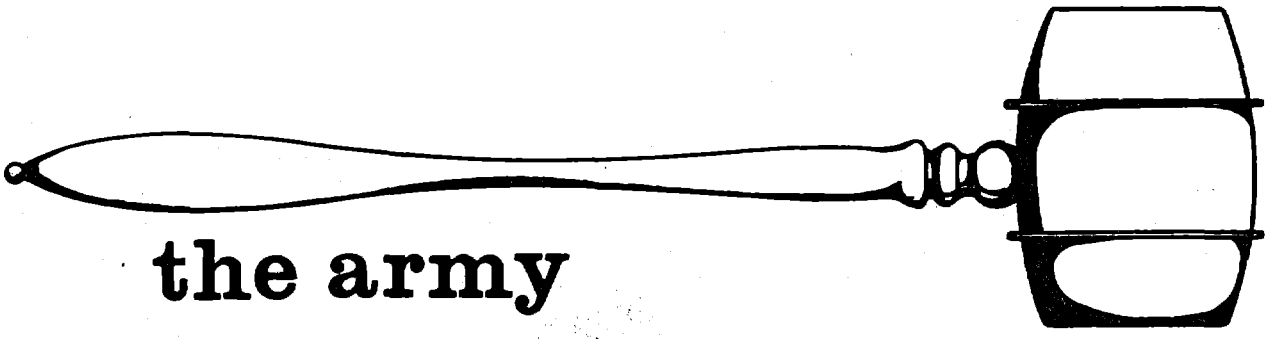
WO1 RINGSTAD



the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-123

March, 1983

Table of Contents

The Meaning of Being Part of the "Corps"

Brigadier General Richard J. Bednar
Judge Advocate, USAREUR and Seventh Army

Our Army is now seriously embarked on the important program to develop a regimental system. The goals of this new system all relate to improved readiness and cohesion. A U.S. Army Regimental System, it is believed, will foster a sense of belonging, promote loyalty and dedication, perpetuate heritage and tradition, and improve espirit de corps.

It is my thought that the U.S. Army Judge Advocate General's Corps is an organization within the Army which already pursues these goals with great success, and has done so as a tradition. It is the very belonging to the *Corps* which promotes the same personal qualities and builds those attributes sought in the establishment of the regimental system.

Judge Advocates are not merely officer/lawyers distributed throughout the Army to fill authorized positions. Of course, they belong to units and commands and serve those organizations in the performance of their professional duties. But much more than that, they also belong to the Judge Advocate General's *Corps*, a proud organization with roots older than the nation itself; an organization that binds all judge advocates together in a special way because they do belong to the "Corps."

The evidence of this special relationship which holds judge advocates together is strong. All judge advocates share the concurrent commitment to

two honored professions—arms and the law. They are tied together by the same code of professional responsibility. They have their own JAG School, by which all were molded during the transition from civilian to military life and which serves as a continuing well-spring of doctrine and learning. Judge advocates all understand the same special language they use in their work; there is no definition of terms needed for one judge advocate to communicate effectively with another. Judge advocates also are free to communicate with one another in the "technical channel." A judge advocate of one command may communicate directly with a judge advocate of an adjacent or superior command or even with The Judge Advocate General. Hence, no member of the Corps, from the newest to the one located in the most remote location ever need feel alone and without help in the preparation of his legal advice. But perhaps the most unifying factor of all is that the Corps has its own head—The Judge Advocate General of the Army—who holds responsibility for assignment of all personnel and for the professional direction of the entire Corps. Through his policies, directives, advice and personal visits, The Judge Advocate General provides a bond to the Corps, which gives it that unique sense of direction, commitment, tradition, and esprit by which it is recognized.

As a judge advocate develops and matures in the Corps, his feeling of this very special sense of belonging and his appreciation of the cohesiveness of his Corps grows and expands. Being a member of the Corps promotes professionalism, builds self-confidence, and fosters trust in fellow judge advocates. This is the meaning of being part of the "Corps."

Children Can Be Witnesses, Too: A Discussion of the Preparation and Utilization of Child-Witnesses in Courts-Martial*

Captain Jeff C. Woods
Office of the Staff Judge Advocate
5th Infantry Division (Mechanized)
Fort Polk, Louisiana

Introduction

A recent article appearing in this publication, a fellow judge advocate noted that most military trials are won or lost on the testimony of witnesses rather than novel or narrow questions of law or the arguments of counsel.[1] Witnesses are, therefore, the most important tools available to the trial

*Masculine and feminine pronouns appearing in this article refer to both genders unless the context indicates another use.

[1]Hahn, *Preparing Witnesses for Trial—A Methodology for New Judge Advocates*, The Army Lawyer, July 1982, at 1, 3-12.

The Judge Advocate General
Major General Hugh J. Clausen
The Assistant Judge Advocate General
Major General Hugh R. Overholt
Commandant, Judge Advocate General's School
Colonel William K. Suter
Editorial Board
Colonel Robert E. Murray
Lieutenant Colonel Thomas P. DeBerry
Captain Connie S. Faulkner
Editor
Captain Stephen J. Kaczynski
Administrative Assistant
Ms. Eva F. Skinner
The Army Lawyer (ISSN 0364-1287)

The Army Lawyer is published monthly by The Judge Advocate General's School. Articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Footnotes, if included, should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is $19.00 a year, $2.50 a single copy, for domestic and APO addresses; $23.75 a year, $3.15 a single copy, for foreign addresses.

Issues may be cited as The Army Lawyer, [date], at [page number].

judge advocate. Children are often in a position to see people, things, and events which are never witnessed by adults. Because of their tendency to wander, children sometimes find themselves in places where they observe crimes being committed or, worse yet, have crimes perpetrated against them. Consequently, a child may be the primary, if not the only, witness available to the prosecution in a subsequent court-martial of the offender. Under these circumstances, the prosecuting judge advocate will find it necessary to determine whether a child's testimony will enhance or stay the cause of justice.[2]

As Art Linkletter has demonstrated on numerous occasions, children have a propensity to act and speak in a sometimes unexpected manner. Therefore, the child witness must be treated with great care and consideration. It is the purpose of this article to discuss various matters concerning the potential utilization of child witnesses.

Legal Background

In England, as early as 1778, the courts recognized that children could be competent witnesses in criminal trials.[3] In 1895, the United States Supreme Court held in *Wheeler v. United States*[4] that a five-and-one-half year old infant was competent to testify in a murder trial. In so ruling the court stated that

> the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness . . . While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends upon the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous . . .[5]

The rule enunciated by the court in *Wheeler* was followed by most states for a long period of time thereafter and has been codified in various statutes.[6] In some jurisdictions, certain age requirements regarding the competency of child witnesses were strictly delineated.[7] In military practice, prior to the adoption of the Military Rules of Evidence,[8] Paragraph 148a of the Manual for Courts-Martial provided:

---

[2] *See* Wheeler v. United States, 159 U.S. 523, 526 (1895).

[3] Rex v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779). The court, in considering the admissibility of an infant's testimony, stated:

> [I]nfants, though under [the] age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . but their admissibility depends upon the sense and reason they entertain of the danger and impriety of falsehood, which is to be collected from their answers to questions propounded to them by the court [and] if they are found incompetent to take an oath, their testimony cannot be received . . . .

Id. at 203, 168 Eng. Rep. at 206.

[4] 159 U.S. 523 (1895).

[5] *Id.* at 524-25.

[6] Inasmuch as a listing of state statutes would be of little value, this discussion will consider statutes only to the extent that they are reflected in reported cases and no attempt will be made to present the current statutory law of any jurisdiction. *See e.g.* State v. Pace, 301 So. 2d 323 (La. 1974); York v. York, 280 S.W.2d 553 (Ky. App. 1972); Bradburn v. Peacock, 135 Col. App. 2d 161, 286 P.2d 972 (1955).

[7] A number of state statutes provide: "The following persons shall be incompetent to testify . . . children under 10 years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." *See, e.g.,* West v. Sinclair Refining Co., 90 F. Supp. 307 (W.D. Mo. 1950); Davis v. Weber, 93 Ariz. 312, 380 P.2d 608 (1963); Litzkuhn v. Clark, 85 Ariz. 355, 339 P.2d 389 (1959); State v. Withrow, 142 W. Va. 522, 96 S.E.2d 913 (1957); State v. Michaels, 37 W. Va. 565, 16 S.E. 803 (1893); Geist v. Freeburg, 494 P.2d 126 (Colo. App. 1972); Pollard v. Decker, 354 S.W.2d 308 (Mo. App. 1962).

[8] The Military Rules of Evidence became effective on 1 September 1980.

> A person of fourteen or more years of age is presumed to be generally competent to be a witness. If, upon an allegation of incompetency with respect to such person, it does not appear by clear and convincing evidence that a specific ground of incapacity exists, the person should be allowed to testify.[9]

Consistent with *Wheeler*, paragraph 148b required, among other factors as a prerequisite to being permitted to testify, that an individual know the difference between truth and falsehood and understand the moral importance of telling the truth. By applying the provisions of paragraph 148, military courts have considered children of the ages of thirteen,[10] eleven,[11] ten,[12] seven,[13] and four[14] to be competent witnesses. Such testimony has been admitted in cases ranging from assault,[15] to rape,[16] sodomy[17] and indecent acts or liberties with a minor.[18] In other cases, military courts have held that children of similar tender years were not competent to testify.[19] However, in such cases, the determination of competency of lack thereof was made on the basis of intelligence or the ability to truthfully relate the facts, rather than age.[20]

Although many statutes and courts have established a minimum age at which a child could be presumed competent to testify,[21] the Federal Rules of Evidence[22] and its mirror-imaged military counterpart[23] provide for the contrary. Rule 601 of the Military Rules of Evidence allows that "[e]very person is competent to be a witness except as otherwise provided in these rules."[24] At first glance, it appears that the rule effectively abolish-

[9]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 148a.

[10]United States v. Slozes, 1 C.M.A. 47, 1 C.M.R. 47 (1951); United States v. Shade, 18 C.M.R. 536 (A.B.R. 1954); United States v. Borrowman, 1 C.M.R. 290 (A.B.R.), *petition denied*, 2 C.M.R. 177 (C.M.A. 1952).

[11]United States v. Long, 6 C.M.A. 45, 6 C.M.R. 45 (1952); United States v. Marshall, 6 C.M.R. 450 (A.B.R. 1951), *aff'd*, 6 C.M.A. 54, 6 C.M.R. 54 (1952).

[12]United States v. Hunter, 2 C.M.A. 37, 6 C.M.R. 37 (1952); United States v. Davis, 29 C.M.R. 798 (A.F.B.R. 1960); United States v. Marshall, 6 C.M.R. 450 (A.B.R. 1951), *aff'd*, 6 C.M.A. 54, 6 C.M.R. 54 (1952).

[13]United States v. Storms, 4 M.J. 624 (A.C.M.R.), *petition denied*, 6 M.J. 268 (C.M.A. 1977); United States v. Dorsett, 14 C.M.R. 475 (N.B.R. 1953); United States v. Jennings, 2 C.M.R. 324 (A.B.R. 1952).

[14]United States v. Nelson, 39 C.M.R. 947 (A.F.B.R. 1968).

[15]*Id.*; United States v. Jennings, 2 C.M.R. 324 (A.B.R. 1952).

[16]United States v. Long, 6 C.M.A. 45, 6 C.M.R. 45 (1952); United States v. Hunter, 2 C.M.A. 37, 6 C.M.R. 37 (1952); United States v. Slozes, 1 C.M.A. 47, 1 C.M.R. 47 (1951); United States v. Lawrence, 1 C.M.R. 248 (A.B.R.), *petition denied*, 1 C.M.A. 98, 1 C.M.R. 98 (1951).

[17]United States v. Lohr, 43 C.M.R. 1017 (A.F.C.M.R. 1970); United States v. Borrowman, 1 C.M.R. 290 (A.B.R.), *petition denied*, 2 C.M.A. 177, 2 C.M.R. 177 (1952).

[18]United States v. Storms, 4 M.J. 624 (A.C.M.R. 1977); United States v. Chambers, 41 C.M.R. 1023 (A.F.C.M.R. 1970); United States v. Davis, 29 C.M.R. 798 (A.F.B.R. 1960); United States v. Stevens, 13 C.M.R. 220 (A.B.R. 1953).

[19]*See e.g.*, United States v. Baranowski, 26 C.M.R. 636, 640 (A.B.R. 1958), wherein the court held that, under the circumstances, the testimony of a five year old witness "fell far short" of that held by the Court of Military Appeals to be competent. *See generally* United States v. Tyson, 10 C.M.R. 563 (N.B.R. 1953), wherein the court held that it was error to admit the deposition of a child who was almost six years old at the time it was taken because the court did not have an opportunity to judge her intelligence and understanding.

[20]United States v. Tyson, 10 C.M.R. 563 (N.B.R. 1953).

[21]Despite the fact there is no specific age at or under which a child was *absolutely* excluded as a witness and over which he is or may be competent, many courts, based upon the witnesses' intelligence, ability to understand an oath and to recollect and communicate, excluded the testimony of children of very tender years. *See e.g.*, Wheeler v. United States, 159 U.S. 523, 524 (1895), wherein the Court noted that "no one would think of calling as a witness an infant only two or three years old." *See also* Stowers v. Carp. 29 Ill. App. 2d 52, 172 N.E. 2d 370 (1961). In State v. Pace, 301 So. 2d 323, 325 (La. 1974), the court stated that "[u]nderstanding and not age, must determine whether any person tendered as a witness shall be sworn; but no child less than twelve years of age shall, over the objection [of either party] be sworn as a witness, until the court is satisfied, after examination, that such child has sufficient understanding to be a witness."

[22]Fed. R. Evid. 601.

[23]Mil. R. Evid. 601.

[24]*Id.*

es, among other factors,[25] age as a ground for declaring a person incompetent as a witness.[26] With its reference to matters "otherwise provided in these rules," Rule 601 clearly establishes that any person will be competent to testify as an ordinary witness in a courts-martial unless he refuses to declare that he will testify truthfully,[27] is the presiding military judge,[28] or is a member of the court-martial panel hearing the case.[29]

Inasmuch as Rule 601 eliminates the artificial grounds for disqualifying a witness as incompetent, it appears that the traditional preliminary examination into competency[30] is no longer required.[31] However, numerous reasons operate in favor of a "quasi-competency examination" when dealing with child witnesses. The trial judge retains the broad general discretion to control the course and conduct of the proceedings[32] and to rule on the qualifications of witnesses[33] as well as matters or questions of relevancy.[34]

Because competency is often defined as the minimum standard of credibility necessary to permit any reasonable person to put any credence in a

---

[25]By declaring that every person is competent to testify Mil. R. Evid. 601 clearly abolishes age, mental capacity, religious beliefs, conviction of crime and connection with the litigation as a party or interest person as a basis for excluding testimony. *See*, United States v. Urbina, 14 M.S. 962, 965 (A.C.M.R. 1982); H.R. Rep. No. 93-650, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7075, 7083. *See* S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 271-73 (1981) [hereinafter cited as Saltzburg and Schinasi].

[26]Pursuant to Mil. R. Evid. 601, the military trial judge does not appear to have the discretion to exclude testimony on grounds of competency unless the testimony is incompetent under Mil. R. Evid. 603, 605, or 606. Saltzburg and Schinasi, *supra* note 25, at 273. *See e.g.*, United States v. Fowler, 605 F.2d 181 (5th Cir 1979). *See also*, S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 298 (3d ed. 1982) [hereinafter cited as Saltzburg and Redden].

[27]Mil. R. Evid. 603 provides: "Before testifying every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." *See* United States v. Allen, 13 M.J. 597 (A.F.C.M.R.), *petition denied*, 14 M.J. 174 (C.M.A. 1982).

