unpaid compensation. 54 Comp. Gen. 858 (1975). The employee had not designated a beneficiary and was unmarried at

the time of his death. The claimants characterized themselves as the illegitimate children of the deceased for the limited purpose of asserting this claim. The member had no other children.

The claims were initially denied since under the laws of intestate succession of the State of New York, which was the domicile of the deceased, the children would not be able to inherit.

The issue before the Comptroller General was the breadth of the phrase "child or children" as used in 5 U.S.C.A. 5582(b). Did the phrase include the "children of a deceased Federal employee who cannot inherit from their natural father under [the law of the deceased's state of domicile]"? pp 859–60.

It was noted that "since there is no body of Federal domestic relations law, issues of personal status arising under [this statute] are resolved with reference to relevant State law." p. 860. It appears, however, that equal deference was given, *inter alia*, to the implications of recent Supreme Court cases. *Levy v. Louisiana*, 391 U.S. 68 (1968) (Recognition of general right of illegitimate children to share equally with legitimate children in governmentally-conferred programs); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (Denial of equal recovery rights to unacknowledged illegitimate children under workman's compensation laws violative of Equal Protection Clause of the Fourteenth Amendment); *Jimenez v. Weinberger*, 417 U.S. 628 (Social Security Act provisions disqualifying some categories of illegitimate children from eligibility under disability benefits program violative of Equal Protection Clause of Fourteenth Amendment).

This Comptroller General decision notes that these and other cases "signify the ongoing evolution, reflecting changes in social and political attitudes, of a judicial disposition to mitigate the legal incapacities and onerous burdens that still flow from 'illegitimacy'." 861. Departing from prior decisions it was held that probative evidence on the issue of paternity would be considered "if the relevant State statute of intestate succession incorporates rigid procedural requirements. . . ." p. 862.

The effect of this decision is to give the illegitimate children, *i.e.* the claimants under a governmental program, an additional forum to prove their relation to the deceased if they can show that the relevant *state* statute on intestate succession incorporates "rigid procedural requirements for establishing paternity before 'illegitimate' children can inherit." p. 862. (Emphasis added). [Ref: Ch. 23, DA Pam 27–12].

State Income Taxation–Section 514 of the Soldiers' and Sailors' Civil Relief Act–The ACIR Report–The Effect of the Federal Privacy Act. In the last issue of *The Army Lawyer* the theory and constitutionality of Section 514 were briefly analyzed and the present status of the states' taxation of military pay was described. It is obvious that military pay is treated differently than civilian pay and that the long-term effect of Section 514 upon the states has been to limit or discourage the application and enforcement of state income taxes with regard to military pay. Recently, a number of events have coalesced to renew the pressure for Congressional reevaluation of the present methods and practices relating to the state income taxation of military pay.

Certainly states are increasingly in need of new sources of revenue, and to many states it is preferable, to the extent possible, to use the progressive income taxation rather than regressive forms of state taxation such as sales and excise taxes. Additionally there have been during the past several years a number of reported incidents of income tax evasion or failure to file returns by some members of the military. Furthermore, a September ruling of the Office of Management and Budget abruptly ended the federal government's 20-year-old practice of informing the servicemember's home state of the member's address and military income during the prior year. The OMB rescinded the circular, No. A–38, based upon its interpretation of the Privacy Act provisions which prohibit the transfer of certain personal information between agencies of the federal government and from the federal government to state and local governments.

These events have added further incentive to the push for reform. In addition to the efforts of

state tax authorities and the National Association of Tax Administrators, the Advisory Commission on Intergovernmental Relations (ACIR) held hearings and released its Draft Report this fall. The Report included a number of recommendations for consideration including the withholding of state and local income taxes. Legislation has been introduced to effectuate that recommendation. Also suggested for consideration was the removal of Section 514's jurisdictional rule so that military pay would be taxable under state personal income taxes according to the same rules as apply to all other forms of compensation.

Although it is far too early to determine which, if any, of the many recommendations will be enacted, these events and the increasingly substantiated evidence of evasion or forgetfullness should remind all military personnel, and especially military Legal Assistance Officers in counseling their clients, that military persons are required to follow the state tax laws of their bona fide domicile. [Ref: Chs. 40, 43, DA Pam 27-12].

