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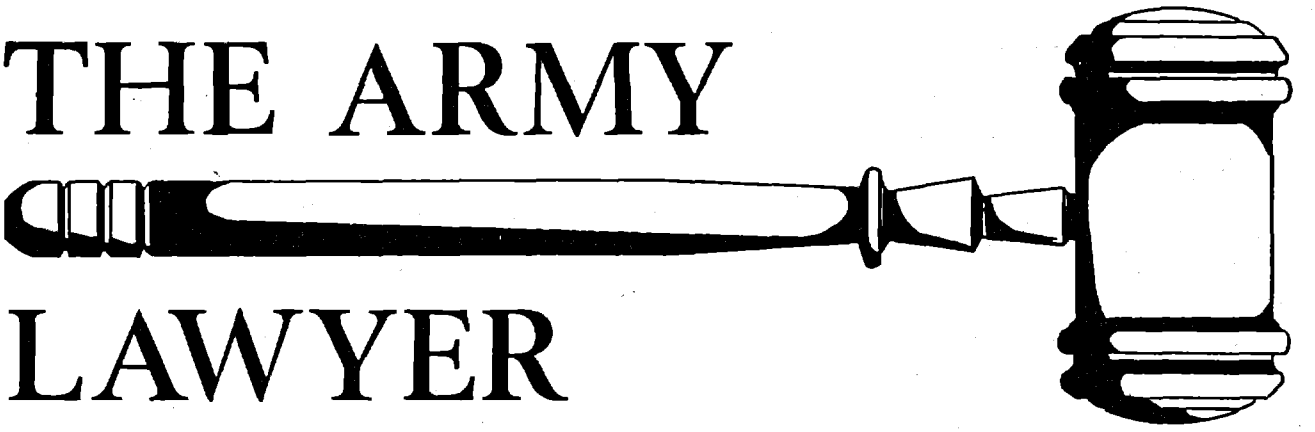
THE ARMY LAWYER



Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-129

September 1983

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The Trade Agreements Act - Installation Procurement and International Government Acquisition Law

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"It appears that the simple rules, which have been clearly spelled out, continue to go unheeded."
Secretary of Defense Casper Weinberger.[1]

Preface

The Secretary of Defense is referring to the widespread lack of compliance with some of the regulations that are intended to implement the Trade Agreements Act of 1979.[2] For example, the United States, and specifically the Department of Defense, has been criticized by the European Communities (EC) for its failure to comply with the required thirty-day bidding period which is supposed to follow the issuance

[1]Acquisition Letter 83-2 [hereinafter cited as AL83-2], Subject: Compliance With Trade Agreements Act (15 Mar 83), inclosed memorandum from the Secretary of Defense (4 Feb 83).

[2]19 U.S.C. §§2501-2582 (Supp. V 1981).

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310

REPLY TO
ATTENTION OF

DAJA-CL 1983/5499

28 JUL 1983

SUBJECT: Courts-Martial Processing

STAFF JUDGE ADVOCATES

1. My review of cases forwarded on appeal indicates serious inattention to detail in the preparation of post-trial reviews, convening authority actions, and court-martial orders. For example, in several recent cases the fact that the post-trial review was served on trial defense counsel in accordance with United States v. Goode, 1 MJ 3 (CMA 1975) was not properly documented, necessitating that the cases be returned for a new review and action. In fact, one Staff Judge Advocate's Office initially could not even determine whether certain post-trial reviews had ever been served on the trial defense counsel.

2. I realize I have stressed numerous areas that are of special interest during GO Article 6 visits and that all of you face increasing requirements. Nonetheless, we cannot compromise the exacting standards which must be followed in the processing of courts-martial.

3. Accordingly, I must once again remind you that your continuous and personal emphasis on the accurate and timely processing of courts-martial is essential.

Hugh J Clausen

HUGH J CLAUSEN
Major General, USA
The Judge Advocate General

of a covered solicitation[3] and for its failure to make reference to note "12" in the Commerce Business Daily to identify procurements which are covered by the Act.[4]

The U.S. Trade Representative has advised that this noncompliance constitutes a serious embarrassment to the United States, seriously undermines both the trade agreement and export opportunities for United States firms, and possibly exposes the United States government to demands for compensation or retalia-

[3]AL 83-2, *supra* note 1, inclosed memorandum from Ambassador Brock, the United States Trade Representative (17 Jan 83). Claims of 90% noncompliance have been confirmed by a review of the Commerce Business Daily. This noncompliance may be explained by DOD's failure to issue the implementing regulations in the format of a Defense Acquisition Circular. Acquisition Letter 81-1, Subject: Purchases Under the Trade Agreements Act of 1979 (6 Jan 81), was issued to the field, but the provisions cited therein have not been issued in the form of a Defense Acquisition Circular. Thus, the DAR does not contain the provisions following Section 6-1600 (1981). However, these provisions can be found at 5 Gov't Cont. Rep. (CCH)¶ 37,620.18 (16 Feb 83). *See note 26 infra.*

[4]AL 83-2, *supra* note 1, includes a memorandum from the DAR Council directing the Departments to disseminate the following revision to the DAR:

> In DAR 1-1003.9 add, (i). Each notice publicizing a procurement which is subject to the requirements of the Agreement on Government Procurement as approved and implemented by the Trade Agreements Act of 1979 (see Section VI, Part 16) shall reference numbered note "12". When referenced, note "12" will appear in the Commerce Business Daily as follows:
>
> > One or more of the items under this procurement may be subject to the requirements of the Agreement on Government Procurement approved and implemented in the United States by the Trade Agreements Act of 1979. All offers shall be in the English language and in U.S. dollars. The solicitation procedure is open; that is, all interested suppliers may submit an offer.

This is the note "12" mentioned by the Secretary of Defense and the United States Trade Representative which DOD activities have been failing to include in their synopsis in the Commerce Business Daily. It is interesting to note that this addition to DAR §1-1003.9 has not been issued in any Defense Acquisition Circulars since 1981. The failure to issue DAR § 1-1003.9(i) in a Defense Acquisition Circular may explain why DOD has failed to comply with the provision.

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

tory countermeasures from other signatory nations.[5]

The problems identified by the Secretary of Defense and the U.S. Trade Representative may not totally be the fault of the installation contracting officer or legal advisor. Regardless of fault, the success or failure of this free trade experiment depends upon the efforts of the contracting officer's team at the installation level. It is therefore imperative that every contracting officer and legal advisor be aware of the scope of The Trade Agreements Act of 1979, become familiar with its provisions, and insure compliance with the appropriate regulations that implement the Act. This article endeavors to simplify that task.

I. Introduction

The United States Constitution vests in Congress the power to regulate commerce with foreign nations.[6] However, since 1934, Congress has increasingly delegated to the President the power to negotiate matters of foreign trade.[7] Consistent with this trend, Congress, in the Trade Act of 1974,[8] authorized the President to engage in multilateral trade negotiations.[9] This delegation's significance was that, of the six reasons set forth in the congressional statement of purpose for this authorization, two of the reasons were unique. Specifically, Congress authorized the president to negotiate trade agreements:

> (1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries *through open and nondiscriminatory world trade*;
>
> (2) to *harmonize, reduce, and eliminate barriers to trade* on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States.[10]

This authorization was prompted by congressional findings:

> that barriers to (and other distortions of) international trade [were] reducing the growth of foreign markets for the products of United States agriculture, industry, mining and commerce, diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations.[11]

The President was therefore urged to enter negotiations and "harmonize, reduce, or eliminate...barriers to (and other distortions of) international trade."[12]

Armed with these goals, United States representatives engaged in multilateral trade negotiations which culminated in 1979 with the signing of the Agreement on Government Procurement,

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[5] *Id.* This is an unexpected development. Much of the literature on the Agreement envisioned a different result: A primary need will be vigorous enforcement of U.S. rights under the Agreement on Government Procurement (Code). Pomeranz, *Toward A New International Order in Government Procurement*, 12 Pub. Cont. L.J. 129, 160 (1982). American contractors should prepare to discover noncompliance by signatory countries and enlist the government's assistance in compelling compliance. Anthony & Hagerty, *Cautious Optimism As A Guide To Foreign Government Procurement*, 12 Pub. Cont. L.J. 1, 38 (1981). Whether the Government Procurement Code (GPC) will open up international trade opportunities depends upon the extent to which signatory countries live up to their obligations. Brown, *The New International Government Procurement Code Under GATT*, 53 N.Y.S.B.J. 198, 232 (1981). The government must insure that domestic industry is not threatened by the offering of a procurement opportunity without reciprocation by our trading partners. Goldstein, *Doing Business Under The Agreement on Government Procurement: The Telecommunications Business—A Case In Point*, 55 St. John's L. Rev. 63, 91 (1980).

[6] U.S. Const. art I, § 8, cl. 3.

[7] Legislative History, 1979 U.S. Code Cong. & Ad. News 381, 390.

[8] 19 U.S.C. §§ 2101-2187 (1976).

[9] *Id.* at § 2111.

[10] *Id.* at § 2102(1), (2) (emphasis added).

[11] *Id.* at § 2112(a).

[12] *Id.*

under the umbrella of the General Agreement on Tariffs and Trade (GATT).[13] These negotiations, referred to as the "Tokyo Round," covered a wide variety of trade subjects[14] including the main topic of this article, the Agreement on Government Procurement.[15]

The United States implemented the Agreement on Government Procurement by enacting the Trade Agreements Act of 1979.[16] The Act's "effective date" was 1 January 1981. The Agreement on Government Procurement was further implemented by the issuance of Executive Order 12260[17] on 31 December 1980 and the publication and issuance of part 16 to section VI, Defense Acquisition Regulation (DAR) on 6 January 1981.[18] The ultimate goal of these negotiations, statutes and regulations is to eliminate non-tariff barriers (NTBs) to international trade, and to increase United States access to foreign markets which were previously closed by NTBs including domestic laws, rules and procedures.

II. Overview

Before reviewing these statutory and regulatory changes, an appropriate question is *why* were certain national governments willing to change certain procurement practices which affected international trade.

Historically, many nations have used a series of devices to protect domestic industry and labor. Protectionist actions included high tariffs on imported goods and non-tariff barriers such as laws and policies, both written and unwritten, prohibiting foreign companies from bidding on government contracts. As interdependency gradually grew among the various nations' economies, these nations enacted a series of laws which reduced the number and amount of tariffs imposed on foreign goods.[19]

As tariff barriers eroded and economic interdependence continued to grow, the international business community further analyzed foreign trade to determine what "new" markets were available for their goods and what barriers existed which blocked their access to these markets. The governmental sector was a market identified as a possible purchaser of goods. As an example of the size of this market, in 1978, the United States spent an estimated $90 billion on federal procurement.[20]

Throughout the world today, national governments and their instrumentalities are procuring an increasing amount of goods, thus creating a market which commercial enterprises desire to enter. However, not until the signing of the GATT: Agreement on Government Procurement and its implementation by the parties to the agreement, were many of the NTBs which impeded entrance into the government procurement market lifted.

III. Non-Tariff Barriers in the United States

Two examples of NTBs in the United States are the Buy American Act[21] and the Balance of Payments Program.[22] The Buy American Act uses price differentials to protect American business and labor from foreign competition. Price differentials are added to bids when the end product offered is not manufactured in the United States or the cost of the components

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[13]The Agreement on Government Procurement does not currently have a U.S.T. or T.I.A.S. number but it can be found in International Legal Materials, Vol. XVIII, No. 4, at pages 1052-78 (1979).

[14]The Tokyo Round covered 14 different trade topics and the Agreements reached in regards to those topics are listed in the Trade Agreements Act of 1979, 19 U.S.C. § 2503(c) (Supp. V 1981).

[15]For a more detailed analysis of the initiation of, and the negotiations within, the Tokyo Round, *see* McRae & Thomas, *The GATT and Multinational Treaty Making: The Tokyo Round*, 77 Am.J. Int'l L. 51 (1983).

[16]19 U.S.C. §§ 2501-2382 (Supp. V 1981).

[17]Exec. Order No. 12260, 46 Fed. Reg. 1653 (1981).

[18]Defense Acquisition Reg. § 6-1600 (1981).

[19]Legislative History, 1979 U.S. Code Cong. & Ad. News 381-393.

[20]*Id.* at 514, 527-28. It is estimated that if foreign government procurement markets were more accessible, United States industry would have a potential market of $20 billion per year.

[21]41 U.S.C. §§ 10a-d (1976).

[22]DAR § 6-102.2.

manufactured in the United States do not account for more than fifty percent of the total cost of all the components. While the Buy American Act does not technically apply outside the United States, provisions of the Act do apply through the Balance of Payments Program. This program requires that, in the procurement of both supplies and services outside the United States, domestic source end products and services be acquired.

As a result of such barriers, foreign corporations experienced difficulty in competing for government contracts and sought to remove them. Furthermore, the United States government has shown an interest in seeing these barriers removed, realizing that, in the absence of NTBs, needed goods were obtainable from foreign concerns at *lower prices.*

IV. Barriers "Overseas"

Although the United States gave preference to domestic suppliers prior to 1 January 1981, foreign contractors were still permitted to bid on United States government contracts. This is *not* the case in many countries where there exists what amounts to "closed government procurement systems." Only domestic suppliers are eligible to bid on government contracts. Such a system constitutes an NTB.

Another NTB often found in foreign countries is the absence of *published* government procurement regulations which clearly set out how the government will solicit and award contracts. Without such guidance, foreign corporations find it difficult to compete for the contracts offered by the government.

These and other NTBs have traditionally prohibited United States concerns from competing for foreign government contracts. United States industry has often expressed interest in having these barriers removed.[23]

The Agreement on Government Procurement seeks to reduce and possibly eradicate the NTBs described above. The elimination or reduction of these NTBs should open up new markets. Furthermore, in the long run, this should insure a more efficient allocation of the world's labor, capital, and materials.[24]

V. The Agreement on Government Procurement and Its Implementation in the United States

The Preamble to the Agreement on Government Procurement contains goals which can be summarized into three general objectives:

(1) Elimination of unjustified discrimination against foreign concerns;
(2) Publication of each countries' rules governing procurement; and
(3) Providing mechanisms to insure that the provisions of the Agreement on Government Procurement are followed.[25]

In furtherance of these objectives, the United States enacted the Trade Agreement Act of 1979, issued an Executive Order, and amended federal procurement regulations such as the Defense Acquisition Regulation (DAR). However, these implementing documents primarily address the first objective listed above.[26] The

[23]Legislative History, 1979 U.S. Code Cong. & Ad. News 515.

[24]*Id.* at 393.

[25]This summary of the preamble comes from Sherzer, International Government Contracting, Sec. A, Law and Policy Framework, at A-145 (1980).

[26]Only DAR § 6-1605 adds new substance to the mechanics of solicitation, or bid opening. This section provides that:

> Procedures for the Purchase of Products Listed at 6-1607. When the proposed acquisition for a listed product is estimated to be $169,000 or more and not otherwise exempted by 6-1603, the following procedures shall apply:
>
> (a) Consistent with user requirements, a minimum of 30 days from the date of the issuance of the solicitation to receipt of offers is required for offers of products listed at 6-1607.
>
> (b) Under no circumstances will technical requirements be imposed solely for the purpose of precluding the acquisition of products listed at 6-1607 from designated countries.
>
> (c) Proposals in response to solicitations anticipating competitive negotiations shall be opened in the presence of an impartial witness whose name shall be recorded in the file.
>
> (d) The term "promptly," as used in 2-408.1 and 3-508.3(a), shall, for purposes of this Part, be construed to mean "within seven days."

One of the "simple rules" which has been clearly spelled out but continues to go unheeded is found at DAR § 6-1605(a).

reason for this is that the procurement regulations used by federal agencies already meet the requirements of the Agreement on Government Procurement and the objectives summarized in paragraphs two and three above. Therefore, as the means by which the United States has implemented the Agreement on Government Procurement is discussed, it should be remembered that most of the statutes and regulations in this area only address the first objective.

A. Article I: Scope of the Agreement

The Agreement on Government Procurement does not affect all forms of government contracting. Article I specifies that the Agreement applies *only* to:

(1) "the procurement of products" and those "services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves...." The agreement therefore does *not* cover service type contracts.

(2) procurement of a value of Special Drawings Rights (SDR) 150,000 or more. Furthermore, no procurement can be divided with the intent of reducing the value of the resulting contracts below SDR 150,000.

