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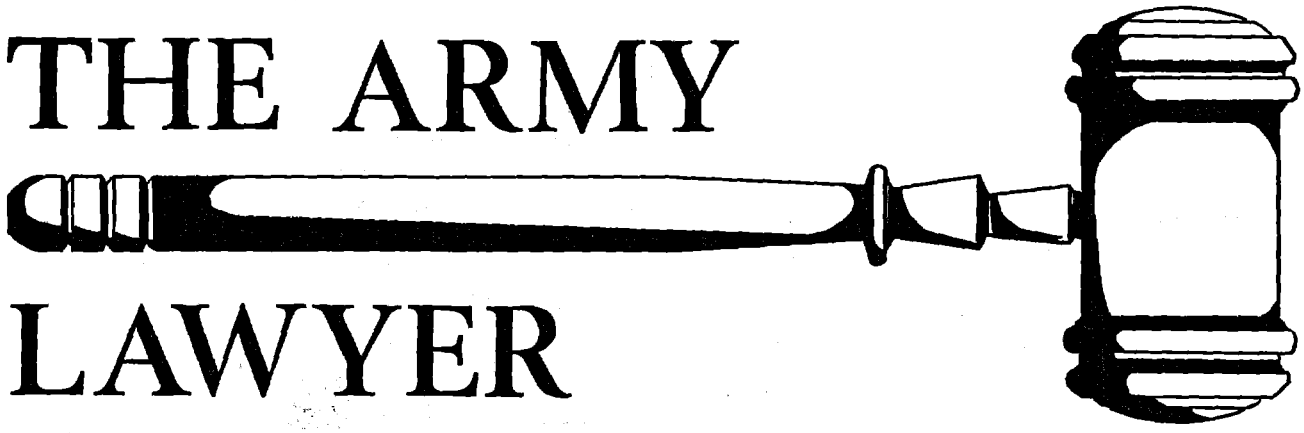

Headquarters, Department of the Army

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Attorneys' Fees and Expenses Under the Equal Access to Justice Act

Major James A. Hughes, Jr.
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Fees of Attorneys, Solicitors, and Proctors.

In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided,* That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law where judgement is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

For scire facias and other proceedings on recognizances, five dollars.

For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal. . ."

—Act of Feb. 26, 1853, 10 Stat. 161-162 (1855).

I. Introduction

The Equal Access to Justice Act (EAJA) was enacted to eliminate the financial burden of litigation as a deterrent to challenging unreasonable government action.[1] Congress intended small businesses and individuals to be the primary beneficiaries of the Act. The EAJA permits the prevailing party in certain administrative proceedings and judicial actions[2] to recover attorneys' fees, expenses and costs.[3] Since its enactment, attorneys' fees and expenses have been sought in a wide variety of actions, including habeas corpus proceedings, public contract disputes, civilian personnel actions, military personnel actions, and suits for constitutional torts. The EAJA went into effect on 1 October 1981 for a period of three years. Under a "sunset provision" the EAJA will expire on 1 October 1984, unless legislation is enacted to extend it.[4] This article discusses the Equal Access to Justice Act and its application to the military departments. A portion of the article will examine recent cases which interpret and apply the EAJA.

[1]Equal Access to Justice Act § 202, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504 (Supp. V 1981); 28 U.S.C. § 2412 (Supp. V 1981)) [hereinafter cited as EAJA] states:

Findings and Purpose

Sec. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States shall be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

[2]EAJA § 203, 5 U.S.C. § 504 (Supp. V 1981), created a new section which pertained to attorneys' fees, expenses, and costs arising out of administrative actions. EAJA § 204, 28 U.S.C. § 2412 (Supp. V 1981), provides for attorneys' fees, expenses, and costs arising out of judicial proceedings.

[3]The distinctions between attorneys' fees, expenses, and costs are discussed in Section III of the text.

[4]EAJA §§ 203(c), 204(c). S. 919, 98th Cong., 1st Sess. (1983) would delete the sunset provision and make the Act permanent.

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II. Entitlement to Attorneys' Fees, Expenses, and Costs Prior to the Enactment of the Equal Access to Justice Act

It is well established in American common law that each party pays its own attorneys' fees. Under this "American rule," the prevailing litigant is not entitled to collect attorneys' fees from the loser.[5] There are, however, numerous statutory exceptions. For example, the Civil Rights Act of 1964, the Civil Rights Act of 1968, the Organized Crime Control Act, the Privacy Act, the Freedom of Information Act, the Voting Rights Act of 1975, the Consumer Product Safety Act, and the Civil Rights Attorneys Fees Awards Act of 1976, all make some provision for the recovery of attorneys' fees.[6]

There are also two common law exceptions to the "American rule": the bad faith exception and the common benefit rule. Courts have used their inherent equitable power to develop these exceptions. Under the bad faith exception, fees may be assessed against a party who has willfully disobeyed an order of the court.[7] Fees may also be awarded when the losing party has acted "vexatiously, wantonly, or for oppressive reasons."[8]

The common benefit rule, also called the common fund doctrine, applies when a litigant prevails and establishes a common fund for recovery or obtains a substantial nonmonetary benefit for a class through litigation. The courts, recognizing the difficulty in collecting fees from each individual of a particular class, have allowed recovery of attorneys' fees from the common fund or directly from the losing party. "The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."[9]

The Supreme Court has recognized these two common law exceptions to the "American rule", but has declined to expand them further.[10] In *Alyeska Pipeline Service Co. v. The Wilderness Society*, the Court reversed an award for attorneys' fees based upon a "private attorney general" theory which vindicated an important statutory benefit for the public.[11] The Court reasoned that judicial allocation of attorneys' costs, without statutory authority, was contrary to the "American rule" and would invade the province of the legislature.

The "American rule" was made applicable by statute to all civil actions in which the United States was a party.[12] Prior to the EAJA, section 2412 of Title 28, U.S. Code, did not permit attorneys' fees to be assessed against the government without express statutory authorization. Section 2412 also prevented assessment of attorneys' fees against the government under the common law exceptions to the "American rule".[13]

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[5]Alyeska Pipeline Service Company v. The Wilderness Society, 421 U.S. 240 (1975). *See generally* 7 Am. Jur. 2d *Attorneys at Law* §§ 238-39 (1980).

[6]H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4987. For a more detailed listing of federal statutes authorizing awards of attorneys' fees, *see Alyeska*, 421 U.S. at 260 n.33.

[7]Toledo Scale Co. v. Computing Scale Company, 261 U.S. 399, 426-28 (1923).

[8]F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126-31 (1974) (citing Vaughan v. Atkinson, 369 U.S. 527 (1962)).

[9]Boeing v. Gemert, 444 U..S 472, 478 (1980). *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (extended common benefit theory to include nonmonetary benefits as a basis for award in stockholder's derivative suit); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) (court permitted equitable award of attorneys' fees and costs from the proceeds of bond sales); Miller-Wohl Co. v. Commissioner of Labor and Industry, State of Montana 694 F.2d 203 (9th Cir. 1982) (common benefit exception applies when the court can accurately shift the litigant's expenses to those who benefited from them, amicus curiae not entitled to award of attorneys' fees under common benefit exception).

[10]*Boeing*, 444 U.S. at 478-79.

[11]421 U.S. at 270-71.

[12]28 U.S.C. § 2412 (1976) provided in part:

> Except as otherwise provided by statute, a judgement for costs, as enumerated in section 1920 of this title but *not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. [emphasis added] [later amended by EAJA].

[13]H.R. Rep. 96-1418, *supra* note 7.

III. Attorneys Fees, Expenses, and Taxable Costs

Monetary outlays associated with pursuing a claim in an administrative action or a judicial proceeding fall into three categories: attorneys' fees, expenses, and taxable costs. The EAJA treats these three categories as separate and distinct concepts. The distinctions are important because the standards for award under the EAJA are different.

Attorneys' fees are compensation for personal services rendered by a lawyer on behalf of a particular client. In practice, attorneys' fees normally include the "reasonable and necessary out-of-pocket expenses of providing a lawyer's services that are not covered by the hourly rate."[14] This encompasses office overhead expenses such as utilities, rent, and secretarial support, and incidental expenses such as postage, local transportation, and telephone tolls.[15]

The EAJA limits attorneys' fees to a maximum of $75 per hour and makes no provision for overhead or other incidental expenses. An agency, however, may increase the maximum hourly rate awarded in administrative actions if the agency determines that the cost of living or other special factors, such as the limited availability of qualified attorneys, justify the higher rate.[16] Similarly, a court may increase the maximum hourly rate awarded in judicial proceedings for the same reasons.[17]

In determining appropriate attorneys' fees, the courts frequently apply the "lodestar" concept. This concept adopts a market value approach to attorneys' fees. It is well developed and has been used under other statutes authorizing the award of attorneys' fees.[18] The "lodestar" is a base fee determined by multiplying the reasonable number of hours expended on a case by the reasonable hourly rate at which counsel should be compensated. The base fee or "lodestar" may then be adjusted for a variety of factors. A premium may be awarded if counsel would have obtained no fee in the event the action was unsuccessful. The "lodestar" may be increased or decreased to recognize legal representation of unusually superior or inferior quality.[19]

Under the EAJA, the "lodestar" cannot be adjusted so that the rate of fee compensation is greater than $75 per hour without some special circumstance or an increase in the cost of living. Neither the EAJA nor the legislative history of the EAJA mentions the "lodestar" concept. Since the "lodestar" concept is merely an application of market valuation technique and does not favor either side, it is well suited for application to the EAJA.

Taxable costs are defined in section 1920 of Title 28, U.S. Code, which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

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[14]Bennett v. Department of the Navy, No. 16-82, slip op. at 10 (Fed. Cir. Feb. 4, 1983).

[15]*Id.*; *See* 7 Am. Jur. 2d *Attorneys at Law* § 288 (1980).

[16]5 U.S.C. § 504(b)(1)(A). Fees are also allowable for agents. The hourly rates are the same as for attorneys. Awards greater than $75 per hour must be pursuant to agency regulations.

[17]28 U.S.C. § 2412(d)(2)(A)(ii) (Supp. V 1981).

[18]*See* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1323 n.2 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc). *Copeland* set the "lodestar" standard for Title VII litigation, but "lodestar" market valuation has also been applied to civil cases in which an award of attorneys' fees is authorized by statute, such as the Toxic Substances Control Act, the Freedom of Information Act, and the Truth in Lending Act.

[19]*National Ass'n of Concerned Veterans*, 675 F.2d at 1323.

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgement or degree.[20]

Section 1920 does not list deposition costs but,"it is well settled that deposition costs are included by implication in the phrase 'stenographic transcript' under section 1920(2)."[21] Section 1920(4) is broadly construed to include "[the] reasonable expense of preparing maps, charts, graphs, photographs, motion pictures, photostats and kindred materials."[22] Transcripts of cockpit voice recorders, models, statistical consulting costs, computer expenses, aerial photographs, photocopying, and technical drawings have been allowed as taxable costs.[23]

Depositions and exhibits need not be used at trial. A district court has discretion to award costs for depositions and exhibits which were "necessarily obtained for use in the case,"[24] even though not introduced into evidence.[25] The court, however, must distinguish between the cost of preparing for trial and the cost of producing an exhibit. Trial preparation costs are not permitted as taxable costs under section 1920(4).[26]

Expenses cannot be defined concisely. Expenses are those expenditures made in the preparation or presentation of a case that are not classified as either attorneys' fees or taxable costs. In judicial proceedings, the EAJA allows for recovery of "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case...based upon [the] prevailing market rate for the kind and quality of the services furnished."[27] Expert witness fees are limited to the maximum rate of compensation paid for expert witnesses by the United States. There is a parallel provision for agency actions.[28]

IV. Significant Statutory Provisions of the Equal Access to Justice Act

A. Administrative Actions

The EAJA has two separate sections: one deals with agency adjudications, the other concerns civil actions. Section 504 of Title 5, U.S. Code, permits the prevailing party, other than the United States, to recover fees and expenses in adversary agency adjudications under the Administrative Procedure Act unless the position of the government was substantially justified or special circumstances make the award unjust. An adversary adjudication is one in which the agency is represented by counsel.[29]

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[20]28 U.S.C. § 1920 (1976 & Supp. V 1981).

[21]Bennett v. Department of the Navy, No. 16-82, slip op. at note 4 (Fed. Cir. Feb. 4, 1983).

[22]*In re* Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 687 F.2d 626, 631 (2d Cir. 1982) (quoting 6 *Moore's Federal Practice* § 54.77[6], at 1739 (2d ed. 1982)).

[23]*Id.*; Bennett, No. 16-82, slip op. at 12-13.

[24]28 U.S.C. § 1920(2),(4) (1976 & Supp. V 1981).

[25]*Air Crash Disaster*, 687 F.2d at 631.

[26]*Id.*

[27]28 U.S.C. § 2412(d)(2)(A) (Supp. V 1981).

[28]5 U.S.C. § 504(b)(1)(A) (Supp. V 1981). *See Bennett*, No. 16-82, slip op. at 5-14, for a discussion of fees, expenses, and taxable costs in an appeal of an adversary agency proceeding before the Merit Systems Protection Board.

[29]5 U.S.C. § 504(a)(1) (Supp. V 1981). Rate, licensing, and license renewal proceedings are excluded.

[30]H.R. Rep. No. 96-1416, *supra* note 7, at 4990.

[31]In Wallis v. United States, No. 453-79C (Ct. Cl. Nov. 25, 1981), plaintiff successfully sought correction of his military records to reflect retirement from the Air Force by reason of disability. His request for a 30-day extension to file for fees under the EAJA was denied on the grounds that the 30-day period is jurisdictional. In Bowers v. Moffett, No. 81-2674, (D.D.C. June 15, 1982), plaintiff filed his application for attorneys' fees pursuant to 28 U.S.C. § 2412(d)(1)(B) (Supp. V 1981) 180 days after a court approved settlement. The court denied the application and relied upon the clear and unequivocal language of the Act which directs that

A prevailing party must submit an application for fees and expenses within thirty days of final disposition in the adversary adjudication. An application may be filed even though the government intends to appeal the agency decision.[30] The thirty-day period is jurisdictional and cannot be waived.[31] The prevailing party must allege that the agency's position was not substantially justified. The agency or adjudication officer has discretion to reduce the award if the prevailing party had unreasonably protracted the proceedings.[32]

B. Judicial Proceedings

The EAJA preserves the former law which permitted the discretionary award of costs to the prevailing party in any civil action brought by or against the United States.[33] However, the former law made no provision for attorneys' fees and expenses. The EAJA makes two important changes regarding judicial awards. First, section 2412(b) of Title 28, U.S. Code, permits an award of attorneys' fees and expenses to the prevailing party. Under this section, the United States is liable for fees and expenses to the same extent that any other party would be liable under the common law or applicable statutes. This section does not create a new entitlement to fees and expenses, it merely waives sovereign immunity.

Second, section 2412(d) provides that in civil actions, other than tort cases, a court *shall* award attorneys' fees and expenses to a party who prevails over the United States, unless the court finds that the position of the United States was substantially justified or special circumstances would make the award unjust.[34] This provision also applies to judicial review of an adversary adjudication by a federal agency. The meaning of substantially justified is discussed below. As in administrative actions, the court has discretion to reduce an award if the prevailing party unreasonably protracted final resolution of the dispute.