Family Law-Adoption-State Subsidized Adoption Legislation. In recent years the number of white infants available for adoption has declined significantly. This decline has been attributed to changes in the abortion law, the wider availability of contraceptives and the resultant lowering of the birth rate, and the increasing number of unmarried mothers keeping their children. At the same time the application for adoptable children has continued to increase.

Despite the high demand for adoptable children, one type of child—the child with "special needs", traditionally has not been considered "adoptable" by either the potential parents or the agencies. As stated by Mr. Stanley B. Thomas, Assistant Secretary for Human Development, HEW, "[t]he history of adoption practices in this country has generally reflected our assumption that each child is the total responsibility of his or her parents. In the course of typical adoptions of healthy white infants, there has been little reason to re-examine this notion—that is, until recently. Now we face an increasing number of children with special needs who are available for adoption but for whom we are unable to find adoptive homes. These are the children with physical, mental, or emotional handicaps, children of various minority groups, older children, and sibling groups. As an unintended but very real consequence of our assumption, hundreds of children are relegated to institutional care or the uncertainties of foster family care at substantial cost to the States and at immeasurable but immense human cost to the children.

"In recognition of these unfortunate circumstances, the relatively new idea of subsidized adoption has developed as a way to help qualified families assume permanent responsibility for these special children. Subsidized adoption provides reimbursement after a child has been placed for adoption, according to a prior agreement between the adoptive parent(s) and the social agency. Such an agreement is tailored to the child's needs, and may allow for a specific medical, legal, or other cost; a monthly reimbursement for a limited time; a monthly reimbursement for an indefinite period."

At the present time 41 states have subsidized adoption legislation, although in some states appropriations have not yet been made or the implementing regulations promulgated. Further and up-to-date information on the subsidized adoption programs may be obtained by writing the Children's Bureau, Adoption Section, Post Office Box 1182, Washington, D.C. 20013. Telephone: 202-755-7730. [Ref: Ch. 21, DA Pam 27-12].

2. Pending Legislation.

Estate Planning-Federal Estate Tax Exemption. Despite the tremendous changes in the real value of the dollar, Congress has not increased the amount of the federal estate tax exemption since its enactment in 1942 (Sec. 2052, I.R.C. ($60,000)). Several bills are presently before the House Ways and Means Committee which would boost the exemption to as much as $200,000. In light of Congress' repeated "recognition" of the effect of inflation with regard to other governmental legislation (Social Security, DIC, federal wages, personal income tax exemptions), the likelihood of some increase

in the exemption is strong. [Ref: Chs. 13,42, DA Pam 27-12].

3. Articles and Publications of Interest.

Estate Planning-Insurance-Survivor's Benefits. DA Pam 360-517, *Armed Forces Life Insurance Counselor's Guide,* May 1975. Although this pamphlet was prepared to aid the military commanders and insurance officers in counseling servicemembers, this publication may also be extremely useful to the Legal Assistance Officer. It briefly analyzes the major government benefits relevant to estate planning (government insurance programs, DIC military retirement and the Survivor Benefit Plan, Social Security, VA education assistance, CHAMPUS, etc.) and it outlines the basic types and fundamentals of insurance planning and purchasing. For a far more thorough and detailed analysis of the types of insurance, the sales practices, and consumer information see THE CONSUMER UNION REPORT ON LIFE INSURANCE (Bantam Books) (Rev. 1972 Ed.) (139 pp.). [Ref: Chs. 11, 13, 16, DA Pam 27-12].

Retired Personnel-Interrelation Between Military Service and Civil Service. Hayman, "Military Service Credit Toward Civil Service Retirement," *The Retired Officer Magazine,* p. 22 (October 1975). [Ref: Ch. 38, DA Pam 27-12].

Veterans' Benefits-Survivors' Benefits-State Bonuses. DOD Information Guidance Series (DIGS) No. 8A-10 (Rev. 7), "State Bonuses for Vietnam Veterans," September 1975. Seventeen states and the Territory of Guam have authorized the payment of cash bonuses to veterans or to the survivors of veterans who served on active duty during the Vietnam period. The exact eligibility requirements and the amount of the entitlement vary from state to state. Most states have set a cut-off date for the receipt of all applications so that if an individual believes he may be eligible for a state bonus, he should make prompt inquiry or application. The above-noted publication summarizes each state program and lists the proper mailing address of the appropriate state agency or office to which application should be made. To obtain a copy of a DIGS publication, see the October issue of *The Army Lawyer* [Ref: Chs. 16, 44, DA Pam 27-12].