(3) those governmental entities which the Parties indicate are covered by the Agreement. The Agreement states that this list is to be set forth in Annex I of the Agreement.[27]

The United States has implemented these scope provisions in the following manner. In Executive Order 12260, the President stated that the Agreement on Government Procurement applies only "to procurement[s] of eligible products by the Executive agencies listed in the Annex to this Order...."[28] That annex lists fifty-three federal agencies that are covered by the Agreement, but it is apparent that not all the federal agencies or quasi-federal agencies are within the scope of the Agreement. Among the agencies missing from the list are the Department of Energy, Department of Transportation, Tennessee Valley Authority, Corps of Engineers, Bureau of Reclamation, some of the offices of the General Services Administration, the Postal Service, COMSAT, AMTRAK, CONRAIL, and regional and local governments.

The DAR provides further guidance at DAR section 6-1602(a) concerning the scope of the Agreement on Government Procurement. Only *products* (supplies)[29] are covered and the figure of SDR 150,000 is translated to mean contracts with a total value of $169,000 or more.[30] DAR section 6-1602(c) also implements Article I of the Agreement by stating as a matter of policy that "[n]o requirement for eligible products shall be divided with the intent of reducing the value of the resulting offers below $169,000."

DAR section 6-1607 further limits the agreement's scope of application. This provision indicates that not all supplies procured by the fifty-three federal agencies are to be covered by the Agreement. In order to be an eligible end product, the supplies must be among the fifty-eight items listed in DAR section 6-1607.

The elimination process concludes with DAR section 6-1603. This section lists twelve types of contracts not covered by the Agreement on Government Procurement. Included are pur-

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[27] Article I, Agreement on Government Procurement, International Legal Materials, Vol. XVIII, No. 4, at 1055-1056.

[28] The United States wanted greater coverage of agencies but because other countries were not so responsive the United States elected to reserve some agencies from coverage of the Agreement. Legislative History, 1979 U.S. Code Cong. & Ad. News 515-16.

[29] "Designated country end product" includes services, except transportation services, incidental to its supply, *provided* that the value of those incidental services does not exceed that of the product itself. It does not include service contracts per se. DAR § 6-1601(b).

[30] "The Trade Representative shall determine, from time to time, the dollar equivalent of 150,000 Special Drawing Right units and publish that figure in the Federal Register." Exec. Order No. 12260, 46 Fed. Reg. 1653 (1981). Note that the amount was reduced from $196,000 to $182,000 by AL 82-3 (15 Jan. 82), and from $182,000 to $169,000 by Acquisition Letter 82-16 (29 Dec. 82), and Air Force Acquisition Letter 82-8 (27 Dec. 82). For a more detailed explanation of this threshold figure, see Anthony & Hagerty, *Cautious Optimism As A Guide To Foreign Government Procurement*, 12 Pub. Cont. L.J. 1, 19 (1981).

chases under the small or disadvantaged business preference programs; purchases of arms, ammunition, war materiel; construction contracts; and service contracts. Clearly, the United states strictly limited the coverage of the Agreement on Government Procurement to supply contracts of the types outlined in Article I of the Agreement.

B. Article II: Non-Discrimination

The major assault on the barriers collectively referred to as "buy national laws" is found in this article. All parties to the Agreement are required to treat foreign products and supplies no less favorably than domestic products and supplies, or the products and supplies of any other nation. Thus, it was agreed that the parties would not apply laws and rules like the Buy American Act to foreign products and that these foreign products would be treated no differently than if they were domestic products.

The United States implemented Article II with the Trade Agreements Act of 1979.[31] It should be noted, however, that this legislation repeals no statutes that discriminate against foreign products. This legislation merely gives the President the authority to *waive* any law, regulation, procedure, or practice regarding government procurement that would result in treatment of eligible foreign products from designated countries less favorable than that afforded to United States products and suppliers of such products or to eligible products of another foreign country or instrumentality which is a party to the Agreement and suppliers of such products.[32]

The President may designate that products from a foreign country or instrumentality are entitled to a waiver of these discriminatory laws if he determines that such country or instrumentality:

(1) is a country or instrumentality which (A) has become a party to the Agreement, and (B) will provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products;

(2) is a country or instrumentality, other than a major industrial country, which (A) will otherwise assume the obligations of the Agreement, and (B) will provide such opportunities to such products and suppliers;

(3) is a country or instrumentality, other than a major industrial country, which will provide such opportunities to such products and suppliers; or

(4) is at least developed country.[33]

This statute is implemented by DAR sections 6-1601(a) and 6-1602(a). The President has designated forty-five countries that fit within one or more of the four categories listed above.[34] These countries' bids or eligible products are entitled to evaluation without regard to the restrictions of the Buy American Act and the Balance of Payments Program. Thus, eligible products from the forty-five designated countries listed in DAR section 6-1601(a) will now receive the same treatment as products domestically produced in the United States. However, it must be noted that this rule does *not* apply to customs duties and charges of any kind imposed on, or in connection with, the importation of foreign goods.[35] The Agreement on Government Procurement was directed only at reducing barriers such as "buy national laws," not *tariff* barriers to trade.

C. Article III: Special and Differential Treatment for Developing Countries

One of the goals of the Agreement on Government Procurement was to facilitate the economic development of the "least developed countries" (LDCs). Those who negotiated the

[31] 19 U.S.C. §§ 2511-2512 (Supp. V 1981).

[32] *Id.* at § 2511(a).

[33] *Id.* at § 2511(b).

[34] The forty-fifth country, Israel, became a party to the Agreement and agreed to provide reciprocal competitive government procurement opportunities to U.S. products on 29 June 1983. 48 Fed. Reg. 31,127 (to be effective 29 June 1983).

[35] Article II, Agreement on Government Procurement, International Legal Materials, Vol. XVIII, No. 4, at 1056.

Agreement held the opinion that the economies of LDCs could be enhanced by treating them as developed countries which had signed the Agreement. Article III permits LDCs to sell their products to governmental entities even though these countries may not have signed the Agreement.

Furthermore, the LDCs need not grant reciprocal rights permitting other governments to bid on their government procurements. The LDCs may continue protecting their government procurement from foreign bidding. Thus, as a result of their special status, LDCs enjoy the benefits of the Agreement, while continuing to enforce their "buy national laws" which internalize their government procurement. DAR section 6-1601(a) implements these provisions by listing certain LDCs as designated countries entitled to the same immunities from the Buy American Act and the Balance of Payments Program as the developed countries which signed the Agreement.

D. Articles IV, V, and VI: Fair Solicitation Procedures

These articles were designed to insure that the manner in which a government solicits bids or offers does not erect any barriers against foreign competition. As indicated earlier, the Agreement on Government Procurement describes in detail what is now prohibited and required when soliciting bids. However, the federal statutes, executive order, and DAR sections which implement the Agreement do not really address these matters. This is probably because the procurement regulations presently in use in the federal sector essentially meet all the requirements of these articles, thus eliminating any need for re-enacting them in statute or regulation.[36] However, it warrants repeating that thus far it has been the Department of Defense's failure to strictly comply with some of these requirements that has drawn fire from the European Communities. The general scope of these three articles is set forth below.

Article IV concerns "Technical Specifications" and prohibits the parties from using the same in their solicitations with the intent to create obstacles to international trade. This article further provides that, when technical specifications are used in a solicitation, they must be in terms of performance rather than design and be based on international standards, national technical regulations, or recognized national standards. In addition, when a trade mark, patent, or brand name must be indicated, the specification must allow for substitution of equivalent items.

Article V sets forth the "tendering" or bidding procedures to which the parties must adhere. The Agreement on Government Procurement (Code) uses the words "transparent" and "transparency" to describe written and readily available laws, regulations, purchasing information, and evidence of the practices employed in awarding contracts.[37] The article's thrust is, first, to insure that qualified supplier lists are not used to discriminate against foreign suppliers not on the lists, and to provide a mechanism whereby foreign suppliers can apply for admission to those lists. Second, the article provides for establishment of an effective *notice* system so that all suppliers can be informed of procurement opportunities. In this regard, enough information must be provided potential offerors or suppliers so that they can tender a responsive bid. Third, a uniform system of reviewing bids submitted is provided so that no favoritism can be shown to domestic suppliers. Finally, the article establishes limitations on "single tendering" or sole source solicitations. Such procurement is limited to specified situations,[38] so that this form of solicitation cannot be used as a device to limit procurement from or to discriminate against foreign concerns.

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[36] *See* DAR, Secs. II, III. DAR, Sec. VI, Part 16 adds only one section as a result of the Agreement on Government Procurement that addresses the mechanics of solicitation and award. That section is DAR § 6-1605, referenced in note 26 *supra*.

[37] The concept of "transparencies" is developed in Anthony & Hagerty, *Cautious Optimism As A Guide To Foreign Government Procurement*, 12 Pub. Cont. L.J. 1, 2 n.3, 21 (1981).

[38] Sole source solicitation is limited to the following situations:

a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been either collusive or do not conform

Article VI provides that each party to the Agreement must publish its laws, regulations, judicial decisions, administrative rulings and procedures regarding government procurement in Annex IV of the Agreement. Such publication insures that all the parties understand how each country handles government procurement. This reduces the possibility of *sub rosa* practices. This article also requires that the governmental entities involved in procurement explain in a timely manner why a particular concern's bid was rejected or why that concern was not put on a particular list. The drafters of the Agreement on Government Procurement believed that such notification would help resolve disputes without resort to litigation.

E. Article VII: Enforcement of Obligation

This article provides a mechanism whereby one party can register a complaint with the Committee on Government Procurement against another party for violation of the Agreement. If, after consultation and a form of mediation, the dispute cannot be resolved, the Committee may authorize the suspension in whole or in part of the application of the Agreement to the particular party held culpable of a violation. The article's language is vague and some of its consequences will be discussed later.

F. Article VIII: Exceptions to the Agreement

There are two general exceptions to the Agreement on Government Procurement. These are as follows:

(1) Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

(2) Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons or philanthropic institutions or of prison labor.[39]

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to the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified if the contract is awarded;

b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, the products can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products could not be obtained in time by means of open or selective tendering procedures;

d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the entity to purchase equipment not meeting requirements of interchangeability with already existing equipment;

e) when an entity purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent purchases of products shall be subject to paragraph 1-14 of this Article.

Article V, Agreement on Government Procurement, International Legal Materials, Vol. XVIII, No. 4, at 1065-66.

[39]Article VIII, Agreement on Government Procurement, International Materials, Vol. XVIII, No. 4, at 1071.

The first exception is the basis for DAR section 6-1603(iv),[40] while the second exception justifies protection of small or disadvantaged business preference programs in DAR section 6-1603(iii).[41]

G. Article IX: Final Provisions

As with most international agreements, the Agreement on Government Procurement has been left "open" so that other countries may join in this experiment in "free[r] trade." In this regard, the President has been given statutory authority to encourage additional countries to become parties to the Agreement.[42]

This provision's "invitation" to join contains an implied threat that a negative response triggers authority in the President to *bar* all procurement attempts by those countries in the future. This marks a rather dramatic change from prior policy because, even under the Buy American Act, foreign concerns were not prohibited from engaging in the federal procurement process. Under the Buy American Act, the only consequence of offering foreign products for purchase is that they are saddled with a preference for domestic goods which at most made if difficult for them to compete. However, "developed countries" that do not sign the Agreement on Government Procurement face more than a preference; they face the possibility of being prohibited from competing in the United States federal procurement process.

VI. Other Matters of Interest

A. Disputes Process

Article VII of the Agreement provides a mechanism to resolve disputes concerning violations of the Agreement. The provision's existence raises the issue of whether or not it is the exclusive remedy available to an individual foreign corporation which believes that the government entity with which it has been dealing has violated the government's published procurement law or regulations. For example, could a wronged foreign corporation plead its case to the GAO[43] or would that protest be denied on the grounds that Article VII is its exclusive protection or remedy?

It is submitted that the existence of Article VII would *not* preclude the German corporation's protest to the Comptroller General. First, Article VII contains no expression that the disputes settlement procedure therein described is the exclusive remedy for any disputes or protests involving challenges to the procurement process. Second, the Agreement on Government Procurement is an international agreement, an understanding between the nations who signed the Agreement. Unless otherwise stated, when it refers to the "Parties" therein and discusses

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[40]DAR § 6-1603 states that: This Part does not apply to:

...

(iv) purchases of arms, ammunition, war materials or purchases indispensable for national security or national defense purposes including purchases from foreign sources where prohibited by the Department of Defense annual appropriations act (see 6-302). The products listed at 6-1607 generally do not come under this exception, but in the event a Department considers an individual acquisition of such a listed product to be a purchase "indispensable for national security or national defense purposes," and appropriate for exclusion from the provisions of this Part, a request with supporting rationale shall be submitted for approval by DUSDRE(AP) or his designee.

[41]DAR § 6-1603 states that: This Part does not apply to:

...

(iii) purchases under small or small disadvantaged business preferences programs;

[42]19 U.S.C. § 2512(a) (Supp. V 1981) provides:

(a) Authority to bar procurement from non-designated countries

With respect to procurement covered by the Agreement, the President, in order to encourage additional countries to become parties to the Agreement and to provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products—

(1) shall prohibit the procurement, after the date on which any waiver under section 2511(a) of this title first takes effect, of products (A) which are products of a foreign country or instrumentality which is not designated pursuant to section 2511(b) of this title, and (B) which would otherwise be eligible products; and

(2) may take such other actions within his authority as he deems necessary.

[43]Comptroller General Bid Protest Procedures, 4 C.F.R. Pt. 21 (1983).

dispute settlement, it refers only to how the national governments will deal with problems. The Agreement does not purport to restrict what courses of action an individual claimant may seek to pursue. Third, the Trade Agreements Act of 1979 indicates that no provision of any trade agreement approved by Congress under section 2503(a) of Title 19, U.S. Code, such as the Agreement on Government Procurement, which is in conflict with any other statute will be given effect. The Comptroller General's authority to dispose of bid protests is based on a federal statute.[44] Therefore, the German corporation could proceed before the Comptroller General notwithstanding Article VII.

B. Conflicting Goals?

Is the Trade Agreement Act of 1979 doomed to fail because it works at cross-purposes with the Buy American Act and those who support such protectionist legislation?

Obviously, the Agreement on Government Procurement seeks to eliminate "buy national acts" because they are now viewed as barriers to purchasing products at the least cost to the government and its taxpayers, expanding markets for business, and the development of the economies of LDCs. When the Buy American Act was originally enacted, Congress was not concerned with these matters. The Buy American Act was enacted during the "Great Depression" for the purpose of protecting jobs in the United States. Job protection remains a concern, although the resultant protectionist labor policies contribute to increased federal expenditures for products. As a result of these conflicting interests, the Trade Agreements Act of 1979 requires the President to submit a report to Congress on the economic impact of the Agreement on Government Procurement on "labor surplus areas" before any further negotiations to reduce NTBs are initiated.[45] Presumably, if that report indicated that the Agreement was having a negative impact on labor surplus areas, the United States could exercise its discretion and withdraw not only from future negotiations, but also from the Agreement on Government Procurement.[46]

VII. Conclusion

The Department of Defense and the Department of the Army have expressed concern over noncompliance with the Trade Agreements Act of 1979. Their concern is well founded upon complaints by the European Communities. Because of significant changes in the law concerning the applicability of the Buy American Act, contracting officers and legal advisors *must* familiarize themselves with the provisions of DAR section VI, part 16. In particular, the contracting officer's team must be sure to insert in solicitations and contracts the new required clauses,[47] allow a minimum of thirty days for responses to bid solicitations for applicable supply contracts,[48] and disregard the preferences affecting bids submitted by corporations from the forty-five countries listed in DAR section 6-1601(a).

Determining whether a particular federal contract is affected by the Agreement on Governmental Procurement dictates the consideration of numerous factors including:

(1) Is the procurement in the form of a supply type contract? If *not*, there is no coverage.

(2) Does the contract's total value exceed a figure of SDR 150,000 (currently fixed at $169,000)?

(3) Which federal government agency or entity is making the procurement? Is the agency listed in the Annex to Executive Order 12260?

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[44]31 U.S.C. § 71 (1970).

[45]19 U.S.C. § 2516 (Supp. V 1981).