As written, Mil. R. Evid. 603 permits children to satisfy the basic criterion of being sworn prior to testifying. As discussed above, the child witness must appear believeable and trustworthy in all aspects of his testimony. Therefore, the oath administered to a child witness should include simple words which he can easily understand. The wording of the administered oath should also demonstrate that the child is aware of and appreciates the significance of what he is doing. The following is an example of an oath administered to a child witness:

> Do you swear or promise God that the answers you will give to the questions asked of you here today will be the truth and nothing but the truth?

[28]Mil. R. Evid. 605(a) in pertinent part provides: "The military judge presiding at the court-martial may not testify in that court-martial as a witness . . .." *See also* Fed. R. Evid. 605.

[29]Mil. R. Evid. 606(a) in pertinent part provides: "A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting . . .."

[30]When used in this context the term "competency" refers to the general qualities which every witness must possess in order to testify. The traditional preliminary examination into competency was designed to ascertain whether a given witness had the capacity to understand the difference between truth and falsehood and appreciate the moral importance of telling the truth, and was intelligent enough to observe, recollect and describe with reasonable accuracy the facts involved.

[31]In United States v. Roach, 590 F.2d 181, 186 (5th Cir. 1979), the court stated "there seems no longer to be any occasions for judicially-ordered . . . competency hearings of witnesses—none, at least, on the theory that a preliminary determination of competency must be made by the [trial] court." *See also* United States v. Martino, 648 F.2d 367, 384 (5th Cir. 1981), wherein the court noted that a witness' mental state during a period about which he or she proposes to testify is a matter affecting credibility and therefore is a matter for jury determination and not germane to his or her competency to testify.

[32]Mil. R. Evid. 611.

[33]Despite the fact the court panel potentially has the responsibility to determine the weight and credibility which may be assigned to the testimony of a witness, the question of whether any witness is qualified to testify in the first instance, is a question for the presiding military judge. Mil. R. Evid. 601; United States v. Allen, 13 M.J. 597 (A.F.C.M.R.), *petition denied*, 14 M.J. 174 (C.M.A. 1982).

[34]Mil. R. Evid. 401 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable than it would be without the evidence." Mil. R. Evid. 403 permits the military trial judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

witness's testimony[35] and further includes the general qualities which every witness must possess in order to be allowed to testify, the court is obligated to insure that the witness is, at minimum, competent on matters which form the basis of his or her testimony.[36] Consequently, the court will, in making this determination, be deciding the competency of the child witness. Some may deem it more appropriate to say that the trial judge will, under these circumstances, be deciding minimum credibility rather than competency.[37] However, matters of terminology notwithstanding, the military judge has the power to exclude a witness's testimony on the ground that it is not relevant or that no one could reasonably believe the witness had the ability to observe and remember the events in question and to later recall and communicate pertinent facts concerning those events.[38] The traditional voir dire examination provides a mechanism which may aid the court in making this determination.

Although Rule 601 initially appears to compel the admissibility of the testimony of any child witness, one must realize that the court can exercise its authority to exclude the testimony of extremely youthful witnesses.[39] Although some young children have the potential to be independent reliable witnesses, it is absurd to expect that quality in every child. It is an unfortunate fact of life and legal practice that some children act as mere tape recorders, preserving and regurgitating the statements of others. It is under these circumstances that the usefulness of the now seemingly outdated "voir dire" examination is again realized. The skillful trial attorney will utilize such an examination not only to establish the credibility of the child witness, but also to put the child at ease. An effective utilization of such an examination will also set the stage for the ready acceptance of, and belief in, the child's testimony.

In recent years there has been considerable discussion among legal scholars as to whether the voir dire examination of a potential witness should be conducted by the proponent attorney or the trial court.[41] With the advent of Rule 601, as indicated above, the emphasis in the examination has shifted from competency to credibility. Given the multiple purposes and beneficial results which may be produced by such an examination, it is recommended that, to the extent possible, it be conducted by the proponent attorney. Even when conducted by the proponent attorney, however, the determination as to whether the courtmembers will be present during the inquiry rests in the sound discretion of the military judge.[42] It is therefore incumbent upon the proponent attorney, as a threshold matter, to convince the military judge of the importance to the factfinding process of the establishment of the minimal level of credibility or

---

[35] *See* United States v. Banks, 520 F.2d 627, 630 (7th Cir. 1975); United States *ex rel.* Lemon v. Pate, 427 F.2d 1010 (7th Cir. 1970); United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978), *rev'd on other grounds*, 596 F.2d 759 (8th Cir. 1979).

[36] *See generally* United States v. Harris, 542 F.2d 1283, 1303 (7th Cir. 1976); United States v. Killian, 524 F.2d 1268, 1275 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). *See also* United States *ex rel.* Lemon v. Pate, *supra* note 34.

[37] United States v. Strahl, 590 F.2d 10, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); United States v. Jackson, 576 F.2d 46 (5th Cir. 1978).

[38] *See* United States v. Strahl, 590 F.2d 10 (1st Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); United States v. Raineri, 91 F.R.D. 159 (W.D. Wis. 1980) (the court stated that a trial judge in his discretion could conduct a hearing where the presumption of competency could be rebutted); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

[39] As discussed above, the military judge may exclude testimony under Mil. R. Evid. 401 because it is not relevant or would otherwise be cumulative or cause an unnecessary delay in the proceedings. *See* Saltzburg and Schinasi *supra* note 25, at 176-80.

[40] The term "credibility" normally refers to that quality in a witness which renders his testimony worthy of belief. The objective of Mil. R. Evid. 601 is to provide the trier of fact with the greatest amount of reliable evidence possible, with the expectation that they can decide the appropriate weight to be given to it. Therefore, Rule 601 anticipates that those attributes previously relied upon to raise issues of competency will now be considered in determining the weight to be given to the testimony of an imperfect witness. *See* Saltzburg and Schinasi, *supra* note 25, at 272.

[41] *See, e.g.*, Goldstein, *The Child Witness*, in The Trial Lawyer's Guide 427-43 (1959); Lubin, *The Voir Dire Examination*, in the Trial Lawyer's Guide 485-98 (1957); Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 302 (1962).

[42] *See* Mil. R. Evid. 104; Saltzburg and Schinasi, *supra* note 25, at 24.

competency of the child witness[43] in the presence of those with whom the ultimate decisions rest.

Interviewing and Preparing the Child Witness

The interview, a tool common to many professions, is one of the most important investigative techniques available to the legal profession. In general, interviews are the most accurate and direct methods utilized to gather facts and ascertain the truth.[44] A good interview represents a verbal and nonverbal interaction between two or more people working toward a common goal. It is this purposeful nature which distinguishes an interview from an ordinary conversation.[45] Because the process of interviewing is an art, rather than an exact science, a good interviewer should be able to accept and understand individual differences in human development, heredity, background, experiences and attitude.[46] To a significant degree, the success of an interview is dependent upon the interviewer's understanding of these traits which affect the interviewee's ability to give information freely. A genuinely thorough appreciation of these traits will convince the interviewee that he is important and needed.[47]

An attorney must, during the interview, endeavor to obtain all of the pertinent facts. This quest for information, however, should be pursued in a patient and tolerant manner. The need for patience is especially important when interviewing the child witness. The interview must be used to educate the child witness, who will, in turn, inform the attorney. The interview will also prepare the child for a potentially new and traumatic experience.

The process of interviewing a child witness is replete with obstacles. Because of their tender years, children are easily led and influenced. For example, a child's recollection may be the target of parental interference which will make the search for the unadulterated facts diffucult. Because of these potential influences, an attorney must pay close attention to the ethical obligation not to create or use perjured or misrepresented testimony.[48]

It is elementary that an attorney's witnesses are his best tools. Consequently, witnesses should be treated with extreme care and consideration. This is especially true of the child witness who must be made to believe that the proponent attorney is his friend and protector. This relationship must be conceived and nurtured during the initial pretrial interviews. Because children are usually quick to detect or sense hypocrisy, one must be honest, careful, and tolerant while attempting to establish a mutually beneficial relationship with a child witness.[49]

In many instances the child witness will perceive the interviewing attorney as nothing more than another adult. Therefore, as in any encounter between the two, the adult should not force the relationship upon the child. The interviewing attorney should encourage the child to come to him and at his own pace relate the information he possesses.

It has been often said that everything has a beginning, a middle, and an ending. These three seemingly simple elements generally describe the structure[50] which should be applied to an interview with a child witness. Although some degree of structure is necessary to give the interview form and content, it is not necessary that it be overly rigid or totally inflexible.

At the beginning of the interview the attorney should introduce himself and his role to the child witness. This introduction should be accomplished in a manner which is easily understood by the child. At all costs one must avoid the perception of being just another authoritative figure. In the

---

[43] *See* text accompanying notes 35-38 & notes 35-38 *supra*.

[44] *See* Johnson, *Interviewing the Complaining Witness*, in The Prosecutor's Deskbook 19-21 (2d ed. 1977) [hereinafter cited as Johnson].

[45] A. Fenlason, G. Ferguson, & C. Abrahamson, Essentials in Interviewing 3, 51 (1962 rev. ed.) [hereinafter cited as Fenlason and Ferguson].

[46] Johnson, *supra* note 44, at 20.

[47] Fenlason and Ferguson, *supra* note 45, at 4, 51.

[48] *See* Model Code of Professional Responsibility DR 7-102(A)(4), (6)(1979).

[49] *See* Flanagan & Shaw, *The "Special" Witness*, in The Trial Lawyer's Guide 329, 331-42 (1962).

[50] In this context the term "structure" means an organizational pattern. *See generally* Fenlason and Ferguson, *supra* note 45, at 131.

presence of authoritarians, children often become polite but noncommittal—an undesireable quality in a witness. The first remarks made to a child witness should be honest and capable of relaxing him. Although the child should be engaged in a "get-acquainted" conversation, he should not be treated as a small, unintelligent individual who does not understand the significance of the interview. The overall content of this initial conversation should not be "aimless, small talk." The child should be approached on his level and engaged in a conversation directed toward giving him a frank and understandable explanation of the purpose of the interview.

Once satisfied that the child witness understands the nature of the interview and is relaxed and willing to relate information about himself and the matter at hand, the attorney should allow the interview to progress to the middle stages. At this point the attorney should strive to obtain information about the child. Inasmuch as Rule 601 has transformed question of competency into a question of credibility, impeachment rather than exclusion will be relied upon to combat adverse testimony. Therefore, the attorney must, during the *middle* stage of the interview, acquire information which will best foster the effective presentation and acceptance of the child's testimony. In short, the attorney must acquire information which will demonstrate that the child witness has the ability to distinguish the difference between truth and falsehood and understand the moral importance of telling the truth, and is sufficiently intelligent to observe, recollect, and describe the involved events with reasonable accuracy.[51] Such information is best acquired by engaging the young witness in a flexible conversation about his life, family, friends, and educational and religious background.[52]

[51]The information collected during the middle stage of the interview is identical to the information required prior to the advent of Mil. R. Evid. 601 to establish the competency of witnesses. This information is essential to effectively establish the credibility of a child witness.

[52]By obtaining this information, the proponent attorney will gain an understanding of the person. This information may be presented at trial to demonstrate the intelligence, perception, memory, and maturity of the child witness. This information will also permit the attorney to evaluate and demonstrate the child's ability to distinguish truth and falsehood and the importance of telling the truth at trial.

Once the attorney is satisfied that he has acquired the information necessary to evaluate and ostensibly demonstrate at trial the credibility[53] of the child witness, he should continue the *middle* stage of interview and cautiously guide the witness into a discussion of the involved incident or offense. Generally, the child witness should be given an opportunity to freely tell his story in his own words and in his own fashion. Although he should not be rigidly limited in his recital, it is imperative that he be kept to the subject at hand. To the extent possible, one should, at this time, avoid taking notes. Once he realizes his statements are being recorded the child witness may be unduly influenced by what he perceives to be a captive audience. It is also possible that the child witness will stop talking once he notices his remarks are being recorded on paper. Consequently, the ability to listen and observe is a fundamental prerequisite when interviewing a child witness. The ability to detect and interpret nonverbal behavior will prove useful in analyzing the interview and evaluating the potential effectiveness of the child witness.[54]

Once the child witness has completed his "general story" the attorney may find it necessary to develop or explore it. This may be done through the use of carefully formulated questions. Leading and double questions, however, must be avoided.[55] The child should also be given ample opportunity to completely answer each question before being asked another. Even at this stage of the interview,

[53]The term credibility in this context refers to those qualities which render a witness' testimony worthy of belief. Although the age of the witness no longer affects the admissibility of the testimony, it will be of primary concern in determining the weight to be given to his testimony.

[54]Because things which are not stated are sometimes more meaningful than those said directly, one must be attentive to expressions made on a nonverbal level through actions, gestures, and mannerisms. *See* S. Mahoney, The Art of Helping People Effectively (1967). For more information on observing and interpreting nonverbal behavior *see* J. Fast, Body Language (1970); S. Szasz, The Body Language of Children (1978).

[55]*See* Johnson, *supra* note 44, at 21. Because the child witness may be easily led or influenced, it is imperative that the interviewing attorney avoid introducing his knowledge or subjective expectations into the interview. Leading and double questions have a tendency to cause the interviewee to deviate from a recitation of the facts as he recalls them and to state what he thinks his interviewer wants to hear.

questions should be kept to a minimum and used primarily to keep the inquiry from getting too far afield.

The attorney must allow adequate time to interview the child witness. Prior to ending the interview, the child witness should be given an opportunity to ask any questions he may have. Once the child's questions have been answered, the attorney should take time to explain the pending proceedings and arrange for future meetings. The child should also be instructed not to discuss the interview or the facts of the case with anyone other than the interviewing attorney or members of the opposing side.[56]

Generally speaking, all important witnesses should be taken through their direct and probable cross-examination at least once prior to trial. This is especially true of the child witness. Most adults are tense and uneasy in the seemingly formal and often unfamiliar surroundings of a courtroom. To the child witness, a courtroom will represent a strange domain occupied exclusively by adults, many of whom use words larger than he. The usual reactions experienced by newcomers to the courtroom can be greatly magnified with a child. The proponent attorney will find it beneficial to familiarize the young child witness with the courtroom prior to trial. At this time, the position and role of the various court personnel who will be present during the proceedings should be explained. The child witness should also be told how to enter and what to do once inside the courtroom.

Depending upon the emotional maturity of the child witness, one should consider going through his testimony in the courtroom. However, one should be careful not to destroy the natural attributes desired in a witness[57] or cause his testimony to appear memorized or rehearsed.

Examination of the Child Witness

The apparent success of pretrial interviews and rehearsals notwithstanding, it must be assumed, in almost every instance, that a child witness will be nervous and ill at ease. As stated previously, the surroundings of the courtroom will be strange and unusual to him. In addition, the importance of his court appearance will have been elevated by numerous external factors.[58] Again, it must be remembered that the child will be in what he perceives to be a world owned and operated exclusively by adults. In accordance with this perception, the child witness may be fearful of making a mistake. In this potentially vulnerable state, he must be treated with care and made to feel he has friends in the courtroom. He must also be made to feel that the attorney who is about to question him is his friend and protector. If pretrial efforts to establish a viable rapport with the child witness were successful, this will be an easy task.[59]

In light of the emphasis of Rule 601 on credibility,[60] the direct examination of the child witness should serve the same purpose as the qualification of an expert witness. In other words, one must strive to create an atmosphere conducive to the easy acceptance of the child's testimony. The preliminary examination of a child witness should begin with informal questions of a general nature.

---

[56]The more a child witness talks about the subject of his testimony, the greater the potential for influence. Adults may, unwittingly, attempt to assist or steer the child in his testimony. Consequently, the child may be mislead or confused or his testimony may later appear to be rehearsed or unduly biased. By instructing the child not to discuss the matter with anyone other than the interviewing attorney or members of the opposing side, outside influences which may adversely affect his credibility can be avoided.

[57]Despite the fact no amount of advice given to a witness can be as effective as a practice session, one must be careful not to create what will appear to be a rehearsed or memorized story. Honesty and spontaneity are attributes of an effective witness. Therefore, one must avoid weakening a witness' testimony by destroying his natural emotions, *i.e.*, fear, embarassment, etc. *See generally*, R. Keeton, *Trial Tactics and Methods* 39 (2d ed. 1973).