C. Statutory Net Worth Prerequisites

A prevailing party under either section 504 of Title 5, U.S. Code, or section 2412(a), (b) of Title 18, U.S. Code, must meet statutory net worth requirements before recovering fees and expenses. If the prevailing party is an individual with a net worth over $1,000,000 or is a business which employs more than 500 employees or has a net worth over $5,000,000, that party is not entitled to recover under those sections of the Act.[35] Those provisions strongly favor small businesses. The waiver of sovereign immunity in section 2412(d) of Title 28, U.S. Code, applies regardless of net worth or number of employees. Thus a litigant who cannot meet the net worth requirements may still be able to recover fees and expenses from the United States.

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application for award *shall* be filed within thirty days of final judgement. Since neither the legislative history nor the EAJA itself defines "final judgment," the court found the common usage of the term in other contexts controlling, such as Fed. R. App. P. 4(a) and Fed. R. Civ. P. 54. It is arguable that this rationale would support a claim filed more for 30 days after entry of judgment but within the United States' 60-day appeal period since judgment is not final until the time for appeal has expired. *See generally* Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982) (action held pending on 1 Oct 81, since the 60-day period for appeal had not expired).

[32]5 U.S.C. § 504(a)(2),(3) (Supp. V. 1981).

[33]28 U.S.C. § 2412(a) (Supp. V 1981) preserves 28 U.S.C. § 2412 (1976).

[34]Fees have been denied in two cases on the grounds that "special circumstances" existed. In Matthews v. United States, 526 F. Supp. 993 (M.D. Ga. 1981), plaintiff was denied attorneys' fees on two grounds. First, the government's position was substantially justified; second, since the bulk of the court's opinion was completed before 1 October 1981, the effective date of the EAJA, a special circumstance existed which made the award of fees unjust. In Metropolitan National Bank of Farmington v. United States, No. 81-71842 (E.D. Mich. Mar. 16, 1982), the court denied a motion for fees under section 2412(b),(d). The civil action was against the Internal Revenue Service for failure to correct a wrongful tax levy. The court held that an award of fees would have been unjust because the plaintiff bank did not give the IRS adequate opportunity to correct the mistake before filing suit and the bank failed to provide full information to the IRS. *See generally* Aukes v. United States, No. 82-M-43 (D. Colo. Mar. 30, 1982). Where the court found that an award of attorneys' fees under EAJA would be unjust because the civil action was caused in large measure by plaintiff's failure to file tax returns.

[35]5 U.S.C. § 504(b)(1)(B) (Supp. V 1981); 28 U.S.C. 2412(d)(2)(B) (Supp. V 1981).

D. Substantially Justified

Awards of attorneys' fees and expenses under section 504 of Title 5, U.S. Code, and section 2412(d) of Title 28, U.S. Code, depend in most cases upon whether the position of the United States was "substantially justified." This raises three questions. What does "substantially justified" mean? At what point in time does the government take a position under the EAJA? Can fees and expenses be awarded when only part of the government's position is substantially justified?

The meaning of "substantial justification" is frequently litigated under the EAJA.[36] Two earlier versions of the EAJA were rejected by the Congress. One provided for an automatic award to the prevailing party, the other made awards purely discretionary. The enacted version of the EAJA applies a reasonableness standard which falls between the two rejected versions and is based upon Rule 37, Federal Rules of Civil Procedure.[37] The legislative history of the EAJA sets forth this standard:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the government can show that its case has a reasonable basis both in law and fact no award will be made.
>
> . . .
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This safety valve helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where

[36] *See* Kay Manufacturing Company v. United States, No. 478-73, slip op. at 6-10 (Fed. Cir. Feb. 18, 1983) (reasonableness of position of government is measured against law at the time the government is litigating the case); Gava v. United States, No. 317-48, slip op. at 8-11 (Fed. Cir. Feb 18, 1983) (the standard of substantial justification is reasonableness); Goldhaber v. Foley, 698 F.2d 193, 194-98 (3d Cir. 1983) (substantial justification in one claim does render defense against other claims substantially justified); Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 119-20 (6th Cir. 1982) (mere fact party loses or position is contrary to precedent does not mean position was not substantially justified); Knights of the K.K.K. v. East Baton Rouge Parish School Bd., 679 F.2d 64, 68 (5th Cir. 1982) (test is one of reasonableness); S & H Riggers & Erectors, Inc. v. O.S.H.A.R.C., 672 F.2d 426, 429-30 (5th Cir. 1982) (substantially justified standard not heightened beyond whether there was a reasonable basis in law or fact, government need not establish a substantial likelihood of prevailing); Cornella v. Schweiker, No. 79-5041, mem. op. at 5 (D.C. S.D. Dec. 15, 1982) (fact that government's position was not supported by substantial evidence does not require finding that position was not substantially justified and the standard falls between the common law "bad faith" exception and an automatic award of attorneys' fees to a prevailing party); Hornal v. Schweiker, 551 F. Supp. 612, 616-17 (M.D. Tenn. 1982) (substantially justified is a standard slightly above reasonableness, evidentiary standard is between little or no evidence and substantial evidence); Allen v. United States, No. 79C3812 (N.D. Ill. July 6, 1982) (government position was substantially justified in not abandoning claim for taxes based on uncorroborated statement by defendant); Twohey v. Sheet Metal Workers' Union, No. S-81-962 RAR (E.D. Cal. May 21, 1982) (where government request for injunctive relief was denied, position was still substantially justified where government acted on reasonable belief that National Labor Relations Act hasd been violated); Wolverton v. Schweiker, No. 78-1223, (D. Id. Mar. 2, 1982) (position of government not substantially justified when there was little or no evidence in administrative record to support the agency decision); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982) (government acted unreasonably and without substantial justification when GPO rejected plaintiff's low bid on the contract "with no more than a terse three-sentence letter"); Arvin v. United States, No. 81-6476-CIV-JAG (S.D. Fla. Feb. 10, 1982) (termination assessment made by IRS not substantially justified). For a comprehensive listing of cases *see* Digest of Court Cases Under the Equal Access to Justice Act, Pub. L. No. 96-481, U.S. Department of Justice, Office of Legal Policy (1982).

[37] "Substantially justified" was adopted from Fed. R. Civ. P. 37. *See* H.R. Rep. 96-1418, *supra* note 7, at 4997. *See also* Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act, United States Department of Justice, Office of Legal Policy, 38-40 (1981).

> equitable considerations dictate an award should not be made.[38]

Under this standard, the government is not precluded from advancing a new or novel theory of law. Government attorneys may act zealously without obligating their client to pay fees and expenses since the courts should not look to the government's likelihood of success but rather to the reasonableness of its position. The United States has the burden of establishing that its position was substantially justified.

In determining if the position of the United States was substantially justified, the courts will examine each of plaintiff's claims. In *Goldhaber v. Foley*,[39] the court permitted recovery of expenses attributable to one of two claims. The government prevailed on one claim, but its position was not substantially justified on the other. The court found "it incongruous to deny fees to a prevailing party who identifies and defeats one unreasonable government position simply because the government had substantial justification for defending a second claim in the same action."[40] The court reasoned that since the purpose of the EAJA was to deter unreasonable government action, allocation of expenses between justifiable and unjustifiable positions was required. The court also correctly noted that this is consistent with other fee-shifting statutes.

Substantial justification under section 2412(d) refers to the position taken by the government during the course of a civil action.[41] The prelitigation position of the government is irrelevant; fees and expenses incurred in dealing with the agency are not recoverable.[42] Similarly under section 504, fees and expenses incurred in an *adversary* agency proceeding are recoverable from the agency if the agency's position was not substantially justified and no special circumstances exist which would make the award unjust.

E. Prevailing Party

While there is a dearth of reported cases interpreting the meaning of "prevailing party" under the EAJA, the legislative history of the Act provides clear guidance:

> Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of final judgement following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement...; if the plaintiff has sought a voluntary dismissal of the groundless complaint...; or even if he does not ultimately prevail on all issues.[43]

Useful analogies may be drawn from the Civil Rights Attorneys Fees Awards Act. Success on *any* issue generally causes the party to prevail.[44]

F. Must Fees Be Incurred?

The award of attorneys' fees using market valuation techniques has raised an interesting issue involving public interest attorneys. Must attorneys' fees actually be incurred by plaintiff to be recoverable under the EAJA? In *Hornal v. Schweiker*,[45] a social security disability claimant had sought attorneys' fees under the EAJA after successfully appealing an adverse agency determination. He was represented by the Van-

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[38]H.R. Rep. 96-1418, *supra* note 7, at 4989-90.

[39]698 F.2d 193 (3d Cir. 1983).

[40]*Id.* at 197.

[41]Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982).

[42]*See* Muth v. Secretary of the Army, 525 F. Supp. 604 (D.D.C. 1981). Plaintiff, who prevailed in part at agency level in age discrimination action and later brought suit in district court seeking additional relief, was precluded from recovering attorneys' fees for work performed at agency level. *See also* Wolverton v. Schweiker, No. 78-1223 (D. Id. Mar. 2, 1982) (no award of attorneys' fees could be made under the EAJA since social security proceedings at the administrative level are not adversarial).

[43]H.R. Rep. No. 96-1416, *supra* note 7, at 4990.

[44]*See generally* those cases which define "substantially justified", *supra* note 36.

[45]551 F. Supp. 612 (M.D. Tenn. 1982).

derbilt Legal Clinic and incurred no actual fees or expenses. After finding that the EAJA applied and that the government's position was not substantially justified, the District Court for the Middle District of Tennessee held that "the government cannot escape payment of attorneys' fees simply because plaintiff was represented without charge, by the Vanderbilt Legal Clinic."[46] The court cited the House Report on the EAJA which states:

> In general, consistent with the above limitations [on maximum hourly fee rates] the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the act. In short, the award of fees is to be determined according to general professional standards.[47]

The court also cited *Washington v. Seattle School District No. 1*, in which the Supreme Court recognized that "the Courts of Appeals have held with substantial unanimity that publicly-funded legal services organizations may be awarded fees [under the Civil Rights Attorneys Fees Awards Act]."[48]

However, a contrary result was reached by the District Court for South Dakota based on similar facts in *Cornella v. Schweiker*.[49] The court denied attorneys' fees under the EAJA to a party who had successfully challenged a final decision by the Secretary of Health and Human Services denying social security disability benefits. The prevailing party was represented by a legal services organization and did not incur any obligation to compensate counsel for representation or expenses. In *Cornella*, the court found that the government's position was substantially justified, thereby barring recovery under section 2412(d). The court held in the alternative, however, that since plaintiff did not actually "incur" any financial burden within the meaning of the EAJA, he was not entitled to an award of fees and expenses. Since the EAJA does not define the word "incurred," the court applied a fundamental canon of statutory construction: "unless otherwise defined, words will be interpreted as taking their plain, ordinary, contemporary, and common meaning."[50] The court found that the legislative history did not indicate whether Congress contemplated fee awards to parties represented by public interest lawyers. Looking to the purpose of the EAJA, the court stated that the EAJA was enacted to eliminate deterrents to contesting unreasonable government action and concluded that this purpose would not be furthered by an award of attorneys' fees. The court distinguished other fee-shifting statutes which allowed public interest groups to recover reasonable attorneys' fees. The Civil Rights Attorneys Fees Awards Act of 1976 does not require that fees be incurred; rather, "In any action or proceeding to enforce [certain] provision[s]. . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs."[51]

The District Court of Vermont reached the same result in *Kinne v. Schweiker*.[52] There, a successful plaintiff in an insurance disability action was represented by a legal clinic and sought an award of attorneys' fees. The court looked to the legislative history and purpose of the Act, and the net worth limitations of the EAJA. Since the plaintiff incurred no out-of-pocket expenses and did not face the prospect of dilution of any past-due benefits by an award, the court concluded he faced no economic deterrent and was not entitled to an award of attorneys' fees. The court also distinguished the fee-

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[46] *Id.* at 616.

[47] H.R. Rep. No. 96-1416, *supra* note 7, at 4994.

[48] 551 F. Supp. at 616 (quoting Washington v. Seattle School District No. 1, 102 S. Ct. 3187, 3204 n.31 (1982)).

[49] No. 79-5041, mem. op. at 5 (D. S.D. Dec. 15, 1982).

[50] *Id.* at 10.

[51] *Id.* at 14 (citing 42 U.S.C. § 1988 (1976 & Supp. V 1981)). *See supra* note 3 for purpose of EAJA.

[52] No. 80-81 (D. Vt. June 30, 1982).

shifting provisions of the EAJA from the civil rights statutes.[53]

The views expressed in *Cornelia* and *Kinne* seem to be better reasoned than the opinion in *Hornal*. These views also coincide closely with the rationale for enacting the EAJA. The district courts' opinions in all three cases leave open the question of whether or not a pro se litigant is entitled to an award of attorneys' fees.

V. Application of the Equal Access to Justice Act to the Military Departments

A. Public Contracts

There are two situations in which a contractor might seek attorneys' fees and expenses under the EAJA: when a contractor prevails at a board of contract appeals or when a contractor is successful in the Claims Court.

The first situation was resolved in *Fidelity Construction Company v. United States*.[54] Fidelity appealed a decision by the Department of Transportation Contract Appeals Board. The Board denied the application for fees because they were incurred prior to the effective date of the EAJA. The Board's decision implied that it was empowered to award fees under the Act. The Court of Appeals for the Federal Circuit upheld the Board's decision not to award fees but did so because it found that the "board of contract appeals is without jurisdiction to award fees under this Act retroactively or prospectively."[55] The court strictly construed the waiver of sovereign immunity contained in the EAJA. The court noted that section 504(a)(1) only authorizes the award of fees in those adversary adjudications subject to the Administrative Procedure Act. The court also noted that under the Contracts Disputes Act of 1978, boards of contract appeals are not subject to the Administrative Procedure Act. Therefore, the court concluded that there could not be any recovery under section 504.[56]

The court also rejected Fidelity's claim under section 2412(d)(3). This section permits a court to award fees and expenses in the judicial review of an adversary adjudication subject to the Contracts Disputes Act. Since the only issues being appealed were the non-award of attorneys' fees and the amount of interest due, an award of fees would have circumvented both the language and intent of the section.

Finally, the court refused to apply section 8(d) of the Contracts Disputes Act which states that "the agency board is authorized to grant relief that would be available to a litigant asserting a contract claim in the Court of Claims."[57] Again, the court relied on the absence of clear statutory language in the EAJA waiving sovereign immunity.

There have been congressional efforts to amend the EAJA and give the boards of contract appeals authority to award attorneys' fees and costs. The Senate version of a bill to make the EAJA permanent, S. 919, contains such a provision.[58] The American Bar Association also has sponsored a technical amendment which would, in its view, place "the Federal Government and civil litigants on a completely equal footing" by giving boards the authority to award attorneys' fees.[59]

A recent Court of Claims case involving a contract dispute has applied the EAJA. In *Broad Avenue Laundry & Tailoring v. United States*, the petitioner prevailed on appeal to the Court of Claims from a decision of the Armed Services Board of Contract Appeals denying an upward price adjustment on a government con-

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[53]Awarding attorney fees to plaintiffs who are under no obligation to compensate their attorneys is appropriate in the civil rights context because it encourages people to seek judicial redress of unlawful discrimination and recompenses those who serve the public interest by helping others. The EAJA's goal is more modest than those underlying the numerous fee-shifting provisions in the civil rights statutes; rather than making fee-shifting a part of the remedy, the EAJA employs fee-shifting as a device to increase the accessibility of other pre-existing remedies. *Id.*, slip op. at 6-7.