[46]Article IX, Agreement on Government Procurement, International Legal Materials, Vol. XVIII, No. 4, at 1073.

[47]DAR § 6-1606 states "Required Clauses. Where this Part applies, each solicitation and resulting contract for a product(s) listed at 6-1607 shall contain the clause at section 7-104.3(b) and the solicitation shall contain the certificate at section 7-2003.47(b). A contracting officer shall rely on the offeror's certification as submitted."

[48]DAR § 6-1605(a).

(4) Are the supplies being procured identified as eligible products by DAR section 6-1607?

(5) Is the procurement specifically exempted from the Act by DAR section 6-1603?

(6) Is the offeror a corporation or entity registered in a country designated in DAR 6-1601(a)?

Enactment of the Agreement on Government Procurement constitutes a major step towards eliminating NTBs. This description of the Agreement's scope should, however, make apparent that numerous NTBs still block the doors to new business markets and prohibit the government from purchasing the lowest priced goods.

Will the door ever be opened to "free trade"? While only time will tell, free trade economists and private national interest groups continue the debate. The Trade Agreements Act of 1979 remains an experiment, hopefully providing data from which intelligent future decisions can be made. The usefulness of this data will depend upon each contracting officer's team's ability to understand the Act and play by the rules of the game.

Client Perjury: A Guide for Military Defense Counsel

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[The lawyer's] loyalty runs to his client. He has no other master. — Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951).

All advocates... may and should fight hard for their clients, but they must fight fairly... they may not deceive, they must not lie. — Stryker, The Art of Advocacy 283 (1954).

Introduction

Every trial attorney must confront ethical issues as a regular part of his or her criminal practice. For defense counsel in criminal cases, no area of ethics poses more problems than "client perjury." Although relatively few cases dealing with client perjury are reported by the military appellate courts[1] or The Judge Advocate General's Professional Responsibility Advisory Committee,[2] client perjury issues pervade criminal defense practice from the initial client interview to the closing argument.[3] It is a rare defense counsel indeed who has never suspected that the client might be lying.

Unfortunately, while client perjury is a common ethical problem, it remains an area where professional responsibility standards are confusing and contradictory. The absence of clear guidance is in large measure a result of the continuing disagreement within the legal profession about how to resolve conflicts between the basic normative principles addressed above by Curtis and Stryker.[4] The most recent evi-

[1]The most recently reported decision in the area is United States v. Radford, 14 M.J. 322 (C.M.A. 1982). The lower appellate opinion is reported at 9 M.J. 769 (A.F.C.M.R. 1980). Prior to *Radford*, the last reported client perjury case in the military was United States v. Winchester, 12 C.M.A. 74, 30 C.M.R. 74 (1961).

[2]The last client perjury case reported by the OTJAG Professional Ethics Committee was an advisory opinion concerning the duties of an appellate defense counsel when the client expresses an intention to commit perjury in another jurisdiction. *Professional Responsibility*, The Army Lawyer, July 1977, at 12.

[3]As will be discussed later in this article, client perjury issues can surface after the trial is concluded.

[4]Over a hundred law review articles have been written discussing the normative principles in the client perjury area.

See generally Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951); Drinker, *Some Remarks on Mr. Curtis' "The*

dence of this disagreement is the highly publicized debate over the proposed Model Rules of Professional Conduct.[5]

The purpose of this article is to provide military defense counsel with a practical guide for resolving client perjury issues. After a general discussion of the normative principles applicable to the client perjury area and the specific authorities which govern military practice, the article focuses on the specific standards currently applicable, the grey areas where only limited guidance is available, and the areas of proposed change contained in the final draft of the Model Rules of Professional Conduct.[6]

Ethics of Advocacy," 4 Stan. L. Rev. 349 (1952); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966); Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Counsel's Dilemma*, 6 Hofstra L. Rev. 665 (1978); Reichstein, *The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?*, 71 J. Crim. L. C. & P.S. 1 (1970); Wolfram, *Client Perjury*, 50 S. Cal. L. Rev. 809 (1977); Comment, *The Failure of Situation-oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 Wash. L. Rev. 211 (1979); Comment, *Client Perjury: Truth, Autonomy, and the Criminal Defense Lawyer*, 9 Am. J. Crim. L. 281.

[5]*See generally* Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A. J. 429 (1982); Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116 (1981); Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 A.B.A. Found. Research J. 964. *See also* Stone, *Are Lawyers So Special*, U.S. News & World Rep., Feb. 28, 1983, at 76.

[6]In 1977, ABA President William B. Spann, Jr. appointed the Commission on Evaluation of Professional Standards to "undertake a comprehensive rethinking of the ethical premises and problems of the profession of law." Rather than amend the existing Model Code of Professional Responsibility, the Commission recommended a complete revision in the form of the Model Rules of Professional Conduct. The Commission's final draft, dated May 30, 1981, is contained in a pullout supplement to the Oct. 81 issue of the A.B.A Journal. The ABA House of Delegates made final amendments to the final draft in February 1983. *See ABA Moves Closure to Adoption of New Model Rules of Conduct*, 32 Crim. L. Rep. 2431, Feb. 23, 1983. This revision of the final draft will be submitted to the House of Delegates for final approval in August 1983.

Sources of Authority

In order to understand the standards applicable to military counsel and to resolve conflicts between standards, it is necessary to appreciate the hierarchy of and relationship between the professional responsibility authorities which govern the area of client perjury.

Ethical standards in the United States are "jurisdictional" in the sense that each court system or legislature can prescribe its own rules for the practice of law. The American Bar Association, the American College of Trial Lawyers, the Association of Trial Lawyers of America, and other national organizations can propose model codes or model rules but these have binding effect only in so far as they are adopted by a particular jurisdiction. The military services are quasi-independent, federal jurisdictions free to adopt or tailor these "model standards" to meet the needs of their own practice. To the extent that proper statutory or regulatory authority authorizes or mandates professional responsibility standards for the military, those standards have supremacy over conflicting state standards and other "model standards" for practitioners in military courts.[7] Of course, any statutory or regulatory provision prescribing rules of procedure or standards of conduct is subject to challenge on constitutional grounds and can be superseded by other statutory or regulatory provisions.

In military practice, the sources of authority regarding client perjury are the Uniform Code of Military Justice (UCMJ),[8] the Manual for Courts-Martial (MCM),[9] departmental regulations, and the decisions of the military appellate courts.

[7]Note that this is particularly relevant for military attorneys because they are members of individual state bars. The supremacy clause allows them to comply with federal standards even if those standards are inconsistent with the standards which are applied to practice in the courts of the state where they are licensed.

[8]Uniform Code of Military Justice arts. 131, 134, 10 U.S.C. §§ 931, 934 (1976) [hereinafter cited as UCMJ].

[9]Manual for Courts-Martial, United States, 1969 (Rev. ed.) paras. 48*c*, 210, 213 [hereinafter cited as MCM, 1969].

The UCMJ makes the commission of perjury[10] and the subornation of perjury[11] criminal offenses. These offenses contemplate active participation in the proscribed conduct and would not apply to defense counsel who merely tolerate the commission of the offense through inaction. In the case of subornation, the offender must influence, cause, or persuade[12] another to commit perjury.

The MCM explains the elements of perjury contained in the UCMJ,[13] but provides very little guidance for defense counsel in dealing with client perjury other than a very general statement that it is improper for defense counsel to "tolerate any manner of fraud or chicane."[14] The same paragraph, however, also provides that it is the duty of the defense counsel "to represent the accused with undivided fidelity; and not to divulge his secrets or confidences."[15]

The primary source of professional responsibility standards for military counsel is departmental regulation. For Army defense counsel, Army Regulation 27-10 unqualifiedly adopts the ABA Model Code of Professional Responsibility (Model Code) for Army court-martial proceedings.[16] It also adopts the American Bar Association Standards for Criminal Justice (ABA Standards) to the extent that they are not "clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations."[17]

In *United States v. Radford*, the only reported case since 1961 dealing with client perjury,[18] the Court of Military Appeals specifically held that the ABA Standards for Criminal Justice were applicable to military practice.

It is important to note that, if the Model Rules of Professional Conduct (Model Rules) are passed by the ABA in August 1983,[19] they will not automatically apply to military practice, but will only apply insofar as they are subsequently adopted by proper statutory or regulatory authority.

The Competing Normative Principles

At the root of the client perjury issue lies an inevitable tension among various ethical values

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[10]UCMJ art. 131 provides in part:

> Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—
>
> (1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry....
>
> is guilty of perjury and shall be punished as a court-martial may direct.

[11]UCMJ art. 134.

[12]U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook para. 3-170 [hereinafter cited as DA Pam 27-9], lists as an element of subornation the "inducement and procurement" of perjury. This is further defined to mean influence, persuade, or cause.

[13]MCM, 1969, para. 210.

[14]MCM, 1969, para. 48*c*.

[15]*Id.*

[16]For Army personnel there are two applicable regulations: U.S. Dep't of Army, Reg. No. 27-10, Legal Services - Military Justice, para. 5-8 (1 Nov. 1982) [hereinafter cited as AR 27-10]; and U.S. Dep't of Army, Reg. No. 27-1, Legal Services - Judge Advocate Legal Service, sec. VI (IC 102, 1 Nov. 1982) [hereinafter cited as AR 27-1]. AR 27-1 makes the ABA Model Code of Professional Responsibility applicable to all judge advocates. AR 27-10 makes the Model Code applicable to all lawyers involved in court-martial proceedings.

For Air Force proceedings, *see* U.S. Dep't of Air Force, Manual No. 111-1, Military Justice Guide, para. 1-10(d) (1973) [hereinafter cited as AF Manual 111-1], which makes the Model Code generally applicable to counsel in Air Force courts-martial.

For Navy and Marine Corps proceedings, *see* U.S. Dep't of Navy, Manual of the Judge Advocate General, para. 0142 (C2, June 1982), which makes the Model Code generally applicable to counsel in Navy and Marine Corps courts-martial.

For Coast Guard proceedings, *see* U.S. Dep't of Transportation, Coast Guard Supplement to Manual for Courts-Martial, rule 12, App. I (Amend. No. 24, Mar. 1972), which makes the Model Code applicable to Coast Guard courts-martial.

[17]AR 27-10, para. 5-8. AR 27-1 is silent regarding the ABA Standards for Criminal Justice. *See also* AF Manual 111-1, para. 1-11.

[18]*See* note 1 and accompanying text *supra*.

[19]*See* note 6 and accompanying text *supra*.

and constitutional guarantees, each of which is deemed to be fundamental to our system of criminal justice. Although this tension has been described differently by various commentators,[20] the ethical dilemma centers around the competing principles of "confidentiality of client communications"[21] and "candor toward the tribunal."[22] Any system of rules designed to guide defense counsel in dealing with client perjury necessarily must address the extent to which the attorney may or must disclose confidential communications to prevent or remedy fraud upon the court.

For criminal cases, the ethical issue is further complicated by the fact that, depending on the circumstances, constitutional issues such as the right of the accused to testify,[23] the due process right to trial by an unbiased fact finder,[24] the right against compulsory self-incrimination,[25] and the right to effective assistance of counsel[26] may impact upon the way the ethical values can be compromised.

As a general proposition, the current Model Code of Professional Responsibility and ABA Standards for Criminal Justice attempt to strike a compromise between the competing ethical principles and provide maximum protection to potential constitutional issues. Under the proposed Model Rules of Professional Conduct, clear priority is given to the duty of candor toward the tribunal with little or no guidance on how these ethical mandates can be constitutionally implemented.

In addressing the specific standards currently applicable to military counsel and the potential impact of the Model Rules on military practice, it is necessary to divide the standards into three categories: the duties of the defense counsel in preparing his or her case, the duties of the defense counsel when the client insists on taking the stand to commit perjury, and the duties of the defense counsel when the perjury is discovered after it has been presented.

The Duties of the Defense Counsel in Preparing the Case

In the pretrial preparation stage of a case, client perjury issues involve the role of the defense counsel in promoting perjury. It is clear that counsel cannot actively encourage the client to commit perjury. Article 134, UCMJ, makes it a crime for a defense counsel to "influence, persuade, or cause" the client to commit perjury.[27] The disciplinary rules of the Model Code expand upon the criminal prohibition and hold that "a lawyer shall not. . . counsel or assist his client in conduct that the lawyer knows to be illegal or

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[20]*See e.g.*, Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 Den. L. J. 1 (1981) (The issue is framed in the broader context of "the role of the defense counsel as an officer of the court" versus "the role of the defense counsel as a trained advocate for the accused."); Sampson, *Client Perjury: Truth, Autonomy, and the Criminal Defense Lawyer*, 9 Am. J. Crim. L. 387 (1981) (The client perjury issue is seen as a conflict between the "values of truth seeking" and the "protection of individual autonomy and dignity.")

[21]Model Code of Professional Responsibility, Canon 4 (1979).

[22]Model Rules of Professional Conduct, Rule 3.3 (Final Draft 1981).

[23]Although there is considerable debate over whether there is a "right to testify" or whether it is a privilege, at least some authority exists that the freedom to testify has constitutional implications. *See, e.g.*, United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 119 (3d Cir. 1977); Robinson, *The Perjury Dilemma in an Adversary System*, 82 Dick. L. Rev. 545, 554-61 (1978); ABA Standards for Criminal Justice 4-5.2(a) (2d ed. 1980); *Compare* Harris v. New York, 401 U.S. 222, 225 (1971) (where Chief Justice Burger holds that "every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.") *with* Brooks v. Tennessee, 406 U.S. 605, 612 (1972) (where Chief Justice Burger in dictum states "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.")

[24]*See* Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978) (accused was denied a fair trial where counsel's actions were equivalent to telling the trier of fact that his client was lying); Butler v. United States, 414 A.2d 844 (D.C. App. 1980).

[25]*See generally* Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 Mo. L. Rev. 601, 624-39 (1979) [hereinafter cited as Brazil].

[26]Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstedler, J., concurring); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); United States v. Radford, 14 M.J. 322, 327 (C.M.A. 1982).

[27]*See* note 12 and accompanying text *supra*.

fraudulent."[28] Focusing on the quality of evidence, the disciplinary rules also prohibits a lawyer from participating "in the creation or preservation of evidence when he knows, or it is obvious, that the evidence is false."[29] Although these standards are couched in general terms, they do serve to circumscribe any active involvement of the attorney in the creation of perjured testimony.

The prohibitions against active and knowing involvement in the client's creation of perjured testimony represent the easy case. The more difficult issue for defense counsel is the extent to which they may structure the interview process, or tactically use "inaction," when to do so naturally increases the opportunity for the client to create a false story. For example, would it be proper for counsel to describe the evidence that the government has and explain the substance of defenses which "seem to be likely" before the attorney has the client relate his or her version of the facts?[30] Alternatively, is it proper for counsel to simply defer a detailed interview of the client until after the client has had an opportunity to hear the government witnesses' version of events presented at an Article 32 hearing?

The only guidance available for resolving this "grey area" issue is found in the ABA Standards for Criminal Justice (Defense Functions) which prohibits the lawyer from instructing the client or intimating to the client that he or she should not be candid in revealing facts so as to afford the lawyer free rein to take actions which might otherwise be precluded.[31] The Defense Functions also suggest that "as soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses."[32] The commentary indicates that the reason for the standard is that, to insure that the lawyer will be able to present an effective defense, honesty is essential.

It is obvious from the non-mandatory nature of the language ("should"), and the subjective orientation of the standard ("seeking to influence"), that counsel have a great deal of discretion in this area as long as they also have legitimate reasons for delaying the interview of their client such as a need for time to develop a rapport and trust with the client so he or she will be willing to speak candidly. Likewise, the "education" of a client about the case is easily justified since it is arguably required by the Defense Functions.[33] Although the premise that "honesty is essential to an effective defense" is often correct, it is not universally true. Recognizing the realities that false testimony can result in acquittal, that the defense rarely benefits from presenting its case at the Article 32 hearing, and that most clients can be subtly manipulated, it is disconcerting that a more definite standard does not exist.

Under the current standards, the defense counsel's conduct in the two scenarios described above would be improper only if the motive were to encourage perjury or if the manner in which the interview was conducted was obviously suggestive of a desired fabrication. These are virtually unenforceable standards.

The proposed Model Rules do not provide much change in the standards relating to pretrial preparation. Model Rule 1.2(d) provides that "a lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent." This represents only a modest broadening of coverage in the prohibition against promoting client perjury.