[58]It must be remembered that children are amenable to suggestions from elders and peers. The child's upcoming court appearance may also serve as a means to greater recognition and acceptance by others.

[59]Goldstein, *supra* note 41, at 432. *See also* Fenlason and Ferguson, *supra* note 45, at 157 for a discussion on establishing rapport. The French word *rapport* is used to denote a relationship characterized by harmony and accord.

[60]*See* Saltzburg and Schinasi, *supra* note 25, at 272.

The questions traditionally utilized to establish the competency of infant witnesses will prove effective in both putting the child at ease and in establishing his underlying or foundational credibility. More specifically, such questions will demonstrate the child's age, ability to understand simple questions, general intelligence, ability to interact with the world about him, and ability to recollect and relate facts with some degree of accuracy.

In examining a child witness, the attorney's voice and manner should remain natural and clearly indicate a friendly quality. The form of the questions asked of a child witness should be the same as those put to him in preparation for court. Changes in the form of the questions may confuse the child witness and result in misunderstandings or elicit incoherent, undesired, or nonresponsive answers.

In questioning a child witness, it is important that the attorney communicate with the child on his level. In this regard the importance of speaking the child's language cannot be overemphasized.[61] The use of anything other than the simplest of words during the direct examination of a child witness must be kept uppermost in the questioner's mind as a misunderstood word or phrase may result in an answer which can be easily misconstrued. Therefore, it is suggested that the examining attorney use a carefully scrutinized list of questions from which all difficult words have been deleted.[62]

In many jurisdictions, courts will permit the use of leading questions when examining a child witness.[63] Military Rule of Evidence 611(c) vests the military judge with the discretion to allow the attorney to employ leading questions.[64] Because of the emphasis on credibility, however, leading questions should be used sparingly. Triers of fact are more likely to accept and believe the testimony of a child witness if he is able and permitted to tell what happened and what he observed in his own words and without the assistance of the suggestive questioning of examining counsel. In cases involving a sensitive or embarassing subject, demonstrative aids may be used to clarify or explain the child's testimony. For example, in child molestation cases, natural dolls depicting the various anatomical parts of the human body may be used to explain a child's otherwise nondescriptive reference to sexual organs.

As stated previously, the attorney who anticipates offering a child witness must talk with him prior to placing him on the stand. Consequently, prior to arriving in court, the attorney will know something of the child's background and will have formed some opinion as to his degree of competency and his ability to answer necessary questions. The attorney will also have the knowledge necessary to formulate the requisite questions at his fingertips. However, to assist in the formulation of the questions necessary to place the child witness at ease and create an atmosphere conducive to the acceptance of his testimony, the following example is provided:

TC: _____I want you to speak in a nice, clear tone so that we can understand you; okay?

A: (Shook his head yes.)

Q: I want you to tell us what your full name is.

A: _____.

Q: Do you know how old you are, _____?

A: Four.

Q: And do you have any sisters?

A: (Shook his head yes.)

Q: How many?

A: One.

[61]The presentation of the testimony of a child witness must demonstrate that he is capable and worthy of being believed. Testimony presented in a youngster's own simple words will often paint a more vivid and convincing picture than that rephrased in the language of an adult questioner. Similarly, a child witness' simple direct description of the involved offense will demonstrate his knowledge of the details and make a lasting impression upon the trier of fact. A story told in language not normally attributed to a person of tender years may be rejected or given less weight because it appears to be rehearsed or otherwise influenced by adults.

[62]*See* Goldstein, *supra* note 41, at 434.

[63]*See* United States v. Voudren, 33 C.M.R. 722 (A.F.C.M.R. 1963), and United States v. Davis, 29 C.M.R. 798, 805 (A.F.C.M.R. 1960), wherein the court favorably considered the use of leading questions in the examination of young witnesses.

[64]Mil. R. Evid. 611(c).

Q: What is her name?

A: _____.

Q: And do you know how old she is?

A: Two.

Q: Do you know what your mother's name is?

A: (Shook his head yes.)

Q: What is it?

A: _____.

Q: Do you know what your father's name is?

A: _____.

Q: Do you know where you live right now?

A: (Shook his head yes.)

Q: Where?

A: I live at my aunt's house.

Q: Where is your aunt's house?

A: Florida.

Q: How did you get from your aunt's house to Fort Polk?

A: Drive on down here in a car.

Q: Do you go to school, _____?

A: No, not yet, but I will in October.

Q: How old will you be in October?

A: Five.

Q: Do you go to church or Sunday School?

A: (Shook his head yes.) Sometimes.

Q: What do you talk about in church and Sunday School?

A: We talk about Jesus and God.

Q: Do you and your mother ever talk about God and Jesus?

A: (Shook his head yes.)

Q: Let me ask you, _____, do you believe in God?

A: (Shook his head yes.) Yes, sir.

Q: Do you know what it means to tell the truth?

A: Not to get a whipping.

Q: Do you know what it means to tell a lie?

A: (Shook his head yes.) You get a whipping.

Q: _____, if you broke a glass, and you told your mommy that you did not do it, would you be telling the truth or telling a lie?

A: A lie.

Q: Which one?

A: I was telling a lie if I said I didn't and I did.

Q: _____, is it good or bad to tell a lie?

A: Bad.

Q: How do you think God feels about lies?

A: Awful.

Q: Would you want to make God feel awful?

A: (Shook his head no.) No, sir.

Q: What do you think God would do to you if you told a lie?

A: Take me to the devil's house, down there (pointing towards the floor).

Q: Would you want to make God mad at you, _____?

A: (Shook his head no.) No, I wouldn't want to make God mad.

Q: If I asked you, _____, to raise your right hand and to promise God that you would tell the truth here today, would you make that promise?

A: (Shook his head yes.)

Q: And when you were asked questions by either myself or CPT (Defense Counsel), over there, would you tell the truth?

A: (Shook his head yes.)

Q: And if you were asked questions about what may have happened to you and your sister, by either myself, CPT (Defense Counsel), or the military judge up there, would you tell the truth?

A: (Shook his head yes.)

Inasmuch as each child differs in age, personality, background, and intelligence, all questions must be tailored to the individual involved. However, one should notice the example includes essential questions concerning home and family, formal or informal education, religious education, and the child's knowledge of the difference between truth and falsehood and the consequences of lying.[65]

A final method for putting the child witness at ease in the courtroom was illustrated in the recent case of *United States v. Johnson.*[66] In *Johnson*, the accused was charged with committing indecent, lewd, and lascivious acts upon his four year-old son and two year-old daughter.[67] The government had requested that the son's aunt be permitted to sit beside the boy during his testimony. The trial court granted the request, but cautioned the aunt not to provide guidance to the child during his testimony.[68] The boy thus testified and the accused was convicted.

Commending the trial judge for "utilizing sound judicial procedure in dealing with this situation,"[69] the Army Court of Military Review affirmed the conviction.[70] Absent any indication in the record that the aunt had violated the court's admonition, the moral support silently provided by the trusted relative was deemed a permissible means by which to calm a skittish youth.

Cross-Examination of the Child Witness

The right of cross-examination is an important tool in criminal litigation. However, it is often ineffective in eliciting the truth from a child who speaks his impression of the truth. The cross-examination of a child witness also presents a number of practical difficulties. For example, the sometimes seemingly defenseless nature of a child may arouse the sympathies and protective parental instincts of the triers of fact. The cross-examination of a child witness is further complicated by the fact that children are perhaps the world's greatest psychologists. Therefore, one is often forced to battle wits with a near-adult mind housed in a little body.[71]

It is imperative that the cross-examiner avoid rudely attacking or bullying a child witness. Similarly, the use of tricky or unfair questions or tactics may elicit feelings of resentment from the trier of fact. Consequently, one must proceed cautiously when cross-examining the child witness.

The testimony of a child witness may often form the foundation of an opponent's case. Because children often relay their impressions of the facts, a careful and courteous attack upon their credibility may prove effective. In this regard, one should, when preparing to cross-examine a child witness, remember that children are susceptible to the influences of adults, playmates, and other suggestive phenomenon.[72] The following is an example of the cross-examination of an eleven year old child

[65]The questions provided are calculated to satisfy the requirements of Mil. R. Evid. 603 and awaken the child's conscience and impress upon him, in language appropriate to his age, the need to provide truthful answers to the questions asked. These questions will also demonstrate the child's knowledge, understanding and intelligence. *See generally* United States v. Allen, 13 M.J. 597 (A.F.C.M.R.), *petition denied*, 14 M.J. 174 (C.M.A. 1982).

[66]SPCM 18040 (A.C.M.R. 5 Jan. 1983).

[67]The accused's acts violated the Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1976).

[68]SPCM 18040, slip op. at 2.

[69]*Id.*

[70]The accused had been convicted of performing the indecent acts "on divers occasions" within a stated period on each child. The convening authority had, consistent with the evidence adduced at trial, approved only so much of the findings of guilty which convicted the accused of committing the acts on a single occasion with each victim. The findings and sentence, thus modified, were affirmed. *Id.*, slip op. at 2-3.

[71]*See generally* J. Piaget, The Language and Thought of a Child (3d ed. 1971).

[72]It must be recognized that children are more impressionable than adults and often have a tendency to weave information produced by their imaginations or obtained from others into their testimony. *See* A. Montagu, Growing Young (1981) for a discussion of the effects of environment and the socialization process upon the character traits or qualities with which children are abundantly endowed. *See also* G. Medinnus & R. Johnson, Child and Adolescent Psychology (2nd ed. 1976) for a general discussion on the development and suggestability of children.

witness, who appeared stable on direct examination:[78]

TC: _____ you stood up just a minute ago and raised your hand, and you swore, didn't you?

A: (The witness nodded affirmatively.)

Q: Do you know what those words that I asked you meant?

A: (The witness nodded affirmatively.)

Q: What did they mean?

A: To tell the truth.

Q: How do you remember seeing your sister _____ over at _____'s house that day?

A: They were over on her swing.

Q: Where were you in relation to them?

A: On the side of her garage.

Q: Were you listening around the corner?

A: Yes

Q: Why were you doing that?

A: I don't know.

Q: Do you always listen in on conversations?

A: Some of the times.

Q: Did you go back and tell anybody what you had heard?

A: No.

Q: Why not?

A: I don't know.

Q: What did you think they were thinking about doing to your dad?

A: Getting him into trouble.

Q: Did you tell your dad about that?

A: No.

Q: Why not?

A: I don't know.

Q: Did you not think it was important for him to know?

A: (The witness nodded negatively.)

Q: Why not?

A: I don't know.

Q: When did you first tell somebody what you had heard?

A: I didn't tell nobody.

Q: You never did tell anybody?

A: No.

Q: When was the first time you told somebody?

A: I didn't.

Q: How did CPT (defense counsel) find out?

A: I told him.

Q: When did you tell him?

A: I forget.

Q: Did you tell anybody before him?

A: Huh-huh.

Q: What made you tell CPT (Defense Counsel)?

A: I don't know.

Q: Where were you when you told him?

A: I forget.

Q: Did you tell your mommy?

A: No, she wasn't home.

Q: So the first time you ever told anybody was when you told CPT (Defense Counsel)?

A: Yes.

---

[78]In a recent case, the accused was charged with committing the offense of carnal knowledge with his thirteen year old daughter. The accused's ten year old daughter was called as a defense witness and was expected to testify that she had heard her sister talking to an older teenage female about getting her father, the accused, into trouble. Prior to testifying, the witness resisted being brought into the courtroom and was subsequently taken into an interview room by her parents. After talking to her parents for approximately thirty minutes, the ten year old female appeared as a witness and without a preliminary examination testified as indicated above.

Q: How do you feel about your sister being away from home?

A: Kind of sad.

Q: What about you? Would you like to be away from home?

A: No.

Q: You wouldn't like that at all, would you?

A: (The witness nodded negatively.)

Q: Have you ever been scared about being taken away from home?

A: Yes.

Q: Why would you be scared to be taken away from home?

A: I don't know.

Q: Now, since your sister was taken away, you've been home with your mommy and daddy, haven't you?

A: Yes.

Q: Have you all talked about why _____ has been taken away?

A: Part of it.

Q: So you and your mommy and your daddy have talked about why _____ is gone, haven't you?

A: Yes.

Q: Now, a little while ago you didn't want to come in here and talk to us, did you?

A: No.

Q: Why not?

A: I don't know.

Q: Before you came in here to talk to us, you ran out and then you talked to your mommy and daddy, didn't you?

A: Yes.

Q: And they told you to come in here and talk, didn't they?

A: Yes.

TC: You have a nice day, okay? Your Honor, we have no further questions.

It is easy to notice that the examination of this witness explored her bias, motives to fabricate, and raised questions concerning parental influence. In cross-examining a child witness, one must pay close attention to detail, assume nothing, and carefully analyze all of the witness' nonverbal behavior.[74]

[74] *See* Stafford, *supra* note 41, at 322-324 for an example of the benefits which can be derived from paying close attention to detail while observing and analyzing nonverbal factors. In this article, Charles F. Stafford, a Washington State trial judge, explains how an attorney obtained "devastating" results during his cross-examination of a youngster whose apparently stable testimony on direct examination formed the foundation of his opponent's case. According to Judge Stafford, the boy was small in stature, clean cut, handsome, well-mannered, and wore a high school letterman's sweater with two stripes. Following a few questions concerning the youngster's direct examination, the attorney concluded his examination in a courteous manner as follows:

Q. What did you say your age is?
A. Fourteen.
Q. Are you attending school right now?
A. Yes.
Q. How are you getting along in school?
A. Not too well.
Q. I see you are wearing a letterman's sweater. What do the stripes mean?
A. The stripes show how many letters a fellow has.
Q. Do you mean those stripes on your sweater signify that you earned a letter in some sport?
A. Yes.
Q. What sport did you win your letters in?
A. None.
Q. Do you mean you didn't earn any letters at all?
A. No, I didn't.
Q. How did you get the sweater then?
A. Anyone can buy them.
Q. Did you buy your sweater.
A. Yes.
Q. Now, _____, when you wear that sweater with the stripes, isn't it the same as saying—"I won a letter in two high school sports?"
A. Yes.
Q. But when you wear that sweater, you aren't actually telling the truth, are you?
A. No.
Q. When you wore that sweater on the stand today, you really told this jury that you were a high school letterman, didn't you?
A. Yes.
Q. But it is not true, is it?
A. No, it is not.
Q. The jury might never have found out about it if you and I hadn't straightened it out here, would they?
A. No, they wouldn't.

Additionally, the attorney may establish that, while the youthful witness would never tell a lie—because that would be wrong, the same witness would tell a "fib," especially if it might protect someone.[75] That a child-witness is merely regurgitating memorized testimony may be demonstrated by obtaining an admission that the child had read or had read to him or her a statement prepared by someone else, usually the police, followed by an in-court comparison of the proferred testimony with the prior statement.[76] It has been noted that this is a no-lose situation:

> If the child's testimony is very similar to the statement, the jury will conclude that the child's testimony was the result of coaching. If, on the other hand, the testimony varies greatly from the statement, this inconsistency will allow you to discredit the witness.[77]

Finally, the limitless imagination and inventiveness of the child-witness may be probed by engaging the witness in a colloquy concerning his or her favorite sport or other activity in which he or she consistently emerges as the hero or heroine.[78]

[75]F. Bailey & H. Rothblatt, Cross-Examination in Criminal Trials § 94, at 92 (1978).

[76]*Id.* at § 95, at 93-94.

[77]*Id.* at 94.