[54]700 F.2d 1379 (D.C.C.A. 1983), *petition for cert. filed*, 51 U.S.L.W. 3921 (U.S. June 15, 1983) (No. 82-2060).

[55]*Id.* at 1386.

[56]*Id.* at 1387.

[57]41 U.S.C. § 607(b) (Supp. V 1981).

[58]39 Fed. Cont. Rep. (BNA) ¶ 949 (May 9, 1983).

[59]9 Gov't Cont. Rep. (CCH) ¶ 92598 (May 5, 1983).

tract.[60] Petitioner then sought attorneys' fees and expenses under section 2412(d). The U.S. Court of Appeals for the Federal Circuit, in applying section 2412(b),(d), found that the government was substantially justified in its position during litigation and therefore denied the claim for fees and expenses. The case is, nonetheless, significant because the court held that the EAJA was applicable to proceedings in the Court of Claims. The Court also held that the position of the United States under section 2412(d) did not cover the position the United States took in the administrative proceedings which led to the civil action.

In *Aero Corp. v. Department of the Navy*, the U.S. District Court for the District of Columbia awarded attorneys' fees under section 2412(b) after finding that the Navy acted in bad faith when it failed to solicit competitive bids for its C-130 aircraft Service Life Extension Program.[61] The court found that the Navy failed to comply in good faith with two previous court orders and advice from the General Accounting Office. The court awarded attorneys' fees and costs incurred during the period the Navy acted in bad faith. The court reasoned that the "American rule" permitted, as an exception, the award of attorneys' fees upon a finding of bad faith in the conduct of the litigation.[62] Since section 2412(b) holds the United States liable for fees and expenses to the same extent as any other party, the court concluded that "Congress intended to make the bad faith attorneys' fee exception applicable to the United States and its agencies."[63]

B. Constitutional Torts

The Department of Justice has taken the position that the EAJA does not provide for an award of attorneys' fees in a constitutional tort action seeking monetary damages against the United States or an official of the United States sued in an official capacity because there has been no waiver of sovereign immunity.[64] In the wake of the Supreme Court's decision in *Wallace v. Chappell*, the number of lawsuits involving the military department which allege constitutional torts by military officials should decline significantly.[65] Similarly, the Department of Justice has taken the position that the EAJA is not applicable when an official is sued in his individual capacity, even if the official is defended by the Department.[66] In this case, the language of the EAJA is self-limiting. The Act applies only to actions brought "by or against the United States."[67]

VI. Summary

The first annual report by the Director of the Administrative Office of the United States Courts has shown that the EAJA has not been an onerous burden on the U.S. Treasury. During the period 1 October 1981 through 30 June 1982, thirty petitions for attorneys' fees and expenses were filed under section 2412(d). Seventeen of the thirty requests were denied, fourteen of them because the court determined that the position of the United States was "substantially justified." A total of $672,692 was awarded.[68] During that same period, 103 applications for awards of attorneys' fees and expenses were filed with various federal agencies under section 504. By 30 September 1982, seventy-two applications were pending, twenty-five were denied, and six were disposed of by

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[60]693 F.2d at 1390-93.

[61]558 F. Supp. 404 (D.C. D.C. 1983).

[62]*Id.* at 418.

[63]*Id.* at 419.

[64]Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act, United States Department of Justice, Office of Legal Policy, 14 (1981).

[65]103 S. Ct. 2362 (1983) (The Court held that the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel with a *Bivens*-type remedy against their superior officers).

[66]Award of Attorney Fees, *supra* note 67, at 15.

[67]18 U.S.C. § 2412(b) (1976).

[68]Report by the Director of the Office of the United States Courts On Requests for Fees and Expenditures Under the Equal Access to Justice Act of 1980, October 1, 1981 through June 30, 1982 (September 22, 1982).

settlement without award, dismissal, or withdrawal.[69]

The Equal Access to Justice Act serves several important functions. First, it has created a procedure whch eliminates the financial deterrent to challenging unreasonable government action. Second, it has provided actual recovery of fees and expenses in those isolated cases where the government's conduct was found to be unreasonable. Finally, the Act has also created the important perception that the average citizen and small business can challenge unfair government action. None of these functions has created a substantial drain on the United States Treasury. For these reasons, it is likely that the sunset provision in the EAJA will be repealed and the Act will be permanently extended beyond 30 September 1984.

[69]51 U.S.L.W. 2381 (U.S. Jan. 1, 1983).

The Impact of Section 1034 of the Internal Revenue Code of 1954 on the Decision to Sell or Rent a Principal Residence When a Service Member is Reassigned

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Introduction

A service member who owns a house is presented with special problems when reassigned. The most important decision is whether to sell or keep, and probably rent, the house. Among numerous considerations involved in determining whether to sell or keep the house are the tax implications. In particular, the tax treatment of any gain on sale of the residence is important. Whether the house is sold immediately or in the future after having rented it, the situation should trigger the application of section 1034 of the Internal Revenue Code of 1954.[1] Tax Court decisions in this area are not clear concerning when service members may apply section 1034. This article will attempt to provide guidance on the applicability of section 1034 to help legal assistance officers better advise the service member-homeowner of the options available upon reassignment.

Selling

Section 1034 provides that a taxpayer does not recognize gain from the sale of a personal principal residence under certain conditions. These conditions are:

1. that the taxpayer constructs[2] or purchases a new principal residence,
2. within two years before or after the sale of the old principal residence, and
3. the gain from the sale of the old principal residence is recognized only to the extent that the adjusted sales price of

[1]26 U.S.C. § 1034 (1976) [hereinafter referred to as section 1034].

[2]Reconstruction costs of the new residence can be made part of the purchase price in a section 1034 transaction:

> [A]ny expenses incurred by the taxpayer for reconstruction which is completed within 18 months of the sale of the old residence that are properly chargeable to the capital account are "reconstruction costs" within the meaning of section 1034 of the Internal Revenue Code of 1954 and are treated as the cost of purchasing the new residence for purposes of nonrecognition of gain irrespective of the date or manner of acquisition of the reconstructed residence. See section 1.1034-1(c)(4) of the Income Tax Regulations. Gain from the sale of the old residence is to be recognized by the taxpayer only to the extent that the adjusted sales price of the old residence exceeds the "reconstruction costs" of the new residence. Rev. Rul. 147, 1978-1 C.B. 261.

the old principal residence exceeds the cost of the new principal residence.[3]

Section 1034(h) provides special relief to active duty military personnel by extending the replacement time period requirement to four years after the date of sale of the old principal residence.[4] A recurring question is whether a service member-taxpayer, upon sale of the old residence, can recognize the gain and pay the taxes, then in the fourth year buy a replacement residence and file an amended return (Form 1040X) to apply section 1034 to recover the taxes paid. For example, D sells her principal residence in 1983 for 75X. She recognizes the gain and pays taxes on it. In 1987, D buys a replacement residence for 100X. D wishes to file a Form 1040X electing the use of section 1034.

The problem is that the statute of limitations[5] does not allow a return to be amended after three years except in very narrow and extraordinary circumstances.[6] In the above example, D cannot file the amended return to invoke section 1034 in the fourth year. However, D may avoid losing section 1034 treatment by not using it until the fourth year or by paying interest on capital gains tax if she does not qualify for section 1034 after electing to use it. D may sell the residence and pay capital gains tax on the gain in 1983. In 1986, she may submit a claim, using Form 1040X, under section 6402(a) of the Internal Revenue Code of 1954 to protect her possible future application of section 1034. This amendment notifies the Internal Revenue Service of the claim and its basis. Should D purchase a residence in 1987, she would file a second Form 1040X, to supplement the first Form 1040X, which would claim the actual application of section 1034 and request the return of additional taxes paid on the capital gain recognized in 1983. In submitting these amendments to the taxpayer's return, there are a few troublesome areas where the taxpayer should be careful. The claim must be as specific as possible to afford the Internal Revenue Service proper notification of the amount and basis of the claim.[7] A

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[3]Section 1034 provides:

(a) Nonrecognition of Gain.—If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him and, within a period beginning 2 years before the date of such sale and ending 2 years after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing new residence.

(b) Adjusted Sales Price Defined.—

(1) In general.—For purposes of this section, the term "adjusted sale price" means the amount realized, reduced by the aggregate of the expenses for work performed on the old residence in order to assist in its sale.

(2) Limitations.—The reduction provided in paragraph (1) applies only to expenses—

(A) for work performed during the 90-day period ending on the day on which the contract to sell the old residence is entered into;

(B) which are paid on or before the 30th day after the date of the sale of the old residence; and

(C) which are—

(i) not allowable as deductions in computing taxable income under section 63 (defining taxable income), and

(ii) not taken into account in computing the amount realized from the sale of the old residence.

[4] Section 1034(h) provides:

Members of Armed Forces.—The running of any period of time specified in subsection (a) or (c) (other than the 2 years referred to in subsection (c)(4)) shall be suspended during any time that the taxpayer (or his spouse if the old residence and the new residence are each used by the taxpayer and his spouse as their principal residence) serves on extended active duty with the Armed Forces of the United States after the date of the sale of the old residence except that any such period of time as so suspended shall not extend beyond the date 4 years after the date of the sale of the old residence. For purposes of this subsection, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.

[5]26 U.S.C. § 6511 (1976).

[6]26 U.S.C. §§ 1311-14 (1976).

[7]Treas. Reg. § 301.6402-2(b) provides:

Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth *in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.* The statement of the grounds and facts

general protective clause, such as "or such greater amount as is legally refundable," does not protect a claim for any amount greater than actually claimed in the amended return.[8] Letters, instead of Form 1040X, are particularly dangerous and should be avoided.[9] The second Form 1040X, which supplements the first Form 1040X and requests the refund, should specifically refer to the first Form 1040X and should not present any different grounds for claiming a refund.[10] The first Form 1040X should specifically state the amount of tax contemplated to be refunded and the transaction causing the tax. A copy of the original return should be attached. In the remarks section on the back of the form, a complete and clear explanation of the circumstances and reasons for the submittal of the claim should be given. A clear statement that the actual request for refund will be submitted once the purchase of a new residence is completed should be made. The second Form 1040X should request the refund, provide the missing information on the purchase of a new residence, and provide a clear explanation of the circumstances. A copy of the original return and the first Form 1040X should be attached. This procedure should protect a claim for refund of taxes using section 1034 in the above example.

must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit. [emphasis added].

[8]Endicott v. Mellon, 39 F.2d 505 (D.C. Cir.), *cert. denied*, 282 U.S. 849 (1930); Aladdin Co. v. Woodworth, 43 F.2d 150 (6th Cir. 1930) (claim specific in one area, but worded to make it so general that it amounted to an attempt by a catch-all provision to toll the statute of limitations pending any amendment the taxpayer may submit). *See also* Socony-Vacuum Oil Co. v. United States, 146 F.2d 853 (2d Cir. 1945).

[9]Pratt & Letchworth Co. v. United States, 1 F. Supp. 745 (W.D.N.Y. 1932).

[10]For supplemental claims, *see* Cochran v. United States, 62 F. Supp. 872 (Ct. Cl. 1945); Curran Printing Co. v. United States, 15 F. Supp. 153 (Ct. Cl. 1936); Caswell v. United States, 190 F. Supp. 591 (N.D. Cal. 1960). For different grounds, *see* United States v. Andrews, 302 U.S. 517 (1938); and United States v. Garbutt Oil Co., 302 U.S. 528 (1938).

Benefits to Service Members

The unique characteristics of military life can make the use of section 1034 very beneficial for service members who own houses. One important characteristic is the frequent relocation of a service member. Although frequently moved, a service member usually remains at a duty station for a sufficient amount of time to establish roots. Children attending the same school for several years, active family participation in community activities, spouse working or attending school, and home ownership are typical roots established while at a particularly duty station. These roots indicate that the service member has set up a permanent place of residence. A service member may realize that three years is the usual length of time at a particular duty station. This is a sufficient length of time to become part of a community and establish residential roots.[11] Thus, a service member's residence at a duty station is not temporary merely because of foreseeable time limits on the assignment.

Another characteristic is that a service member cannot be sure of returning to a duty station, except in rare instances, once reassigned to another location. This characteristic is not solely determinative in applying section 1034, since the service member's intention to return is the basis of defining principal residence.[12] Finally, the availability of government housing and the ability to force a service member to elect to use it or live off-post without the aid of a housing allowance is a characteristic peculiar to military life which must be considered in selling or keeping a house.

The "simple" section 1034 transaction does not involve multiple dwelling ownership or rental problems. The taxpayer simply sells the old residence and purchases or constructs a new residence within two years before or after such

[11]A duty assignment of three years is not an ironclad rule. Service members may be able to extend for a period of years at a duty station. Alternatively, a service member may decide to leave the service rather than be reassigned out of the area.

[12]The Internal Revenue Service has not argued this particular point.

sale with no complicated or creative financial schemes.[13] Such a "simple" transaction provides two benefits to a service member: the service member does not have to worry about renting the house and the attendant difficulties of being an absentee landlord, and the service member may invest the gain on the sale, receiving interest or dividends, until the purchase or construction of a new principal residence. The investment aspect for service members is especially enhanced by the extended time provision.[14] Even with these benefits, the sale of a principal residence contemplating the use of the "simple" section 1034 transaction may be wise or desirable. Certain circumstances can preclude application of section 1034, resulting in the recognition of gain on the old principal residence and no tax deferral. Likewise, the client may not wish to sell the old principal residence.

Disadvantages for Service Members

The situation which usually causes the most difficulty for service members in applying section 1034 is that they simply wait too long to purchase or construct a new principal residence after selling the old principal residence. This is most commonly caused by an overseas[15] tour

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[13]Assume for this article that the purchase price of the new residence is adequate to cover any gain on the sale of the old residence. Also, assume that there are no installment sales contracts. It is interesting to note the Internal Revenue Service has issued a private letter ruling stating that the retention of title to a residence by the seller under an installment sales contract does not prevent the buyer-taxpayer from using section 1034. In that case, the taxpayer sold the old residence for a gain and bought a replacement principal residence, making a down payment and paying the balance in monthly installments. Title to the new residence was retained by the sellers until final payment was made to secure taxpayer's indebtedness. The Internal Revenue Service ruled that the taxpayer bought the new residence when the down payment was made at closing. Further, the indebtedness incurred by taxpayer under the installment sales contract will be included in the new residence's purchase price. In this case, it exceeded the old residence's adjusted sales price, resulting in no recognizable gain. Therefore, the retention of title by the seller to a new residence, merely as a security device, does not disqualify the buyer-taxpayer from using section 1034. Letter Rul. No. 8152103 (30 Sept. 1981).

Further, if part of an old residence is used in the taxpayer's trade or business and the business use meets the requirements of section 280A(c)(1) of the Internal Revenue Code of 1954 in the year of sale, then the part of the gain allocable to the business part may not be deferred under section 1034. Rev. Rul. 26, 1982-1 C.B. 5.

Section 280A(c) provides in part:

> EXCEPTIONS FOR CERTAIN BUSINESS OR RENTAL USE; LIMITATION ON DEDUCTIONS FOR SUCH USE.
>
> (1) CERTAIN BUSINESS USE.—Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer,
>
> (B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
>
> (C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.
>
> In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

This principle is illustrated by the following example: Q is a service member who is married to P. Their principal residence is a four bedroom house. P is a self-employed street walker. P conducts all business with clients in one bedroom set aside exclusively for this purpose. The part of the house used in P's business is about one-tenth of the total residence and, state law aside, meets the requirements of section 280A(c)(1). The application of section 1034 upon the sale of the old residence and purchase will not defer recognition of the gain allocable to the business part of the house. In this case ten percent of the gain must be recognized.