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[28]Model Code of Professional Responsibility DR 7-102(A)(7) (1980). Note that the prohibition only involves conduct *known* to be illegal or fraudulent.

[29]Model Code of Professional Responsibility DR 7-102(A)(6) (1980). Note that this provision expands coverage to evidence which is *obviously* false.

[30]This represents the classic "Anatomy of a Murder" scenario. *See* R. Traver, Anatomy of a Murder (1958).

[31]ABA Standards for Criminal Justice 4-3.2(a) (2d ed. 1980) [hereinafter cited as Defense Function].

[32]Defense Function, *supra* note 31, at 4-3.2(b).

[33]Defense Function, *supra* note 31, at 4-3.8.

The Duties of the Defense Counsel When the Client Insists on Taking the Stand to Commit Perjury

Before addressing the standards governing the defense counsel's conduct when the client insists upon committing perjury, it is necessary to deal with the threshold question of what degree of certainty that the client will commit perjury must be present to trigger any obligations on the part of the defense counsel? This includes the issue of when a defense counsel must investigate to either substantiate or discount the likelihood of perjury.

The Model Code of Professional Responsibility places no obligation to investigate on defense counsel. The lawyer's obligation is to represent his or her client zealously within the bounds of the law.[34] Zealous representation is qualified only when the lawyer "knows, or from the facts within his knowledge should know," that the testimony will be perjured.[35]

The ABA Standards regarding the presentation of perjured testimony are not invoked unless the client makes inculpatory admissions to the lawyer and later indicates he or she will testify differently at trial.[36] The lawyer then has the preliminary duty of conducting an investigation to see if there is "sufficient corroboration of the original admissions such that they are established as true."[37] The limited obligation to investigate is intentional. Both Ethical Consideration (EC) 7-26[38] and the commentary to Defense Function 4-7.7 indicate that the defense counsel need not substitute his or her judgment for that of the judge and jury. Even if the defense counsel's realistic appraisal of the case indicates that the client is guilty and that the protestations of innocence are false, the lawyer still must present a vigorous defense including the presentation of the client's testimony.

The Model Rules of Professional Conduct would provide a subtle but important change in this approach. Model Rule 3.3 requires the defense counsel to take preventive action when he or she knows the client's testimony will be false, but also gives the counsel the discretion to act when the lawyer "reasonably believes" the testimony will be false.[39] This discretionary provision appears to allow defense counsel wide latitude in substituting their judgment for that of the tribunal.

Once the respective threshold considerations are satisfied and the client insists on committing perjury, the various ethical authorities mandate different preventive and remedial procedures for the defense counsel. Each employs one or more of the following five actions:

(1) attempt to dissuade the client from lying;
(2) seek to withdraw from the case;
(3) refuse to offer the testimony;
(4) disclose the client's intention to the judge;
(5) passively represent the client.

Although some commentators have advocated that attorneys should fully present and argue the perjured testimony,[40] this approach has not been widely accepted. Each of the five listed measures employed in the ethical standards offer certain advantages, limitations, and uncertainties.

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[34]Model Code of Professional Responsibility Canon 7 (1980).

[35]*Id.* at EC 7-26 (1980).

[36]ABA Standards for Criminal Justice 9-7.7 (1978 Draft).

[37]*Id.*

[38]Model Code of Professional Responsibility EC 7-26 (1980) provides:

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have represented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

[39]Model Rules of Professional Conduct Rule 3.3c (Final Draft 1982) provides: "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false."

[40]*See, e.g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). Freedman bases his approach upon the central role that the confidentiality plays in the judicial system and the view that a lawyer does not "vouch" for the evidence he or she presents.

"Attempting to dissuade the client from committing the perjury" is always the first obligation of the defense counsel. The obvious problem with dissuasion is that in many cases it will not be effective and some other approach will be required.

"Seeking to withdraw from the case" potentially can have two positive effects. First, the prospect of losing their defense counsel may persuade some clients to change their mind about committing perjury. Second, it disassociates the attorney from the wrongdoing and preserves the integrity of the legal profession. On the other hand, withdrawal has some rather obvious limitations as a solution for the client perjury problem. First, it may not be allowed by the court. Permitting counsel to withdraw from a case is a matter within the discretion of the convening authority[41] or military judge.[42] Under applicable ethical standards, the defense counsel does not have a right to withdraw. If the trial date is imminent and the counsel is unable to articulate a reason for the request because it would disclose confidential material, the likelihood of success is not great. The second and more important problem in withdrawal is that it does not solve the problem of client perjury, it merely transfers the problem to another defense counsel. Once the case is transferred one of two results is likely; the accused will conceal the perjurious nature of his or her testimony and get the new counsel to fully present it, or the new attorney will discover the perjury and also seek to withdraw. Although in some cases the change in personality of a new defense counsel may result in the client being dissuaded from committing perjury, there is no evidence to indicate that this result is more likely than one of the other two unsatisfactory situations.

"Refusing to offer the perjured testimony of the client" preserves the confidences of the client and promotes candor toward the tribunal, but it may be unconstitutional.[43] Even if the right to testify is not constitutionally protected, current ethical standards indicate that the decision whether to testify is the personal decision of the accused rather than a tactical decision of defense counsel.[44]

"Disclosure of the client's intent to commit perjury" preserves the integrity of the defense counsel but merely transfers the problem to the judge. In addition, disclosure also entails the greatest potential for constitutional error. To the extent that disclosure is mandatory, self-incrimination issues may be implicated.[45] If disclosure is made to the factfinder, there may be a violation of the due process right to a fair trial.[46] Finally, depending on the circumstances surrounding the disclosure, the accused may be able to assert that he or she was denied effective assistance of counsel.[47] Although none of the constitutional challenges is supported by a substantial body of precedent relating specifically to client perjury, sufficient authority does exist to make disclosure an uncertain and risky approach to the problem.

Finally, "passive representation" is a compromise approach wherein the client is permitted to testify perjuriously, but in narrative form and without the active participation of the defense counsel. This approach compromises the principle of "candor toward the tribunal" by allowing the perjury to be admitted and may compromise the preservation of confidences by "flagging" the client's testimony as "different." Although this "flagging" suggests due process problems similar to disclosure[48] and the lack of

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[41]MCM, 1969, para. 37*a*.

[42]*See generally* Model Code of Professional Responsibility DR 2-110, EC 2-32 (1980) (withdrawal should only be sought in compelling circumstances).

[43]*See* note 23 and accompanying text *supra*.

[44]ABA Standards for Criminal Justice 4-5.2(a) (2d ed. 1980).

[45]*See* note 25 *supra*.

[46]*See* note 24 *supra*.

[47]*See* note 26 *supra*.

[48]To the extent that using a narrative signals the fact finder that the client is committing perjury, due process may be implicated. *See* note 24 *supra*. *But see* United States v. Campbell, 616 F.2d 1151 (1980) (the jury, not being aware of the attorney's ethical dilemma, could have ascribed reasons other than client perjury to the unusual manner in which the defense counsel handled the case. The possibility of alternate explanations means that the attorney's actions were not the equivalent of telling the fact finder that the accused was lying).

active representation necessarily implicates potential ineffective assistance of counsel claims, courts which have reviewed the passive representation approach have unqualifiedly accepted it as passing constitutional muster.[49]

The five remedial and preventive measures discussed above constitute the full spectrum of approaches available to a defense counsel whose client insists on taking the witness stand to commit perjury. The Model Code of Professional Responsibility contains provisions which seems to prohibit the defense counsel from offering his client's perjured testimony[50] and which arguably require counsel to disclose the client's intention to commit perjury.[51] Because these provisions are not arranged in a coherent scheme, it is unclear how the Model Code envisions them being employed to prevent defense counsel from running afoul of the constitutional issues inherent in the area.

The clearer, more practical approach and the one specifically sanctioned by the Court of Military Appeals[52] is the passive representation scheme contained in Defense Function 4-7.7. It prescribes a five step procedure which is triggered when the client makes inculpatory admissions which he or she later disavows. First, the attorney must conduct an investigation to see if there is sufficient corroboration of the original admissions such that they are established as true. Second, the attorney must advise the client against taking the witness stand to testify falsely. Third, if the client insists upon testifying, counsel must withdraw, if feasible. Fourth, if not feasible, or not permitted by the court to withdraw, counsel should make a memorandum for record regarding his or her advice to the client. Finally, the attorney should allow the client to testify without actively aiding the testimony. Counsel can identify the client as the accused and allow him or her to testify about the perjurious matters in narrative form, without the assistance of direct examination. The counsel cannot rely upon the perjury in the examination of other witnesses or in closing argument.

The Model Rules of Professional Conduct require that counsel attempt to dissuade[53] the client and then refuse to offer the evidence.[54] The major problem in applying the Model Rules is that they are expressly made subject to constitutional limitations[55] but make no attempt to discuss how each counsel is supposed to define and apply those limitations in his daily practice. Given the uncertain state of the constitutional law in the client perjury area, the Model Rules are of marginal utility.

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[49]United States v. Radford, 14 M.J. 322 (C.M.A. 1982).

[50]Model Code of Professional Responsibility DR 7-102(A)(4) (1980) provides that "a lawyer shall not...[k]nowingly use perjured testimony." EC 7-26 expands upon this by saying a "lawyer who knowingly participates in introduction of such testimony...is subject to discipline."

The Model Code does not further define what constitutes "use" of the testimony or what constitutes "participation" in the introduction. Passive representation is arguably permissible in that the client is actually introducing his or her own testimony and the lawyer is not later using the testimony in cross-examination of witnesses or argument.

[51]Model Code of Professional Responsibility DR 4-102 (1980) permits a lawyer to reveal the "intention of his client to commit a crime and the information necessary to prevent the crime." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965) indicates that this is a mandatory obligation when "facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed."

[52]*See* notes 12-19 *supra*.

[53]The dissuasion policy of the Model Rules takes the form of an obligation to "warn" the client about limitations on the lawyer's conduct imposed by the Model Rules on other law. Model Rules of Professional Conduct Rule 1.2*e* (Final Draft 1982).

[54]Model Rule of Professional Conduct 3.3 (Final Draft 1982) provides that a lawyer shall not "offer evidence that the lawyer knows to be false." In addition to this mandatory prohibition, the Rule permits the lawyer to refuse to offer evidence which he reasonably believes to be false. This latter provision gives a great deal of discretion to defense counsel without making clear whether or not this authority applies with equal force to client testimony.

[55]Model Rules of Professional Conduct Rule 3.3 (Final Draft 1982) provides the following qualification: "Caveat: Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this Rule." The comment to the Rule adds that the provisions of the Rule also may be qualified by due process considerations.

The Duties of the Defense Counsel When the Perjury is Discovered After It Has Been Presented

When the defense counsel is surprised by the client's perjury at trial or when counsel discovers after trial that the client committed perjury, the balance between competing ethical principles shifts. The integrity of the attorney is not directly implicated since the attorney was an unknowing participant in the fraud and the opportunity to prevent the offense is past. Accordingly, professional conduct standards give more weight to the preservation of client confidentiality.

Under the existing standards, the defense counsel must refrain from taking an active role in advancing or arguing the testimony after it is known to be perjured[56] and must encourage the client to rectify the perjury.[57] The defense counsel may not disclose the perjury if it involves "privileged communications."[58] In military practice, the crime of perjury is completed when the testimony is given and subsequent recantation is not a defense to the crime.[59] If the client was acquitted at trial and the perjured testimony related to an element of the offense, there is little to be gained from rectifying the perjury since the client cannot be retried for the same offense (double jeopardy) and cannot be tried for the perjury (collateral estoppel).[60]

The Model Rules of Professional Conduct substantially change the existing standards. As long as the trial proceeding has not been concluded, defense counsel has a duty to "take reasonable remedial measures"[61] regarding the client's perjury. The comment to Model Rule 3.3 indicates that the proper remedial measure "ordinarily is to make prompt disclosure to the court." This disclosure merely shifts the burden to the judge who in turn is given no guidance on how to resolve the problem.[62] After the conclusion of the proceeding, the lawyer still has the discretion to reveal the perjury "to the extent necessary to rectify fraud in which the lawyer's services were used."[63]

Conclusion

Client perjury issues have been and will continue to be topics of intense academic debate within the legal profession. Disagreement is inevitable when fundamental ethical principles such as preservation of confidences and candor toward the court directly conflict. The conflict is further exacerbated by the collateral impact the ethical principles have on constitutional guarantees.

For defense practitioners in criminal trials, this lack of academic agreement translates into

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[56]ABA Standards for Criminal Justice 4-7.7 (1971).

[57]Model Code of Professional Responsibility DR 7-102(B)(1) (1980) provides:

> A lawyer who receives information clearly establishing that...his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication* (emphasis added).

The last phrase of this disciplinary rule was added by amendment in 1974. As of 1979, only 16 states had adopted this amendment. The majority of the states retained the language which imposed on defense counsel the duty to disclose the perjury. Brazil, *supra* note 25, at n.6.

[58]*Id.* The term "privileged communications" extends to both confidences and secrets under DR 4-101. ABA Comm. on Ethics and Professional Responsibility Formal Op. 341 (1975).

[59]United States v. Parrish, 21 C.M.R. 639 (A.F.B.R. 1956).

[60]Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Hooten, 12 C.M.A. 339, 30 C.M.R. 339 (C.M.A. 1961); United States v. Martin, 8 C.M.A. 346, 24 C.M.R. 156 (C.M.A. 1957).

[61]Model Rules of Professional Conduct Rule 3.3(a)(4) (Final Draft 1982).

[62]The comment to Model Rule 3.3 states that it "is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing."

[63]Model Rules of Professional Conduct Rule 1.6(b) (Final Draft 1982). This provision probably will not be adopted by the ABA in August 1983 since it was rejected by the House of Delegates at their February 1983 meeting. *See generally* note 6 & accompanying text *supra*.

a lack of clearly defined standards. Although the ABA Standards provide some sound practical guidance in dealing with a client who insists on committing perjury, most client perjury issues can only be resolved by a careful reading of the Model Code, the ABA Standards, and the most recent case law regarding related constitutional issues.

The proposed Model Rules of Professional Conduct do little to clarify client perjury issues. In fact, for most questions, they increase confusion and uncertainty. If the military does adopt the Model Rules, it should supplement them by practically oriented guidelines similar to the ABA Standards.

Defense Concessions as a Trial Tactic

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Introduction

A purely adversarial system of criminal justice starts with the presumption that each of the opposing parties will advocate opposite positions concerning critical factual and legal issues which arise during the course of the trial. When each side in the dispute has performed its function of partisan advocacy, it is expected that an impartial judge or jury will resolve the disputed issue in favor of the party which has been more successful in marshalling the law or facts to support its advantage.[1] However, in many criminal cases, the process of seeking justice has evolved from one which is purely adversarial to one in which the opposing parties seek something less than absolute victory. Criminal cases are routinely disposed of by resort to a process of plea bargaining in which each side agrees to accept a resolution which requires each party to settle for less than an optimal result. In plea bargaining, the adversarial relationship exists in the process of negotiating the agreement,[2] but the dispute is resolved by compromise rather than by conflict. Given limited judicial resources, the practice of plea bargaining has been recognized as an essential component of the administration of justice.[3]

A second means by which the adversarial system may appear to be diluted occurs when the accused and the government agree to stipulate relevant facts of the case.[4] The facts which are stipulated may be neutral and give neither side an advantage beyond simple conservation of the resources which would have been required to prove those facts. In some cases, the stipulated facts may be especially damaging to the cause of one of the parties, usually the accused.[5] By agreeing to a stipulation of facts, the parties are no longer adversaries as to the proof of those facts, although they may remain adversaries concerning conclusions to be drawn from the stipulated facts.

The decision to plea bargain or to stipulate is a strategic decision which is made to dispose of a case or particular charges, facts, or issues in the case. These decisions are usually reached by mutual agreement of the parties outside the courtroom. They may be subject to extensive judicial scrutiny before they are accepted as binding on the accused.[6]

There is a third way in which an issue in a criminal case can be resolved by means which

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[1]Model Code of Professional Responsibility, EC 7-19 (1980).

[2]Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[3]Santobello v. New York, 404 U.S. 257, 261 (1971); United States v. Dawson, 10 M.J. 142 (C.M.A. 1981).

[4]Manual for Courts-Martial, United States, 1969 (Rev. ed), para. 54*f* [hereinafter cited as MCM, 1969].