[78]*Id.* at § 97, at 95. The following example was provided:

Q. What is your favorite sport?
A. Baseball
Q. I'll bet you are very good at it?
A. Yes, I am.
Q. You look like a strong boy. Aren't you the best player in your class?
A. Yes.
Q. What position do you play?
A. I am a pitcher.
Q. You probably have a good fastball.
A. Yes, I have.
Q. Do you also have a good curve ball and sinker?
A. Yes.
Q. I don't imagine many players get hits when you are pitching.
A. No, none of them do.
Q. Do you throw no-hitters all the time?
A. Yes, I do.
Q. And how are you as a batter?
A. Very good.
Q. I'll bet you hit a lot of home runs.
A. Every time.
Q. That's wonderful. Every time you pitch you throw a no-hitter and every time you are at bat you hit a home run?
A. Yes, I do.

Id. at 95-96.

Conclusion

Attorneys often fail to explore or consider the possibilities of using child witnesses. Those who consider doing so, in many instances, look upon the prospects of examining a child witness as an arduous task replete with obstacles. This unfortunate attitude has prevented the use of an effective and often reliable resource in the field of criminal litigation. Because few articles have discussed the utilization of child witnesses there are few guidelines available to assist the attorney required to use or confront the child witness. This article was intended to highlight the potential pitfalls inherent in this area. These pitfalls may be avoided by simply remembering that children are little people who can be witnesses too.

The Precedential Value of Decisions of the Courts of Military Review and the Need for En Banc Reconsiderations

Captain Kenneth J. Allen
31st Graduate Class, TJAGSA

Introduction

In *United States v. Chilcote*,[1] the Court of Military Appeals invalidated the practice of en banc reconsideration of panel decisions at the Courts of Military Review (CMRs). The court did not condemn the practice itself, but rather held it to be unauthorized under Article 66 of the Uniform Code of Military Justice[2] (UCMJ). As a result, no CMR judge outside the panel that decides a case ever participates in that case. In this setting, conflicting panel decisions can and do emerge from different panels of the same CMR. Since *Chilcote*, the absence of en banc reconsideration has detracted from the precedential authority of CMR panel decisions by insulating those decisions from the immediate and direct approval or disapproval of the entire CMR. In May 1982, a bill was introduced in the Senate to amend various Articles of the UCMJ.[3] One proposed change would add to Article 66(a): "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules." This language would satisfy *Chilcote's* requirement for specific statutory authorization of en banc reconsideration and once again permit the entire CMR to participate in panel decisions. This article will examine the need for legislation to permit en banc reconsideration, survey the current reconsideration practice at the CMRs, with particular emphasis on the Army Court of Military Review (ACMR), and comment on the precedential value and consistency of CMR panel opinions without en banc reconsideration.

The Abolition of En Banc Reconsideration: *United States v. Chilcote* and *United States v. Wheeler*

During the first years of their existence, CMRs provided for some form of en banc reconsideration of their panel decisions.[4] The availability of this practice served as a check against inconsistent jurisprudence and meant that every final panel decision represented the opinion of a majority of the entire CMR. The *Chilcote* case is an excellent example of how the practice operated. A three judge panel of the Navy Court of Military Review decided to set aside findings of guilty and authorized a rehearing in a 2 to 1 decision. The nine other members of the CMR disagreed with the decision. Consequently, the case was reconsidered by the whole court and reversed, 10 to 2. The appellant argued to the Court of Military Appeals that the participation of the en banc CMR was improper, and the issue became whether the en banc reconsideration of a panel decision was permitted by the UCMJ. The court held that it was not.

Judge Darden, writing for the court, found no express authority for the practice in the UCMJ and stressed that Article 66(a) of the Code provided that CMRs could sit in *either* panels *or* as a whole.[5] This result was bolstered by the history of the UCMJ and the hearings on the legislation that became Article 66. The Court found that the postwar legislators were concerned that a CMR panel's factual determination, which was favorable to an accused, might be overturned by the court en banc. The spectre of this result was so objectionable that Congress was willing to sacrifice en banc reconsideration in order to avoid it.[6] The court also held that rules permitting en banc

[1] 20 C.M.A. 283, 43 C.M.R. 123 (1971).

[2] Uniform Code of Military Justice, art. 66, 10 U.S.C. § 886 (1976) (hereinafter cited as UCMJ).

[3] S. 2521, 97th Cong., 2d Sess. (1982).

[4] The Uniform Courts of Military Review Rules of Practice and Procedure (CMR Rules), did not specifically authorize en banc reconsideration. *See* CMR Rule 19 (1 Aug 1969). The CMR Rules are promulgated pursuant to Article 66(f), UCMJ. The current CMR Rules are published at 10 M.J. LXXIX-XCIV (1981).

[5] 20 C.M.A. at 286, 43 C.M.R. at 126 (emphasis added).

[6] *Id.* at 285-286, 43 C.M.R. at 125-126 (citing *Hearings before House Armed Services Comm. on H.R. 2498*, 81st Cong., 1st Sess.).

reconsideration of panel decisions could not be written under the authority of Article 66(f), which requires the Judge Advocates General to prescribe uniform rules of practice and procedure for the CMRs.[7] The court emphasized that, while it favored the resolution of inconsistent panel decisions within the same CMR, en banc reconsideration would not be sanctioned through case law.[8]

United States v. Wheeler[9] was a variation on the same theme. The case was originally assigned to a panel of the ACMR, which decided to reverse the conviction. The draft opinion was then circulated among the entire court. The existing Army procedure was to withhold the panel decision until all other members of court had had the opportunity to review it. A majority of the court disagreed with the panel and the case was referred to the en banc ACMR, which affirmed the case.[10] The issue before the Court of Military Appeals concerned the propriety of this procedure.

The Army's Government Appellate Division, in an effort to overturn or modify *Chilcote*, argued that the congressional intent to achieve sound internal administration within the CMRs was consonant with en banc reconsideration since it would eliminate inconsistent decisions.[11] It was also argued that en banc reconsideration of panel decisions was not prohibited by Article 66 since this statute approximated the statute governing practice in the United States Circuit Courts of Appeals in which en banc reconsideration is practiced.[12] Judge Darden, again writing for the court, found insufficient support for these arguments in both the statutes and legislative history. The Court acknowledged the issue that *Chilcote* prevented only en banc reconsideration of panel factual determinations that were favorable to an accused such that questions of law were proper subjects for en banc reconsideration. Nonetheless, given the decision in *Chilcote* that it would be difficult to fashion any workable rule to separate factual from legal determinations,[13] the court declined to adopt the government's position.

The Court of Military Appeals reasoned that the ACMR panel which had originally reviewed *Wheeler* had decided the case notwithstanding that its decision had never been formally released. Thus, the participation of the en banc court was a form of the practice prohibited by *Chilcote*.[14] The court again stressed the desirability of resolving conflicting panel decisions within the CMR,[15] but indicated that it was still constrained by the language and legislative history of Article 66. The case was reversed.

Chilcote and *Wheeler* had two positive results; appellate workload was reduced and appellate procedure was simplified. Motions for reconsideration were referred only to the panel that decided the case and judges could not participate in other panels' cases. This CMR appellate process, without en banc reconsideration, has transformed the CMRs into several independent courts whenever the court sits in panels. A survey of the present CMR appellate process is illustrative.

CMR Appellate Procedure in the Absence of En Banc Reconsideration

Courts of Military Review are established under the authority of Article 66(a) of the UCMJ, which requires each Judge Advocate General to create an appellate court within his service to review certain courts-martial.[16] Unlike other appellate tribunals, CMRs can only affirm findings of guilty and sentences that are correct in fact and law.[17] This re-

---

[7] 20 C.M.A. at 286, 43 C.M.R. at 126.

[8] *Id.* at 287, 43 C.M.R. at 127.

[9] 20 C.M.A. 595, 44 C.M.R. 25 (1971).

[10] 43 C.M.R. 853 (A.C.M.R. 1971) (en banc). This decision was released by ACMR only seven days after the Court of Military Appeals decision in *Chilcote*.

[11] 20 C.M.A. at 596, 44 C.M.R. at 26.

[12] *Id.* at 596-597, 44 C.M.R. at 26-27.

[13] *Id.* at 597, 44 C.M.R. at 27.

[14] *Id.* at 598, 44 C.M.R. at 28.

[15] *Id.*

[16] Cases in which the approved sentence affects a general or flag officer, extends to death, dismissal of a commissioned officer, cadet, or midshipman, or punitive discharge or confinement of one year or more are automatically referred to a CMR Article 66(b), UCMJ. Other cases may be referred to a C.M.R. at the direction of The Judge Advocate General. Article 69, UCMJ.

[17] Article 66(c), UCMJ.

quires a thorough review of each case even if there is no claim of error on appeal. Each CMR consists of a chief judge, senior judges, and associate judges, all of whom are certified and appointed to the court by the respective Judge Advocate General.[18] The chief judge is responsible for the administration of the court, and for his or her own caseload as an appellate military judge. Additionally, the chief judge determines the composition of and designates a senior judge to head each panel.[19] While the CMR may sit either in panels or as a whole,[20] the vast majority of cases are decided by panels of three judges each. Each judge who participates in a decision has an equal voice, and all decisions are determined by majority vote.[21]

The appellate process begins when a case is referred to the CMR and the clerk of the court assigns it to a panel. Cases are assigned on a random rotating basis as they arrive at the court. Consequently, there is no way to predict which panel will review a case.[22] After the case has been assigned, appellate counsel have the opportunity to advocate their positions, taking into account the particular jurisprudence of the judges on the panel that will decide the case. Every issue raised by counsel, the appellant, and the panel is resolved by the decision, although not necessarily discussed in the written opinion. The action judge makes a preliminary decision as to whether the case will be published[23] and drafts the opinion accordingly.[24] The opinion, together with the recommendations of the participating judges as to whether the case should be published is then submitted to the chief judge. If all the judges on the panel recommend against publication, the opinion is not published; otherwise, the chief judge determines if the case will be published.[25] The chief judge does not approve the panel's decision; his review is administrative. The case is then returned to the panel and publicly released. The parties to the appeal have ten days to move for reconsideration[26] and the panel may reconsider a decision on its own motion within thirty days.[27] Only the panel that decided the case may rule on the motion and participate in any reconsideration. As a general rule, a panel will reconsider a decision when a majority of its members question the correctness of an opinion and desire further argument and deliberation.[28] No other member of the CMR, including the chief judge, participates in another panel's case. Every panel decision represents the opinion of only the three judges on the panel and not the consensus of the entire CMR.

CMRs attempt to reconcile inconsistencies and avoid new ones by screening cases for en banc decision.[29] Frequently, however, a case is already de-

---

[18]Article 66(a), UCMJ U.S. Army Court of Military Review Internal Operating Procedures paras. 1-4a-c (25 Apr. 1977) [hereinafter cited as ACMR Proc]. The ACMR internal rules are promulgated pursuant to CMR Rule 26.

[19]Article 66(a), UCMJ; paras. 1-4d, e, A.C.M.R. Proc.

[20]Article 66(a), UCMJ.

[21]CMR Rule 4.

[22]Para. 1-5b, ACMR Proc., The ACMR procedural rules are currently under revision. The revised draft contemplates assigning cases on a rotating basis, with provision for adjustments based on a panel's caseload.

[23]Para. 9-4, ACMR Proc..

[24]The content and style of opinions vary depending on whether they are intended for publication. *See* paragraph 9-6, ACMR Proc..

[25]Paras. 9-9a-c, ACMR Proc.. The ACMR standards for publication provide:

> An opinion will be published if it meets one or more of the following standards:
>
> *a.* Establishes a new rule of law or alters or modifies an existing rule.
>
> *b.* Resolves an apparent conflict of authority.
>
> *c.* Presents a novel application of existing law.
>
> *d.* Criticizes or questions existing law.
>
> *e.* Involves a legal issue of continuing public interest.
>
> *f.* Constitutes a significant contribution to military law because of its historical or interpretive review of jurisprudence.

Id. at para. 9-5. These standards are slightly broader than the ABA guidelines. *See* ABA Standards Relating to Appellate Courts § 3.37(b) (1977).

[26]CMR Rule 20b.

[27]*Id.* at Rule 20a.

[28]*See* Brown v. Aspeden's Adm'rs 55 U.S. (How.) 25 (1852).

[29]A party may move the court for en banc decision or a majority of the judges present may order referral to the court as a whole. En banc decisions are normally reserved for those cases in which the consideration of the full court is necessary to insure uniformity of decision or when the case involves an important issue or a general or flag officer. CMR Rules 18a, b. En banc decision does not always settle a matter within a CMR. For ex-

cided in panel before it is recognized as worthy of referral to the entire court. When inconsistent decisions emerge, the bench and bar must await resolution of the matter by the Court of Military Appeals. This review is by no means certain[30] and, when it does occur, often takes a year or longer before a decision is reached.

If en banc reconsideration returns to the CMRs, its impact should be substantial. Both government and defense motions for reconsideration will increase. En Banc reconsideration will afford the parties a "second bite at the apple" in which several new judges will consider the merits of the appeal. Since the cases will have already been briefed, argued, and decided in a panel's opinion, the issues for reconsideration will require little additional research and preparation by counsel.

The Precedential Value of CMR Panel Decisions in the Absence of En Banc Reconsideration

Over ten years have passed since *Chilcote* and *Wheeler* were decided. What is the precedential value of CMR panel decisions in the absence of en banc reconsideration? The simplest answer is that it is probably less than people who are unfamiliar with military appellate practice realize. The most complex answer, which is beyond the scope of this article, would necessarily include an analysis of the deference each appellate military judge is willing to extend, as a matter of law, to the decisions of other panels. Perhaps the most revealing insight on this subject was provided a year after *Wheeler*, when a panel of the ACMR was cited to three recent ACMR panel decisions. Judge Taylor, writing for the panel, refused to follow those cases and observed that, as a result of *Wheeler*, panel decisions no longer represented an opinion of the entire court and that CMR panels had been relegated to a status similar to the separate and autonomous boards of review. Since one panel could no longer object to the decisions of another panel, they were not bound to follow each other under the doctrine of stare decisis. The opinions of the judges on other panels would be respectfully and carefully considered in the interest of comity.[31] A few examples of the inconsistencies spawned in the absence of en banc reconsideration support this view and demonstrate the need for en banc reconsideration.

In *United States v. Abeyta*,[32] a panel of the ACMR held that taxicab services could not be the subject of a larceny. This decision contradicted the earlier opinion of another panel of the same court in *United States v. Brazil*.[33] Since there was no opportunity for the entire court to either accept or reject these opinions through en banc reconsideration, neither case can be said to represent a majority opinion of the ACMR. One observer of the military appellate system has concluded that *Abeyta* overrules *Brazil*.[34] This is imprecise, since panels not linked together by en banc reconsideration cannot overrule each other. The *Abeyta* panel did not purport to overrule *Brazil*. Instead, it simply disagreed with the reasoning of the prior case and refused to follow it. Even those close to military law sometimes overlook the significance of the absence of en banc reconsideration.

In *United States v. Crawford*,[35] a panel of the ACMR held that the failure of the military judge to fully discuss each cancellation condition of a pretrial agreement with the accused was reversible error. In *United States v. Davis*,[36] decided fourteen days later, another panel of the ACMR decided that reversal was warranted only in cases of demonstrated prejudical error. Three months

---

ample, United States v. Crowley, 3 M.J. 988 (A.C.M.R. 1977) (en banc), was referred to the whole ACMR in order to resolve some of the questions raised by United States v. King, 3 M.J. 458 (C.M.A. 1977), and United States v. Green, 1 M.J. 453 (C.M.A. 1976). Two dissenting judges in *Crowley*, nonetheless, continued to adhere to their previous positions when they returned to their panel. *See* United States v. Reedy, 4 M.J. 505 (A.C.M.R. 1977).

[30]Cases reach the Court of Military Appeals by automatic appeal, certification by a Judge Advocate General, or by grant of a petition for review by the court. Article 67 (b)(1)-(3), UCMJ. Denials of a petition for review are of little precedential value. *See* Untied States v. Mahan, 1 M.J. 303, 307 n.9 (C.M.A. 1976).

[31]United States v. Penman, C.M. 427657 (A.C.M.R. 29 Aug. 1972) (mem.).