[14]Section 1034(h). This provision merely tolls the replacement time period. If a service member sells an old residence and leaves military service seven months later, then the ex-service member has two years from the military service termination date to purchase or construct a new residence.

[15]In the case of civilian taxpayers, such as DA civilian employees, the term "overseas" is strictly defined by the Internal Revenue Service. If a taxpayer is transferred to a United States possession, such as Puerto Rico, temporarily and sells an old residence before moving, then the taxpayer has only the normal two year replacement time period. Section 1034(k), a tolling provision for civilians living overseas with the same four year time limit as section 1034(h), does not apply because a possession of the United States is viewed as part of the United States and is not "overseas." This is most clearly enunciated in Rev. Rul. 326, 1980-1 C.B. 234, which states:

> Section 1034(k) of the Code provides that the running of any period of time specified in section 1034(a) shall be suspended during any time that the taxpayer (or the taxpayer's spouse if the old residence and the new residence are each used by the taxpayer and the tax-

followed by a tour at an installation in the United States having adequate available government quarters. If the service member occupies the government quarters, it would be unreasonable to buy a house off the installation. There is no housing allowance, and the extra expense is a drain on the income of the service member, who may not be able to cope without the housing allowance. Similarly, if the service member refuses the adequate government quarters, there is again no housing allowance, forcing the service member into the same predicament. In this situation, the service member must amend the tax return for the tax year in which the old principal residence was sold to show a gain on the sale. This results in the service member having to pay tax on the gain and interest for the late payment of this tax.

A service member may not wish to sell the principal residence for a variety of reasons. The two most common reasons are that the service member plans to return and spend the twilight years of life in the principal residence upon retirement or, because of the local economy, the real estate market for selling the principal residence is poor at the time of reassignment. For these and other reasons, a service member may decide to retain ownership of the residence upon reassignment. Having made the decision to keep the residence, the service member must decide whether to rent it or leave it vacant. Whatever the service member decides, the house is subject to some amount of deterioration. Usually, the risk and amount of deterioration, through neglect and vandalism, is much greater if the house is left vacant. Also, if the house is rented, depreciation and business expenses may be deducted. Therefore, the service member will probably choose to rent the residence. The question now arises as to the effect of renting a principal residence on the application of section 1034 to a later sale of that residence.

payer's spouse as their principal residence) has a tax home (as defined in section 913(j)(1)(B)) outside the United States after the date of the sale of the old residence; except that any such period of time as so suspended shall not extend beyond the date four years after the date of the sale of the old residence.

Section 913(j)(1)(B) of the Code provides that an individual shall not be treated as having a tax home in a foreign country for any period for which the taxpayer's abode is within the United States.

Section 913(j)(1)(E) of the Code provides that the term "United States," when used in a geographical sense, includes possessions of the United States.

Section 5b.913-3(d) of the Temporary Income Tax Regulations provides that the term "foreign country" means any territory under the sovereignty of a government other than that of the United States. It does not include a possession or territory of the United States.

For purposes of section 1034(k) of the Code the Commonwealth of Puerto Rico is treated as a possession or territory of the United States. Thus, an individual residing in Puerto Rico is not considered to have a tax home outside the United States within the meaning of that section. See section 7701(c), which provides that for purposes of the Internal Revenue Code the term "possession of the United States" generally includes the Commonwealth of Puerto Rico, and Rev. Rul. 78-23, 1978-1 C.B. 79, which holds that for purposes of section 274(h), relating to deductions of an individual for attending foreign conventions, the Commonwealth of Puerto Rico is treated as a possession of the United States.

Renting

The answer to that question, supplied by Tax Court decisions and Internal Revenue Service opinions, is convoluted and, at first, confusing. In the final analysis, the answer is that, under certain circumstances, a taxpayer may rent a principal residence, sell it at a later date, and still properly use section 1034.

While renting the principal residence, the taxpayer may use the deductions applicable to rental property.[16] Interest on the mortgage loan payments, state and local real property taxes, expenses incurred collecting rent, including attorneys' fees and real estate commissions, expenses incurred to maintain the residence, including repairs and travel expenses, the ordinary and necessary expenses incurred in connection with the determination, collection, or refund of any tax, and depreciation of the building may be deducted.[17] For property placed "in service", *i.e.*, rental, after 1980, if accelerated depreciation is used, it must be calculated using

[16]These are "above the line" adjustments to gross income, so a taxpayer does not have to itemize to claim them.

[17]26 U.S.C. §§ 163-64, 167-68, 212(3) (1976).

the Accelerated Cost Recovery System (ACRS).[18] This system uses statutory periods over which accelerated methods of cost recovery are applied and replaces the Class Life ADR System. Of course, the taxpayer may elect to use the straight-line method depreciation, instead of the ACRS. However, the recovery period is still determined by statute and the salvage value is not included.[19] Upon the sale of property which has been depreciated, certain depreciation recapture provisions may apply. Dwelling units fall under the recapture provisions of section 1250 of the Internal Revenue Code of 1954. The main idea behind recapture provisions is to tax the gain which equals the amount of depreciation taken in excess of the straight-line method of depreciation as ordinary income if the property is sold within certain time periods.[21] If the house at the time of sale qualifies as a personal residence, then section 1250(d)(7)[22] exempts the transaction from normal section 1250 treatment. However, the additional depreciation on the old residence is taken into account in determining the adjusted basis of the new residence and the amount of depreciation allowed the new residence.[23]

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[18]26 U.S.C. § 168 (1976).

[19]*Id.* § 168(f)(4).

[20]Section 1250(c) provides:

SECTION 1250 PROPERTY.—For purposes of this section, the term "section 1250 property" means any real property (other than section 1245 property, as defined in section 1245(a)(3)) which is or has been property of a character subject to the allowance for depreciation provided in section 167.

[21]Sections 1250(a),(b) provide:

(a) GENERAL RULE.—Except as otherwise provided in this section—

(1) ADDITIONAL DEPRECIATION AFTER DECEMBER 31, 1975.—

(A) IN GENERAL.—If section 1250 property is disposed of after December 31, 1975, then the applicable percentage...shall be treated as gain which is ordinary income. Such gain shall be recognized notwithstanding any other provision of this subtitle.

* * *

(2) ADDITIONAL DEPRECIATION AFTER DECEMBER 31, 1969, AND BEFORE JANUARY 1, 1976.—

(A) IN GENERAL.—If section 1250 property is disposed of after December 31, 1969, and the amount determined under paragraph (1)(A)(ii) exceeds the amount determined under paragraph (1)(A)(i), then the applicable percentage...shall also be treated as gain which is ordinary income. Such gain shall be recognized notwithstanding any other provision of this subtitle.

* * *

(3) ADDITIONAL DEPRECIATION BEFORE JANUARY 1, 1970.—

(A) IN GENERAL.—If section 1250 property is disposed of after December 31, 1963, and the amount determined under paragraph (1)(A)(ii) exceeds the sum of the amounts determined under paragraphs (1)(A)(i) and (2)(A)(i), then the applicable percentage...shall also be treated as gain which is ordinary income. Such gain shall be recognized notwithstanding any other provision of this subtitle.

(b) ADDITIONAL DEPRECIATION DEFINED.—For purposes of this section—

(1) IN GENERAL.—The term "additional depreciation" means, in the case of any property, the depreciation adjustments in respect of such property; except that, in the case of property held more than one year, it means such adjustments only to the extent that they exceed the amount of the depreciation adjustments which would have resulted if such adjustments had been determined for each taxable year under the straight line method of adjustment.

[22]Section 1250(d) provides:

EXCEPTIONS AND LIMITATIONS.—

* * *

(7) DISPOSITION OF PRINCIPAL RESIDENCE.—Subsection (a) shall not apply to a disposition of—

(A) property to the extent used by the taxpayer as his principal residence (within the meaning of section 1034, relating to rollover of gain on sale of principal residence),....

[23]Treas. Reg. § 1.1250-3 provides:

(g) Disposition of principal residence.

(6) Treatment of property acquired in section 1034 transaction. If a principal residence is disposed of in a transaction to which section 1250(d)(7) applies, and if by reason of the application of section 1034 (relating to sale or exchange of residence) the basis of property acquired in the transaction is determined by reference to the basis in the hands of the taxpayer of the property disposed of, then—

(i) The additional depreciation for the acquired property immediately after the transaction shall be an amount equal to (a) the amount of the additional depreciation for the property disposed of, minus (b) the amount of any gain which would have been taken into account under section 1250(a) by the transferor upon the disposition if the applicable percentage for the property has been 100 percent,

(ii) For purposes of computing the applicable percentage, the holding period of the acquired prop-

There are no clear rules defining under what circumstances section 1034 applies. To understand the circumstances in which section 1034 may apply to principal residences which are rented, the facts and circumstances of major cases in this area must be examined. As will be seen, although certain factors must be present, the applicability of section 1034 turns on the particular facts and circumstances of each case. The examination of the major cases will be in chronological order.

Temporary Rental Concept

The earliest interpretation of what constitutes a personal principal residence was made by the Internal Revenue Service.[24] The case involved a service member-homeowner who rented a residence for three years because of reassignment to another location. The house had been inherited and the family regarded it as their residence. The service member retired, sold the residence, and built a new principal residence in another city. The decision focused on whether the house was a principal residence or property used for the production of income. Application of section 1034 was disallowed because the rental was for an indefinite time period. It was not "a temporary arrangement entered into during a period made necessary by the purchase of a new residence."[25]

Two years later, this ruling was attacked in the *Ralph T. Trisko*[26] case. In that case, the taxpayer built a house in 1941 and occupied it as a principal residence until June 1943. The taxpayer entered the Navy in 1943, was assigned outside the area of the principal residence, and rented the residence for almost a year before returning to it. In 1948, the taxpayer was appointed to the foreign service and assigned to a position overseas. During the time the taxpayer and his family were overseas, they rented apartments in which to live. The house was rented below market value to obtain a responsible tenant to maintain and preserve the premises. The lease agreements were of short duration so that the owners could move back into the house quickly once the foreign service assignment terminated. However, upon returning in 1951, the taxpayer could not reoccupy the house because of state rent controls. He bought another residence and sold the old residence. The court held that such temporary rental of a residence would not deny application of section 1034 upon sale of the residence. The Tax Commissioner acquiesced,[27] but soon formulated a new tack to limit the scope of *Trisko*.[28]

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erty includes the holding period of the disposed of property (see section 1250(d)(3)),

(iii) If the adjusted basis of the acquired property exceeds the adjusted basis immediately before the transfer of the property disposed of, the excess is an addition to capital account under paragraph (d)(2)(ii) of § 1.1250-5 (relating to property with more than one element), and

(iv) If the property disposed of consisted of two or more elements within the meaning of paragraph (c) of § 1.1250-5, see paragraph (e)(3) of § 1.1250-5 for the amount of additional depreciation and the holding period for each element in the hands of the transferee.

[24]Rev. Rul. 22, 1955-1 C.B. 349 [hereinafter cited Rev. Rul. 55-222].

[25]*Id.* at 350.

[26]Ralph T. Trisko v. Commissioner, 29 T.C. 515 (1957).

[27]Rev. Rul. 72, 1959-1 C.B. 5.

[28]The Internal Revenue Service does not always fight temporary rental of principal residence cases. For instance, a taxpayer owned a residence in city X. The taxpayer was transferred to city Y, some distance away, for a two-year period. A second residence was purchased in city Y because there were no suitable rental facilities for the taxpayer and family. Company policy was to reassign employees to city X after the two-year period in city Y and the taxpayer intended to return to live in the first residence in city X. During the two-year period, the house in city X was rented. Uon return to city X, the taxpayer found the local school closed. The taxpayer's children would have had to travel an unacceptable distance to a school if the old residence was reoccupied. The taxpayer sold the second house in city Y. The taxpayer then sold the first house and bought a third house in city X. The Internal Revenue Service ruled that:

> [s]ince the taxpayer was to be reassigned to city X at the conclusion of the 2-year assignment and intended to return to and reoccupy the old residence in city X upon the expiration of the assignment, the second home in city Y will not be considered the taxpayer's principal residence for purposes of section 1034 of the Code. Thus, the residence in city X remained the taxpayer's principal residence even though it was leased for two years while the taxpayer was away on assignment and even though the taxpayer had purchased a second home to serve as the family's residence while on such assignment.
>
> Accordingly, the residence the taxpayer occupied

Abandonment Concept

The new tack was the concept of abandonment. It was used in the case of *William C. Stolk*,[29] where the taxpayer moved into a luxury apartment close to his place of business two years before selling his old residence. The house furniture was placed in a warehouse. The house was listed for sale, it was not rented, and it was heated to maintain its good condition. The court found that the evidence showed the taxpayer to have abandoned the house as a principal residence when he moved into the apartment. Since the taxpayer did not purchase or construct a new residence within the appropriate time period after moving out of the old residence, the court held that section 1034 could not be used.

A clearer case of abandonment is *Rene A. Stielger, Jr.*,[30] in which the taxpayer purchased a residence in one city and lived in it for two years, then moved to another city and purchased another residence. The old residence was rented for six years then sold in 1959. In 1960, the taxpayer constructed another house in the second city. At this time, the taxpayer attempted to use section 1034 to shield the gain on the house sold in the first city and relate the sale to the house built in 1960. The court held that the taxpayer had clearly abandoned the first house for a period of several years and section 1034 would not apply.

Stolk and *Stiegler* set the stage for *Richard T. Houlette*.[31] In *Houlette*, the Internal Revenue Service was finally able to successfully rely upon the abandonment concept in a case remarkably similar to *Trisko*. In *Houlette*, the taxpayer was a service member stationed in Oregon. He purchased and lived for one year in a home in Portland and was then reassigned to Alaska in 1955, where he and his family occupied government quarters. Later, he was reassigned to Astoria, Oregon and again lived in government quarters. In 1960, he was moved to Wisconsin where he purchased a second house. He had attempted to sell the Oregon house when he was assigned to Alaska, but he could not sell it without incurring a loss. The house was leased five times over six years. The first and last leases were for two-year periods. Sales efforts were made at the end of each lease. None of the leases contained an option to buy. In 1961, the Oregon house was sold for a gain. The court held that the taxpayer had abandoned the old residence as a principal residence and would not allow the application of section 1034 to the gain on the Oregon house. Although *Houlette* and *Trisko* are similar, the court found three important factors distinguishing the cases.

> (1) In *Trisko*, the old residence was not put up for sale until the time of the transactions upon which section 1034 operates; in the present case, during nearly 6 years of nonoccupancy, petitioner persisted in his desire and efforts to sell the Portland house. (2) In *Trisko*, actual occupancy, which is usually required to prove the old residency, was impossible because rent control laws prevented the taxpayer from reoccupying his own dwelling. We were convinced on the evidence that the taxpayer intended to and would have reoccupied his old dwelling if he had not been prevented from doing so by the rent control legislation in force. In the present case the petitioner put his Portland house up for sale before his departure from Portland in 1955 and never relented in his efforts to sell it when the various leases expired. We can only conclude upon the limited record

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in city X prior to the 2-year assignment was the taxpayer's principal residence for purposes of the nonrecognition of gain provisions of section 1034 of the Code. Thus, the *2x dollar* gain realized with respect to the sale of the residence in city X is subject to the nonrecognition provisions of section 1034. The *20x dollar* gain must be recognized by virtue of section 1002. Rev. Rule 146, 1978-1 C.B. 260 [emphasis added].