[5]*See* United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977).

[6]*See id.*; United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

are less than purely adversarial. A party can make a tactical decision at trial to concede the merits of an opposing party's position or gratuitously admit the truth of facts favorable to the opposing party. Such concessions or admissions are not normally made for purely altruistic reasons. They generally involve a determination by counsel that there is a tactical advantage to be gained from the concession or admission. When it is the defense counsel who makes the concession or admission which seems to be adverse to the interests of the accused, counsel and the trial judge must be aware of the ethical and legal limitations associated with this type of tactical decision. This article will examine the practice of defense concessions and admissions in contested cases and the limitations which must be considered by the defense counsel and military judge when the defense counsel decides to use those tactics at trial. Defense counsel must be aware of these limitations in order to avoid allegations that he or she breached a duty to the client and that he or she provided ineffective assistance of counsel. The military judge must recognize the legal limitations on defense trial tactics in order to fulfill his or her obligation to insure that the accused receives a fair trial, sometimes despite the efforts of counsel.[7]

An attorney has an obligation of loyalty to the client and an obligation to zealously represent the client's interests within the bounds of the law.[8] Counsel is prohibited from intentionally acting to the prejudice or damage of the client during the course of the professional relationship.[9] Occasionally the criminal defense attorney, in the exercise of his or her professional judgment, will employ trial tactics which, when reviewed objectively, appear to be contrary to the interests of the client. It is in these instances that the tactics selected by the defense attorney have been subject to examination by appellate courts to determine whether, intentionally or inadvertently, the defense attorney has breached a duty to the client. Usually, the issue of defense counsel's breach of duty to the accused is raised in one of three areas of trial practice: stipulations, opening statements, and closing argument.

Stipulations and Admissions by Counsel

In *Dick v. United States*,[10] the defendant was charged with being a repeat offender for unlawful sale of liquor. One of the elements of the offense required proof that there had been a prior conviction for unlawful sale of liquor. In his opening statement and closing argument, the defendant's counsel conceded that the defendant had in fact been convicted previously. At trial, the prosecution's proof on this element was deficient, but the conviction was affirmed on appeal. The court held that the defense counsel's statement that the defendant had a prior conviction was binding on the defendant and the government had been relieved of the burden of proving the prior conviction. The holding in *Dick* has been followed in military practice. In *United States v. Cambridge*,[11] the Court of Military Appeals held: "Ordinarily, statements made by defense counsel will bind the accused as effectively as though the accused himself had made them. This is particularly true if the statement is made by counsel in the progress of the trial and acquiesced in by the accused through his silence."[12] Although a confessional stipulation requires judicial inquiry at trial and the express concurrence of the accused,[13] no similar requirement exists for stipulations or statements by the defense counsel which are binding on the accused and which admit something less than the accused's guilt. It is not unusual for defense counsel to admit the truth of particular aspects of the government's case.

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[7]United States v. Rivas, 3 M.J. 282 (C.M.A. 1977); United States v. Morales, 1 M.J. 87 (C.M.A. 1975); United States v. Graves, 1 M.J. 50 (C.M.A. 1975).

[8]Model Code of Professional Responsibility, DR 7-101(A)(1). *See also* MCM, 1969, para. 48*c*.

[9]Model Code of Professional Responsibility, DR 7-101(A)(3).

[10]Dick v. United States, 40 F.2d 609 (8th Cir. 1930).

[11]United States v. Cambridge, 3 C.M.A. 377, 12 C.M.R. 133 (1953).

[12]*Id.* at 382, 12 C.M.R. at 138. *See also* United States v. Laman, 6 M.J. 664, 665 (A.F.C.M.R. 1978), in which the Air Force Court of Military Review held that "An accused is bound by stipulations entered into by his counsel even though he did not personally and expressly join in them."

[13]United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977).

Common examples of such admissions by counsel include an admission of intercourse between the accused and an alleged rape victim while defending the rape charge on the issue of consent, or an admission that the accused took certain property in a larceny prosecution while defending the charge on the issue of the accused's intent at the time the property was taken. Such admissions or stipulations by defense counsel are often made casually during the trial and usually pass without notice or inquiry. In the vast majority of cases, there is no adverse consequence to the accused as a result of counsel's statements. However, counsel must be conscious that, if for some reason the prosecution fails to meet its burden of proof as to an element of an offense, the statements of the defense counsel may be used against the accused to provide the proof necessary to sustain a conviction.[14]

Concession of Guilt or Appropriateness of Severe Sentence

A circumstance in which defense counsel concessions occur less frequently but with a more dramatic impact involves concessions made by counsel during closing argument on findings or on sentence that the client has been proven guilty or deserves a severe sentence. At the conclusion of a contested case in which the evidence presented by the prosecution has been overwhelming, it is sometimes a tempting tactic for the defense counsel to concede his or her client's guilt or the appropriateness of a severe sentence. Of course, this tactic is not elected with the intent of abandoning the interests of the client. It is usually employed for the purpose of allowing the defense counsel, by a show of candor, to enhance his or her credibility with the fact finder and thereby gain some advantage as to other contested charges, the sentence, or some particular aspect of the sentence. The case law in this area shows that there is considerable risk to both the counsel and the accused when this trial tactic is used by the defense counsel.

In *United States v. Mitchell,*[15] the Court of Military Appeals stated that the role of the defense counsel is that of an advocate for the accused, not an *amicus* to the court.[16] In argument, the defense counsel is obliged to marshal the evidence in the manner most favorable to the accused. When the accused has pled not guilty, the defense counsel should not concede guilt. The court stated that there is a distinction between a defense counsel's passive acceptance of the force of adverse facts and a positive declaration by the defense counsel of the inevitable conclusion to be drawn from the adverse facts.[17] In the cases considered by the Court of Military Appeals, the court has found reversible error in each instance in which the accused's counsel has conceded his or her client's guilt in a contested case.

The Court of Military Appeals first considered the issue in *United States v. Walker.*[18] In *Walker*, the accused was represented by both a detailed and an individually requested defense counsel. The requested counsel acted as the lead counsel and conducted almost all of the defense case. The accused was charged with premeditated murder and the entire defense case, including the testimony of the accused, was based on the argument that the homicide had been an accidental killing. At the conclusion of the requested counsel's closing argument, the detailed defense counsel presented a second defense argument in which he conceded that the court members could be reluctant to return a finding of not guilty. He urged that they consider a finding of guilty as to a lesser included offense. The Court of Military Appeals found that the argument of the detailed defense counsel urging a finding of guilty to a lesser offense had undermined the merit of the defense of accident and was contrary to the testimony of

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[14]If the accused has pled not guilty, neither a stipulation which practically amounts to a confession nor a stipulation which would operate as a complete defense should be received in evidence. *See* MCM, 1969, para. 54*f*.

[15]United States v. Mitchell, 16 C.M.A. 302, 36 C.M.R. 458 (1966).

[16]*Id.* at 304, 36 C.M.R. at 460 (citing Ellis v. United States, 356 U.S. 674 (1958)).

[17]*Id.*

[18]United States v. Walker, 3 C.M.A. 355, 12 C.M.R. 111 (1953).

the accused. The conviction was reversed and the court ordered a rehearing.

In *United States v. Smith*,[19] the Court of Military Appeals was again willing to reverse a conviction because the defense counsel's argument in a contested case had conceded an issue which was contrary to the accused's plea of not guilty and the accused's testimony during the trial. Although the court's decision to reverse the conviction in *Smith* was based on an erroneous instruction, the court, in a footnote, noted that the defense counsel's closing argument included a statement which, although not a concession of the accused's guilt, was contrary to his plea of not guilty and his testimony. Such an argument would have required reversal of the accused's conviction.[20]

In *United States v. McFarlane*,[21] the accused was charged with felony murder and assault with intent to commit murder. The accused pled guilty to the assault charge and was required to plead not guilty to the murder charge because the charges had been referred as a capital case.[22] The defense counsel asked that the court members be advised that the accused was precluded from pleading guilty to the murder charge; the trial judge so instructed the members. The defense counsel did not interfere with the prosecution's presentation of its case, presented no defense case, and waived closing argument on the merits. The Court of Military Appeals recognized that the defense counsel's purpose in employing those tactics was to impress the court members with the fact that had there not been a statutory prohibition, the accused would have pled guilty and thrown himself on the mercy of the court. The court held that the defense counsel's tactics were contrary to the intent of the Code and that the defense counsel had acted improperly in virtually conceding the accused's guilt. Even when the accused lacks a meritorious defense, counsel should not send "a signal that he has defaulted on the merits because his client is in fact guilty."[23] The court's opinion in *McFarlane* did not cite its prior decision in *Walker* as authority for finding error in the defense counsel's virtual concession of guilt. Consequently, it is possible that the decision in *McFarlane* is limited to that counsel's tactics in a capital case. However, in *United States v. Hampton*,[24] the Court of Military Appeals cited its decision in *McFarlane* as authority for holding that a defense counsel's concession of guilt in the face of his client's plea of not guilty constituted prejudicial error.[25] In *Hampton*, the defense counsel had made the following closing argument on the merits after the accused had pled not guilty:

> The prosecution has successfully proven that the accused is guilty of the offense charged. The defense feels that since the possible sentence in this case is rather severe and since the government must prove the guilt of the accused beyond a reasonable doubt, the only effective method is to place this burden on the shoulders of the prosecution and plead not guilty; and, accordingly, we have done so. I believe the evidence that the trial counsel presented has proven beyond a reasonable doubt that he is guilty. I have nothing further, sir.[26]

The opinion of the Court of Military Appeals in *Hampton* does not state whether the accused testified on the merits or how vigorously the merits had been contested. The court simply held that such an outright concession of guilt by the defense counsel was prejudicially erroneous

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[19]United States v. Smith, 8 C.M.A. 582, 25 C.M.R. 86 (1958).

[20]*Id.* at 585 n.2, 25 C.M.R. at 89 n.2.

[21]United States v. McFarlane, 8 C.M.A. 96, 23 C.M.R. 320 (1957).

[22]Uniform Code of Military Justice art. 45(b), 10 U.S.C. §845(b) (1976) [hereinafter cited as U.C.M.J.]. Article 45, U.C.M.J., provides that an accused's plea of guilty may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

[23]*McFarlane* 8 C.M.A. at 99, 23 C.M.R. at 323.

[24]United States v. Hampton, 16 C.M.A. 304, 36 C.M.R. 460 (1966).

[25]*Id.* at 305, 36 C.M.R. at 461. Also cited as authority are United States v. Walker, 3 C.M.A. 355, 12 C.M.R. 111 (1953), United States v. Smith, 8 C.M.A. 582, 25 C.M.R. 86 (1958), and United States v. Mitchell, 16 C.M.A. 302, 36 C.M.R. 458 (1966).

[26]*Hampton*, 16 U.S.C.M.A. at 305, 36 C.M.R. at 461.

and, in effect, amounted to pleading the accused guilty at the close of the case on the merits. The court stated that at the very least, such a concession by the defense counsel demanded an inquiry of the accused concerning his agreement with the concession and his understanding of the meaning and effect of the concession as a virtual plea of guilty.[27]

Despite the consistent finding of prejudicial error by the Court of Military Appeals in cases in which the defense counsel has conceded the client's guilt after a plea of not guilty, a survey of decisions by the various Courts of Military Review shows that the service courts have usually been either more tolerant of defense counsels' election of tactics, or at least less willing to reverse convictions because such tactics have been unsuccessfully employed at trial.

In *United States v. Buchanan*,[28] the accused was charged with larceny. Part of the prosecution's case consisted of the pretrial statement of the accused in which he admitted taking the property without the owner's consent. The accused testified at trial that he had borrowed the property and that he had intended to return it to the owner. He further testified that the property belonged to his roommate and it was not an unusual practice for he and his roommates to borrow each others' property without first obtaining consent. In closing argument, the defense counsel conceded that the accused's statement constituted a confession to the lesser included offense of wrongful appropriation. The accused was convicted for larceny. The Air Force Board of Review held that the defense counsel had not acted improperly in conceding that the accused had confessed to wrongful appropriation, and the judge was not required to conduct an inquiry to determine whether the defense counsel's argument was made with the client's understanding and concurrence.[29]

In *United States v. Henderson*,[30] the Air Force Court of Military Review held that a concession of guilt by the defense counsel in closing argument was not improper. Henderson had been prosecuted for four offenses. Despite his plea of not guilty, the defense did not contest the government's evidence as to one of the four specifications and, in closing argument, the defense counsel conceded that the government's evidence was sufficient as to that offense. The court found that the concession of guilt was a tactic which served to emphasize, albeit unsuccessfully, that the other three specifications were "definitely contested."[31] The court characterized the defense counsel's argument as "a realistic assessment of the evidence, which was compelling."[32]

In a prosecution for absence without leave in *United States v. Harmash*,[33] the accused challenged the Army's jurisdiction to try him. The accused maintained the lack of personal jurisdiction as his defense to the charge and pled not guilty. In his closing argument on the merits, the accused's civilian defense counsel made the following statement:

> I represent a man, a psychopath—and he is a criminal, there's no two ways about it. He is a criminal and has a criminal record and I make no bones about it, and I think that is obvious. I couldn't care less if he was AWOL or if he was a deserter. I frankly don't understand this rather terrible effort to keep—and I will say it quite flatly—to keep a bum in the Army. I really don't understand it. Here is a man "who isn't but a week in the Army and there's a suicide attempt. There it is. Here is a man who comes into the Army with a record—this is the bottom of the barrel—I can't give my

[27] *Id.* (citing United States v. Chancelor, 16 C.M.A. 297, 36 C.M.R. 453 (1966)).

[28] United States v. Buchanan, 37 C.M.R. 927 (A.F.B.R.), *petition denied*, 17 C.M.A. 646, 37 C.M.R. 470 (1967).

[29] 37 C.M.R. at 934.

[30] United States v. Henderson, 44 C.M.R. 553 (A.F.C.M.R.), *petition denied*, 21 C.M.A. 599, 44 C.M.R. 939 (1971).

[31] 44 C.M.R. at 555.

[32] *Id.*

[33] United States v. Harmash, 48 C.M.R. 809 (A.C.M.R. 1974).

client the best of it because that is what he is. He is a criminal...

. . . .

Do you know the greatest favor you could do to this fellow, really, and I'll show you the essence of the mentality. The greatest favor you could do to him is give him a bad conduct discharge, a dishonorable discharge, put him up against the wall and shoot him. But get him out; that's all he wants....[34]

The Army Court of Military Review described defense counsel's argument as "admittedly unusual" but found that the argument was "nothing more than hyperbole."[35] The court found that counsel's argument was designed to focus directly on the accused's contention that he was never inducted into the Army and that the court-martial lacked jurisdiction over him. The court stated that, although it did not necessarily agree with the defense counsel's tactics, it was inconceivable that the court members would have reacted to the argument of counsel to the detriment of the accused.

The Army Court of Military Review again considered the propriety of defense counsel's concessions in *United States v. Caldwell.*[36] In *Caldwell*, the accused was prosecuted for larceny and housebreaking. The evidence presented by the prosecution included the accused's pretrial statement in which he admitted participating in the larcenies but denied participating in the housebreaking. The accused testified at trial and made some damaging admissions as to the larcenies. In his closing argument, the defense counsel conceded the accused's guilt as to the larcenies and concentrated his argument on his client's non-involvement in the housebreaking. The accused was found guilty of all charged offenses. The Army Court of Military Review held that counsel's concession of his client's guilt was not improper in this case. The court held that defense counsel may not concede an issue contrary to the testimony of the accused or concede guilt in the face of a defense raised by the testimony of the accused. It is permissible, however, for the defense counsel to concede that the prosecution has met its burden of proof on one of several charges in order to emphasize an asserted weakness on the remaining charges. The court cited *Tatum v. United States*[37] *and Turberville v. United States*[38] as authority for defense concessions as a trial tactic in an appropriate case. The court noted that in *Tatum*, the court had observed that some concessions "are not only proper but highly commendable."[39]

Most recently, the propriety of a defense counsel's concession of his or her client's guilt in a contested case was raised in *United States v. Matthews.*[40] In *Matthews*, the accused had attempted to plead guilty to premeditated murder and rape despite the referral of these charges as capital offenses. Because of the prohibition against a guilty plea in a capital case,[41] the military judge refused to accept the plea of guilty to either offense. The accused then entered a plea of guilty to unpremeditated murder and a plea of not guilty to premeditated murder and rape. In his opening statement to the court members and in his closing argument on the merits, the accused's defense counsel conceded that the accused was guilty of rape and that, but for the statutory prohibition, the accused would have pled guilty to the rape. On appeal, the issue

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[34]*Id.* at 811.