JAG School Notes

1. Environmental Law Course. The 1970's have witnessed the growth of a new body of law: environmental law. This growth, in large measure, can be attributed to a number of federal environmental enactments, including the National Environmental Policy Act of 1969, the Clean Air Amendments of 1970, and the Federal Water Pollution Control Act Amendments of 1972. That these environmental laws may, and will, affect military activities is apparent. Recognizing such, the Acting The Judge Advocate General recently directed the appointment of an Environmental Law Specialist at all Army installations.

Providing the necessary professional training to those attorneys designated as Environmental Law Specialists, and those other attorneys whose duties require dealing with the various environmental laws, is the goal of the 3d Environmental Law Course (5F-F27) to be offered at TJAGSA from 12-15 January 1975. This course will provide the students with an overview of the environmental law area, with particular emphasis on the National Environmental Policy Act of 1969 and the requirement for Environmental Impact Statements.

In anticipation of the training requirements of the designated Environmental Law Specialists, an exception to the normal quota procedure system has been made. For this course only, quotas should be obtained directly by calling TJAGSA (804-293-2028 or 293-7475 or AUTOVON 274-7110 and asking for one of the commercial numbers) with the names of attendees prior to the close of business on 1 December 1975. The instruction will be conducted by members of the TJAGSA faculty and guest speakers.

2. Freedom of Information Act CLE Cassette. The newest listing in TJAGSA's growing library of CLE audio cassettes is a 74-minute offering on the Freedom of Information Act. This tape includes a discussion of the background and development of the Act, with emphasis on the Army's implementation of the recent amendments which became effective on 19 February 1975. Captain Thomas M. Strassburg, Instructor in the School's Administrative and Civil Law Division, is the tape narrator. The program was produced during a class given at The Judge Advocate General's School on 15 May 1975.

The Freedom of Information Act audio cassette (JA–A–232) and its accompanying instructional materials are available on a loan basis, or if a blank cassette is sent in, may be duplicated without charge by the Audio Visual Division, TJAGSA. As an alternative, the JAG School Bookstore carries a stock of cassettes as follows: 60-minute, $.70; 90-minute, $1.00; 120-minute, $1.75. Those desiring to purchase blank cassettes for duplication need only send a note to the Custodian, TJAGSA Bookstore, indicating the tape to be copied. Checks should be made payable to "Fort Lee Exchange, Branch 1603."

Reserve Affairs Items

From Reserve Affairs, TJAGSA

1. ADT For HQ IX Corps. The annual training for HQ IX Corps was recently completed at Schofield Barracks, Hawaii. The SJA section, headed by Colonel Shuichi Miyasaki, participated in exercise Tropic Lightning X (TLX), along with the Japan-based active Army elements of HQ IX Corps, and the 25th Infantry Division. Serving with the only corps headquarters currently composed of active and reserve augmentation elements, the SJA section was in a unique position to cooperate and coordinate with active Army personnel. Captain Gary J. Krump of HQ USARJ/IX Corps, from Camp Zama Japan, was the active Army SJA representative who participated. Accompanying Colonel Miyasaki as part of the reserve augmentation were Lieutenant Colonel George W.Y. Yim, the Deputy SJA, Captain Earle A. Partington, the chief of administrative law, and Captain Frank Yap, chief of claims. Colonel George Loo and Captain Wesley F. Fong served as the SJA exercise controllers for the two week period. Administrative support was supervised by SGM John Tollentino, and provided by SP5 William Campbell, SP5 Ronald Sakata, and SP4 Alan Nakasone.

Operating a corps headquarters SJA office at a main CP, then deploying to the field while continuing operations, were the two most difficult physical aspects of the exercise. Section operations consisted of identifying, analyzing, and resolving problems, and coordinating those resolutions with the other headquarters' staff sections. Coordination was accomplished with subordinate command SJA's such as Lieutenant Colonel Pedar C. Wold, SJA of the 25th Infantry Divison. Corps legal policy guidance and staff legal review were also provided, thereby enabling all training goals to be met. The IX Corps headquarters was given a considerable boost by the performance of this reserve section during the course of TLX.