[32]12 M.J. 507 (A.C.M.R. 1981).

[33]5 M.J. 509 (A.C.M.R. 1979).

[34]*See* headnote 1 to *Abeyta*, 12 M.J. at 507.

[35]S.P.C.M. 14569 (A.C.M.R. 17 July 1980) (mem).

[36]S.P.C.M. 14576 (A.C.M.R. 31 July 1980) (mem.)

later, in *United states v. Duval*,[37] yet another panel looked at similar conditions and characterized them as recitals, not negotiated terms, and held that the failure to inquire into these recitals was not fatal.[38] Only *Duval* was published and it therefore probably represents the law to most practitioners in the field. One can imagine the situation of a court-martial conducted according to *Duval*, only to have appellate review of the case assigned to a *Crawford* or *Davis* panel at ACMR. Without en banc reconsideration, the outcome of certain cases may well depend on a form of appellate roulette.

In those instances where there is a settled principle of law, the application of that principle can result in disparate results when applied to similar facts. For example, the investigative technique employed by CID agents at a Frankfurt, West Germany, train station resulted in two convictions which were assigned to different panels of the ACMR. In *United States v. Thomas*[39] the conviction was affirmed by a majority which held that the investigator's technique did not require probable cause. The companion case, *United States v. Foster*[40], however, was reversed by a majority which found that a similar technique constituted a seizure which was unlawful without probable cause.[41] En banc reconsideration would probably have reconciled these decisions. Instead, the cases are of limited value to the legal and law enforcement community.

Another situation where en banc reconsideration would be of immediate value is where a panel espouses a position which is novel but, perhaps, is unlikely to influence a majority of entire CMR.[42] Both the parties to the appeal and the legal community in general should not have to wait until these cases reach the Court of Military Appeals before receiving the benefit of additional judicial advice. The need for en banc reconsideration will become even more apparent once conflicting panel decisions emerge concerning the Military Rules of Evidence.

Finally, while not directly related to the question of en banc reconsideration, the distinction between published opinions, or Opinions of the Court, and unpublished, or Memorandum Opinions, should be noted. As indicated above, the chief judge determines whether an ACMR opinion will be published. A published panel decision is designated an Opinion of the Court, but is still the decision of only one panel. No judge outside the panel has had an opportunity to comment on the case. Published panel decisions, however, do enjoy a special status at the ACMR. By internal rule, the ACMR judges may only cite published cases in their opinions[43] and they have been faithful to this rule. Counsel were once prohibited from citing unpublished opinions to the court.[44] At some point, however, counsel began citing unpublished cases and this practice was apparently sanctioned.[45] In any case, neither published nor unpublished panel decisions represent the opinion of a majority of the entire CMR and are of currently equal limited value in assessing the position of the whole court.[46]

---

[37]10 M.J. 687 (A.C.M.R. 1981).

[38]The Navy Court of Military Review has also reached conflicting decisions in this area. *Compare* United States v. Schaller, 9 M.J. 939 (N.C.M.R. 1980) *with* United States v. Newland, 9 M.J. 434 (N.C.M.R. 1980).

[39]10 M.J. 687 (A.C.M.R. 1981).

[40]11 M.J. 530 (A.C.M.R. 1981).

[41]A dissenting judge would have found that there was no seizure. *Id.* at 533 (Rector, C.J. dissenting).

[42]*See, e.g.*, United States v. Mitchell, 11 M.J. 907 (A.C.M.R.) (O'Donnell, J., dissenting), *petition granted*, 12 M.J. 305 (C.M.A. 1981), in which a majority of the panel held that solicitation under Article 134 requires only general criminal intent.

[43]Paras. 9-6e, 9-7e, ACMR (Proc..) The draft revision of the procedural rules would continue this practice.

[44]U.S. Army Legal Services Agency Standard Operating Procedures para. 1-14(d) (10 Apr. 1970).

[45]In a memorandum dated 7 July 1978, Subject: Citation of Unpublished Opinions, the Commissioner to the ACMR Chief Judge informed the Chiefs of the Army Appellate Divisions that the citation of unpublished decisions is not encouraged. Where such citation was deemed necessary, counsel were requested to attach a copy of the opinion as an appendix to their brief. The draft revision of the ACMR Proc. states that the citation of unpublished opinions is not favored.

[46]ACMR memorandum decisions receive limited distribution. They are generally available to Army trial judges through the trial judiciary and to trial and defense counsel through the Trial Counsel Assistance Program and Trial Defense Service, respectively. Memorandum decisions are occasionally digested in *The Army Lawyer* and *The Advocate* and are routinely reported or digested in the Public Law Education Institute's *Military Law Reporter*. Counsel in the field should study memorandum decisions and not hesitate to present them as authority at trial.

Conclusion

There is a need for amendment of Article 66, UCMJ to sanction en banc reconsideration. Legislation, such as the bill introduced in May 1982, would clearly authorize en banc reconsideration by overcoming *Chilcote's* difficulty with the disjunctive language of the present statute and permitting the mechanics of en banc reconsideration to be written as a CMR Rule under Article 66(f). The bill was referred to committee and hearings were held in September 1982.[47] The bill did not come to vote in the 97th Congress, but en banc reconsideration legislation is expected to be introduced again in this Congress.[48]

In any system which contains an intermediate appellate court, lawyers are expected not only to know the law as enunciated by the lower court, but also to anticipate how that law will be received in the higher court. It is quite another thing, however, to speculate about how the lower court will receive its own law. This unreasonable burden has plagued military justice for more than 10 years. It is hoped that en banc reconsideration will soon be available, adding the authority of the entire CMR to panel opinions and enhancing the consistency, predictability, and prestige of CMR jurisprudence.

[47]128 Cong. Rec. D1186 (daily ed 16 Sept. 1982).

[48]Legislation similar to S. 2521 is expected to appear in the 98th Congress. The Department of Defense is also drafting legislation which would permit en banc reconsideration in the CMRs.

Inevitable Discovery—Reprise*

Captain Stephen J. Kaczynski
Developments, Doctrine, & Literature Department, TJAGSA

"It ain't over 'til it's over."
Lawrence Peter Berra[1]

In an article which appeared in the August 1982 issue of *The Army Lawyer*, the impact of the case of *State v. Williams*[2] on the doctrine of inevitable discovery was discussed. It will be remembered that *Williams* was the infamous "Christian burial speech" case. In *Williams*, the body of a murder victim was discovered through a disguised interrogation of a suspect in custody after he had requested counsel and had opted to remain silent.[3] The U.S. Supreme Court had reversed the conviction because of this illegally obtained evidence,[4] but hinted that evidence concerning the location and condition of the body might be admissible under a

*This article is an update of *Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery*, The Army Lawyer, Aug. 1982, at 1.

[1]At the outset of the article appearing in the August 1982 issue of *The Army Lawyer*, the author noted a quote from William Shakespeare. In response, a homicidal intent was expressed in Hemingway, *In Defense of Lawyers, Or, The First Thing We Do, Let's Kill All Who Quote Shakespeare Out of Context*, The Army Lawyer, Dec. 1982, at 4. It is conceded that Mr. Berra, in the quote cited above, was speaking not of the subject matter of this article, but rather concerning the national pasttime. Nonetheless, it is the author's opinion that the thought expressed is equally applicable to the history of the case discussed herein.

[2]284 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[3]The accused, on the advice of his attorney, had turned himself in to the authorities in Davenport, Iowa. The Des Moines police dispatched a detective to Davenport to transport the accused back to Des Moines. It had been agreed between the Des Moines police and the accused's attorney that there would be no attempt to question the accused during the 160 mile trip. Enroute to Des Moines, however, the detective enticed the accused, a former mental patient, to lead him to the victim's body by discussing how a potentially heavy snowstorm would render discovery of the body difficult for the police. The family of the victim, a ten year-old girl, would thus be deprived of affording their daughter, murdered on Christmas Eve, a "Christian burial." Brewer v. Williams, 430 U.S. 387, 391-93 (1977).

[4]*Id.* The Court found that the " 'Christian burial speech' had been tantamount to interrogation" in violation of the accused's rights under the Sixth and Fourteenth Amendments. *Id.* at 400.

theory of inevitable discovery, *i.e.* that, notwithstanding the illegal police activity, the body would have been found anyway in the course of the pre-existing and ongoing police search.[5]

Government authorities seized on the advice. At Williams' retrial, the government offered and the trial court permitted testimony regarding the circumstances surrounding the location and condition of the body on a theory of inevitable discovery. Williams was again convicted, the conviction was affirmed by the state's highest court[6] and the Supreme Court denied review.[7]

Williams' fate was thus sealed, right? Wrong. Williams promptly filed a writ of habeas corpus in the federal district court, attacking the state's use of inevitable discovery at his second trial. The petition was denied and Williams appealed the denial to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the district court and ordered that the writ be issued.[8] The saga of the "Christian burial speech" thus continues.

The Eighth Circuit Opinion

The case was *Williams v. Nix*.[9] In this *Williams III*,[10] the accused had alleged, *inter alia*,[11] that, even assuming the constitutional validity of the doctrine of inevitable discovery as set forth by the state's highest court, the government had nonetheless failed to meet its burden of proof on the issue. Specifically, given that the government must affirmatively establish not only that the proffered evidence would have been discovered notwithstanding the illegal police activity but also that the police activity in question was not undertaken in bad faith,[12] the record at Williams' retrial was entirely devoid of evidence supporting a conclusion of a lack of bad faith. The Eighth Circuit agreed.[13]

In *State v. Williams*,[14] the Supreme Court of Iowa had dealt rather cursorily with this question:

> The issue of the propriety of the police conduct in this case . . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.[15]

Hence, if reasonable judges disagree, then the police activity must have constituted something less than bad faith.[16] The Eighth Circuit refused to resolve the issue so simply.

The appellate panel cited excerpts from the opinions of various Supreme Court justices in *Brewer I*,[17] which alternatively characterized the police conduct as "*so clear* a violation of the Sixth and Fourteenth Amendment . . . [that it] cannot

[5]The Court had noted that:

> While neither Williams' incriminatory statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had the incriminatory statements not been elicited from Williams.

Id. at 407 n.12.

[6]285 N.W.2d 248 (Iowa 1979).

[7]446 U.S. 921 (1980).

[8]Williams v. Nix, No. 82-1140 (8th Cir. 10 Jan. 1983).

[9]*Id.*

[10]*Williams I* would be the first conviction which was set aside by the U.S. Supreme Court. 430 U.S. 387 (1977). *Williams II* was the second conviction which had been affirmed by the Supreme Court of Iowa and concerning which the Supreme Court had denied review. 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[11]In addition to the issue upon which he prevailed in the Eighth Circuit, the accused alleged six other grounds for setting aside his conviction. No. 82-1140, slip op. at 2 n.1, 8 n.4.

[12]285 N.W.2d at 258 (quoting 3 W. LaFave, Search & Seizure § 11.4, at 620-21 (1978)).

[13]No. 82-1140, slip op. at 2.

[14]285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[15]285 N.W.2d at 260-61.

[16]Or, put another way; "Given this division among lawyers, the court had little problem in attributing a lack of evil motive to the police." Kaczynski, *Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery*, The Army Lawyer, Aug. 1982, at 1, 10 (footnote omitted).

[17]430 U.S. 387 (1977).

be condoned,"[18] "undertaken deliberately," "designedly," and "purposely,"[19] such that the detective "no doubt . . . consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination."[20] Further, neither at the first trial nor at the second trial, at which time the government could have potentially wiped the slate clean of the above-quoted judicial remarks, did the government inquire of the interrogating detective concerning his motives or belief at the time of the questioning.[21] Finally, the panel noted that the record contained evidence only of bad faith. The police had broken two express promises to the attorney of the accused[22] and, at trial, contradicted the testimony of several other witnesses concerning the circumstances surrounding the accused's transportation to this attorney.[23]

Based upon the above-noted record, the Eighth Circuit found that the government had failed to meet the burden of proof imposed upon it by the Iowa Supreme Court.[24] The district court was directed to issue the writ and Williams was ordered released from custody unless the state chose to retry him within sixty days.[25]

[18]*Id.* at 406 (Stewart, J.), *cited in* No. 82-1140, slip op. at 12 (emphasis added).

[19]430 U.S. at 406, *cited in* 82-1140, slip op. at 14.

[20]430 U.S. at 407 (Marshall, J., concurring), *cited in* No. 82-1140, slip op. at 15. The panel also quoted Justice Powell: "[T]he entire setting was conducive to the psychological coercion that was successfully exploited . . . the police *deliberately* took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement." 430 U.S. at 412, 413-14 n.2 (Powell, J., concurring), *cited in* No. 82-1140, slip op. at 15 (emphasis added).

[21]*Id.*, slip op. at 14 n.9.

[22]The police breached the agreement with the accused's attorney that the accused not be questioned during the trip to Des Moines. *Id.*, slip op. at 15-16. Additionally, the police broke a promise that the accused would be brought directly to Des Moines. As evidence of a premeditated breach, the court pointed to testimony wherein the accused was told, as he entered the police car that "we'll be visiting between here and Des Moines." *Id.*, slip op. at 17 (citing 430 U.S. at 391).

[23]No. 82-1140, slip op. at 18.

[24]*Id.*, slip op. at 2.

[25]*Id.*, slip op. at 19. In so deciding, the Eighth Circuit explained:

> It will inevitably be remarked that our opinion focuses more on the conduct of the police than of the alleged murderer. . . . A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results. . . . Some criminals do go free because of the necessity of keeping government and its servants in their place. This is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

Id., slip op. at 18-19.

Lesson for the Military Attorney

The Court of Military Appeals adopted the doctrine of inevitable discovery in *United States v. Kozak*.[26] In *Kozak*, military and German authorities searched a locker in a railroad station in direct violation of the terms of an authorization to apprehend the accused issued by the accused's commander.[27] The fruits of the search were admitted into evidence, however, without comment by the military judge.[28] The *Kozak* court, however, ignored this apparently deliberate breach of instructions enroute to its endorsement of inevitable discovery.[29] Only the first prong of the *Williams* court's test was discussed.[30] Consequently, on reading *Kozak* alone, the military practitioner would not think it necessary that the government establish that police officials did not act in bad

[26]12 M.J. 389 (C.M.A. 1982).

[27]The accused's battalion commander had specifically directed only an apprehension of the accused and a search of his possessions. *Id.* at 390, *discussed in* Kaczynski, *supra* note 16, at 6-7 & n.56.

[28]12 M.J. at 391.

[29]*See id.* at 392.

[30]The court's requirements were:

> In applying this exception to the exclusionary rule in the future, we will require that after an accused challenges the legality of a search, the prosecution must, by a preponderance of the evidence, establish to the satisfaction of the military judge that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would have been inevitably discovered had not the illegality occurred.

Id. at 392 (footnote omitted). Good or bad faith in police activity is notably absent from this discussion.

faith in accelerating the discovery of evidence which would have been inevitably located.

Notwithstanding the *Kozak* court's avoidance of the bad faith issue, however, the notion that the police ought to act in good faith when dealing with Fourth Amendment issues is being increasingly discussed in the federal courts.[31] In such an atmosphere, it is unlikely that military law will long remain immune from such a minimal requirement as a lack of bad faith on the part of police officials in inevitable discovery cases. Accordingly, the judge advocate seeking to advance inevitable discovery as a theory of admissibility ought to place the subjective intentions and thoughts of the official who engaged in the unconstitutional conduct on the record. Failure to do so leaves the appellate court with a record in the same posture as *Williams III*: objectively illegal conduct unbalanced by the reasoning of the actor. In those cases in which the constitutional violation was merely "technical," such as a prematurely, but innocently, executed search or a search authorization issued by a disqualified commander, there should be little difficulty in successfully litigating the issue. In cases such as *Kozak*, however, it is questionable that the government should carry the day when presenting to the court an objectively deliberate disregard of the instructions of the official authorizing the search. Additional evidence which might tend to diminish the apparent flagrancy of the conduct, such as an unforeseen and exigent event which required the actions in question, may be necessary.