[35]*Id.* at 812. Service courts will occasionally reverse. In United States v. Burwell, 50 C.M.R. 192 (A.C.M.R. 1975), the accused was charged with aggravated assault and robbery. He testified at trial that he had acted in self-defense concerning the assault charge (Charge I). The accused's counsel made this closing argument on the merits: "With regards to Charge I we believe the man is guilty. He convicted himself. In regards to Charge II, there was no stealing. Therefore, we ask that it be not guilty and we rest our case." *Id.* at 193. The Army Court of Military Review held that the counsel's concession of his client's guilt and his failure to argue the issues raised by the evidence as to the robbery constituted an inadequate performance. Reversal was required for the convictions for both offenses.

[36]United States v. Caldwell, 9 M.J. 534 (A.C.M.R. 1980).

[37]Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951).

[38]Turberville v. United States, 303 F.2d 411 (D.C. Cir. 1962).

[39]United States v. Caldwell at 535, citing *Tatum* at 618.

[40]United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982).

[41]U.C.M.J., art. 45(b).

of counsel's concession of the accused's guilt in contravention of the intended purpose of Article 45 of the Uniform Code of Military Justice (UCMJ) was addressed by the Army Court of Military Review. The court held the United States Supreme Court decision in *Coker v. Georgia*[42] had effectively invalidated the death penalty provisions of Article 120, UCMJ. Consequently, counsel's concession of guilt did not contravene Article 45. Concerning the propriety of the concession itself, the court found that the defense tactic was designed to focus attention on the issue of lack of premeditation in the homicide. The court recognized that rape is a serious offense but, under the circumstances, it was a proper and legitimate tactic to concede the less serious offense of rape in an effort to avoid conviction for the more serious offense of premeditated murder. As the court had done in *Caldwell*,[43] the decision of the Court of Military Appeals in *Hampton*[44] was interpreted as not establishing a *per se* rule against defense counsel concessions of guilt in a contested trial or requiring judicial inquiry of the accused in all cases involving such concessions by counsel. This decision of the Army Court of Military Review is presently under review by the Court of Military Appeals.[45]

The numerous reported appellate court decisions in cases in which the accused's counsel has potentially made an improper concession during the sentencing phase of a court-martial have uniformly involved concessions related to the appropriateness of a punitive discharge as part of the adjudged sentence.[46] Historically, the military appellate courts, particularly the Court of Military Appeals, have regarded a punitive discharge as an exceptionally severe form of punishment.[47] Nevertheless, many accused affirmatively embrace the opportunity to receive any type of discharge in order to terminate their military service. Others, although not so enthusiastic about a punitive discharge, are at least willing to bargain away the opportunity to earn an honorable discharge in exchange for the possibility of a more lenient sentence to confinement. The reported appellate decisions provide some guidance to defense counsel who elect to concede the appropriateness of a sentence which includes discharge or to affirmatively argue in favor of a punitive discharge for their client.

Defense counsel can help the client obtain a punitive discharge if the accused understands the consequences of such a discharge and desires that counsel seek a punitive discharge as part of the sentence.[48] However, defense counsel may not concede the appropriateness of a punitive discharge when the accused has either expressed a desire to remain in the service or has not expressly or implicitly indicated a desire to be discharged from the service.[49] Although it is probably a better practice for defense counsel to clearly establish the client's desires prior to conceding or arguing for a punitive discharge, and for the trial judge to specifically inquire of the accused his or her desires when the defense

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[42]Coker v. Georgia, 433 U.S. 584 (1977).

[43]United States v. Caldwell, 9 M.J. 534 (A.C.M.R. 1980).

[44]United States v. Hampton, 16 C.M.A. 304, 36 C.M.R. 460 (1966).

[45]Private Wyatt L. Matthews was sentenced to death. U.C.M.J., art. 67(b)(1) provides for mandatory review by the Court of Military Appeals in all cases in which the sentence, as affirmed by a Court of Military Review, extends to death. The Army Court of Military Review affirmed the findings and the death sentence in Matthews' case.

[46]*See* United States v. Mitchell, 16 C.M.A. 302, 36 C.M.R. 458 (1966); United States v. Richardson, 18 C.M.A. 52, 39 C.M.R. 52 (1968); United States v. Garcia, 18 C.M.A. 75, 39 C.M.R. 75 (1968);' United States v. Weatherford, 19 C.M.A. 424, 42 C.M.R. 26 (1970); United States v. Schwartz, 19 C.M.A. 431, 42 C.M.R. 33 (1970); United States v. Holcomb, 20 C.M.A. 309, 43 C.M.R. 149 (1971); United States v. Webb, 5 M.J. 406 (C.M.A. 1978); United States v. Harmash, 48 C.M.R. 809 (A.C.M.R. 1974); United States v. Dotson, 9 M.J. 542 (C.G.C.M.R. 1980); United States v. Mosley, 11 M.J. 729 (A.F.C.M.R. 1981); United States v. Garcia, 12 M.J. 703 (N.C.M.R. 1981); United States v. Boyce, 12 M.J. 981 (A.F.C.M.R. 1982).

[47]*See* United States v, Prow, 13 C.M.A. 63, 32 C.M.R. 63 (1962) in which the Court of Military Appeals analogized a punitive discharge to a death sentence.

[48]*See* United States v. Weatherford, 19 C.M.A. 424, 42 C.M.R. 26 (1970); United States v. Harmash, 48 C.M.R. 809 (A.C.M.R. 1974); United States v. Dotson, 9 M.J. 542 (C.G.C.M.R. 1980).

[49]United States v. Webb, 5 M.J. 406 (C.M.A. 1978).

counsel concedes the appropriateness of a discharge,[50] the Air Force Court of Military Review has held in two recent cases that an on-the-record inquiry of the accused is not required if it is otherwise apparent that the accused concurs in counsel's choice of tactic.[51]

Conclusion

Throughout the course of a defense counsel's representation of an accused in a contested trial, counsel must remain aware of the obligation owed the client to loyally and zealously advocate the client's interests. Although concessions made in stipulations, opening statements, or closing arguments are recognized as a legitimate trial tactic of the defense advocate, such concessions must be made with caution and only after thorough consideration of possible adverse ramifications. Defense counsel must weigh the benefit to be gained by such concessions and balance that potential benefit against the risk of prejudice to the accused. Although the intermediate military appellate courts have recognized defense counsel concessions of guilt in contested cases as a legitimate trial strategy, the Court of Military Appeals has never expressly sanctioned the tactic. The defense counsel who makes such concessions does so at the risk of being accused, either by the client or an appellate court, of breaching his or her duty as an advocate. The military judge who allows a defense concession to pass without inquiry of the accused runs the risk of reversal. The interests of the accused, counsel, and the trial judge will be best served when the record fully reflects that the accused understands and concurs in any type of adverse concession made on his or her behalf by the counsel who is charged with the responsibility of effectively advocating the accused's interests. The military appellate courts have recognized that defense counsel should be allowed to exercise their professional judgment in selecting trial tactics and in advocacy.[52] Along with the freedom to exercise professional discretion comes the responsibility to exercise that discretion competently and within the bounds of professional responsibility and the law.

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[50] *See* United States v. Mitchell, 16 C.M.A. 302, 36 C.M.R. 458 (1966).

[51] United States v. Mosley, 11 M.J. 729 (A.F.C.M.R. 1981); United States v. Boyce, 12 M.J. 981 (A.F.C.M.R. 1982).

[52] *Holcomb* 20 C.M.A. at 311, 43 C.M.R. at 151; *Boyce* 12 M.J. at 983.

HQDA Message - Urinalysis/Service-connection: Murray v. Haldeman

P 271300Z JUL 83
FM DA Wash,DC //DAJA-CL//
DAJA-CL 1983/5920
FOR SJA: Pass to Subordinate Court-Martial Jurisdictions
SUBJECT: Urinalysis/Service-connection: Murray v. Haldeman, 16 M.J. 74 (CMA 25 July 1983)

1. On 25 Jul 83, the US Court of Military Appeals (CMA) issued an opinion addressing the merits of an extraordinary writ to prohibit the prosecution by the Navy of Boatswain's Mate Second Class Victor Ross Murray for the wrongful use of marijuana.

2. Facts: After approximately thirty days leave between duty stations, Murray reported to Navy Apprentice School at the Naval Damage Control Center, Philadelphia. Pursuant to Navy policy, he was ordered to provide a urine sample within 48 hours. He obeyed the order and laboratory analysis of his urine revealed the presence of the metabolite or marijuana (D-9-HTC). This positive urine test provided the basis for the charge. At trial, Murray attacked the service-connection of the alleged offense and legality of the seizure of his urine. The military judge ruled against Murray and Murray petitioned for extraordinary relief.

3. Expanding on footnote 28 of US v. Trottier, 9 M.J. 337 (CMA 1980), CMA held that even where a servicemember uses a psychoactive drug (which includes marijuana) in private while on extended leave, this use is service-

connected if he later enters a military installation while subject to any physiological or psychological effects of the Drug.

4. CMA further held that the proscriptions of MRE's 312(C), (D) and (E) do not apply to obtaining a urine specimen by an order to a servicemember that the member provide such a specimen. While specifically finding it unnecessary to try to fit the compulsory urinalysis in Murray into any category under the MRE's, CMA found the compulsory urinalysis of Murray is justified by the same considerations that permit health and welfare inspections.

5. SJA's and counsel should become thoroughly familiar with the facts, issues, and text of this case, including the material cited in footnotes. Specifically, the opinion highlights the legal viability of the issue of passive inhalation. Moreover, in those cases where urinalysis takes place soon after a servicemember returns from an extended leave, as in Boatswain's Mate Murray's case, evidence of any physiological or psychological effects of the drug must be made a part of the record.

Legal Assistance Items

Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Major Charles W. Hemingway
Administrative and Civil Law Division, TJAGSA

Individual Retirement Accounts

Trustee's Fees

Trustee's fees paid by a taxpayer with respect to an individual retirement account are deductible from adjusted gross income as an expense incurred for the production of income, according to the IRS. Therefore, the amount does not reduce the allowable contribution and will not subject the taxpayer to the penalty for excess contributions. Furthermore, the payment of trustee's fees is an expense incurred for the production or collection of income, and is deductible for federal income tax purposes under section 212 of the IRC. IRS Letter Ruling, dated 19 April 1983.

Investment

The following table reflects the number of years required for an investment in an IRA to be preferable to an alternative taxable investment, paying the same interest rate and being taxed at the same marginal rate. It also assumes that the IRA distribution will be taxed at the same rate used for computing the tax benefit on the IRA contribution.

		Pretax Interest Rate		
		8%	10%	15%
Marginal	50%	6 yrs.	5 yrs.	4 yrs.
Income Tax	40%	7 yrs.	5 yrs.	4 yrs.
Rate	30%	7 yrs.	6 yrs.	4 yrs.

As the table indicates, even if an individual is unwilling to tie up funds until retirement, an IRA may be an appropriate alternative investment vehicle for the relatively short periods indicated in the table. The investment decision, however, needs to be made on an annual basis. (Source: *Personal Financial Strategies*, published by Arthur Young and Co.)

Sale of Personal Residence Previously Rented

In *Arthur R. Barry*, TC Memo 1971-179, 30 TCM 757 (1971), the Tax Court came up with what was then an unusual answer regarding the tax treatment of the sale of personal residence where the residence of the military member was rented immediately prior to the sale and had been rented for a number of years. Barry, an Army officer, purchased a personal residence in Maryland in 1955, but due to various assignments, the house was rented from 1960 to 1966, when he sold it. He had claimed depreciation and maintenance expenses on it during the years it was rented. He intended to return there when he retired; however, upon retirement, he applied for admission to the Colorado State Bar and accepted a position as Dean of the University of Denver Law School. He sold his house in Maryland at a gain and purchased a new residence in Colorado at a considerably higher price. The Tax Court used six tests to determine whether the Maryland residence was, in fact,

his principal residence and thus, subject to the favorable treatment of 26 U.S.C. § 1034 (1976). These were:

(1) Did he always intend to return to it?
(2) Was the property leased with a view to gaining income or to provide for its proper care and maintenance?
(3) Did the owner realize a significant profit from the rental?
(4) Was it offered for sale at various times or only at the date of his actual change of residence?
(5) Was this his only home and not one of several purchased and sold upon each subsequent transfer?
(6) Did he have a sudden change of plans which necessitated this sale?

Using these tests the Court decided that the house in Maryland, although rented for a considerable period, was in fact Barry's principal residence and that the sale thereof was entitled to the favorable tax treatment under section 1034 of the Code. Compare this with *Richard T. Houlette*, 48 TC 350 (1967) and *Ralph L. Trisko*, 29 TC 515 (1957).

Family Law

A notice in the August 16, 1983 *Family Law Reporter* contains an item of interest to legal assistance attorneys. The North Carolina legislature has passed a bill that includes military retirement pensions within the definition of marital property subject to distribution upon dissolution of the marriage. The bill, HB 1129 took effect August 1, 1983. The bill specifies that only vested pensions would be included within the definition of marital property and nonvested pensions would be considered separate property.

Reflecting a continuing trend among states to reach the assets of non-supporting parents, Texas has enacted a statute under which any person who is subject to a court order to pay child support may voluntarily assign a portion of his/her earnings to pay the required support. Under such an assignment, the court, after a hearing, may order the employer to withhold either the amount specified in the assignment or up to one-third of the assignor's disposable earnings, which ever is less.

The statute is an attempt to circumvent a constitutional prohibition against garnishment in Texas. However, the statute contains a provision that if a constitutional amendment permitting garnishment for the enforcement of child support orders is adopted by voters in the November general election, Texas courts, upon notice and hearing, may issue involuntary wage assignments for child support.

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:

1. Fill out 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 applicant is an actively participating Reservist.

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

3. The Reservist must sign it, affix fingerprints, attach an appropriate photograph, and return the materials to RCPAC.

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

5. Applicant must execute the receipt form and send it to RCPAC.

2. Senior Judge Advocate Positions

Assignment of Military Law Center commanders and staff judge advocates of ARCOM or GOCOM headquarters is the responsibility of TJAG. The selection process set forth at para-

graph 2-20h, AR 140-10 calls for the ARCOM or GOCOM commander to forward to TJAG the names of at least three nominees for each position. All eligible officers, to include officers assigned to the USAR Control Group who are located within the ARCOM or GOCOM area, must be considered. There have been instances where eligible officers within the geographic vicinity of an ARCOM or GOCOM have been overlooked in the selection process. Thus, to insure that all eligible officers are given an opportunity to be considered for these senior judge advocate positions, TJAG has directed the semiannual publication of these positions and the termination date of the incumbent's tenure. Tenure for these positions is limited to three years unless exceptional circumstances justify an extension. Interested eligible officers should so advise the appropriate ARCOM or GOCOM commander no later than six months prior to the expiration of the incumbent's tenure. For those positions marked by an asterisk, eligible individuals should contact the respective ARCOM or GOCOM commander immediately.