The Functions and Duties of an ARCOM Staff Judge Advocate

By: Colonel Charles E. Brant, JAGC, USAR
Staff Judge Advocate, 83d US Army Reserve Command

What is an Army Reserve Command and what are the duties of the ARCOM Staff Judge Advocate? In 1968 the ARCOM's replaced the CONUS Army Corps, assuming full responsibility for the administration, training, support and command of reserve units in given geographical areas. There are 19 ARCOM's throughout CONUS. Initially, therefore, the ARCOM SJA replaced the Corps SJA in his functions, but soon thereafter important differences between

the two became apparent. The reserve SJA has few military justice duties, but has training, legal assistance and staff responsibilities which the Corps SJA did not have.

Over the past seven years the ARCOM experience has proven a happy one for the Army. The reservist has been integrated into the Army total force concept, to his professional improvement, and the Army has been able to answer its manpower needs within a realistic cost effective framework. Most importantly, the readiness of the reserve has been steadily upgraded. During these years, the SJA's role became clearer and his value to the ARCOM and his commander has been firmly established. Many of the traditional activities of the Active Army SJA are performed by his ARCOM counterpart, but variations and differences are nonetheless present. This article has then, a twofold purpose: to introduce the Active Army JAGC officer to the ARCOM SJA section and to assist the newly-appointed Reserve Command SJA toward a better understanding of the duties he will likely be called upon to perform.

Areas of Responsibility.

The SJA is in most ARCOM's a member of the special staff along with the Adjutant General, the Inspector General, the Surgeon, the Chaplain and the Information Officer. In others, he may be on the personal staff if that concept is employed by the commander. In either case, his functions can be categorized under three main headings which, for want of a more accepted description, may be thought of as supervisory services, staff services and personal services. For me, these describe the SJA's work from the standpoint of the recipients of his service and are useful for identification and discussion, but they are not meant to suggest that the SJA is less than first and always, the military legal advisor to his commander. As with every SJA, this is his *raison d'etre.*

Supervisory Services.

ARCOM's are assigned command and control over Judge Advocate General's Service Organizations, or JAG detachments. These selected reserve units are composed entirely of JAGC personnel whose active and inactive duty training and administration are the responsibility of the ARCOM. Because of the professional nature of their training and duties, they cannot be properly or effectively supervised by a nonprofessional officer. Therefore, AR 27-4, para. 7d, tasks the ARCOM SJA with technical supervision over JAGSO units assigned to the ARCOM. The SJA thus gives the ARCOM commander and staff the expertise to carry out this aspect of command. He inspects unit training, makes staff visits and evaluates the performance of the detachment commanders and team directors. He assists in recruiting for detachments and facilitates assignments and reassignments of ARCOM JAGC personnel between detachments.

Support groups, general officer commands and other troop program units subordinate to the ARCOM, have junior staff judge advocates assigned for whom the ARCOM SJA provides technical assistance and supervision. He makes sure that the JAGC officers assigned to the ARCOM become educationally qualified for the positions they hold and for promotion and reassignment. The ARCOM SJA is the initial link between the ready reserve officers assigned to units in the field and the CONUS SJA's within technical channels of communication.

In addition to rendering legal support to the command, the SJA performs a necessary staff supervisory function without which the commander could not effectively discharge his responsibilities.

Staff Services.

This category includes all those functions directed toward advising the commander and his staff on matters affecting the command which have legal implications. Because of the dual status (civilian and military) of the ready reservist, problems arise that are quite foreign to an active Army command. Different statutes and regulations apply, and involvement with the civilian community is constant and, in some cases, complex.

Indeed, differences are significant and the active Army SJA should coordinate with his re-

serve counterpart when and if a problem involving the reserve or a reservist reaches his desk. Some matters upon which the ARCOM SJA must advise his commander or his staff colleagues, or be the action officer are:

1. Personnel actions which adversely affect the pay, rank, status, promotability or eligibility for benefits of a reservist.

2. Matters in which a reserve member is represented by an attorney at law.

3. Disciplinary procedures against reservists arising out of incidents during inactive duty training (AR 140–158; AR 140–1).

4. The use of Article 15 in connection with infractions occurring while the reservist is performing annual training.

5. Incidents giving rise to a claim against the government arising out of reserve activities.

6. Incidents giving rise to a claim on behalf of the government arising out of reserve activities.

7. Allegations of discrimination because of race, creed, sex, political belief or activity.

8. Allegations of illegal or unfair use of rank, position or command.

9. Allegations of actual or suspected criminal activity, misappropriation of funds or equipment by reservists.

10. Problems arising in the civilian employment of reservists which are alleged to be due directly or indirectly to performance of military training. (The reservists' rights under 50 App USC § 459.)