Hopefully, as inevitable discovery cases reach the appellate level, the courts of review and the Court of Military Appeals will further refine the military definition of the doctrine and more accurately and fully instruct the trial counsel concerning the minimal constitutional evidentiary requirements involved. Prompt and detailed attention by the courts to this issue could prevent reversals such as *Williams* and help insure that "when it's over, it's over."

[31]Noting that the exclusionary rule is not required by the Constitution, but rather is a judicially-created mechanism designed to deter illegal searches, the Fifth Circuit, in United States v. Williams, 622 F.2d 830, 841-44 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981), has held that the purposes behind the rule would not be served by suppressing illegally seized evidence in cases in which the police authorities acted in an objective and subjective good faith belief that their conduct was lawful. *See also* United States v. Nolan, 530 F. Supp. 386 (W.D. Pa. 1981) (following *Williams*). This "good faith exception" to the exclusionary rule was proposed in the President's Message to Congress Transmitting the Criminal Justice Reform Act of 1982 (13 Sept. 1982), as well as S. 2903, 97th Cong., 2d Sess. (1982). *See generally* LawScope, *The Exclusionary Rule*, 69 A.B.A.J. 137 (1983).

The Supreme Court has expressed an apparent willingness to pass upon this issue. In Illinois v. Gates, No. 81-430 (U.S. Reargument ordered 29 Nov. 1982), the Court directed the parties

> to address the question whether the rule requiring exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Id. (citations omitted). *Gates* involved a situation in which the police conducted a search and seizure pursuant to a judicially issued warrant which was later ruled insufficient. In such a case where the magistrate, not the constable, erred, the underlying purpose of the exclusionary rule, that of deterring illegal police conduct, would appear to be ill-served in a case in which the police did seek judicial sanction for their actions. On the other hand, in inevitable discovery cases, the exclusionary rule would be well served if evidence would be excluded, even in those cases in which it would have been inevitably discovered, in circumstances in which police engaged in bad faith activities to accelerate the discovery of the evidence. *See* 3 W. LaFave, Search & Seizure § 11.4, at 620-21 (1978). To the extent that a rule of good faith becomes accepted as an exception to the exclusionary rule, it is unlikely that the minimal requirement of a lack of bad faith in inevitable discovery cases will be eschewed.

Major Changes in Minor Construction

Major James O. Murrell
Instructor, Contract Law Division, TJAGSA

On 1 October 1982, the Military Construction Codification Act[1] went into effect. The purpose of the act is to revise and codify the permanent provisions of law relating to minor construction and family housing.[2] For the most part, current policy and procedures have simply been incorporated in a new format. However, some significant substantive and procedural changes have been adopted. The purpose of this article is to highlight those changes that have affected minor construction.

In order to more fully appreciate the significance of the Military Construction Codification Act, as compared to the repealed Minor Construction Act, a summary review of the military construction authorization and appropriation process may prove useful.

Congress funds specific construction projects in the annual Military Construction Appropriation Act. Military Construction, Army (MCA) funds can only be used for those projects for which the funds were appropriated except as specifically authorized by law.[3] A misapplication of such funds may result in a violation of what was previously called the "Anti-Deficiency Act," which has now been codified[4] and implemented by Army regulation.[5] The congressional exercise of control over these specific "line item" projects creates a three to five year delay between the time a project is identified and the time the project is finally authorized and funded.

Recognizing the need for a more expeditious process, Congress in 1958 enacted the Minor Construction Act.[6] This statute provided for the accomplishment of urgent requirements that had not been included as specified projects in the annual authorization and appropriation acts.[7] In the 1978 Military Construction Authorization Act, this minor construction authority was modified and the necessity for an urgency determination was eliminated.[8] Congress funds these unspecified projects from a pool of funds called Minor Military Construction, Army (MMCA) which is appropriated as part of the yearly Military Construction Appropriation Act.

As amended, the Minor Construction Act authorized minor construction not in excess of $500,000 per project.[9] The statute made available Operation and Maintenance (OMA) funds for minor construction projects not in excess of $100,000.[10] The Act established mandatory prior approval requirements[11] and provided procedures for approval of unforeseen cost increases in previously approved projects.[12]

The Minor Construction Act was revised and recodified in 1982.[13] The $500,000 ceiling has been increased to $1 million. The new statute authorizes the use of OMA funds for minor construction projects not in excess of $200,000.[14] Under the

---

[1] 10 U.S.C.A. §§ 2801-61 (Supp. 1982).

[2] *See* H.R. Rep. No. 97-612, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 443 [hereinafter cited as House Report.]

[3] 31 U.S.C.A. § 1301(a) (Supp. 1982).

[4] 31 U.S.C. § 665 (1976).

[5] Army Reg. No. 37-20, Financial Administration—Administrative Control of Appropriated Funds (1 Aug. 1980) [hereinafter cited as AR 37-20].

[6] 10 U.S.C. § 2674 (1976).

[7] House Report, *supra* note 2, at 8.

[8] Monroe, *New Minor Construction Act*, The Army Lawyer, Mar. 1978, at 35.

[9] 10 U.S.C. § 2674(b) (Supp. V 1981).

[10] *Id.* at § 2674(c).

[11] *Id.* at § 2674(b).

[12] *Id.* at § 2674(b)(2).

[13] Pub. L. No. 97-99, tit. IX, § 907, 95 Stat. 1385 (1982) (codified at 10 U.S.C.A. § 2805 (Supp. 1982)).

[14] Army Reg. No. 415-35, Construction—Minor Construction para. 2-2 (1 Feb. 1979) [hereinafter cited as AR 415-35] requires the use of OMA funds for minor construction projects not exceeding $100,000. Dept of the Army Message 231500Z Dec 82, subject: Additional Policy Guidance Resulting from PL 97-214, Military Codification Act, states:

new statute, the prior approval required is only by the Secretary of the Army and only for projects that will exceed $500,000.[15] A construction project was defined in 10 U.S.C. § 2674 as "a single undertaking which includes all construction work, land acquisition and installation of equipment necessary to: (1) *accomplish a specific purpose* and (2) produce a complete and usable facility or a complete and usable improvement to an existing facility." Although the new statute omits the language "accomplish a specific purpose," a reading of the legislative history does not suggest any intended substantive change.[16]

The area of most significant change is in allowance for cost variations in approved minor construction projects. The Act sets forth guidelines for approving variations in the estimated costs of approved minor military construction projects.[17] The approved amount may be increased prior to contract award if the Secretary of the Army determines that the increase is necesary to meet an unusual variation in cost that could not have been reasonably anticipated at the time the project was originally approved.[18] If the new estimated cost of the project exceeds $1 million *and* is more than 25 percent of the original approved amount for the project, no contract may be awarded until the increase is approved by the Secretary, a written notification of the facts is submitted to the appropriate committee of Congress, and either 21 days has elapsed from the date of submission of the notification or each of the appropriate committees of Congress has indicated approval.[19]

After a contract for a project has been entered into, the Secretary of the Army may approve increases in order to meet the costs of change orders or contractor claims.[20] If the cost increase is more than 25 percent of the approved cost of the project or if there had been a prior cost increase before award of the contract, the appropriate committees of Congress will be promptly notified of the revised costs and the reasons for the revision.[21]

In summary, the practitioner should be aware that the Military Construction Codification Act has significantly altered the limits and procedures of the Minor Construction Act, to include:

(1) increasing the maximum limit for minor construction using MMCA funds to $1 million per project;

(2) authorizing the use of OMA funds for minor construction not exceeding $200,000 per project;

(3) limiting the statutory approval requirements to the Secretary of the Army for projects in excess of $500,000; and

(4) expanding the procedures for authorizing cost variations for approved minor construction projects.

Exceeding the above fund limitations or failing to follow the statutory procedural requirements will cause a violation of Army regulations, which would require a report to Congress.[22] Exceeding regulatory limitations, other than those in funding channels or included on funding documents, or failing to follow procedures which are not statutorily mandated should not, however, be consid-

---

Public Law 97-377, 21 Dec 82 [Continuing Resolution Authority] contains the entire FY 1983 DOD Appropriation Act and by deletion of the formally stated $100,000 OMA New Work limitation, the limitation is automatically raised to $200,000 as originally intended by PL 97-214 which enacted 10 USC 2805.

It will be the authority and decision of MACOM commander to determine what part of this amount will be delegated to their installation commanders.

But see Army Reg. No. 37-110, Financial Administration—Budgeting, Reporting, and Responsibilities for Industrial Funded Installations and Activities, para 4-52 (C.2 1 Jan. 1983) [hereinafter cited as AR 37-110] which limits the use of industrial funds for alterations to the real property facilities of an industrial fund activity to $100,000 per project.

[15]Para. 2-5, AR 415-35 prescribes specific approval requirements depending upon the estimated cost of each project.

[16]House Report, *supra* note 2, at 17. The same prohibitions against incremental and phased construction are expressed.

[17]10 U.S.C.A. § 2853(b) (Supp. 1982).

[18]*Id.*

[19]*Id.* at § 2853(c).

[20]*Id.* at § 2853(e).

[21]*Id.*

[22]*See* 31 U.S.C. § 665(i)(2) (1976).

ered as a reportable violation.[23] Existing regulatory provisions concerning minor construction should be followed until new guidance is published.[24]

[23]Dept of the Army, Ass't Comptroller of the Army for Fiscal Policy Letter, Responding to Inquiries from Chief, Procurement Law Div., The Judge Advocate General's School, 23 Jun. 1977. An example of a regulatory limitation in funding channels a violation of which would also be a violation of AR 37-20 is AR 37-110. *See* note 6 *supra*.

[24]*See* AR 37-20.

The Only Things Certain Are Death and . . . State Taxation of Military Income

Major Michael E. Schneider
Administrative and Civil Law Division, TJAGSA

As spring approaches, all servicemembers' thoughts turn to the inevitable tax season. Most members of the armed services are familiar with their obligations to file federal income tax returns, but not all are as aware of their obligations concerning state income taxation. In these days of decreased federal assistance, the states have increased their collections of state taxes, particularly state income and personal property taxes.[1] During a military career, servicemembers may serve in many different states, and, but for the protection provided by Section 514 of the Soldiers and Sailors Civil Relief Act (SSCRA),[2] may be subject to multiple taxation of their income and personal property. For this reason, it is helpful to review the protections afforded by the Act and to look at a few current problems facing servicemembers regarding state taxation.

[1]It has been noted that:

> [t]axes collected by state and local governments totaled $265.7 billion during the 12 months ending June 1982. This was an increase in total taxes of 23.7 billion or 9.8%, in comparison with the year ending June 1981. State tax collections totaled $162.2 billion up 8.3%, while locally imposed taxes amounted to $103.5 billion up 12.3%, during this period.
>
> Property tax collections showed the largest percentage increase during the period, rising 12.7% to a total of $82.3 billion . . . Individual income tax collections experienced the second greatest percentage of increase, rising 10.3%, with tax collections during the period totaling $51.0 billion. State Taxes, *State & Local Taxes Up Again*, 61 Taxes 51 (1983).

[2]50 App. U.S.C. § 574 (1976) [hereinafter cited as Section 514].

Section 514

Section 514, SSCRA provides that military pay can be taxed only by the state in which the armed forces member is domiciled. The specific purpose of this section was recognized by the United States Supreme Court in *California v. Buzard*:[3]

> [To] . . . broadly free the nonresident [servicemember] from the obligation of having to pay property and income taxes [so as] to relieve him of the burden of supporting the governments of the states where he [is] present . . . solely in compliance with military orders.[4]

To accomplish the stated purpose of Section 514, the Act recognizes three legal principles which, taken together, limit taxation of military pay and personal property to the servicemember's state of domicile. First, military personnel neither acquire nor lose their domicile for tax purposes solely because they are present in or absent from a state pursuant to military orders.[5] This legal principle protects domicile. The second legal principle concerns the nature of military pay.[6] Military compensation is deemed earned only in the state of domicile. This legal fiction gives to the domiciliary state alone the power to tax the military pay of its servicemembers. Another legal fiction and the third legal principle places the situs of personal

[3]382 U.S. 386 (1966).

[4]*Id.* at 393.

[5]Section 514.

[6]*Id.*

property of military personnel in the state of domicile.[7] The combination of these three legal principles forecloses the possibility of members of the armed forces being taxed as either domiciliaries or as statutory residents by any state except their actual state of domicile regarding their military income and their personal property. In short, the Act protects military pay from multiple taxation by recognizing that the state of domicile is the only state jurisdiction with the power to tax.[8]

Although Section 514 provides significant protections, military personnel should be aware of certain limitations. First, the Act protects only *military* compensation from possible multiple taxation. Nonmilitary income derived from off-duty employment or investments could be taxed by the state of domicile and the state where the nonmilitary income was earned.[9] The state of domicile has the power to tax all income wherever earned to include both the military and nonmilitary compensation.[10] The other state where the nonmilitary pay was earned can tax all the income earned within the state.[11] Thus, servicemembers who have off-duty employment or investments may be required to pay tax to both states for their nonmilitary income. The only relief for them may come in the form of state tax credits. This relief may be limited because no state is required to give state tax credits or give full credit for taxes paid to another state. Nonmilitary income is not protected from multiple taxation. The protection afforded under Section 514 is limited to military compensation of military personnel.

Another limitation of importance to servicemembers concerns their dependents. The legal principles applicable to military personnel do not apply to their dependent spouses or children. Therefore, the income of their dependents earned outside the dependent's state of domicile may be subject to multiple state taxation. Likewise, jointly owned personal property may be subject to double taxation. The state of domicile may tax due to the legal fiction that the personal property of the servicemember is located in that state, and the state where the personal property is actually located may also tax the dependent's interest in the property. Again, tax credits may provide some limited relief. However, this relief may be little consolation to the dependents who move to other states only because of the servicemember's military orders. In summary, the protections afforded under Section 514, SSCRA, are limited to protecting the tax status of military personnel based on domicile and to protecting their military pay and personal property from possible multiple state taxation.

State Treatment of Income

Section 514 protects servicemembers from multiple taxation by limiting the power to tax military compensation to the state of domicile. For tax purposes states treat their servicemember domiciliaries in a number of ways. Some states treat them like all persons domiciled within the state. A state in this category with a state income tax may tax all the servicemember's income wherever earned to include military pay and off-duty pay earned outside the state of domicile.[12] On the other hand, in those states that have no state income tax, the servicemembers are absolutely immune from paying state tax to any other state on their military pay. Some military personnel attempt to take advantage of this absolute immunity by changing their domicile to a state that has no income tax. Changing domicile should be done properly by insuring that the requirement of physical presence and intent to be a domiciliary evidenced by the indicia of domicile are met.[13] In this way, servicemembers will be treated as all others in the new state and will avoid challenges from the old state of domicile.

Many states treat servicemembers differently than other persons domiciled in the state. A few states completely exempt active duty pay from taxation.[14] Another three states exempt military

---

[7] *Id.*

[8] *See* Dameron v. Brodhead, 345 U.S. 322 (1953) (Supreme Court upheld constitutionality of Section 514).

[9] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[10] New York *ex. rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[11] Guartanty Trust v. Virginia, 305 U.S. 19 (1938).

[12] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[13] *See* Josephs, *A Checklist for Determining Domicile*, Prac. Law., Jul. 1981, at 55.

pay from state taxes arising from military service outside that state.[15] Several other states have set out various tests, which, if met, have the effect of exempting military pay for service outside the state.[16] Some other states provide for exclusion of only a part of military compensation.[17] These are the methods by which states treat their servicemembers differently than other domiciliaries of the state.[18]

[15]Illinois, New Hampshire, Michigan, and Vermont fall into this category. *See* Office of The Judge Advocate General, USAF, *All* States Income Tax Guide 44 (Illinois), 70 (Michigan), 91 (New Hampshire), 152 (Vermont) (1983) [hereinafter cited as All States Tax Guide].