Army Reserve Commands

First Army

ARCOM	*SJA*	*Vacancy Due*	
77	COL E. C. Padgett	Feb 85	
79	COL J. S. Ziccardi	Sep 85	
81	COL J. E. Baker	Sep 83	*(action pending)
94	COL L. R. Shuckra	Mar 86	
97	COL W. P. George	Aug 85	
99	COL R. L. Kaufman	Sep 85	
120	COL O. E. Powell	Jun 85	
121	COL J. B. Nixon	Apr 86	

Fifth Army

ARCOM	*SJA*	*Vacancy Due*
83	COL T. P. O'Brien	Jul 84
86	COL T. V. Barnes	Feb 85
88	COL L. W. Larson	May 85
90	COL J. M. Compere	Mar 85
102	COL A. E. DeWoskin	Jul 85
122	LTC J. S. Selig	Apr 86
123	COL R. F. Greene	Feb 84

Sixth Army

ARCOM	*SJA*	*Vacancy Due*
63	COL J. M. Provenzano	Jul 84
89	COL F. D. Gehrt	Mar 84
96	COL G. G. Weggeland	Aug 85
124	COL R. M. Ishikawa	Jun 84

Military Law Centers

First Army

MLC	*Commander*	*Vacancy Due*	
3	COL A. S. Aguiar	Sep 85	
4	COL M. Bradie	Feb 86	
10	COL J. M. McDonald	Aug 86	
11	COL J. H. Herring	May 85	
12	COL D. W. Fouts	May 83	*(action pending)
42	COL D. M. Laufe	Sep 84	
153	COL P. A. Feiner	May 86	
213	COL J. T. Gullage	Jul 83	

Fifth Army

MLC	*Commander*	*Vacancy Due*
1	COL C. J. Sebesta	May 85
2	COL R. H. Tips	Apr 86
7	COL L. E. Strahan	Feb 84
8	COL T. P. Graves	May 85
9	COL N. B. Wilson	Apr 84
214	COL T. C. Klas	Feb 86

Sixth Army

MLC	*Commander*	*Vacancy Due*
5	COL R. B. Jamar	Mar 85
6	COL W. J. Barker	Jul 84
78	COL J. L. Moriarity	Jul 84
87	COL C. A. Jones	Oct 85
113	COL D. S. Simons	Feb 86

Training Divisions

First Army

Tng Div	*SJA*	*Vacancy Due*
76	COL J. E. Pearl	Dec 83
78	LTC R. R. Baldwin	Oct 85
80	LTC R. H. Cooley	Jul 85
98	LTC D. W. O'Dwyer	Apr 86
108	LTC H. B. Campbell, Jr.	Oct 83

Fifth Army

Tng Div	*SJA*	*Vacancy Due*
70	LTC E. D. Brockman	Feb 86
84	COL L. E. Slavik	Sep 83
85	LTC G. L. Coil	Jun 84
95	MAJ J. S. Arthurs	Jul 86
100	LTC E. A. Jasmin	Feb 84

Sixth Army

Tng Div	*SJA*	*Vacancy Due*
91	COL L. Hatch	Jul 86
104	COL R. B. Rutledge	Apr 84

General Officer Commands (Major)

First Army

GOCOMS	*SJA*	*Vacancy Due*	
352 CA CMD	LTC J. E. Ritchie	Aug 83	*(action pending)
353 CA CMD	LTC L. R. Kruteck	Oct 84	
412 ENGR CMD	COL H. B. Hopkins	Apr 86	
290 MP BDE	LTC C. E. Walker	Jun 84	
300 SPT GP (AREA)	COL J. M. Cloud	Oct 83	
310 TAACOM	COL J. B. Gantt	Dec 85	
143 TRANS BDE	LTC R. M. Morris	Jul 85	
7581 USAG	COL F. V. DeJesus	Apr 86	

Fifth Army

GOCOMS	*SJA*	*Vacancy Due*
103 COSCOM	COL C. W. Larson	Oct 85
377 COSCOM	COL A. B. Pierson, Jr.	Feb 83 (action pending)
416 ENGR CMD	COL T. G. Bitters	Jun 86
420 ENGR BDE	MAJ C. E. Lance	Jul 84
30 HOSP CTR	MAJ H. E. Schmalz	85
807 HOSP CTR	MAJ G. A. Glass	Jul 86
300 HP CMD	MAJ J. Wouczyna	Apr 85
425 TRANS BDE	LTC R. G. Bernoski	Apr 86

Sixth Army

GOCOMS	*SJA*	*Vacancy Due*
351 CA CMD	MAJ J. P. Hargarten	Apr 86
311 COSCOM	COL D. M. Clark	Feb 85
HQ IX CORPS	COL M. K. Soong	Oct 83

3. Reserve Component Technical (On-Site) Training Schedule Academic Year 1984

a. The following schedule sets forth the training sites, dates, subjects, instructors and local action officers for the Reserve Component Technical (On-Site) Training Program for academic year 1984. TJAG has directed that all Army Reserve Component judge advocates assigned to JAGSO detachments or to judge adovcate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135-316). All other judge advocate officers (Active, Reserve, National Guard, and other services) are encouraged to attend the training sessions in their areas. These officers will receive two retirement points for each day of attendance. Department of the Army civilian attorneys and Reserve Component personnel who are attorneys but not judge advocates are also invited. This technical training has been approved by several states for CLE credit and occasionally is co-sponsored with some other organization, such as the Federal Bar Association. The local action officer will have information in this regard.

b. Action officers are required to coordinate with all Reserve Component units having judge advocate officers assigned and with active armed forces installations with legal personnel, and are required to notify all members of the IRR that the training will occur in their geographical area. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

c. JAGSO detachment commanders will insure that unit training schedules reflect the scheduled technical training. SJA's of other Reserve Component troop program units should insure that the unit schedule reflects that the judge advocate section will attend technical training in accordance with the below printed schedule RST (regulary scheduled training), as ET (equivalent training) or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

d. Questions concerning the on-site instructional program should be directed to the appropriate action officer at the local level. Problems which cannot be resolved by the action officer or the unit commander should be directed to Captain Thomas W. McShane, Chief, Unit Training and Liaison Office, Reserve Affairs Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22901 (telephone 804-293-6121, or Autovon 274-7110, Extension 293-6121).

APPROVED SCHEDULE FOR RESERVE COMPONENT TECHNICAL (ON-SITE) TRAINING PROGRAM, AY 84

Trip	Date	City, Host Unit And Training Site	Subjects	Instructors/ Reserve Affairs Rep	Action Officers Address & Phone Nos.
1.	22-23 Oct 83	Boston, MA 94th ARCOM ESD HQ, Room CMC BLDG 1606 Hanscom AFB, MA 01731	Admin & Civil Law Criminal Law	MAJ Calvin M. Lederer LTC William P. Greene COL Richard K. Smith	MSG Robert F. Ryan HQ, 94th ARCOM Armed Forces Reserve Center Hanscom AFB, MA 01731 Autov. 478-3000 (Ext. 4565) (617) 451-3000 (Ext. 4565)
	29 Oct 83	St. Paul, MN 214th MLC Thunderbird Motel 2201 East 78th St Bloomington, MN 55420	Admin & Civil Law International Law	MAJ David W. Wagner MAJ James F. Gravelle CPT John P. Ley, Jr.	MAJ Fred Lambrecht 214th Military Law Center BLDG 201, Ft Snelling St. Paul, MN 55111 (612) 725-4677
3.	29-30 Oct 83	Philadelphia, PA 79th ARCOM Willow Grove NAS Willow Grove, PA 19090	Contract Law International Law	MAJ Julius Rothlein MAJ John H. O'Dowd, Jr. CPT Thomas W. McShane	MAJ Stewart Weintraub 79th ARCOM Willow Grove NAS Willow Grove, PA 19090 (215) 985-0800
4.	19 Nov 83	Detroit, MI 123d ARCOM USAR Center 26402 West 11 Mile Rd Southfield, MI 48034	Administrative Law Criminal Law	MAJ Charles W. Hemingway MAJ Michael C. Chapman CPT Thomas W. McShane	LTC John F. Potvin 106th JA Det 26402 West 11 Mile Rd Southfield, MI 48034 (313) 465-7000
	20 Nov 83	Indianapolis, IN 123d ARCOM Gates-Lord Hall BLDG 400 Ft. Benjamin Harrison, IN 46216	Administrative Law Criminal Law	MAJ Charles W. Hemingway MAJ Michael C. Chapman CPT Thomas W. McShane	MAJ James Gatzke Rm 238, Federal Office Bldg. 575 North Pennsylvania Indianapolis, IN 46204 (317) 269-7415
5.	3-4 Dec 83	New York, NY 77th ARCOM U.S. Court Complex Foley Square New York, NY 10007	Criminal Law Contract Law	CPT (P) Lawrence A. Gaydos MAJ Paul C. Smith COL Richard K. Smith	COL Charles E. Padgett 216 Dernott Avenue Rockville Centre, NY 11570 (212) 264-8582
6.	10 Dec 83	Houston, TX 90th ARCOM South Texas College of Law 1303 San Jacinto Houston, TX	Criminal Law International Law	MAJ David W. Boucher LTC Daniel E. Taylor COL Harry C. Beans	MAJ William E. Taylor III 11802 Advance Houston, TX 77065 (713) 221-5840
	11 Dec 83	Dallas, TX 90th ARCOM USAR Center, Rm 8A24 10031 East Northwest Hwy. Dallas, TX 75238	Criminal Law International Law	MAJ David W. Boucher LTC Daniel E. Taylor COL Harry C. Beans	MAJ Glyn Cook 819 Taylor Ft. Worth, TX 76102 (817) 334-2942
7.	21-22 Jan 84	Seattle, WA 124th ARCOM University of Washington School of Law Seattle, WA	Contract Law International Law	MAJ Paul C. Smith MAJ James F. Gravelle CPT Thomas W. McShane	LTC Charles A. Kimbrough 1111 Third Avenue, Ste 2500 Seattle, WA 98101 (206) 223-1313
8.	4 Feb 84	Kansas City, MO 89th ARCOM Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law International Law	MAJ Mark A. Steinbeck MAJ David W. Boucher MAJ John H. O'Dowd, Jr. CPT John P. Ley, Jr.	1LT James M. Tobin 4240 Blueridge Blvd, Ste 825 Kansas City, MO 64133 (816) 737-1555

9.	4-5 Feb 84	Jackson, MS 121st ARCOM Mississippi College School of Law Jackson, MS	Contract Law International Law	MAJ Roger W. Cornelius LTC Daniel E. Taylor CPT Thomas W. McShane	MAJ Woodrow Golden Box 427 Jackson, MS 30205 (601) 354-3456
10.	11-12 Feb 84	Los Angeles, CA 63rd ARCOM Antes Restaurant 729 South Palo Verdes San Pedro, CA 90731	Contract Law International Law	MAJ Julius Rothlein MAJ Sanford W. Faulkner COL Harry C. Beans	LTC John C. Spence 1535 Bellwood Road San Marino, CA 91108 Ofs: (213) 974-3763 Hm: (213) 285-4107
	13-14 Feb 84	Honolulu, HI IX Corps (Aug) Bruyeres Quadrangle Ft DeRussy, HI	Contract Law International Law	MAJ Julius Rothlein MAJ Sanford W. Faulkner COL Harry C. Beans	MAJ Russell Geoffrey OSJA, Westcom Ft. Shafter, HI 96858 (808) 438-2676
11.	25-26 Feb 84	Denver, CO 96th ARCOM Quade Hall Fitzsimons AMC Denver, CO 80240	Admin & Civil Law Criminal Law	MAJ Ward D. King MAJ Craig S. Schwender CPT Thomas W. McShane	COL Charles B. Howe 4605 Talbot Boulder, CO 80302 Ofc: (303) 866-3611 Hm: (303) 499-8280
12.	3-4 Mar 84	Columbia, SC 120th ARCOM USC School of Law Columbia, SC	Admin & Civil Law International Law	MAJ Mark A. Steinbeck MAJ John H. O'Dowd, Jr. COL Richard K. Smith	LTC William W. Wilkins, Jr. 20 Craigwood Road Greenville, SC 29607 Ofc: (803) 233-7081 Hm: (803) 277-7600
13.	10-11 Mar 84	Orlando, FL 81st ARCOM Orlando Hyatt Hotel Orlando, FL	Criminal Law Admin & Civil Law	LTC William P. Greene LTC John C. Cruden COL Harry C. Beans	LTC Bruce C. Starling 200 E. Robinson St., Ste 1475 Orlando, FL 32801 (305) 841-7000
	13-14 Mar 84	Puerto Rico PR ARNG HQ PR ARNG Conference Room San Juan, PR	Criminal Law Admin & Civil Law	LTC William P. Greene LTC John C. Cruden COL Harry C. Beans	CPT Walter Perales P.O. Box 1701 San Juan, PR 00907 FTS 753-9454
14.	17-18 Mar 84	San Francisco, CA 5th MLC 6th US Army Conference Room Presidio of San Francisco, CA 94129	Contract Law International Law	MAJ James O. Murrell MAJ Sanford W. Faulkner CPT Thomas W. McShane	CoL Joseph W. Cotchett 4 West Fourth Ave. San Mateo, CA 94402 Ofc: (415) 342-9000 Hm: (415) 348-5328
15.	24-25 Mar 84	St. Louis, MO 102d ARCOM Site TBD	Criminal Law Contract Law	CPT (P) Lawrence A. Gaydos LTC Joseph L. Graves, Jr. CPT John P. Ley, Jr.	LTC Robert L. Hartzog 211 South Central Clayton, MO 63105 (314) 863-2000
16.	31 Mar- 1 Apr 84	Columbus, OH 83d ARCOM Conference Room, Bldg. 306 Defense Construction Supply Center Columbus, OH	Contract Law International Law	MAJ Roger W. Cornelius MAJ James F. Gravelle CPT Thomas W. McShane	COL Nicholas B. Wilson P.O. Box 16515, DCSC Columbus, OH 43216 (614) 236-3702
17.	14 Apr 84	San Antonio, TX 90th ARCOM HQs, 90th ARCOM 1920 Harry Wurzbach Hwy San Antonio, TX 78289	Criminal Law International Law	MAJ Stephen D. Smith MAJ Sanford W. Faulkner COL Harry C. Beans	MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 656-2602
18.	15 Apr 84	Pittsburgh, PA 99th ARCOM Malcolm Hay USAR Center 950 Saw Mill/Run Road Pittsburgh, PA 15226	Criminal Law Contract Law	MAJ Patrick Finnegan MAJ James O. Murrell CPT John P. Ley, Jr.	CPT Ernest Orsatti 219 Fort Pitt Blvd Pittsburgh, PA 15222 (412) 281-3850

19.	28-29 Apr 84	Chicago, ILL 86th ARCOM SJA Conference Room Fort Sheridan, ILL	Admin & Civil Law Criminal Law	MAJ John F. Joyce MAJ Alan K. Hahn CPT John P. Ley, Jr.	LTC William Raysa 1011 Lake Street, Suite 332 Oak Park, ILL 60301 (312) 386-7273
20.	5 May 84	Washington, D.C. 97th ARCOM First US Army Conference Center Fort Meade, MD	Admin & Civil Law Criminal Law	MAJ Michael E. Schneider MAJ Kenneth H. Clevenger COL Richard K. Smith	LTC Charles E. Brookhart 4218 Shannon Hill Road Alexandria, VA 22310 Ofc: (202) 633-3564 Hm: (703) 960-6344
21.	12-13 May 84	New Orleans, LA 2d MLC USAR Center 5010 Leroy Johnson Dr. New Orleans, LA 70146	Admin & Civil Law Criminal Law International Law	MAJ William C. Jones MAJ Michael C. Chapman LTC Daniel E. Taylor COL Harry C. Beans	MAJ H. Bruce Shreves One Shell Square, Ste 4300 New Orleans, LA 70139 (504) 522-3030
Trip	**Date**	**City, Host Unit And Training Site**	**Instructors/ Subjects**	**Action Officers Reserve Affairs Rep**	**Address & Phone Nos.**
Trip	**Date**	**City, Host Unit And Training Site**	**Subjects**	**Instructors/ Reserve Affairs Rep**	**Action Officers Address & Phone Nos.**
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FROM THE DESK OF THE SERGEANT MAJOR

By Sergeant Major Walt Cybart

SQT for 71D and 71E

The distribution of SQT notices for legal clerks and court reporters took place in June 1983. Some significant changes from the past will take place during the July-September 1983 test cycle. The job site and hands-on components have been eliminated. These two components will not be graded for record as a portion of the SQT. Secondly, the common tasks test (CTT) procedure has been established. All soldiers in the grades E-1 through E-7 are expected to be tested in the common tasks skills and evaluated in accordance with *The Soldiers Manual of Common Tasks* (FM 21-2, Dec. 1982). A change in the SQT scoring system has been implemented, the impact of which is not yet measurable. SQT test results will be scored on an overall percentage of questions answered correctly, rather than by the current system of the percentage of "GO"s received. "GO/NOGO"s for each task will still be reflected, but only for the narrow purpose of identifying weak areas. With the strong SQT training program we have in the Corps, our legal clerks and court reporters will continue to do well on the SQT. The chief legal clerks must continue to insure that *all* legal clerks and court reporters in their jurisdictions receive the proper training. Special emphasis should be placed on training the legal clerks who are assigned to the battalions and brigades, since they usually are not exposed to claims and legal assistance procedures.