11. Input concerning pending state and local legislation affecting reservists and benefits for reservists such as bonuses, tax exemptions, educational benefits and the like.

12. Negotiation and approval of interservice support agreements, usually between the ARCOM and the state National Guard.

13. Negotiations—and enforcement—of leases for USAR facilities.

14. Requests for legal advice by reservists in connection with their reserve duties.

15. The interpretation of federal statutes and Army Regulations, especially those pertinent only to the reserve upon which there is little or no active Army guidance.

16. Legal actions brought against reservists arising out of their duties. These range from injunctions brought against the commander to damage suits and even criminal prosecutions against truck drivers and military police.

17. Preparation and conduct of military justice and law of war training in the ARCOM.

18. Service as legal advisor to elimination board proceedings and assignment of individual counsel for respondents. (AR 135–178; AR 135–178).

19. Administration of the claims service and responsibilities of the ARCOM (AR 27–20).

20. Troubleshooting problems that invariably arise with local officials, government agencies, trade unions, firms and businesses and members of the general public.

21. Review of involuntary calls to active duty for unsatisfactory reserve participation.

Of course, the list is not all inclusive. In addition, many of the subordinate units assigned to the ARCOM have no SJA on their staff and are thus wholly dependent on the ARCOM for this support. Like the ARCOM Commander, these unit commanders face the same legal problems we have just mentioned.

Personal Services.

To borrow an expression from civilian practice, the ARCOM SJA has both institutional and individual clients, assuming that command and staff echelons represent institutions rather than individuals. In addition to the services that the SJA performs for these elements of the command, he has a number of functions which concern only one or two individuals.

As lawyer for the ARCOM, the SJA renders legal assistance to members of the command and

to other military personnel which he supports and who have no JAGC office readily accessible.

Much of today's inactive duty training in the ARCOM involves mutual support and domestic action programs. (AR 360–61; AR 28–19) These training activities bring the reserve into the "Total Force" and do much to enhance the image of the Army in the civilian community. The active Army SJA has little or no contact with them except, of course, the on-site support he may receive from reserve JAG's on active duty. These training programs include military legal instruction for ROTC classes and active Army personnel; providing a full range of legal services for military personnel and their dependents who have no JAG support at their place of duty. These include advisor and support detachments, recruiting personnel, ROTC staff, retired persons and the like, who are located hundreds of miles from the nearest active Army SJA but who can readily be served by the ARCOM SJA and JAG officers under his direction. Likewise, the SJA can arrange to staff the office of his active Army counterpart on weekends and evenings for the convenience of persons who cannot come for legal assistance during normal duty hours.

In domestic action and community service projects, the ARCOM SJA is a key figure. We must review all proposals for such projects to ensure that they do not violate local and federal law or Army regulations and that they do not antagonize trade unions, civic groups or business assocations. Sometimes one man's idea of community service is another's notion of a community problem. Since the purpose is service, potential problems must be anticipated and resolved *before* the project is implemented. The possible legal difficulties can be appreciated when one considers the range of these projects: an engineer battalion may be asked to build a playground or a country airstrip; a medical or dental detachment may be called upon to staff a clinic for indigents or JAG officers to assist in a poverty legal services program. And there are the routine requests for parade details, band appearances and equipment displays. Department of the Army policy is to approve these requests where they constitute, as they often do, meaningful training for the reservists, but problems exist which can be serious for the commander who acts without the guidance of his SJA. The nonlawyer commander may not recognize that the Posse Comitatus Act might prevent his MP company from directing traffic at a county fair racetrack which his engineer company helped to build

An Important Mission.

Because of his close and continuing involvment in both the civilian and military communities, the ARCOM commander faces legal problems that cannot be adequately handled by either military or civilian counsel alone. He needs and depends upon the assistance and advice of his reserve SJA. His mission can be stated thusly:

"The ARCOM Staff Judge Advocate has staff responsibility for the administration of justice within the ARCOM and for furnishing legal advice and services to the Commanding General, the staff and the commanders and personnel of subordinate, assigned or attached organizations. He supervises and administers military law and justice training, claims activities and the legal assistance programs of the ARCOM. He is responsible for the technical and staff supervision of Judge Advocate General's Service Organizations and other JAGC personnel assigned or attached to the ARCOM. He furnishes legal advice and guidance on all matters where such is indicated and maintains liaison with the SJA's of higher and subordinate headquarters and with the Assistant Commandant for Reserve Affairs, TJAGSA." Simply stated, perhaps, but not so simply carried out. The experience of the past years teaches me that an ARCOM commander who is well served by his SJA is a more effective leader.