Of course, the question arises whether the Internal Revenue Service would have ruled the same way if the gain on the sale of the house in city X had been 20x and the gain on the sale of the house in city Y had been 2x.

[29]William C. Stolk v. Commissioner, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964).

[30]Rene A. Stiegler, Jr. v. Commissioner, 23 T.C.M. [CCH] 412 (1964).

[31]Richard T. Houlette v. Commissioner, 48 T.C. 350 (1967).

before us that he did not intend to reoccupy the house at any future point in time. (3) In *Trisko*, we concluded from the evidence that the taxpayer was not holding and using his residence for the production of income but had leased it during a temporary absence while he was employed abroad in order to provide for its care and maintenance. In the present case petitioner apparently had rented the house after sales efforts failed because he could not get his asking price; we cannot say more without evidence that this was not a business purpose in light of petitioner's apparent intention not to occupy the house again.[32]

By using the concept of abandonment, the Internal Revenue Service seemingly was able to severely limit the application of *Trisko* to service members. However, *Arthur K. Barry*[33] counteracts, to a degree, the limiting effect of *Houlette* on *Trisko*. *Barry* slightly widens the scope of the temporary rental doctrine by showing that *Trisko* is still applicable to service members.

Barry Case

After *Houlette*, the availability of *Trisko* in cases involving service members, who move frequently and can be forced to live in government quarters, became questionable. The frequent moves make any service member-owned residence look temporary in nature. Living in government quarters could deprive the service member of the use of section 1034 because of the appearance of abandonment, especially when coupled with an attempted sale of the residence.

In *Barry*, the taxpayer was a service member who purchased a home in Maryland in 1955 and occupied it as his principal residence until the middle of 1960. He was assigned to Germany on an accompanied tour in 1960, then assigned to Colorado in late 1962 until his retirement in November 1965. He and his family had occupied government quarters in both Germany and Colorado. The house in Maryland was leased on a yearly basis from 1960 until September 1965 when the taxpayer put it up for sale. From September 1965 to March 1966, it was rented on a monthly basis. From March 1966 until August 1966 it was vacant. This was the only home owned by the taxpayer during his twenty-six years in the military. In May 1966, the taxpayer began construction of a house he later occupied as his principal residence in Colorado. The court held that the taxpayer could use section 1034 to defer tax on the sale of the Maryland house. In support of its holding, the court found the taxpayer met the *Trisko* criteria, which *Houlette* had failed to meet. First, the Maryland house was not listed for sale until the time of the transactions upon which section 1034 operates. The court found it important that the taxpayer rejected several previous unsolicited purchase offers. Second, the court found that the "change of principal residence was a result of unexpected change of plans."[34] This rationale is supported by the rejected purchase offers and that the taxpayer lived in government housing in Colorado until he retired. From this evidence the court deduced an intent to return to the old residence.[35] The court seemed to use the logic that a reasonable person would begin settling into a community as soon as that person had decided not to return to the old principal residence. Part of settling into a community would be to break all old ties to the old community, including selling the old principal residence and establishing a new home in the new community. In *Barry*, this process was not started until very near the service member's retirement date. In *Houlette*, by comparison, the taxpayer tried to sell the house before leaving the area and never ceased trying to sell the old residence, thereby showing no intent to return to the old residence. Third, the service member in *Barry*

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[32] *Id.* at 355. Hereinafter, these three factors will be referred to as the *Trisko* criteria, even though they were formulated in *Houlette*, since they set out factors for the successful application of section 1034.

[33] Arthur K. Barry v. Commissioner, 30 T.C.M. [CCH] 757 (1971).

[34] *Id.* at 760.

[35] Also, as part of the stipulated facts of the case was the following: "His wife, her father, and other relatives were born and lived in Baltimore. Petitioners had many friends and acquaintances living in the area and had easy access to the facilities of the United States Naval Academy which they could have utilized during retirement." *Id.* at 758.

convinced the court that he rented the Maryland residence to provide for its proper care and maintenance. The court supported this conclusion by stating that the "[p]etitioner realized no significant profit from the rental."[36] However, it must be remembered from *Houlette* that the characterization of rental for a business purpose is closely allied to whether the court finds an intent to return to the old residence. If the court does not find an intent to return and there is no other evidence to the contrary, then the rental will be found to have a business purpose as opposed to a care and maintenance purpose. An actual loss from the rentals[37] or a clause in the lease agreement explaining that the rental was for the care and maintenance of the residence may be evidence of a care and maintenance purpose.

Barry at least removes some of the apprehension that *Trisko* could not be used by service members. Of course, the *Trisko* criteria of not attempting to sell the house before the section 1034 transaction period, of showing an intent to return to the old residence, and of renting the old residence only for the purpose of care and maintenance are still formidable limitations on the use of the temporary rental concept. However, all may not be lost if a service member does not meet these criteria.

Prevailing Economic Conditions Concept

For the service member who cannot meet the *Trisko* criteria, it seems that section 1034 is unavailable. This may not be the case, however, for those service members who can prove that prevailing economic conditions prevented the sale of the old principal residence. This ray of hope has only been successful in one reported case, *Robert G. Clapham*.[38] In that case, the taxpayer, in anticipation of his firm opening a branch office in another city, attempted to sell his principal residence on his own from May 1966 to August 1966. In August 1966, the taxpayer listed the old residence with a real estate broker and moved to the new city leaving the old residence vacant. In early 1967, he accepted an offer to lease with an option to buy. In early 1968, the tenant moved without exercising the option. Again, the house was listed for sale and left vacant. From August 1966 to September 1968, the taxpayer rented a house in the new city because he could not sell the old residence. In September 1968, he purchased a new residence in the new city. In late 1968, the old residence was again rented until December 1968 when the tenants vacated. Finally, in June 1969, the residence was sold at a gain.

The Internal Revenue Service conceded that the transaction of sale and purchase met the time requirements under section 1034, but disallowed the application of section 1034, contending that the taxpayer abandoned the old residence. In claiming abandonment, the IRS relied heavily upon *Stolk* and *Houlette*. The Tax Court rejected the contention that the taxpayer had abandoned the old residence. First, the court emphatically insisted that the determination of principal residence be based on all of the facts and circumstances in a particular case.[39] Finding a specific fact present and relying solely upon it to determine the status of the old residence is in opposition to the intent of section 1034, its legislative history, and the Internal Revenue Service regulations concerning section

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[36] *Id.* at 760.

[37] However, losses incurred while the old residence was rented pending its sale are disallowed under section 183, since the rental was not for the purpose of making a profit. Letter Rul. No. 8132017 (30 Apr. 1981). Of course, if the losses are sufficiently large, then it may be more advantageous for the taxpayer to forget using section 1034 and convert the old residence into income-producing property so as to deduct the losses. However, there must be a profit-seeking motive in the rental to use section 165 to deduct the losses and the courts have drawn fine distinctions in this area.

[38] Robert G. Clapham v. Commissioner, 63 T.C. 505 (1975).

[39] *Id.* at 508.

1034.[40] The court, in examining the legislative history of section 1034, determined that section 1034 could be used "when a poor real estate market or the unavailability of mortgage money requires an individual to lease his old premises for a temporary period concurrent with and ancillary to sales efforts."[41] The court noted that the determination of what is temporary depends on the facts and circumstances of each case. Second, the court held that, "*Stolk* and *Houlette* do not establish a rule of law, but merely identify facts and circumstances deemed relevant in those cases."[42] Thus, abandonment of an old residence does not automatically preclude use of section 1034.

Two important factors in *Clapham* are that the taxpayer could not sell the old residence for a reasonable price because of prevailing adverse economic conditions and that the renting of the old residence was ancillary to the selling efforts. Two elements of the first factor may present special problems of proof. The first element is whether the amount received was "reasonable." Showing a substantial difference between rejected offers and real estate appraisals, sales of comparable houses in the area, and the actual amount received should be sufficient proof of the "reasonableness" of the desired sale price. The second element is whether there is a prevailing adverse economic condition in the area which prevented the taxpayer from selling for that reasonable price earlier. Generally, proving prevailing adverse economic conditions from 1979 to 1982 in any part of the United States should not be difficult. For other time periods, statistical data and expert testimony may be the only methods to prove prevailing adverse economic conditions for a particular area.

The second factor, the rental being ancillary to the sales efforts, seems to be restricted by the court in *Clapham*. In comparing *Clapham* and *Houlette*, the court distinguished the two cases based on the manner of renting the old residence.[43] The court observed that, in *Houlette*, there were numerous leases, two of which were for two-year periods and none of which contained options to buy. Further, the attempts to sell the old residence were limited to those times when the leases expired. Therefore, to rely upon *Clapham*, when leasing an old residence which a taxpayer is attempting to sell it is wise to lease with an option to buy.

It seems that a service member who cannot meet the *Trisko* criteria may still be able to use section 1034 if the service member can prove that prevailing economic conditions prevented the sale of the old residence for a reasonable price and that any rentals were ancillary to the sales efforts. It is interesting to note that no reported Tax Court cases since *Clapham* have used the prevailing adverse economic condition rationale.[44]

Conclusion

The service member-homeowner may use section 1034 upon moving from an old residence by either selling it immediately or by renting it temporarily and selling it later. Although qualifying for the use of section 1034 is most easily accomplished by selling the old residence immediately, problems, such as available government housing, poor real estate economy, or personal desire to return to the old residence, may render the selling of the old residence unwise or undesirable. By renting the old residence until

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[40]Treas. Reg. § 1.1034-1(c)(3) provides:

> Property used by the taxpayer as his principal residence. (i) whether or not property is used by the taxpayer as his residence, and whether or not property is used by the taxpayer as his principal residence (in the case of a taxpayer using more than one property as a residence), depends upon all the facts and circumstances in each case, including the good faith of the taxpayer. The mere fact that property is, or has been, rented is not determinative that such property is not used by the taxpayer as his principal residence.

[41]63 T.C. at 511.

[42]*Id.* at 509.

[43]*Id.* at 509.

[44]A private letter ruling impliedly used this concept. In that case, the taxpayers had moved from the old residence and attempted to sell it. However, they could not retain the price desired. The old residence was rented for four years at fair rental value and expenses deducted, and sold for a gain. Internal Revenue Service held the gain could be deferred under section 1034. Letter Rul. 8132017 (30 Apr. 1981).

it is abandoned as the principal residence and a new principal residence is acquired, the service member-homeowner may realize certain advantages by utilizing the appropriate deductions applicable to income-producing property. However, to apply section 1034 to the gain realized on the sale of an old principal residence after it has been temporarily rented, the facts and circumstances of each case must meet the *Trisko* criteria, which are not attempting to sell the old principal residence before the section 1034 transaction period, showing an intent to return to the principal residence, and renting the old principal residence only for the purpose of care and maintenance. If the service member-homeowner cannot meet the *Trisko* criteria, then the Internal Revenue Service will probably claim abandonment. Where the taxpayer cannot sell the old residence for a reasonable price because of prevailing adverse economic conditions and the renting of the old residence was ancillary to the selling efforts, the argument of prevailing adverse economic conditions may be used, as in *Clapham*, to apply section 1034.

The service member-homeowner may find that applying section 1034 is difficult, *Trisko*, *Barry*, and *Clapham* do expand the options open to the service member-homeowner contemplating the use of section 1034. It is evident, though, that the situations where an old principal residence can be rented and section 1034 applied later to defer tax on the gain are very narrowly defined. In the final analysis, the determination of whether a residence is a principal residence at the time of sale is made on the facts and circumstances of each case. Therefore, the ability to marshal the facts and present a convincing argument based on the cases cited above will determine the application of section 1034.

Appendix

Checklist for determining the applicability of section 1034 when the old residence is rented.

Temporary Rental Concept (*Trisko* criteria)

1. Did the taxpayer attempt to sell the old residence before the section 1034 transaction period?

   A. No — Go to question #2.

   B. Yes— Go to question #4.

2. Is the old residence being rented with the primary purpose being care and maintenance?

   Factors:

   — Clause in rental agreement stating purpose of the rental is for care and maintenance of the old residence, not for the production of income.

   — No significant profit realized from the rental.

   — Term of rental agreement is for short periods or includes provision allowing owners quick reoccupancy.

   A. Yes— Go to question #3.

   B. No — This could cause serious problems. But if an intent to return is adequately shown, the rental will probably not be considered as a trade or business. Go to question #3.

3. Did the taxpayer intend to return to old principal residence?

   Factors:

   — Statement in rental agreement of intent of owners to return to the old residence.

   — Assignment is temporary.

   — Service member bought another house.

   — History of buying and selling houses.

   — Military facilities in area for exercise of retirement privileges.

   — Relatives living in the area.

   — Rejection of unsolicited offers to buy the residence.

Usually the taxpayer intends to return until a

change in circumstances or plans unexpectedly alters this intention. The statement: "I intended to return unless I could find a good job somewhere else in the civilian world," does not qualify as an intention to return to the old residence.

A. Yes— If the answers to question #1 and #2 are also "Yes", then the taxpayer can probably use section 1034 under the temporary rental concept.

B. No — Probably unable to use section 1034. Gain on the sale of the old residence will be recognized.

Prevailing Adverse Economic Conditions Concept (*Clapham* situation)

4. Was the selling price the taxpayer wanted "reasonable"?

Factors:

— Amounts of rejected offers.

— Real estate appraisals.

— Recent selling prices of comparable houses in the area.

— Actual amount received.

A. Yes— Go to question #5.

B. No — This theory will not apply.

5. Was there a prevailing adverse economic condition in the area which prevented the taxpayer from selling for that "reasonable"price earlier?

Factors:

— Statistical economic data of the area.
- inflation rate
- house sales rate
- cost of living increases
- unemployment rate

— Expert testimony.

A. Yes— Go to question #6.

B. No — Then why was the taxpayer not able to sell the old residence at the "reasonable" price? If this cannot be answered adequately on an economic basis, then this theory will not apply.

6. Was the renting of the old residence ancillary to the selling efforts?

Factors:

— Short rental periods.

— Rental agreements contain options to buy.

— If rental agreements contain no option to buy, then
- kept trying to sell during rental period
- statement of care and maintenance as purpose of rental.

A. Yes— May be able to use section 1034 based on the prevailing adverse economic condition concept.

B. No — This theory will not apply.

The Effective Assistance of Counsel

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Introduction

The Sixth Amendment of the United States Constitution guarantees that, "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."[1] This right of counsel has long been recognized by the United States Supreme Court to be the right to *effective* assistance of counsel.[2]

As one commentator noted, the constitutional guarantee of effective assistance of counsel insures that our adversarial system of justice really is adversarial and really does justice.[3] Inadequate performance by trial lawyers has become a growing concern to the bench, the bar, and the public.[4] Criminal defendants do not always receive effective assistance. There were ten thousand published opinions dealing with claims of ineffective assistance of counsel between 1970 and 1980.[5] The military courts are also dealing with this issue more frequently.