[16]California, Idaho, and Pennsylvania fall into this category. *See* All States Tax Guide, *supra* note 14, at 13-18 (California), 41-42 (Idaho), 133-36 (Pennsylvania).

[17]Missouri, New York, West Virginia, and New Jersey apply the three-part test. *See* All States Tax Guide, *supra* note 14, at 81-83 (Missouri), 105-10 (New York), 157-61 (West Virginia).

[17]Wisconsin excludes the first $1,000 of military income from state taxation, *see* All States Tax Guide, *supra* note 14, at 162, while Oregon so excludes the first $3,000. *Id.* at 129.

[18]*See* the summary of state laws granting tax advantages to military personnel appended to this article.

Conclusion

Military personnel of all grades and ages are faced with the agony of the tax season. Complete return preparation includes the federal return and may also include a state tax return. Servicemembers should know the protection afforded by Section 514, SSCRA, and how states treat their military pay. Additionally, they should be familiar with both federal and state tax deductions and credits. A recent example concerns Individual Retirement Accounts. The federal government allows a $2,000 deduction for servicemembers participating in an IRA program, but not all states allow a comparable deduction.[19] This example illustrates the need for military personnel to be aware of not only the changes in federal tax laws, but also the specific state tax laws where they are domiciled. This knowledge coupled with the protection afforded by Section 514, SSCRA, should make the inevitable tax return time a short and pleasant season.

[19]*See* the summary of state treatment of individual retirement accounts appended to this article.

Appendix

States That Have No State Income Tax

Alaska	Nevada	Texas
Connecticut[1]	South Dakota	Washington
Florida	Tennessee[1]	Wyoming

[1]These states may tax dividends and interest which exceed a certain amount.

States That Do Not Tax Military Income

Wherever Stationed	*Outside the State*	*If certain tests are met*[2]
Illinois	California	Missouri
Michigan	Idaho	New Jersey
New Hampshire	Pennsylvania	New York
Vermont		Oregon
		West Virginia

[2]Domiciliary servicemembers are exempt from state income tax *if*
a) they maintained no permanent place of abode in the state during the tax year;
b) they maintained a permanent place of abode elsewhere; and
c) they did not spend more than 30 days of the tax year in the state of domicile.

States That Exempt Part Of Military Income

Arizona	($1000)	California	($1000)[3]	North Dakota	($1000)	West Virginia	($4000)[3]
Arkansas	($6000)	Indiana	($2000)	Oklahoma	($1500)	Wisconsin	($1000)
				Oregon	($3000)[3]		

[3]If stationed in the state of domicile

States That Permit $2000 IRA Deduction

Alabama	Kentucky	North Dakota[1]
Arizona	Louisiana	Ohio
Colorado	Maryland	Oklahoma
Delaware	Michigan	Rhode Island
Hawaii	Mississippi	Utah
Idaho	Missouri	Vermont
Illinois	Nebraska	Virginia
Indiana	New Mexico	West Virginia
Iowa	New York	District of Columbia
Kansas	North Carolina	

[1]Only if state short form is used

States That Permit $1500 IRA Deduction

California	Minnesota	Oregon
Georgia	Montana	South Carolina

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Compilation of Principal Legal Related Army Regulations

On the following page is compiled a list of those Army regulations which should be of interest to the judge advocate. This list is designed to be removed and used as a handy desk reference. It should assist the military attorney in answering those eleventh hour and need-to-know-yesterday questions which darken the life of every judge advocate.

PRINCIPAL LEGAL RELATED ARMY REGULATIONS

Number	Title
15-6	Procedures for Investigating Officers and Boards of Officers
15-180	Army Discharge Review Board
15-185	Army Board for Correction of Military Records
20-1	Inspector General Activities and Procedures
27-5	Army Law Library Service
27-10	Military Justice
27-14	Complaints Under Article 138, UCMJ
27-20	Claims
27-40	Litigation
27-50	Status of Forces Policies, Procedures and Information
195-2	Criminal Investigation Activities
195-5	Evidence Procedures
195-6	Department of the Army Polygraph Activities
200-1	Environmental Protection and Enhancement
200-2	Environmental Effects of Army Actions
210-1	Private Organizations on Department of the Army Installations
210-7	Commercial Solicitation on Army Installations
210-10	Administration
210-25	Vending Facility Program for the Blind on Federal Property
210-51	Army Housing Referral Service
230-1	The Nonappropriated Fund System
340-8	Army Word Processing Program
340-15	Preparing Correspondence
340-17	Release of Information and Records from Army Files
340-18-4	Maintenance and Disposition of Legal and Information Functional Files
340-21	The Army Privacy Program
340-21-4	The Army Privacy Program: System Notices and Exemption Rules for Legal and Information Functions
350-212	Military Justice (Training)
351-22	The Judge Advocate General's Funded Legal Education Program
360-5	Public Information
380-53	Telephone Communications Security Monitoring
405-16	Homeowner's Assistance Program
405-20	Federal Legislative Jurisdiction
415-35	Minor Construction
500-50	Civil Disturbances
600-4	Remission or Cancellation of Indebtedness - Enlisted Members
600-9	Army Physical Fitness and Weight Control Program
600-10	The Army Casualty System
600-11	Authority of Armed Forces Personnel to Perform Notorial Acts
600-14	Preventive Law Program
600-15	Indebtedness of Military Personnel
600-18	Equal Opportunity in Off-Post Housing
600-20	Army Command Policy and Procedures
600-21	Equal Opportunity Program in the Army
600-31	Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings
600-33	Line of Duty Investigations
600-37	Unfavorable Information
600-40	Apprehension, Restraint, and Release to Civil Authorities
600-50	Standards of Conduct for Department of the Army Personnel
600-85	Alcohol and Drug Abuse Prevention and Control Program
600-200	Enlisted Personnel Management System
600-240	Marriage in Overseas Commands
601-280	Army Reenlistment Program
608-1	Army Community Service Program
608-3	Naturalization and Citizenship of Military Personnel and Dependents
608-9	The Survivor Benefit Plan
608-50	Legal Assistance
608-61	Application for Permission to Marry Aliens Residing Outside CONUS
608-99	Support for Dependents, Paternity Claims, and Related Adoption Proceedings
623-105	Officer Evaluation Reporting System
623-205	Enlisted Evaluation Reporting System
630-5	Leave, Passes, Permissive Temporary Duty and Public Holidays
630-10	Absence Without Leave and Desertion
633-30	Military Sentences to Confinement
635-100	Officer Personnel (Separations)
635-120	Officer Resignations and Discharges
635-200	Enlisted Personnel (Separations)
735-11	Accounting for Lost, Damaged, and Destroyed Property
930-4	Army Emergency Relief
930-5	American National Red Cross Service Program and Army Utilization

Legal Assistance Items

Major Joseph C. Fowler, Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell
Administrative and Civil Law Division, TJAGSA

Some Survivor Benefit Plan Benefits May Now Be Included in the Gross Estate

The estates of all decedents dying after 31 December 1982 will include the value of annuity benefits in excess of $100,000 payable to a beneficiary other than the executor. Accordingly, pension and profit sharing plans, individual retirement accounts, and the proceeds of the Survivor Benefit Plan (SBP) may now be taxed to the extent the benefits exceed $100,000. Previously, the estate tax exclusion for such plans was unlimited. This is a result of § 245(a) of the Tax Equity and Fiscal Responsibility Act of 1982, which added subsection 2039(g) to the Internal Revenue Code.

In the case where the proceeds of the SBP are paid to the spouse, amounts over $100,000 remain untaxed because of the unlimited marital deduction concerning these transfers. However, for estate transfers to other beneficiaries, the actuarially anticipated stream of SBP payments in excess of $100,000 will be included in the estate and applied toward the unified credit and exempt transfers. The value of the estate in excess of the credit and exempt amount will be taxed.

Judiciary Notes

US Army Legal Services Agency

1. Digest – Article 69, UCMJ Application

A recent application submitted under the provisions of Article 69, UCMJ, *McMichael*, SUMCM 1982/5230, involved the transfer of an allegedly forged travel order. The accused had sought to terminate a civilian rental agreement, pursuant to a military clause therein, by providing falsified evidence of a claimed permanent change of station in order to avoid forfeiture of his security deposit. The Judge Advocate General granted relief upon the grounds that the specification failed to either state an offense or to allege the relevant facts necessary to support jurisdiction over the accused and over the off-post transfer; *i.e.* uttering, of a forged instrument, and the documentary evidence was received in evidence without the necessary authentication and foundational predicate required by Military Rules of Evidence 901, 902, and 1001-05.

In this case, the specification failed to name the accused or to give any indication of his military unit or otherwise allege that he was a person subject to the UCMJ. Further, although the requirement in United States v. Alef, 3 M.J. 414 (C.M.A. 1977), that the government need allege facts to show requisite service-connection is ordinarily viewed as procedural, *see* United States v. Adams, 13 M.J. 728 (A.C.M.R. 1982); United States v. King, 6 M.J. 553 (A.C.M.R. 1978), *petition denied*, 6 M.J. 290 (C.M.A.), *petition for reconsideration denied*, 7 M.J. 61 (C.M.A. 1979), in this case the deficiency was significant.

Only the off-post transfer of the forged order, as opposed to the forgery itself, was charged. An essential element of an offense under Article 123, UCMJ is that the uttered instrument "would, if genuine, apparently operate to the prejudice of another." Where the instrument at issue does not on its face demonstrably disclose such legal efficacy, mere recitation of the legal conclusion is insufficient and additional pleading is necessary to show *how* such prejudice would result. United States v. Farley, 11 U.S.C.M.A. 730, 29 C.M.R. 546 (1960); United States v. Davis, 4 M.J. 752 (A.C.M.R. 1978); United States v. Billups, 49 C.M.R. 802 (A.C.M.R. 1975). Here, the specification identified the falsified document only as "Exhibit A" and there was nothing on page one of the charge sheet that would remotely suggest what that document might be. Thus, the specification left it impossible to determine that any document with possible legal efficacy had been transferred or that there

was any military interest whatsoever in the transaction between the unidentified accused and the civilian real estate company. Had there been any effort to comply with the precatory language in paragraphs 28c and paragraph 14 of Appendix 6*a* of the Manual for Courts-Martial by setting out the instrument or a reasonable description thereof in the specification, the specification probably would have satisfied the tests of both *Alef* and *Farley*.

The summary court officer's findings of guilt were also premised upon the admission of the CID Report of Investigation and exhibits thereto. They were admitted solely upon the hearsay testimony of the preparing agent. It was concluded that the CID agent did not have the requisite personal knowledge or expertise to authenticate or explain the contractual documents and falsified order that he had allegedly had obtained from the civilian landlord during the course of his investigation. Absent an express consent to a trial without any testimony from the recipient of the false order, the accused's failure to object to the admissibility of the various documents was not deemed a waiver under Military Rule of Evidence 103. As there was no substantive evidence other than the hearsay testimony of the CID agent and his Agent's Investigation Report (CID Form 94) that the accused had transferred any document to the landlord, the accused's motion for finding of not guilty should have been granted.

The *McMichael* case illustrates a continuing problem in the use of summary courts-martial. Supervising staff judge advocates must insure that specifications referred to trial by summary court-martial are drafted to the same standards of specificity and completeness that would be expected in trials by general courts-martial. Summary court officers should be properly briefed on their obligations to insure that findings are based upon the receipt of competent evidence that is admissible under the Military Rules of Evidence. Of particular concern is that supervising SJAs insure that the first page of the Charge Sheet (DD Form 458) correctly indicates the names of witnesses who testified and the identification of documents received in evidence as required by paragraph 79*e* of the Manual for Courts-Martial and paragraphs 27 and 29 of DA Pam 27-7, Guide for Summary Court-Martial Trial Procedure (15 May 1982). When deficiencies of the degree that occurred in the *McMichael* are discovered, supervisory reviewing authorities should take remedial action pursuant to Article 65(c), UCMJ and paragraph 94*a*(2), Manual for Courts-Martial.

2. Court-Martial Orders

Recently, it has been noted that the copies of initial promulgating and supplementary court-martial orders contained in many records of trial are completely illegible. Staff judge advocates should insure that reproduction facilities produce legible copies of court-martial orders. All court-martial orders become a permanent part of the record of trial and are retained therein indefinitely.

3. Certificate of Service or Attempted Service

a. The Notice and Receipt Form (JALS-CC Forms 10d & 10e), properly executed by the accused, should be forwarded to JALS-CC without a forwarding letter of certificate of service (Para. 13-4a(2), AR 27-10).

b. Certificate of Attempted Service (by mail). An original and two copies of the properly completed Certificate of Attempted Service (DA Form 4916-R) and the original and two copies of the postal return receipt should be forwarded immediately when received by general court-martial convening authority to JALS-CCR, Nassif Building, Falls Church, VA 22041. All originals and first and second xerox copies should be stapled separately. One copy of the DA Form 4917-R which advised the accused of his appellate rights should also be attached to the original set. See paragraphs 13-4b & c of AR 27-10, for further guidance where service is unsuccessful or where no receipts have been received 60 days after forwarding the U.S. Army Court of Military Review decision.

4. Transfer Orders

One copy of transfer orders should be forwarded to JALS-CCR immediately so that the Army Court of Military Review decision may be dispatched to the proper general court-martial convening authority for prompt service upon the accused. *See* para. 13-3, AR 27-10.

5. Discharge or REFRAD Orders

When an accused has been discharged or relieved from active duty prior to the publication of a final order by the general court-martial convening authority, a copy of the orders and a DD Form 214 should be forwarded to the Clerk of the Court immediately so that a final supplementary court-martial order may be published by HQDA. *See* para. 13-5c(3), AR 27-10.

6. Request for Final Action

When an accused requests that final action be completed in his or her case after appellate review has taken place, an original and two copies of DA Form 4919-R, Request for Final Action, properly executed, should be sent to JALS-CCR. Ten copies of the final supplementary court-martial order should be attached to the request for final action when forwarded.

7. Petition for Grant of Review in the U.S. Court of Military Appeals

General court-martial convening authorities should insure that DA Form 4918-R is fully completed when forwarded, in five copies, to an accused or to the United States Court of Military Appeals. The Court of Military Appeals has found it necessary on many occasions to request information which had been omitted on the form from the Clerk of Court. Some discrepencies noted were the omission of the name, grade, and social security number of the accused or the case's ACMR number.

Nonjudicial Punishment

Quarterly Punishment Rates Per 1000 Average Strength
July–September 1982

	Quarterly Rates
ARMY-WIDE	43.45
CONUS Army commands	44.33
OVERSEAS Army commands	40.46
USAREUR and Seventh Army commands	39.10
Eighth US Army	56.09
US Army Japan	15.22
Units in Hawaii	36.82
Units in Alaska	32.77
Units in Panama	51.41

Courts-Martial

Quarterly Punishment Rates Per 1000 Average Strength
July–September 1982

	GENERAL CM	*SPECIAL CM*		*SUMMARY CM*
		BCD	*NON-BCD*	
ARMY-WIDE	.48	.77	.38	1.09
CONUS Army commands	.40	.60	.36	1.02
OVERSEAS Army commands	.61	1.04	.39	1.18
USAREUR and Seventh Army commands	.69	1.12	.31	1.21

	GENERAL CM	SPECIAL CM		SUMMARY CM
		BCD	NON-BCD	
Eighth US Army	.20	1.08	.77	.54
US Army Japan	—	.39	.39	.39
Units in Hawaii	.17	.45	1.06	.50
Units in Alaska	.24	.84	—	2.99
Units in Panama	1.29	.57	.14	3.15

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Reserve ID Cards

The Judge Advocate General's School does not issue Reserve Component ID cards. A reserve officer who needs an ID card should follow the procedure outlined below:

a. Fill out a DA Form 428 and forward it to Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-PSE-VC, 9700 Page Boulevard, St. Louis, Missouri 63132. Include a copy of recent AT orders or other documentation indicating that the applicant is an actively participating reservist.

b. RCPAC will verify the information and the individual's entitlement, prepare an ID card, and send it back to the reservist.

c. The reservist must sign the card, affix fingerprints, attach an appropriate photograph, and return the materials to RCPAC.

d. RCPAC will affix the authorizing signature and laminate the card, and will send the finished card to the applicant. Also enclosed will be a form receipting for the ID card.

e. The applicant must execute the receipt form and send it to RCPAC.