CLE News

1. TJAGSA Courses (Active Duty Personnel)

November 10–21: 64th Procurement Attorneys' Course (5F–F10).

December 8–11: 2d Military Administrative Law Developments Course (5F–F25).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F–F11).

January 12–15: 3d Environmental Law Course (5F–F27).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

January 26–30: 23d Senior Officer Legal Orientation Course (5F–F1).

March 8–19: 65th Procurement Attorneys' Course (5F–F10).

April 5–9: 24th Senior Officer Legal Orientation Course (5F–F1).

April 26–May 7: 66th Procurement Attorneys' Course (5F–F10).

May 10–14: 6th Staff Judge Advocate Orientation Course (5F–F52).

May 17–20: 1st Civil Rights Course (5F–F24).

May 24–28: 13th Federal Labor Relations Course (5F–F22).

June 7–11: 26th Senior Officer Legal Orientation Course (5F–F22).

June 28–July 2: 2d Criminal Trial Advocacy Course (5F–F32).

July 12–16: 25th Senior Officer Legal Orientation Course (5F–F1).

July 19–August 6: 15th Military Judge Course (5F–F33).

August 9–13: 3d Management for Military Lawyers Course (5F–F51).

2. TJAGSA Courses (Reserve Component Personnel).

November 10–21: 64th Procurement Attorneys' Course (5F–F10).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F–F11).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

March 8–19: 65th Procurement Attorneys' Course (5F–F10).

April 26–May 7: 66th Procurement Attorneys' Course (5F–F10).

June 21–July 2: 1st Military Justice II Course (5F–F31).

June 21–July 2: 1st Military Administrative Law Course (5F–F20).

July 11–24: USA Reserve School BOAC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction).

3. Selected Civilian-Sponsored CLE Programs (This Quarter).

NOVEMBER

2–5: National College of District Attorneys Course, Pretrial Problems Seminar, Orlando, FL.

2–7: National College of the State Judiciary, Specialty Session in Evidence—Special Courts, Judicial College Building, University of Nevada, Reno, NV.

2–7: National College of District Attorneys Course, Prosecutors Office Administrator Course II, Houston, TX.

2–21: National College of the State Judiciary, Regular Four Week Session (Session III), Judicial College Building, University of Nevada, Reno, NV.

3–4: Federal Publications Inc, Government Contract Program, Contracting for Service, Washington, DC.

6–8: Illinois State Bar Association, midyear meeting, Pick-Congress Hotel, Chicago, IL.

7: ALI–ABA Committee on Continuing Professional Education, meeting, Philadelphia, PA.

7: Maritime Law Association of the United States, fall meeting, Americana Hotel, New York, NY.

9–14: National College of the State Judiciary, Graduate Session, The Judge and the Court Trial, Judicial College Building, University of Nevada, Reno, NV.

10–11: ABA Section of Local Government Law Co-sponsored with the National Civil Service League, national institute on "Equal Employment Opportunity Law," Fairmont Hotel, San Francisco, CA.

10–12: Federal Publications Inc, Government Contract Program, Government Contract Costs, Tropicana Hotel, Las Vegas, NV.

10–12: National Conference on Continuing Legal Education, meeting, sponsored by the ABA, Kellogg Center for Continuing Education, Chicago, IL.

12–15: National Legal Aid and Defender Association, 53d Annual Conference, Olympic Hotel, Seattle, WA.

14–15: ABA Section of Young Lawyers, national institute on "Consumer Law Practice," Omni International Hotel, Atlanta, GA.

14–15: PLI Program, Medical Ethics and Legal Liability, New York Hilton Hotel, New York, NY.

16–19: National College of District Attorneys, Prosecutor Education Institute, Houston, TX.

17–19: Federal Publications Inc, Government Contract Program, Practical Negotiation of Government Contracts, Twin Bridges Marriott, Washington, DC.

19–21: Federal Publications Inc, Government Contract Program, Negotiated Procurement, Washington, DC.

20–21: FBA–BNA and New York State Bar Association Briefing Conference on Labor Law, The Plaza, New York, NY.

20–21: ALI–ABA Program, Trade, Aid and International Regulation, ABCNY, New York, NY.