What is the standard by which attorneys are judged? This article will analyze the standards which the Supreme Court, lower federal courts and military courts have used to measure the effective assistance of counsel. Military case law involving the issue of ineffective assistance of the trial defense counsel will also be analyzed to highlight areas of concern to the courts and potential pitfalls for the practicing attorney. Lastly, a suggested worksheet is provided as a means of aiding the trial defense counsel to organize his case and avoid ineffectiveness claims.[6]

Supreme Court Consideration of the Effective Assistance of Counsel

The right to counsel was fully developed in Supreme Court case law after *Powell v. Alabama*.[7] The Court's expansion of the right to counsel after *Powell* has not, however, been accompanied by a clear articulation of what level of effective assistance is guaranteed by the Constitution.[8] Concerning the right to effective counsel, the Court has done little more than recognize that there is such a right. It has been left to federal and state courts to develop their own criteria for determining whether there has been effective representation on a case-by-case basis.[9] Some commentators have charged that the Supreme Court has avoided the issue of assessing the competency of actual performance of attorneys.[10]

Although the Court has not defined a minimum standard of defense quality, in the 1970 case of *McMann v. Richardson*, the Court noted that defense counsel's performance must be "within the range of competence demanded of

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[1]U.S. Const. amend. VI.

[2]McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[3]Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1 (1973).

[4]*See* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227 (1973).

[5]Ranii, *Appealing A Lawyer's Mistakes*, Nat'l. L.J., Oct. 5, 1981 at 1, cols. 4 & 14, col. 1.

[6]This article will not deal with the ineffective assistance of counsel issues raised from conflict of interest cases. *See* United States v. Davis, 3 M.J. 430 (C.M.A. 1977), and United States v. Brewer, 15 M.J. 597 (A.C.M.R. 1983) for recent case law in that area. *See also* U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. C-2, App. C (1 Sept 1982).

[7]287 U.S. 45 (1932).

[8]Comment, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 Harv. L. Rev. 752, 754 (1980).

[9]Comment, *The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?*, 59 Neb. L. Rev. 1040, 1041 (1981).

[10]*See, e.g.*, Bazelon, *supra* note 3, at 21.

attorneys in criminal cases."[11] The Court, however, would not define what was within that zone of competence, stating:

> Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the constitution is to serve its purpose, the defendant cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.[12]

As Justice Brennan noted in his dissent in *Wainwright v. Sykes*, we "traditionally have resisted any realistic inquiry into the competency of trial counsel," preferring instead "to indulge the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients."[13]

The Supreme Court has left the determination of the effective assistance of counsel to federal, state, and military courts.

Effective Assistance of Counsel as Determined by Lower Federal Courts

With no clear guidance from the Supreme Court, federal courts have used various standards in defining effective assistance. The initial test employed by federal courts was the "farce and mockery test," *i.e.*, a defense counsel's ineffective assistance violated the defendant's Sixth Amendment right only if the lawyer's incompetence was so gross that it rendered the proceedings a farce and mockery of justice.[14] This minimal standard led to ludicrous results as in *United States v. Katz*,[15] where the Court of Appeals for the Second Circuit stated that a defendant was not denied effective assistance of counsel despite the fact that his counsel was observed sleeping on two occasions when the prosecution was examining a witness.

Until 1973, the "farce and mockery" test was the standard employed by all eleven federal circuit courts.[16] The standard was sharply criticized by commentators and modern courts; there was a growing recognition that the "farce and mockery" test was itself a mockery of the Sixth Amendment.[17] This criticism began a movement away from the "farce and mockery" standard.[18] As a result, only one appellate court, the Second Circuit, has continued to apply this test. Ten circuits have explicitly rejected the standard and adopted some variant of a "reason-

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[11]397 U.S. 759 (1970). The Court held that the determination of whether an attorney was incompetent in advising a defendant to plead guilty depended on whether that advice was within the range of competence demanded of attorneys in criminal cases. *See also* Tollett v. Henderson, 411 U.S. 258, 264 (1973).

[12]*Richardson*, 397 U.S. at 771.

[13]433 U.S. 72, 117-18 (1977) (Brennan, J., dissenting).

[14]*See, e.g.*, Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[15]425 F.2d 928 (2d Cir. 1970). Generally, the reasons given for the development of this standard for claims of ineffective assistance of counsel have been the fear that unprincipled lawyers would act in collusion with their clients and perform below the minimum standards so as to make their clients conviction vulnerable to collateral attacks, the fear that the courts would be overburdened with frivolous appeals, the fear that the claims would have the effect of putting defense counsel on trial, and the fear that a lower standard would prevent attorneys from accepting appointments in criminal cases. See Comment, *supra* note 9, at 1049.

[16]Comment, *supra* note 9, at 1048.

[17]Bazelon, *supra* note 3, at 28.

[18]Comment, *supra* note 8, at 757.

[19]Comment, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 Cornell L. Rev. 659, 661 n.8 (1980). Furthermore, the Second Circuit has indicated that it may consider reassessing its use of the standard if given an appropriate opportunity. Rickenbacker v. Warden, 550 F.2d 62, 66 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977). The most recent case from the Second Circuit discussing their adherence to the "farce and mockery" rule is Barnes v. Jones, 665 F.2d 427 (2d Cir. 1981).

able competence" or "customary skill" test.[20]

There are four major expressions of this reasonableness standard. The quality of a defense counsel's representation should be within the range of competence expected of attorneys in criminal cases (First and Fourth Circuits). The quality of defense counsel's representation should be within the range of customary skill and knowledge which normally prevails at the time and place (Third, Eighth, Ninth, Tenth and District of Columbia Circuits). The quality of counsel's representation needs to meet a minimum standard of professional responsibility (Seventh Circuit). Assistance of counsel required by the Sixth Amendment is counsel reasonably likely to render and rendering effective assistance (Fifth Circuit; the Sixth Circuit uses a combination of this and the first standard).[21]

Although there are variations in the standard among the circuits, certain fundamental presumptions apply to all ineffective assistance claims. There is a presumption that lawyers are effective and that inexperience in a given area of law does not in itself overcome that presumption. This presumption should be of some consolation to recent law school graduate defense counsel. Additionally, there is great deference given to a defense attorney in the area of trial strategy and tactics.[22]

The "reasonableness" standards developed by the circuit courts measure a defense counsel's performance against the accepted norm within a legal community. These new standards have been criticized as failing to provide adequate guidance for lower courts and practicing attorneys and may represent a change in form only from the old "farce and mockery" standard.[23]

Military courts have the same responsibilities as federal courts to protect a defendant's constitutional rights.[24] This article will next address a comparison between the miltiary standard and the "reasonableness" standard employed by the federal courts in dealing with Sixth Amendment ineffectiveness claims.

The Military Standard for Effective Assistance

Soon after the enactment of the Uniform Code of Military Justice, the Court of Military Appeals, in 1950, adopted the then current view of the federal courts with regard to ineffective assistance of counsel.[25] The military position was that defense counsel appointed and certified under the Code were presumed to be competent[26] and that, for purposes of appeal, an accused would have to show that his or her counsel's efforts rendered the trial proceedings a ridiculous and empty gesture or completely lacking in judicial character.[27] Thus, the military standard in the early 1950s was closely akin to the "farce and mockery" standard being applied by the federal courts.

Much earlier than the civilian courts, however, military appellate courts began a shift towards a factual determination of adequacy.[28] In 1955, the Court of Military Appeals stated

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[20]For a list of recent cases pinpointing the standards applied by the circuit courts, *see* Note, *Stone v. Powell and Effective Assistance of Counsel*, 80 Mich. L. Rev. 1326, 1332 n.39 (1982). The leading federal case is United States v. De Coster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). The plurality opinion by this prestigious court has been cited with favor by the Court of Military Appeals in United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982). A number of states still apply the "farce and mockery" standard. *See* Annot., 2 A.L.R. 4th 27 (1980). The Arizona Supreme Court has only recently abandoned the old standard. See State v. Wilson, 32 Cr. L. Rept. 2136 (Ariz. 18 Oct. 1982).

[21]Comment, *supra* note 9, at 1052.

[22]*Id.* at 1053. For a military case law example of this presumption, *see* United States v. Cooper, 5 M.J. 850 (A.C.M.R. 1978).

[23]Comment, *The Effective Assistance of Counsel: Chance or Guarantee*, 11 Fordham Urb. L.J. 85, 93 (1982).

[24]Burns v. Wilson, 346 U.S. 137, 142 (1953). *See also* United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

[25]Horton, *Professional Ethics and the Military Defense Counsel*, 5 Mil. L. Rev. 67, 101 (1959).

[26]United States v. Soukup, 2 C.M.A. 141, 7 C.M.R. 17 (1953).

[27]United States v. Hunter, 2 C.M.A. 37, 41, 6 C.M.R. 37, 41 (1952).

[28]Piotrowski & Taylor, *The Competency of Counsel*, The Army Lawyer, Oct. 1977, at 14.

that gross errors in judgment or cumulative minor errors could constitute inadequate representation requiring reversal.[29] Therefore, errors not amounting to making the trial a "ridiculous and empty gesture" could rise to the level of ineffective assistance of counsel.

The modern approach used by military courts can be traced back to a 1972 Court of Military Appeals decision wherein Judge Quinn stated that an accused was entitled to the assistance of an attorney of reasonable competence.[30] Shortly thereafter, the courts of review took up the gauntlet and further attempted to refine the applicable standard. In *United States v. Schroder*, the Army Court of Military Review equated the adequacy of counsel to the customary skill and knowledge that normally prevails in other records of trial that come before the court.[31] In *United States v. Gaillard*, the same court stated that the accused had a right to "counsel reasonably likely to render and rendering effective assistance."[32] This panel emphasized that the counsel must be competent throughout the trial. By adopting this reasonable competence standard for effective assistance, the military courts are in line with the majority view of the federal circuits.

The next landmark decision from the Court of Military Appeals concerning effective assistance came in 1977 and delineated the current standard for military defense counsel. In *United States v. Rivas*, Judge Perry, writing for the majority, noted that the standard for measuring the requisite degree of competence in a criminal trial has been ambiguously stated in the decisions of the Court of Military Appeals and the U.S. Supreme Court.[33] The court stated that the military accused is entitled to counsel who exercises "the skill and knowledge which normally prevails [sic] within the range of competence demanded of attorneys in criminal cases,"[34] and "his right is to one who exercises that competence without omission throughout the trial."[35] Ineffective assistance was found when the counsel in *Rivas* had failed to object or move to strike the direct testimony of a witness who refused to answer certain questions on cross-examination on the grounds of self-incrimination.[36] Thus, a single lack of objection to rebuttal testimony labeled the assistance of counsel ineffective.

The current military standard is as high as in any federal circuit. The *Rivas* language concerning the exercise of the requisite degree of competence without omission throughout the trial would seem to demand perfect representation.[37] More recent cases, however, have indicated that the *Rivas* language is not to be taken literally. In *United States v. Sublett*, the Army Court of Military Review stated that the defense counsel had demonstrated reasonable competence throughout the trial and that *Rivas* should not be read as requiring a counsel to conduct an error-free trial.[38] In a recent Court of Military Appeals decision, Judge Cook spoke of the average competent military defense counsel who is trying to justify his or her tactical trial decisions. He stated that the test was "not whether, when reviewed in the clear light of hindsight, he was correct in every instance, but instead whether, upon consideration of the record as a whole, the accused received competent professional representation."[39] This is a more realistic approach to evaluating an attorney's perform-

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[29]United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 (1955).

[30]United States v. Walker, 21 C.M.A. 376, 378, 45 C.M.R. 150, 152 (1972).

[31]47 C.M.R. 430 (A.C.M.R. 1973).

[32]49 C.M.R. 471 (A.C.M.R. 1974).

[33]3 M.J. 282, 287 (C.M.A. 1977).

[34]*Id.* at 288.

[35]*Id.* at 289.

[36]Chief Judge Fletcher, concurring, agreed that the defense counsel should have made the proper motion but that the trial judge also has some responsibility to safeguard the accused's rights. *Id.* at 289-90 (Fletcher, C.J., concurring). Judge Cook dissented and refused to summarily condemn the defense counsel but rather would have set the matter for a hearing, since the record could be construed as supporting the counsel's action. *Id.* at 290-91 (Cook, J., dissenting).

[37]*Id.* at 289.

[38]5 M.J. 570, 572 (A.C.M.R. 1978).

[39]United States v. Dupas, 14 M.J. 28, 33 (C.M.A. 1982) (Cook, J., concurring).

ance than the error-free standard originally proclaimed in *Rivas*.

The Court of Military Appeals has continued to cite *Rivas* as its primary authority in the area of ineffective assistance of counsel. The court has continued, however, to study current federal case law. Recently, in *United States v. Jefferson*, a majority of the court measured the two defense attorneys' representation against the "performance ordinarily expected of fallible lawyers,"[40] citing language from federal case law.

Pitfalls For Trial Defense Counsel

Defining reasonable competence in terms of effectiveness is a difficult task that can only be accomplished through an analysis of the cases from which the standard derived. The current standard itself means nothing unless laid alongside the error or omission of the trial defense counsel in a particular set of facts. Only by looking at the cases can the practitioner determine what actions or inaction will later be judged to be ineffective assistance.

In 1959, a commentator stated "[T]he military's unique system of separate trial and appellate defense teams has inspired more frequent assertions on appeal of ineffective trial representation than are encountered in the civilian practice."[41] A glance at recent case law concerning ineffective assistance will highlight that this statement is even more true today. Military appellate courts have been less paternalistic toward trial defense counsel since the advent of the Military Rules of Evidence. For example, Military Rule of Evidence (MRE) 103 has been frequently employed by the courts to hold that the defense has waived certain errors. MRE 103(a)(1) requires that a timely objection or motion be made in order to preserve a claim or error. Failure to do so may waive the objection for purposes of trial and appeal.

Now more than ever, the burden is on the trial defense counsel to provide effective assistance. It is also important that trial defense counsel realize their actions are subject to review and detailed examination. This does not mean that a court will question the tactics of counsel, but it does mean that the defense counsel may have to justify his or her actions or inactions where it appears from the record or is claimed on appeal that the assistance was ineffective.

A recent case from the Army Court of Military Review emphasizes this point. In *United States v. Gholston*, the defense counsel did not object to a potentially unlawful pretrial showup. Any error was waived under MRE 321(2)(a) because of the failure to object. On appeal the accused alleged ineffective assistance of counsel and the trial defense counsel supplied an affadavit explaining that his decision not to object was tactical.[42] The trial defense counsel believed "that the identification was so blatantly suggestive and unreliable that members would clearly recognize it as such."[43] The court declined to "second guess appellant's counsel for his action merely because it was unsuccessful," and held that the failure to make timely objection did not amount to ineffective assistance of counsel where the decision not to object was tactical.[44]

A look at other specific cases where ineffectiveness of counsel was alleged should help in determining the parameters of the military's current standard.[45] Failure to conduct voir dire or to reply to extensive opening and closing argument by trial counsel has been held to dem-

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[40]13 M.J. 1, 6 (C.M.A. 1982). Judge Fletcher was lifting language from United States v. De Coster, 624 F.2d 196, 208 (D.C. Cir. 1979), wherein Judge Leventhal's plurality opinion stated that a "claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers."

[41]Survey of the Law, *Military Justice: The United States Court of Military Appeals 29 November 1951 to 30 June 1958*, 3 Mil. L. Rev. 67 (1959).

[42]15 M.J. 582 (A.C.M.R. 1983).

[43]15 M.J. at 584.