71E Applications

In order to give uniform guidance for 71E applications so that they may be properly evaluated for approval or disapproval by MILPERCEN, the following items should be included with 71E applications:

a. DA Form 4187 (completed IAW DA Pam 600-80);

b. Report of results of typing test;

c. Statement of recommendation by GCM jurisdiction SJA. The statement should include a verification of normal speech patterns;

d. A report of results of hearing test;

e. Commander's statement of record of disciplinary action or adverse information;

f. Commander's statement of record of weapons qualifications, PT test results, and height and weight data;

g. Legible copy of service member's DA Forms 2 & 2-1;

h. A copy of English composition and comprehension test results; and

i. A statement of recommendation by chief legal clerk or senior court reporter.

Remarks by Brigadier General Donald W. Hansen, Chief Judge, USALSA, at the 3d Annual Refresher Training Course for Chief Legal Clerks and Court Reporters

Thank you, SGM Cybart, for your kind words of introduction. I am very pleased and honored to have been offered the opportunity to address this group tonight. From time to time, I am called upon to speak to various elements or offices within the Corps but seldom do I have the opportunity to attend and speak to a gathering of the senior members of our Noncommissioned Officers Corps—for this opportunity I am especially grateful.

I think back over my career—both as an officer of the line and as a judge advocate—and I recall how many times my "fat has been pulled from the fire" by a young legal clerk or an older NCO. The number and occasion are a source of some embarrassment to me so I trust you will not require me to dwell upon them. Yet, I can speak from experience when I say that I know what you and your people do—how incredibly important that work is to the mission of the Corps—how ever increasing are your areas of responsibilities as the role of the legal community expands within the Army—and how often—like the football lineman who sweats in the dirt so that the halfback can run to glory—your role is seemingly unappreciated by the very people who depend on you for so much—our well meaning but sometimes inexperienced young judge advocates.

The purpose of my talk tonight is not to dwell on what you all have accomplished but speak instead of another challenge which faces all of us in positions of responsibility—the challenge of leadership. Each of you have been around this Army for a considerable period so it may seem like I'm preaching to the choir when I discuss the concept of leadership and the importance of being a soldier and a professional. I'm satisfied, however, that over the course of the last decade that the Army as a whole and the JAG Corps in particular has spend a great deal of time talking about "managing assets" and "knowing your job" with a corresponding decrease in the emphasis on utilization and development of leadership and soldierly skills. The late 60's and 70's were periods in which Madison Avenue management replaced basic leadership in the Army.

I believe and I think I also speak for The Judge Advocate General when I say that this was a mistake and the senior leadership of the Corps is determined that to the extent this is true we will turn this horse around. To be sure we have a responsibility to effectively manage resources. We owe that to the Army and to the taxpayers who pay our salaries. Yet it is important to remember that while we manage resources we lead soldiers. "Soldiers cannot be managed to their death, they must be led there." In the last analysis, or "the bottom line" as our Madison Avenue friends would say, that is our duty.

The direct responsibility for leading, educat-

ing and developing a sense of professionalism as a soldier lies with our senior judge advocates in the case of our young lawyers and essentially with each of you in the case of our younger NCOs and legal clerks. They must understand that they are soldiers first and foremost albeit soldiers with particular skills of which they can be proud.

How do we best get this message across—I can speak and write on the subject as can The Judge Advocate General and the Chief of Staff of the Army but, as is the case with most things that matter in life, it's not what we say but what we do that counts. Each of you will help achieve the objectives of which I speak through your daily contacts with those who work for and with you. Leadership is basically "the art of influencing others" to act and to want to act in a disciplined way. Discipline for the soldier is doing the right thing at the right time without supervision. How do you—each of you—reinforce change in attitude and conduct?

First, *lead by example.* You must be ever aware that at your level others will follow your example whether that example is good or bad. Realizing this and accepting the responsibility incumbent with your rank, be constantly aware that your personal and professional conduct sets the pace for others to follow. You are always in the spotlight cast by your subordinates. If you are overweight, they will be overweight. If you do not take the PT test, they will not take the PT test. Setting the example is the most basic but most important tenet of leadership.

Second, *be a professional soldier.* Your primary expertise is in the legal support field but your profession is that of a soldier. Know those soldierly skills which are common to all—from general to private—and assist your subordinates in developing their military skill level. Maintain a good military appearance, bearing and state of physical fitness. Military history is full of examples of "technical" personnel who were called upon to perform soldierly duties. One such example was Colonel Blanton Winship who as a judge advocate commanded the 110th and 118th Infantry in WWI, earning the Distinguished Service Cross and Silver Star for gallantry. Colonel Winship later became The Judge Advocate General. More recently judge advocates in the 1st Infantry Division led night ambush patrols in Vietnam, composed of judge advocate enlisted personnel. There is no reason to believe that our people will sit out the fighting in some cushiony, safe, rear area location during any future conflicts. Your people will look to you to see how they should carry themselves—they will respect you only as a professional. Be one!

Third, *stay on top of the technical aspects of the profession.* We can't teach others what we don't know ourselves. This requires some pretty honest and tough self examination of our abilities, skills and deficiencies in order to identify those areas where we need to reeducate ourselves or polish our own skills. You must be able to do any job of any subordinate, and do it better. We are bringing in more and more bright, young, energetic people. It's a challenge to keep up with many of these folks but it's a challenge we must accept. To do so we cannot just sit on our duffs and await a file to come to us. We have to aggressively work the system, check it out, fine tune it, get out and see what is going on, and manage the processes. We are supervisors and technical experts—not just paper pushers.

Fourth, *identify those young soldiers with leadership potential.* You must recognize them, challenge them, and reward them where you can. They are the leaders of the future and we have a responsibility to build from within. Every clerk should be trained so well that he can perform the next higher job. The battalion clerk should know how to do the brigade clerk's job and the brigade clerk the position in the SJA office. The E-4 should know how to do the E-5's job. Whatever else we do, the real test of our stewardship will come after we are gone. Whether we have done our job right depends on how well we have trained our successors, and training our successors is as important as what we do on a daily basis. I have taken personal pride in having commanders tell me that my office functioned just as well when I was gone as when I was there. That is the way it should be. If our successors are quality administrators, technically proficient, well motivated, and possessed of those soldierly qualities and skills required of

members of the armed services, we will have earned our pay and they will have earned our jobs. If not, the Corps would have been better off if we had not passed this way. Every judge advocate should aspire to get General Clausen's job, and every enlisted legal member should aspire and work toward getting SGM Cybart's job. If they do not, they are not worth having. It is our function to teach them how to get our jobs. We should have no "secret" keys to success. Whatever "secrets" we have identified in our professional lives should be known to and available to everyone who wishes to make use of them.

In these four ways and utilizing the examples set by those who've motivated you in the past, we will build and reinforce the concept of the professional legal soldier. That is our challenge, and the goal of the Corps. As George Allen has often said, "The future is now," and the responsibility is ours. I know that the Corps can expect your full support in this important undertaking.

CLE News

1. 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 MACOMs 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).

2. Important Change—Chief Legal Clerks/ Court Reporter Refresher Training Course

The Chief Legal Clerks/Court Reporter Refresher Training Course, previously scheduled for 11-13 July 1984, will be held 22-25 May 1984. Attendees are cautioned not to arrive in Charlottesville earlier than noon on 21 May as civilian lodging facilities will be occupied due to the University of Virginia commencement and TJAGSA quarters will be occupied by Military Judge Course students.

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniversary 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. TJAGSA CLE Course Schedule

October 11-14: 1983 Worldwide JAG Conference

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

October 17-21: 6th Claims (5F-F26).

October 24-28: 10th Criminal Trial Advocacy (5F-F32).

October 31-November 4: 13th Legal Assistance (5F-F23).

November 7-9: 5th Legal Aspects of Terrorism (5F-F43).

November 14-18: 1st Advanced Federal Litigation (5F-F29).

November 14-18: 17th Fiscal Law (5F-F12).

November 28-December 2: 6th Administrative Law for Military Installations (5F-F24).

December 5-9: 24th Law of War Workshop (5F-42).

December 5-16: 97th Contract Attorneys (5F-F10).

January 9-13: 1984 Government Contract Law Symposium (5F-F11).

January 16-20: 73d Senior Officer Legal Orientation (5F-F1).

January 23-27: 24th Federal Labor Relations (5F-F22).

January 23-March 30: 103d Basic Course (5-27-C20).

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training

June 18-29: BOAC: Phase III.

July 9-13: 13th Law Office Management (7A-713A).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-18: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference

October 15-December 14: 105th Basic Course (5-27-C20).

5. Civilian Sponsored CLE Courses

December

1: PBI, Social Security Disability, York, PA.

1-2: BNA, Employment Law Conference, Washington, DC.

1-2: PLI, Federal Civil Practice, San Francisco, CA.

1-2: PLI, Investment Companies, New York, NY.

1-2: PLI, Patent Litigation, New York, NY.

2: KCLE, Domestic Relations, Lexington, KY.

2: ABICLE, Estate Planning, Birmingham, AL.

2: PBI, Fiduciary Income Taxes, Stroudsburg, PA.

2: PBI, Social Security Disability, Mercer, PA.

2-3: PLI, Legal Malpractice, San Francisco, CA.

2-3: PLI, Occupational Disease Litigation, San Francisco, CA.

2-3: ATLA, Proof of Damages, San Francisco, CA.

3: PBI, Social Security Disability, Wellsboro, PA.

4-9: NCDA, Prosecutor's Investigators School, Huntsville, TX.

5-6: PLI, Title Insurance, Los Angeles, CA.

8: VACLE, Trusts & Estates Seminar, Roanoke, VA.

8-9: BNA, Employment Law Conference, Houston, TX.

8-9: ALIABA, Trial Evidence/Techniques in Federal/State Courts Mechanics of Underwriting, San Francisco, CA.

9: VACLE, Trusts and Estates Seminar, Richmond, VA.

10: UMKC, Review of Recent Developments in Federal Tax, Kansas City, MO.

12-13: PLI, Equipment Leasing, New Orleans, LA.

13: PBI, Social Security Disability, Pottsville, PA.

14: PBI, Social Security Disability, Media, PA.

15: CCLE, Colorado Practice Institute, Fort Morgan, CO.

15: VACLE, Trusts and Estates Seminar, McLean, VA.

16: VACLE, Trusts and Estates Seminar, Norfolk, VA.

16-17: KCLE, Kentucky Hospital Law, Lexington, KY.

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

6. The 1984 Government Contract Law Symposium:

The Contract Law Division of The Judge Advocate General's School is pleased to announce the following tentative topics for the 1984 Government Contract Law Symposium: "The Legislative Outlook from DOD"; "The DOD Inspector General—Initial Experiences"; "Effective Program Management"; "A Construction Law Update"; "A Review of the Claims Court and the Federal Courts Improvement Act"; "State Taxation of Federal Contractors"; "Equal Opportunity and Government Contracts—A Status Report"; "Recent Developments at the Boards of Contract Appeals"; "GAO: Recent Developments"; "Bonding Requirements in Government Contracts—A Seminar." The Symposium will be held 9-13 January 1984.

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 B071083	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-1
AD B071084	Criminal Law, Procedure, Trial/JAGS-ADC-83-2
AD B071085	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-3
AD B071086	Criminal Law, Crimes & Defenses/JAGS-ADC-83-4
AD B071087	Criminal Law, Evidence/JAGS-ADC-83-5
AD B071088	Criminal Law, Constitutional Evidence/JAGS-ADC-83-6
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. Articles

Jackson & Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. Pa. L. Rev. 1 (1982).

Levine, *Toward Competent Counsel*, 13 Rutgers L. Rev. 227 (1982).

Linenberger, *What Behavior Constitutes Sexual Harassment?*, 34 Lab. L.J. 238 (1983).

Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14 (1982).

Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 Judicature 363 (1983).

Michelman *A Brief Comparison of Government and Commerical Contract Law and Remedies*, St. Louis B.J., Spring 1983, at 16.

Nagle, *Discretion in the Criminal Justice System: Analyzing, Channeling, Reducing, and Controlling It*, 31 Emory L.J. 603 (1982).

Pardo, *The Convention on the Law of the Sea: A Preliminary Appraisal*, 20 San Diego L. Rev. 489 (1983).

Prer, *Administration of Department of Defense Contracts—A Guide Through the Regulations and Procedures*, St. Louis B.J., Spring 1983, at 27.

Stockenberg, *Bond Claims on Government Construction Jobs Under the Miller Act and State Statute as Substitutes for Mechanics Liens*, St. Louis B.J., Spring 1983, at 36.

Taylor & Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 Cal. West. L. Rev. 269 (1983).

Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 Geo. L.J. 1129 (1983).

Walker, *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 La. L. Rev. 735 (1983).

Weigend, *Sentencing in West Germany*, 42 Md. L. Rev. 37 (1983).

Weiner, *In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice*, 58 Notre Dame L. Rev. 60 (1982).

Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 La. L. Rev. 961 (1983).

Case Comment, *Civilian Speech on Military Bases: Judicial Deference to Military Authority*, Persons for Free Speech at SAC v. United States Air Force, 71 Geo. L.J. 1253 (1983).

Case Comment, *Re-examining the Use of Drug-Detecting Dogs Without Probable Cause*, United States v. Beale, 71 Geo. L.J. 1223 (1983).

Comment, *Supplements to Environmental Impact Statements: Implementation of the Standards Set by the Council on Environmental Quality*, 35 Me. L. Rev. 111 (1983).

Comment, *Attorney Malpractice: Problems Associated With Failure-to-Appeal Cases*, 31 Buffalo L. Rev. 583 (1982).

Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 Creighton L. Rev. 487 (1982-1983).

Comment, *The Erosion of Probable Cause*, 13 N.C. Cent. L.J. 212 (1982).

Comment, *Spousal Benefits and the Pregnancy Discrimination Act of 1978*, 13 Seton Hall L. Rev. 323 (1983).

Note, *Two Models of Prosecutorial Vindictiveness*, 17 Ga. L. Rev. 467 (1983).

Note, *Punitive Damages in Constitutional Tort Actions*, 57 Notre Dame Law. 530 (1982).

Note, *Application of the Advocate-Witness Rule*, 1982 S. Ill. U.L.J. 291.

Note, *Expert Testimony on the Battered Wife Syndrome: A Question of Admissibility in the Prosecution of the Battered Wife for the Killing of Her Husband*, 27 St. Louis U.L.J. 407 (1983).

Note, *Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege*, 36 Sw. L.J. 1175 (1983).

Note, *Awakening From the Exclusionary Trance: A Balancing Approach to the Admissibility of Hypnotically Refreshed Testimony*, 61 Tex. L. Rev. (1982).

Note, *Compelled Testimony as Derivative Use of Prior Use-Immunized Testimony*, 51 U. Cinci. L. Rev. 652 (1982).

Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 Wash. U.L.Q. 1387 (1983).

Note, *Prosecutorial Duty to Disclose Unrequested Impeachment Evidence: The Fifth Circuit's Approach*, 61 Wash. U.L.Q. 163 (1983).

Recent Developments, *The Uniform Arbitration Act*, 48 Mo. L. Rev. 137 (1983).

3. Regulations and Pamphlets

Number	*Title*	*Change*	*Date*
AR 190-52	Military Police/Countering Terrorism and Other Major Disruptions on Military Installations		15 Jul 83
AR 310-1	Publications, Blank Forms and Printing Management	I02	13 Jul 83
AR 340-17	Office Management/Release of Information and Records From Army Files	I01	28 Jun 83
AR 340-21	The Army Privacy Program	I01	22 Jul 83
AR 380-5	Department of the Army Information Security Program		1 Aug 83
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program (ADAPCP)	I04	28 Jun 83
AR 600-200	Personnel General Enlisted Personnel Management System	I13	24 Jun 83
AR 600-200	Personnel General Enlisted Personnel Management System	I14	5 Jul 83
AR 612-2	Personnel Processing—Preparing Individual Replacements for Overseas Movement (POR)	I01	28 Jun 83
AR 635-100	Personnel Separations/Officer Personnel	I04	25 Jun 83
AR 930-1	Army Use of USO Services		1 Aug 83
DA PAM 608-33	Casualty Assistance Handbook	2	15 Jul 83

By Order of the Secretary of the Army:

Official:

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

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

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