21–22: 17th Annual State Tax Institute, Idaho State University, Pocatello, ID.

24–25: Federal Publications Inc, Government Contract Program, Cuneo on Contracts, Los Angeles Mariott, Los Angeles, CA.

24–25: Federal Publications Inc, Government Contract Program, Management Techniques for Construction Subcontractors, Americana Hotel, Los Angeles, CA.

30: ALI–ABA Federal Rules Complex, meeting, St. Thomas, V.I.

30–Dec 12: National College of the STATE Judiciary, Specialty Session in Court Administration, Judicial College, University of Nevada, Reno, NV.

DECEMBER

1–2: ALI–ABA Program, Federal Bankruptcy Procedure Under the New Bankruptcy Rules, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

1–3: ABA Criminal Justice Section, Court Administrators' Conference, Reno, NV.

1–5: ABA Center for Administrative Justice, Trial Techniques in Administrative Proceedings, meeting, Washington, DC.

1–5: Federal Publications Inc. Government Contract Program, Civilian Agency Procurement, Quality Inn/Pentagon City, Washington, DC.

3–4: ALI–ABA Program, International Arbitration, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–4: ALI–ABA Program, Federal Criminal

Procedure, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–5: Oklahoma Bar Association, annual meeting, Oklahoma City, OK.

3–5: State Bar of Georgia, midyear meeting, Atlanta, GA.

3–5: Iowa State Bar Association, midyear meeting, Des Moines, IA.

3–5: Federal Publications Inc, Government Contract Program, Subcontracting, Sahara Tahoe, Lake Tahoe, NV.

4–5: FBA–BNA Briefing Conference on Postal Developments, Stouffer's National Center Inn, Arlington, VA.

4–5: PLI Program, "Public Interest" Litigation, Hyatt on Union Square, San Francisco, CA.

4–6: American Law Institute Program, "Restatement of the Law, Second, Judgments—Advisers," The Westbury, New York, NY.

5–6: ALI–ABA Program, Practice Under the New Federal Rules of Evidence, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

5–6: PLI Program, Medical Ethics and Legal Liability, Americana of Bal Harbour Hotel, Miami, FL.

7: ABA Section of General Practice, Committee on Military Law, meeting of vice chairmen, Washington, DC.

7–10: National College of District Attorneys Course, Law Office Management Seminar, Houston, TX.

8–12: Federal Publications Inc, Government Contract Program, Masters Institute in Government Contracting, Williamsburg, VA.

9–13: National College of District Attorneys Course, Organized Crime Seminar, Portland, OR.

10–12: Federal Publications Inc, Government Contract Program, Government Contract Costs, Hospitality House, Williamsburg, VA.

15–17: Federal Publications Inc, Government Contract Program, Changes in Government Contracts, Quality Inn/Pentagon City, Washington, DC.

18–19: Federal Publications Inc, Government Contract Program, Cost Estimating for Government Contracts, International Inn, Washington, DC.

18–19: Federal Publications Inc, Government Contract Program, Management Techniques for Construction Subcontractors, Quality Inn/Pentagon City, Washington, DC.

JANUARY

4–11: National Institute for Trial Advocacy, Southeast Regional Session, Part Two, University of North Carolina, Chapel Hill, NC.

6–8: US Civil Service Commission CLE Program, Paralegal Training Seminar, Washington, DC.

7–9: Federal Publications Inc, Government Contract Program, Changes in Government Contracts, Holiday Inn/Golden Gateway, San Francisco, CA.

10–17: National Institute for Trial Advocacy, Northeast Regional Session, Part Two, Cornell Law School, Ithaca, NY.

11–14: National College of District Attorneys Course, Welfare Fraud Seminar, Colorado Springs, CO.

15–16: Federal Publications Inc, Government Contract Program, Cost Estimating for Government Contracts, Sheraton Chateau LeMoyne, New Orleans, LA.

20–22: US Civil Service Commission CLE Program, Environmental Law Seminar, Washington, DC.

22–23: ABA Litigation Section, national institute on "Proof of Damages," Fairmont Hotel, San Francisco, CA.

22–24: ALI–ABA Program, Modern Real Estate, Transactions, Los Angeles, CA.

25–29: National College of District Attorneys Course, Advanced Organized Crime Study Group, New Orleans, LA.