[44]*Id.*

[45]United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 (1955), should be read to see the outer limits of defense inadequacy. In a capital case, the defense counsel, among other things interviewed the accused once before trial, presented no evidence on the merits, brought out damaging evidence against his client, and made no attempt to avoid the death penalty.

onstrate inadequate representation.[46] Failure to present evidence of the accused's Vietnam awards was deemed to be ineffective assistance of counsel, even though the accused was wearing the medals at trial.[47] Failure to present evidence during extenuation and mitigation where it appears that evidence was available and would materially affect the outcome is ineffective assistance.[48] As noted in *Rivas*, the failure to move to strike testimony where there is no tactical reason or advantage to remain silent can be ineffective assistance.[49] A trial defense counsel was reprimanded by the Army Court of Military Review for using a para-professional to interview a client and then relying solely on those notes for his trial preparation after only minimal discussion with the accused himself.[50] A thirty-six word argument on findings, admitting guilt to a contested charge of aggravated assault and failing to point out other substantial issues, was deemed ineffective assistance.[51] Conceding the appropriateness of a bad conduct discharge as punishment when there was no evidence in the record that the accused himself desired a discharge is considered inadequate assistance.[52]

Trial defense counsel's activities prior to trial will also be measured against the effectiveness standard. In *United States v. Kloepfer*,[53] the Army Court of Military Review held a defense counsel's conduct with respect to a polygraph examination of his client to be so grossly negligent as to constitute a denial of effective assistance. The defense counsel did not determine the nature of all the questions to be asked, told his client to answer the questions, and did not stay to monitor the examination. The accused ultimately made numerous incriminating statements to the examiner.

Post trial responsibilities were dictated by the Court of Military Appeals in *United States v. Palenius*.[54] The effective assistance of counsel standard was thus extended to every stage of representation. Inadequacy allegations have arisen in the post-trial area by failing to pursue the recommendations of the military judge. In *United States v. Schreck*, the military judge recommended that the bad conduct discharge be suspended. When the staff judge advocate recommended to the convening authority in the post-trial review that the discharge be approved, the defense counsel concurred in the recommendation in the *Goode* response. Whether this concurrence was inadvertent or not, the accused did not receive adequate representation. In *United States v. Titsworth*,[56] the military judge stated that he would entertain a clemency petition to recommend suspension of the adjudged bad conduct discharge. The petition was not submitted, but the Court of Military Appeals held there was insufficient evidence to rebut the inference that Titsworth concurred with the decision. Failure to submit the petition would be inadequate representation absent an appropriate reason.

The opinions dealing with ineffective assistance of counsel appear in one respect to instruct trial defense counsel how to handle certain

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[46]United States v. McMahan, 6 C.M.A. 709, 21 C.M.R. 231 (1956).

[47]United States v. Rowe, 18 C.M.A. 54, 39 C.M.R. 54 (1968).

[48]United States v. Broy, 14 C.M.A. 419, 34 C.M.R. 199 (1964). *See also* United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8 (1957).

[49]*See* note 35 *supra*.

[50]United States v. Gaillard, 49 C.M.R. 471 (A.C.M.R. 1974).

[51]United States v. Burwell, 50 C.M.R. 192 (A.C.M.R. 1975).

[52]United States v. Richardson, 18 C.M.A. 52, 39 C.M.R. 52 (1968).

[53]49 C.M.R. 68 (A.C.M.R. 1974).

[54]2 M.J. 86 (C.M.A. 1977) The Court of Military Appeals laid out four specific responsibilities for trial defense counsel in the post-trial process. First, counsel must advise the accused as to the appellate process and take appropriate action during the intermediate reviews of the case. Second, the accused and any appellate counsel should be informed by trial defense counsel of the specific grounds or issues on appeal. Third, counsel should remain attentive to the needs of his or her client by rendering such advice and assistance as the exigencies of the particular case might require. Finally, counsel should maintain the attorney-client relationship until properly relieved.

[55]10 M.J. 226 (C.M.A. 1981).

[56]13 M.J. 147 (C.M.A. 1982).

situations. In *United States v. Owens*,[57] a claim of ineffective assistance was raised when the defense counsel allowed his client to confess to investigators to premeditated murder. Although the defense counsel had made a record of the advice he gave the accused prior to his confession, the Navy-Marine Corps Court of Military Review was concerned that the defense counsel did not vigorously oppose his client's decision, nor tell him to postpone the decision until the government's investigation was over. It could be held to be inadequate representation not to investigate the facts fully prior to allowing an accused to confess.

The courts will also look closely at the advice given by the defense counsel to determine if there has been effective assistance. In *United States v. King*,[58] the accused, on the record, stated that he did not want to present any evidence in extenuation or mitigation. The Navy-Marine Corps Court of Military Review, however, stated that the failure to present any such evidence bordered very closely on ineffective representation. The defense counsel has the obligation to present any readily available evidence, absent a strategic decision not to, *even if* the accused desires to remain passive. It was deemed to be inappropriate behavior by the trial defense counsel not to have exerted every effort to correct his client's notion that the guilty plea made the trial a mere formality.[59]

The presence of a civilian defense counsel, even if he or she is the lead attorney in the case, does not relieve the detailed military defense counsel from defending adequately. The competency of counsel is measured by the combined efforts of the defense team.[60] In a recent case, both the civilian and military defense counsel were chastised by Chief Judge Everett in a dissenting opinion for seemingly ineffective assistance because they did not personally communiate before trial with key defense witnesses.[61]

In any claim of ineffective assistance of counsel, the Court of Military Appeals stated that the file of the trial defense counsel is open to reasonable access by the accused or appellate defense counsel.[62] The client is entitled to accurate and specific information about what his or her attorney did or failed to do.[63] This may include detailed written interrogatories questioning certain aspects of the defense counsel's strategy and preparation, to include, as in this particular case, the failure to call a potential alibi witness.[64]

Trial defense attorneys may protect themselves from these potential pitfalls by keeping abreast of military case law, other criminal law literature, the ABA Standards for Criminal Justice, particularly the Defense Counsel Functions, and through continuing legal education. In the actual trial preparation, litigation, and post-trial work, the defense counsel must be conscientious, organized, and well prepared. An example of a worksheet used to aide in organizing a case is provided in the Appendix to this article. A worksheet can aid the attorney in insuring that he or she has advised the accused properly, has gathered critical information concerning the accused's history, has reviewed potential defenses and legal issues, and has performed other critical pre- and post-trial duties.

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[57]12 M.J. 817 (N.M.C.R. 1981).

[58]13 M.J. 863 (N.M.C.R. 1982).

[59]*Id.* at 866. United States v. Blunk, 17 C.M.A. 158, 37 C.M.R. 42 (1967), stands for the proposition that, when a defense counsel is instructed by the accused not to present *anything* in extenuation and mitigation, the attorney is bound by his or her desires. The proper procedure in such a situation is to have the accused execute a statement prior to trial reflecting those wishes.

[60]United States v. Urbina, 14 M.J. 962, 964 (A.C.M.R. 1982).

[61]United States v. Jefferson, 13 M.J. 1, 8 (C.M.A. 1982) (Everett, C.J., dissenting).

[62]United States v. Dupas, 14 M.J. 28, 30 (C.M.A. 1982).

[63]*Id.* at 32 n.10.

[64]Hopefully, the courts are not moving to a state which would justify the fears expressed by Judge Latimer in United States v. Allen in 1957:

> It may be expecting too much, but I hope that we are not going to regulate the conduct of the trial participants so closely that we view every decision made by defense counsel, his theories of defense, his trial tactics and techniques, and his every act of omission or commission through a microscopic lens.

8 C.M.A. 504, 510, 25 C.M.R. 8, 14 (1957).

Obviously, no checklist can ever be totally relied upon and must constantly be revised. The point is that organization is paramount in presenting an effective case. It also may help to have some recollection of the preparation and actions should an ineffectiveness claim be raised at some future date and the attorney's work be called into question.

Conclusion

The United States Supreme Court has not provided a specific standard to judge whether a defense counsel's assistance has been effective. The standard developed by almost all of the federal circuit courts has evolved from the "farce and mockery" rule to various standards of "reasonable competence." The military standard for effectiveness has likewise developed from the "ridiculous and empty gesture trial" to the *Rivas* standard under which counsel must exercise the skill and knowledge that normally prevails within the range of competence demanded of attorneys in criminal cases.

The extent to which each lawyer is competent hinges upon the standards that are applied to the lawyering process.[65] The ultimate burden, however, is upon every counsel to act in a manner which evidences competency in both preparation and presentation at and after trial. Knowledge of military case law, an appreciation of the required standard of performance and organization will help the trial defense counsel protect what is most at stake when there is an allegation of ineffective assistance of counsel: his or her reputation.

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[65]Trakman, *Competence In Law: An Unending Search*, 11 Cap. U.L. Rev. 401 (1982).

Appendix

1. TIME CHART

DATE	TIME SPENT	ITEM

2. COURTS-MARTIAL CHECKLIST

NAME

DATE FILE REC'D _____

DATE _____

PRETRIAL CONFINEMENT: _____ (Date) TO _____ (Date)

RESTRICTION: _____ (Date) TO _____ (Date)

ADVICE TO ACCUSED

_____ TDS
_____ Attorney-Client Relationship
_____ Privileged Information/Importance of Telling Truth
_____ Right to Silence
_____ Defense Counsel
  _____ Detailed Military Counsel
  _____ Civilian Counsel
  _____ Individual Military Counsel
_____ Discuss Mechanics of Trial
  _____ Prosecutions Case, Burden of Proof, Presumption of Innocence.

_____ Defense's Right to Present Evidence
_____ Privilege Against Self-incrimination
_____ Pleas
_____ Findings
_____ Right to Present E & M Evidence
_____ Mode of Trial - (MJ, Officer, 1/3 Enlisted)
_____ Discuss Charges, Elements of Proof
_____ Tell Truth - Get Accused's Side of Story
_____ Maximum Punishment
_____ Possibilities of Pre-Trial Agreement
_____ Chapter 10
_____ Fill in Accused Questionnaire
_____ Final Warnings - Speak to no one (best friend) but you.
Danger of not telling truth.

CLIENT DECISIONS — DATE OF SUBSEQUENT INTERVIEWS

Counsel _____

Court _____

Plea _____

3. ACCUSED QUESTIONNAIRE

DATE OF BIRTH/AGE

EDUCATION

MARITAL STATUS (Children/Ages)

FAMILY

HOME ADDRESS & TELEPHONE

TYPES OF JOBS

MOS

PRIOR SERVICE DATES AND UNITS

CURRENT TERM OF ENLISTMENT

BCT
AIT
AWARDS (Bring in documents in personal possession, example- letters of appreciation, etc.)

HAVE HIM WRITE AUTO-BIOGRAPHY

ARTICLE 15's/COURT-MARTIAL

COUNSELINGS/LETTERS OF REPRIMAND

CIVIL PROBLEMS (Arrests, convictions)

FAMILY PROBLEMS

FINANCIAL PROBLEMS

MEDICAL/PSYCHIATRIC PROBLEMS

CHARACTER WITNESSES:
Civilian/Family -

Military -

SUPERVISORS -

4. ATTORNEY CHECKLIST

ORDER 201 FILE MP/CID REPORTS

MEDICAL/FINANCE RECORDS

CHECK ELEMENTS OF PROOF:

GOVERNMENT'S CASE:

WITNESSES INTERVIEWED DATE _____

VIEW REAL EVIDENCE/CHAIN OF CUSTODY _____

VIEW SCENE _____

DEFENSE CASE:

MERITS

WITNESSES INTERVIEWED DATE

EXTENUATION & MITIGATION

WRITE LETTER TO ACCUSED'S FAMILY DATE

5. LEGAL MATTERS

POTENTIAL MOTIONS/DEFENSES

DEFECTS IN SPECIFICATIONS (failure to state offense)

PREFERRAL & FORWARDING OF CHARGES

REFERRAL, CONVENING ORDER

JURISDICTION

Over Accused

Over Offenses (service connected)

SPEEDY TRIAL

JENCK'S ACT

INADEQUATE DISCOVERY

NEW ARTICLE 32

SUPPRESSION:

Confession
Search & Seizure
Identification
Illegal Arrest

MULTIPLICITY

CHECKED CURRENT ISSUE CHECKLIST:

PRE-TRIAL ADVICE

MOTIONS IN LIMINE

OTHER DEFENSES

INSANITY (Sanity Board Request)

SELF-DEFENSE

ENTRAPMENT

AGENCY

INNOCENT POSSESSION

VOL INTOXICATION

DURESS

GOOD CHARACTER

ACCIDENT

INTERVENING CAUSE

IMPOSSIBILITY

MISTAKEN BELIEF OR IGNORANCE

JUSTIFICATION

ALIBI

COMMAND INFLUENCE

PRIOR PUNISHMENT

ILLEGAL PRETRIAL RESTRAINT

STATUTE OF LIMITATIONS

DEALINGS WITH TRIAL COUNSEL

NOTIFICATION

REQUEST FOR DISCOVERY

DISCOVERY RECEIVED _____

SECTION III EVIDENCE RECEIVED

REQUEST FOR WITNESSES:

NAMES DATE

REQUEST FOR REBUTTAL WITNESSES _____

RECEIVED _____

NOTIFICATION TO TRIAL COUNSEL OF MOTIONS _____

DELAY OF TRIAL REQUEST _____

EXTRAORDINARY WRIT _____

FINAL DECISIONS

MODE OF TRIAL DATE OF REQUEST

PLEA

(Need exception & substitution in writing)

AGREEMENT SUBMITTED _____

APPROVED/DISAPPROVED

STIPULATION OF FACTS

REQUEST FOR SPECIAL FINDINGS

6. FINAL PREPARATIONS

GO OVER PROVIDENCY INQUIRY

GET UNIFORM SQUARED AWAY

ACCUSED'S TESTIMONY - Anticipated Cross

VOIR DIRE

POTENTIAL CHALLENGES

MOTION/LEGAL ARGUMENTS READY

OPENING STATEMENT

CROSS OF GOVERNMENT WITNESSES (Merits and E&M)

DIRECT OF DEFENSE WITNESSES (Merits and E&M)

ROUGH OUTLINE CLOSING ARGUMENT

PREPARE INSTRUCTIONS

SENTENCING ARGUMENT

7. POST TRIAL DUTIES

Check Result of Trial (Insure Pre-trial Agreement Attached)

Deferment

Clemency

Appellate Counsel Form

69 Appeal

Explain that you're counsel until Appellate Attorney appointed.

Make MFR of any issues waived and reason

POST TRIAL REVIEW REBUTTAL

Disqualification of SJA/CA to Review

30 day letter _____

60 day letter _____

90 day letter _____

Discussion/Dealings with Appellate Attorney

New OMB Circular No. A-76 (Revised): "Performance of Commercial Activities" Is Published

Contract Law Division, TJAGSA

On 16 August 1983, the Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB), published in the Federal Register[1] the "final" revision to OMB Circular A-76, dated 4 August 1983. Included with the Circular is the Supplement consisting of four parts:

Part I Policy Implementation—the general implementing instructions for the Circular. Included in this part are detailed flow charts and narrative descriptions, inventory and review requirements, and annual reporting requirements.

Part II Writing and Administering Performance Work Statements—sets forth the steps needed to develop, write, and administer a performance work statement and a quality assurance plan for both in-house or contractor operation of a commercial activity.

Part III Management Study Guide—sets forth the recommended procedures for conducting the management review of the in-house organization.