2. Court Reporting Equipment

Court reporting equipment (AN/TNH 23) has been procured for selected USAR units. These units are primarily military law centers, court-martial trial teams, and court-martial defense teams, but certain COSCOMs, support groups, and civil affairs units have been designated to receive the equipment. Because the equipment has been centrally procured, it is issued without cost to the selected units. Each unit must requisition the equipment through normal supply channels. Although the equipment is issued without cost to the receiving unit, maintenance of the equipment will be a responsibility of the unit until spare parts are in the supply inventory, which is anticipated to occur about December 1983. Each CONUS SJA has a listing of units designated to receive the equipment.

3. Senior Judge Advocate Positions

In the January 1983 edition of *The Army Lawyer*, the selection process set forth at paragraph 2-20h, AR 140-10, for assigning Military Law Center commanders and ARCOM or GOCOM staff judge advocates was reviewed in an effort to draw attention to the fact that the lack of compliance with the selection requirements had, in a number of instances, resulted in eligible officers being overlooked for those critical positions. TJAG recently reiterated his policy that all qualified officers must be given an equal opportunity to compete for the limited number of senior troop unit positions available. Towards this end, TJAG has directed that, with regard to future nominations, all nominating commands must clearly establish that they have complied with the literal requirements of AR 140-10. This will include a by-name list of all eligible officers, *i.e.* those holding the prescribed grade or promotable thereto, including those in the control group, the extent of the geographical area screened, and the reasons for selecting the primary nominee. CONUSA SJAs will be responsible for assuring compliance with this requirement.

TJAG also expressed concern regarding the numerous requests for extension of the three year tenure period for these senior positions. Exceptions to this tenure limitation may be granted but only under very limited circumstances. The tenure requirements are intended to provide a pool of experienced officers ready to assume senior positions upon mobilization. To avoid the undermining of this critical goal, TJAG has instructed that extensions will not be granted except under truly exigent circumstances, as described in the regulation, and where there are no feasible alternatives. Any extension request must include a listing of all eligible officers who were considered plus the criteria utilized for determining eligibility. An unsubstantiated assertion that there are no qualified officers in the area will not justify an extension. It is the responsibility of all senior judge advocates to have a comprehensive plan for the recruiting and training of personnel in their units so that there will always be qualified personnel available to fill essential positions. CONUSA SJAs will be monitoring the commands in their area to ensure that proper long range planning is undertaken.

Army Law Library Service

Developments, Doctrine, and Literature Department, TJAGSA

In accordance with AR 27-5, all Army law libraries are reminded that requests for material must be forwarded through their library managers to the Army Law Library Service (ALLS). Recently, numerous requests have been received directly from the field. Those libraries which do not know the location of their library manager may contact ALLS; we will be glad to give you this information.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Physical Training

All legal clerks and court reporters are expected to participate in some type of physical training program and to take the Army Physical Readiness Test (APRT) unless they are precluded from doing so by a medical profile. Individuals who are age 40 and over should be medically screened and are expected to participate in such physical training and testing as medical authorities determine feasible.

Chief clerks and senior NCOs should insure that personnel with profiles which restrict participation in all or some form of exercise or testing periodically consult their local health clinic to determine whether some portion of the APRT may be safely taken and whether some form of physical training is possible (*see* paragraphs 12 and 13, AR 350-15).

The Commander of MILPERCEN (DAPE-MSE) recently sent a message to the field (150800Z Dec. 1982, Subject: Policy Changes to Officer and Enlisted Evaluation Reports) which states that current APRT and *height/weight data will be placed on EER/OERs, beginning with the reports carrying a "thru date" of May 1983 or later.*

All chief clerks are encouraged to aggressively monitor the PT programs for their personnel and set the example by actually leading the various types of physical training sessions in order to keep our clerks in shape.

2. First Annual Judge Advocate General's Senior Noncommissioned Officers and Warrant Officer Workshop

The First Annual Judge Advocate General's Senior Noncommissioned Officers and Warrant Officer Workshop was held during the period 16-19 January 1983 at the U.S. Army Legal Services Agency, Falls Church, Virginia.

The workshop was a great success. The objectives of the workshop were to:

a. Promote an effective warrant and NCO relationship which will enhance mission accomplishment.

b. Increase office efficiency through effective use of personnel.

c. Review and articulate the distinct roles of the senior NCO and warrant officer.

d. Review and discuss problem areas.

e. Submit appropriate recommendations to The Judge Advocate General for approval and utilization throughout the JAG Corps.

CLE News

1. 96th Contract Attorneys Course

The 96th Contract Attorneys Course scheduled for 16-27 May 1983 has been canceled.

2. 16th Fiscal Law Course

The 16th Fiscal Law Course, 5F-F12, has been changed from a 3½ day course to a 4½ day course. The course will now commence on Monday, 9 May 1983.

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 March annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniverary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February every third year
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1983 issue of The Army Lawyer.

4. Failure to Comply With Mandatory CLE Requirements First Step on Road to Disbarment in Washington State

In a recent case, the Supreme Court of Washington, sitting en banc, upheld the disbarment of an attorney who had been suspended from the practice of law for failing to comply with the state's mandatory continuing legal education (CLE) requirements and had continued to act as an attorney during the suspension. The facts of the case illustrate the potential snowballing effect of neglecting to fulfill and report compliance with state CLE requirements.

The case was *In re Yamagiwa*, 97 Wash. 2d 773, 650 P.2d 203 (1982) (en banc). The attorney in question had failed to report compliance with his 1978 annual 15 credit hours CLE requirement. After the year and a four month grace period had elapsed without either a report of compliance or a request for extension of time, he was suspended by a highest court of the state. During the period of suspension, the respondent represented parties before the Immigration Service, distributed professional cards which bore the title "Attorney at Law," billed a client for "attorney's fees," failed to notify clients and attorneys for adverse parties of his suspension, and refused to cooperate with the state bar association's investigation of him.

Noting that "[t]he primary purposes of disciplinary sanctions are to protect the public and preserve confidence in the legal profession and judicial system," the Supreme Court of Washington found that the respondent had severely threatened both these premises. For purposes of preventing repetition, deterring others from engaging in similar conduct, restoring public confidence in the legal profession, and because the respondent had been under suspension when these acts were committed, disbarment was considered the only appropriate remedy.

While the facts of *Yamigiwa* are extreme, the case highlights an important point. Unless specifi-

cally exempted, military attorneys are bound to comply with state mandatory CLE requirements. Judge advocates must not only insure that they observe these requirements, but also that such compliance has been reported to the appropriate authority. Full details of the requirements of each state are provided in the January 1983 issue of *The Army Lawyer*. As *Yamigiwa* illustrates, noncompliance can lead to suspension and continued practice during suspension can lead to disbarment. Simple adherence to the state requirements can avoid such dire consequences.

5. Contract Attorneys Three Day Workshop. We Need Your Help.

The 5th Contract Attorneys Workshop will be held at TJAGSA on 18-29 April 1983. This workshop is for you, the contracting attorney working at the installation level of government acquisition. It is your chance to share with other contract lawyers those knotty problems that you have faced locally and are likely to be encountered against elsewhere. You and your staff judge advocate or command counsel are encouraged to think about problems you might want to present at the workshop. Letters have recently been sent to contract attorneys' offices outlining the procedures on submitting problems for discussion. The workshop structure is designed to address problems faced at all levels of the acquisition process from formation to contract close-out. The deadline for problem submission is drawing near, so contract attorneys are encouraged to send their problems in immediately. Limited quotas are also available for attendees who will not present problems for discussion. To make this workshop a success, we need you *and* your ideas.

6. U.S. Army Claims Service Claims Seminar

The U.S. Army Claims Service (USARCS) will conduct a four and one-half day Claims Seminar at The Judge Advocate General's School, Charlottesville, Virginia, from 13-17 June 1983. Principal objectives of the seminar are to discuss recent legal developments in the claims field, present the background and basis for policy developed by USARCS in the administration of the claims program, and to conduct training concerning topics of general and specific interest to attendees.

The Claims Seminar will be broken into three sessions as follows:

a. Session I, Personnel Claims, Recovery, and Administration, Monday and Tuesday, 13-14 June 1983, 0830-1650 hours.

b. Session II, Tort, Medical Care Recovery, Litigation, Maritime and Foreign Claims, Wednesday and Thursday, 25-26 June 1983, 0830-1630.

c. Session III, Risk Management and Medical Malpractice Claims, Friday, 17 June 1983, 0830-1200 hours.

Due to space constraints, attendance will be limited to 185 registrants for each session. Attendees are required to register for each session. Registration is mandatory and registration forms may be acquired by contacting USARCS, Mrs. Audrey E. Slusher (Autovon 923-7622/7960 or Commercial 301-677-7622/7960).

7. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

8. TJAGSA CLE Course Schedule

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 9-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 96th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 1-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

9. Civilian Sponsored CLE Courses

June

2-3: GICLE, Civil Trial Advocacy, Atlanta, GA.

2-3: BNA, Equal Employment Opportunity Conference, Washington, DC

2-3: ALIABA, Federal & State Class Actions, San Francisco, CA.

2-3: ALIABA/MCLNEL, New Dimensions in Securities Litigation, Boston, MA.

3: WSBA, Collection of Judgments, Olympia, WA.

3-10. NCDA, Executive Prosecutor Course, Houston, TX.

5-10: NJC, Traffic Court Proceedings—Specialty, Reno, NV.

5-17: NJC, Non-Lawyer Judge—General, Reno, NV.

5-17: NJC, Special Court Jurisdiction—General, Reno, NV.

9-10: MCLNEL, Business Planning Institute, Boston, MA.

10: WSBA, Collection of Judgments, Spokane, WA.

10: NKUCCL, Ethics & Professional Responsibility, Highlands Hts., KY.

12-17: NJC, Evidence in Special Courts—Specialty, Reno, NV.

12-24: NCCD, Trial Practice II, Houston, TX.

16: GICLE, Medical Practice for Attorneys, Atlanta, GA.

17: GICLE, Analyzing Medical Records, Atlanta, GA.

17: WSBA, Collection of Judgments, Seattle, WA.

18-27: VACLE, NITA Trial Advocacy, Lexington, VA.

19-24: NJC, Admin. Law: Complex Adjudicatory Proceedings—Graduate, Reno, NV.

19-24: NJC, Civil Actions in Special Court—Graduate, Reno, NV.

19-24: NJC, Alcohol and Drugs—Specialty, Reno, NV.

19-7/1: NJC, Decision Making: Process, Skills and Techniques—Graduate, Reno, NV.

20-24: ALIABA, Federal Securities Law, Boston, MA.

24: NKUCCL, Medical Legal Problems, Highland Hts., KY.

24-25: GICLE, Admiralty Law, Savannah, GA.

24-26: WSBA, Advanced Taxation, Wenatchee, WA.

26-7/1: ATLA, National & Advanced College of Advocacy, Cambridge, MA.

6/26-7/1: NJC, Traffic Court Management—Speciality, Reno, NV.

26-7/1: NJC, Court Management-Managing Delay—Specialty, Reno, NV.

26-7/1: NJC, The Judge in Special Court Trials—Graduate, Reno, NV.

29-7/1: NCLE, Institute on Estate Planning, Vail, CO.

The complete directory of civilian organizations which sponsor CLE courses appears in the January 1983 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

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

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these indices have been classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER TITLE

AD B063185 Criminal Law, Procedure, Pre-

AD NUMBER	*TITLE*
	trial Process/JAGS-ADC-81-1
AD B063186	Criminal Law, Procedure, Trial/JAGS-ADC-81-2
AD B063187	Criminal Law, Procedure, Post-trial/JAGS-ADC-81-3
AD B063188	Criminal Law, Crimes & Defenses/JAGS-ADC-81-4
AD B063189	Criminal Law, Evidence/ JAGS-ADC-81-5
AD B063190	Criminal Law, Constitutional Evidence/JAGS-ADC-81-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

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

2. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 135-91	Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures	I02	1 Dec 82
AR 135-178	Separation of Enlisted Personnel		1 Jan 83
AR 140-185	Training and Retirement Point Credits and Unit Level Strength Accounting Records	1	1 Jan 83
AR 190-22	Searches, Seizures, and Disposition of Property		1 Jan 83
DA Pam 27-10	Military Justice Handbook for Trial Counsel and the Defense Counsel		Oct 82
DA Pam 550-86	Somalia: A Country Study		1982

3. Articles

Arvay, *Developments in Criminal Law and Procedure: The 1980-81 Term*, 3 Sup. Ct. L. Rev. 171 (1982).

Babcock, *Fair Play: Evidence Favorable to the Accused and Effective Assistance of Counsel*, 34 Stanford L. Rev. 1133 (1982).

Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 6 Can.-U.S. L.J. 48 (1983).

Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 Vt. L. Rev. 15 (1982).

Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. Colo. L. Rev. 691 (1982).

Casto, *Government Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act*, 49 Tenn. L. Rev. 201 (1982).

Dowling & Iscan, *Scientific Evidence: A Vital Role in Homicide Cases*, Trial, Sept. 1982, at 35.

Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447 (1982).

Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 Hous. J. Int'l L. 13 (1981).

Hazzard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 Cleve. St. L. Rev. 571 (1981).

Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857 (1982).

Leonard, *Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice*, 4 Whittier L. Rev. 33 (1982).

Lever, *The New Court of Appeals for the Federal Circuit (Part I)*, 64 J. Patent Office Soc'y 178 (1982).

Levit & Mason, *Where Do We Go From Here? Bankruptcy Administration Post-Marathon*, 87 Com. L.J. 353 (1982).

Mann, *The Scope of the All Writs Power*, 10 Fla. St. U.L. Rev. 197 (1982).

Mills & Belzer, *Joint Custody as a Parenting Alternative*, 9 Pepperdine L. Rev. 853 (1982).

Nagle, *Prompt Payment Discounts in Government*

Contracts, 13 Pub. Cont. L.J. 108 (1982).

Raffaele, *Lawyers in Labor Arbitrations*, 37 Arb. L.J. 14 (1982).

Re, *The Lawyer As Counselor and Peacemaker*, Case & Comment, Nov.-Dec. 1982, at 42.

Reilly, *Disputes Between Federal Agencies and their Employees*, 63 Chi. B. Rec. 320 (1982).

Rifkin & Sawyer, *Alternative Dispute Resolution—From A Legal Services Perspective*, NLADA [National Legal Aid and Defender Association] Brief Case, Fall 1982, at 20.

Seago, *Income Tax Consequences of Community Property Divisions and Divorce*, 13 Tax Advisor 402 (1982).

Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 Fam. L.Q. 107 (1982).

Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49 (1982).

Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of Self-Defense*, 15 Conn. L. Rev. 121 (1982).

Comment, United States v. Ross *and the Container Cases—Another Chapter in the Police Manual on Search and Seizure*, 10 Fla. St. U.L. Rev. 471 (1982).

Note, *Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 Fordham L. Rev. 1241 (1982).

Note, *Arrestee's Scope of Immediate Control: An Expansive Definition*, 28 Loy. L. Rev. 359 (1982).

Note, *Free Speech in the Military*, 65 Marq. L. Rev. 660 (1982).

Note, *Interview Notes of Government Agents Under the Jencks Act*, 80 Mich. L. Rev. 1695 (1982).

Note, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 Tex. Tech. L. Rev. 1467 (1982).

Note, *Sixth Amendment Limits on Collateral Uses of Uncounselled Convictions*, 91 Yale L.J. 1000 (1982).

Symposium: *The Restatement (Second) of Contracts*, 67 Cornell L. Rev. 631 (1982).

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

* U.S. GOVERNMENT PRINTING OFFICE: 1983-381-815: 7