JAGC Personnel Section

From: PP & TO, OTJAG

1. Orders Requested As Indicated.

Name	*From*	*To*
	COLONELS	
LARAY, William	USALSA, w/sta Ft Carson	USALSA, Falls Church, Va.
	LIEUTENANT COLONELS	
MAY, Ralph	USALSA, Falls, Church, Va.	USA Computer Sys Cmd, Ft Belvoir
WITT, Jerry V	Europe	JCS, The Pentagon
	CAPTAINS	
ASHLEY, Richard	Korea	USA Admin Cen, Ft. Benj Harrison, Indiana
BOYLE, Martin J	MTMC, Oakland, Ca	USA Letterman Hospital, Presidio of SF Ca
DESONIER, Don P	Korea	9th Inf Div, Ft Lewis, Wash.
DOUBERLEY, William	Europe	31st ADA Bde, Homestead AFB, Fla
DYCUS, Jewel E	USA Field Artillery, Ft Sill, Okla	Thailand
ECKER, Frank	Watervliet Arsenal, N.Y.	Europe
FORBES, David L	Korea	4th Inf Div, Ft Carson, Colo
GENDRY, Thomas	4th Recruiting Region, Ft. S. Houston, Texas	HQ USAG, Ft S. Houston, Texas
HANCOCK, Jeffrey	Europe	6th Region Criminal Inv. Cmd Presidio of S.F. Ca.
HIMES, Albert L	Defense Supply Svc, Wash DC	USALSA, Falls Church, Va
KETELS, Donald	4th Inf Div, Ft Carson, Co.	25th Inf Div, Hawaii
LOH, Kom F	Korea	USA Comm Cen, Ft Huachuca, Ariz
MASENGALE, Roy	Korea	Fitzsimons Gen Hosp, Denver, Co.
NAGLE, James	Korea	Electronics Cmd, Ft Monmouth, NJ
OLIVE, Robert S	Korea	USA Claims Svc, Ft. Meade, Md.
SCHON, Alan W	4th Inf Div, Ft Carson, Co	Def Lang Inst, Monterey, Ca.
SMITH, Michael	Engr Center, Ft L. Wood, Mo	Def Lang Inst, Monterey, Ca.
TOOMEY, Allan A	USALSA, Falls Church, Va	USA CID Agency, Wash DC
TROMEY, Thomas N	Europe	Armor Center, Ft Knox, Ky
VAGLICA, Phillip	Korea	4th Inf Div, Ft Carson, Colo.
WERNICK, Kenneth	9th Inf Div, Ft Lewis, Wa	USALSA, Falls Church, Va.
WICKSTEAD, Michael	Korea	9th Inf Div, Ft Lewis, Wa.
	WARRANT OFFICERS	
RAMSEY, Alzie E	Europe	Stu Det, USA Avn Sch, Ft Rucker, Ala.

2. Admin Notes.

a. The Civil Service Commission just established a Paralegal Specialist Series, GS–950, and a revised Legal Clerk and Technician Series GS–986. Concurrently Legal Assistance and Adjudicating Series (GS–954 and 960) have been abolished. Information, including job descriptions, are contained in CSC Bulletin No. 930–17, 5 August 1975.

b. DTA No. 50–913, Office Type Furniture and Equipment, which contains many items specifically designed and authorized for SJA offices and court rooms, was revised and republished 30 May 1975. New line item numbers have been assigned to several items of interest to Staff Judge Advocates.

Current Materials of Interest

The Fall 1975 issue of the *Military Police Law Enforcement Journal* (Volume II, No. 3) contains several articles of note: (1) "The Trauma of Rape" (2) "Military Police Role in Juvenile Offender Programs" (3) "The Forgotten Female Military Offender" (4) "Investigations Management" (5) "Special Threat—Special Reaction" (6) "Innovative Discipline for Future Confinement Systems" and "ADP: An Application to Confinement."

Patton, "United States Individual Income Tax Policy As It Applies to Americans Resident Overseas," 1975 DUKE L.J. 691 (August 1975).

Comment, "The Right to a Legally Trained Judge: *Gordon v. Justice Court*," 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 739 (Summer 1975). Discusses the unanimous decision of the California Supreme Court that use of a non-attorney judge in any criminal adjudication punishable by imprisonment violates the fourteenth amendment guarantee of due process of law.

By Order of the Secretary of the Army:

FRED WEYAND
General, United States Army
Chief of Staff

Official:

PAUL T. SMITH
Major General, United States Army
The Adjutant General