Part IV Cost Comparison Handbook—provides detailed instruction for developing a comprehensive and valid comparison of the estimated cost to the Government of acquiring a product or service by contract and of providing it with in-house personnel and resources.[2]

Compliance with all parts of the Supplement is mandatory. It should be noted however, that Part II was not included in this revision. Part II will be a revised version of what is currently OFPP Pamphlet No. 4, *A Guide for Writing and Administering Performance Statements of Work for Service Contracts* (October 1980); however, no significant procedural changes are anticipated.[3]

The new Circular rescinds OMB Circular No. A-76 (revised), dated 24 March 1979; Transmittal Memoranda 1 through 7; and Supplemental No. 1, dated March 1979.[4] The new Circular,

[1]48 Fed. Reg. 37,110 (1983).

[2]Supplement, Office of Management and Budget Circular No. A-76, at *i* (August 1983) [hereinafter cited as Supplement].

[3]Supplement at II-1.

[4]Office of Management and Budget Circular No. A-76, 48 Fed. Reg. 37,110 (1983) [hereinafter cited as OMB Cir.].

which was effective upon publication, requires that initial reviews of all commercial activities be completed by 30 September 1975.[5] The Circular and its Supplement are a significant improvement to previously existing guidance. The Management Study Guide, Part III of the Supplement, provides for the first time a methodology for organizing and conducting the management study, perhaps the most critical element of the cost comparison process. Part IV of the Supplement greatly simplifies the cost comparison procedures. For example, common costs that would be the same for in-house and contractor operations, need not be computed.[6]

As in the past, commercial activities must be maintained in an inventory and updated annually. The new Circular requires that only Government commercial activities be included in the inventory. These functions are subsequently reviewed to determine if there exists a non-cost reason to justify continued in-house performance.[7]

In the past, certain commercial activities performed by Federal employees remained in-house without undergoing a cost comparison if no commercial source was available, conversion would cause an undue delay or disruption in an essential program, or Government performance was required for reasons of national defense. The revised Circular adds a new "exception" in that commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultation with the agency's chief medical director, determines that in-house performance is in the best interests of direct patient care.[8]

A proposed revised Circular,[9] dated 6 January 1983, encouraged consolidating commercial activities into a single statement of work for potential contracts in order to reduce costs and complexities of contract administration and simplify management control. The proposed Circular urged a balance between these "umbrella" contracts and smaller contracts that would provide prime contract opportunities for small and small disadvantaged businesses. The proposed Circular emphasized subcontracting to small and small disadvantaged businesses under multi-function solicitations as a method to meet the Government commitment to foster small and small disadvantaged business opportunities. Responding to comments from the small business community the final revised Circular eliminated these guidelines and opted for a single statement of general policy: "Agencies should package commercial activities for potential contracts to maximize economies and efficiences, and comply with provisions and goals for prime and subcontract awards to small and small disadvantaged businesses, pursuant to P.L. 95-507, the Small Business Act Amendments."[10]

The revised Circular continues to require the agencies to establish an administrative appeals procedure to resolve questions from directly affected parties relating to determinations resulting from cost comparisons performed in compliance with the Circular and Part IV of the Supplement. For the first time challenges may also be raised against a decision to convert to contract without a cost comparison. Management studies, which are required as part of a cost comparison, are not appealable.[11]

On a more subtle note,the revised Circular shuffles the order of the three basic precepts upon which the program is premised. In the 1979 revision, the Circular listed reliance upon the private sector for goods and services as the first precept.[12] In the revised Circular, the pol-

[5]OMB Cir. at para. 9e.

[6]Supplement at Pt. I, Ch. 2, para. D.

[7]Supplement at Pt. I, Ch. 1, para. B. Contractual commercial activities are reviewed under normal procurement procedures at the expiration of the individual contract.

[8]OMB Cir. at para. 8c.

[9]Proposed Revision to Office of Management and Budget Circular No. A-76, 48 Fed. Reg. 1376 (1983).

[10]Supplement at Pt. I, Ch. 1, para. C.1.d.

[11]Supplement at Pt. I, Ch. 2, para. I.1.b.

[12]Office of Management and Budget Circular No. A-76 (Revised) 29 March 1979 at para. 4, listed the policy precepts as follows:

a. Rely on the Private Sector. The Government's business is not to be in business. Where private sources are available, they should be looked to first to

icy of achieving economy and enhancing productivity is listed first. The policy of relying upon the private sector has dropped to third and includes a statement that this reliance is required, if the product or service could be procured more economically from the private sector.[13] This change reflects OMB's reaction to persistent criticisms of the program. By emphasizing economy and efficiency as the basis for the Commercial Activities Program rather than the more philosophical argument of reliance on the private sector, it is more difficult for opponents of the program to gain support.

The Circular requires agency implementation within 90 days. A new Army regulation is expected in November. The regulation would supersede the often-extended DA Circular 235-1, dated 1 February 1980.

provide the commercial or industrial goods and services needed by the Government to act on the public's behalf.

b. Retain Certain Governmental Functions In-House. Certain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees.

c. Aim for Economy: Cost Comparisons. When private performance is feasible and no overriding factors require in-house performance, the American people deserve and expect the most economical performance and, therefore, rigorous comparison of contract costs versus in-house costs should be used, when appropriate, to decide how the work will be done.

[13]OMB Cir. at para. 5.

Claims Service News

U.S. Army Claims Service, OTJAG

In September 1982, The Judge Advocate General issued a Memorandum of Decision which instituted an automation project for the Judge Advocate General Corps. General Clausen's goal is to have the JAG Corps use automation and telecommunication technologies to improve mission support and enhance our ability to render timely, accurate and complete legal services. To accomplish this goal, the U.S. Army Claims Service prepared an Information Systems Plan (ISP) on 31 March 1983. The purpose of this plan is to provide products which will be used as a basis for designing, developing and implementing a U.S. Army Claims Service Information System designed to encompass the interrelationships within OTJAG, the USARCS, and worldwide claims offices to improve mission support and enhance our ability to render timely, accurate and complete legal services.

The USARCS ISP is available to all staff judge advocate offices upon request. Request for the USARCS ISP should be forwarded to the U.S. Army Claims Service, OTJAG, Attention: JACS-Z (Mrs. Slusher), Fort George G. Meade, Maryland 20755.

Criminal Law News

Criminal Law Division, OTJAG

IRS Levy

IRS agents recently collected $24,192 from a soldier who had sold heroin and marijuana overseas. Pursuant to a valid search authorization, USACIDC agents seized foreign and U.S. currency and negotiable and non-negotiable instruments from the soldier's off-post quarters and retained them as evidence until completion of court-martial proceedings. Because the money constituted proceeds from overseas drug transactions, the forfeiture provisions of 21 U.S.C. § 881 technically were not applicable. However, the local staff judge advocate contacted the overseas IRS office in accordance with paragraph 2-8*i*(18), AR 195-5 (which requires notifying the local IRS office when more than $10,000 in U.S. or foreign currency is impounded.) The IRS made a jeopardy assessment for taxes and penalties and served a notice of levy in the amount of $24,192. Upon receipt of the

notice of levy, USACIDC delivered the seized money to the Internal Revenue Service.

When there is possible IRS interest in money impounded as evidence in CONUS, the Chief, Criminal Investigation at the nearest IRS office should be contacted. If overseas, the Assistant Commissioner (Criminal Investigation), Internal Revenue Service, Constitution Avenue NW, Washington, D.C. 20221 should be contacted. Furthermore, DAJA-CL has recommended a change to AR 195-5 that would eliminate reference to $10,000 or more and would simply require notification when there is possible IRS interest in seized currency or other property.

Pretrial Agreements and Impositions of Fines

In a recent memorandum opinion, the Army Court of Military Review disapproved imposition of a fine because during providency the trial judge failed to assure that all parties were in agreement as to the meaning and effect of the plea bargain on the sentence. At trial, defense counsel disagreed as to whether the pretrial agreement would permit inclusion of a fine.

To avoid needless litigation at trial and upon appeal, staff judge advocates should ensure that, in cases where the approval of an adjudged fine or a fine resulting from sentence commutation may be appropriate, covening authorities include a provision in the pretrial agreement that expressly indicates whether a fine may be approved and ordered executed.

Model Rules of Professional Conduct

The House of Delegates of the American Bar Association gave final approval to the Model Rules of Professional Conduct at the annual meeting held 28 July - 4 August in Atlanta. Although the Model Rules now reflect the official policy of the American Bar Association, it remains to be seen whether each state will adopt them.

For Army judge advocates and civilian attorneys of the Judge Advocate Legal Service, the Model Code of Professional Responsibility and the ABA Standards for Criminal Justice, as adopted in AR 27-10 and AR 27-1, continue to be the governing ethical standards.

The entire text of the Model Rules of Professional Conduct and the comments thereto can be found at 52 U.S.L.W. 1 (U.S. Aug. 16, 1983).

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

JAGSO TEAM TRAINING 1984

The Judge Advocate General's Service Organization (JAGSO) triennial training for military law centers and legal service teams will be conducted at The Judge Advocate General's School during 18-29 June 1984. Inprocessing will take place on Sunday, 17 June 1984. Attendance is limited to commissioned officers only; alternate AT should be scheduled for warrant officers and enlisted members. The 1036th U.S. Army Reserve School (USARS), Farrell, PA, will host the training; orders should reflect assignment to the 1036th USARS with duty station at TJAGSA. Units should forward a tentative list of members attending AT at TJAGSA to the School, ATTN: JAGS-RA (Mrs. Park), as soon as possible. Final lists of attendees must be furnished by 1 March 1984. Commanders are encouraged to visit their units during the training. These visits, however, must be coordinated in advance with either Mrs. Park or Captain McShane of the Reserve Affairs Department. Point of contact at TJAGSA is Mrs. Lee Park, Reserve Affairs Department at 804-293-6121; FTS 938-1301/1209; or AUTOVON 274-7110, ext. 293-6121.

JAOAC 1984

The Judge Advocate Officer Advanced Course (JAOAC), Phase IV, will be conducted at The Judge Advocate General's School during 18-29 June 1984. Inprocessing will take place on Sunday, 17 June 1984. Transfer from JAGSO Team Training to JAOAC, Phase IV, must be accom-

plished prior to arrival. Transfers will not be permitted after arrival at TJAGSA. ARNG quotas are available through channels from the Education Branch, National Guard Bureau. USAR quotas are available through channels from the JAGC Personnel Management Officer, Major William Gentry, RCPAC. Requests for quotas must be received by 1 April 1984. For planning purposes, JAOAC, Phase VI, is scheduled to be conducted in 1985 and JAOAC, Phase II, to be taught in 1986. Point of contact at TJAGSA is Mrs. Lee Park, Reserve Affairs Department, at (804)-293-6121; FTS 938-1301/1209; or AUTOVON 274-7110, ext. 293-6121.

ENLISTED UPDATE

By Sergeant Major Walt Cybart

Chief Clerk/Court Reporters Course

The 3rd OTJAG Chief Legal Clerk/Court Reporter Refresher Training Course was conducted at The Judge Advocate General's School 12 through 15 July 1983. Fifty-nine chief clerks/court reporters attended this course, representing Hawaii, Europe, Korea and Okinawa, as well as our Reserve force and the Court Reporter and Legal Clerks' schools. From all indications the course was a resounding success. A detailed after action report will be mailed to each attendee as well as to the installations unable to send a representative. Next year's course will again be at the JAG School during the period 22-25 May 1984. The change in dates should help somewhat in obtaining funds for attendance. Once again, attendance will be by invitation only, to be mailed at a later date.

SEER Weighted Averages

As of July 1983, the SEER weighted averages for MOS 71D/71E are:

	71D	*71E*
E5	122	123
E6	123	123
E7	124	124
E8	123	125
E9	124	125

Sergeants Major Academy Selections

The following NCOs were selected to attend the SMA: MSG Eugene Fix, 71E, Joint Chiefs of Staff, Washington, DC, Class #24, Resident MSG Dwight Lanford, 71D, 8th Inf Div, Europe, Class #24, Resident SFC(P) William Sheehan, 71E, Ft. Polk, LA, Non-Resident Course

Video Tape

Due to recent restrictions placed on the reproduction of video tapes, copies of MAJ John Altenburg's *Authority of an NCO* are no longer available through this office. Efforts are being made to obtain additional tapes from Europe.

Change of Address

Effective 1 October 1983, the address for SFC Steve Widdis and SFC Ira Law, the individuals who develop the SQT for MOS 71D/71E, is: US Army Soldier Support Center, Individual Evaluation Branch, ATTN: ATSG-DTD-IE (SFC Law/Widdis), Ft. Ben Harrison, Indiana 46216.

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 units or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate

General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

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).

3. Civilian Sponsored CLE Courses

January

1-3: UMLC, Medical Institute for Attorneys, Miami Beach, FL.

9-10: PLI, Creative Financing in the 1980's, Los Angeles, CA.

9-13: UMLC, Institute on Estate Planning, Miami Beach, FL.

12-13: PLI, Preparation of Annual Disclosure Documents, New York, NY.

12-13: PLI, Trademark Infringement, New York, NY.

15-20: ATLA, Basic Course in Trial Advocacy, Coral Gables, FL.

16: PLI, Mechanics of Underwriting, New York, NY.

19-21: PLI, Tactics & Strategy in Major Litigation, New York, NY.

20-21: KCLE, Construction Contract Law, Lexington, KY.

26: ABICLE, Sales Law in Alabama, Montgomery, AL.

26-27: PLI, EEO Litigation, New York, NY.

26-27: PLI, Employment at Will, San Francisco, CA.

26-27: PLI, Preparation of Annual Disclosure Documents, Chicago, IL.

27: ABICLE, Sales Law in Alabama, Birmingham, AL.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IED: The Institute for Energy Development, P.O. Box 19243, Oklahoma City, OK 73144.

IICLE: Illinois Institute for Continuing Legal Education, 2395 West Jefferson Street, Springfield, Illinois 62702 (Phone: (217) 787-2080).

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan Hutchins Hall, Ann Arbor, MI 48109.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NKUCCL: Chase Center for the Study of Public Law, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY 41076. Phone: (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street NW, Washington, D.C. 20036.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65221.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

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. Professional Writing Award for 1982

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the previous year. The award consists of a written citation signed by The Judge Advocate General and an engraved plaque. The history and criteria for the award are set forth at 87 Mil. L. Rev. 1 (1980), updated at 90 Mil. L. Rev. 1 (1980), and 93 Mil. L. Rev. 1 (1981).

Major Eugene R. Sullivan, JAGC, USAR, has been selected to receive the award for 1982 for his article, "Procurement Fraud: An Unused Weapon," 95 Mil. L. Rev. 117 (Winter 1982). Major Sullivan is Deputy General Counsel for the Department of the Air Force and an Individual Mobilization Augmentee to the Office of the Staff Judge Advocate, U.S. Military Academy, West Point, New York.

3. Videocassettes

The Television Operations Office of The Judge Advocate General's School announces that videocassettes of the Seventh Criminal Law New Developments Course, held 22 through 24 August 1983, are available to the field. Listed below are titles, running times, synopses and speakers for each program. If you are interested in obtaining copies of any of these programs, please send a blank 3/4" videocassette of the appropriate length to: The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape # / Running Time	Title/Speaker/Synopsis
JA-366-1	**Coma Watch**
51:14	Speaker: Major Stephen D Smith, Instructor, Criminal Law Division, TJAGSA. Presentation deals with the interrelationship between judicial philosophies and recent cases decided by the Court of Military Appeals. The period covered encompasses approximately one year, beginning at 14 M.J. 1.
JA-366-2	**Rules for Courts-Martial, Part I**
49:33	Guest Speaker: Major John S. Cooke, Member, Joint Service Committee for Military Justice, OTJAG. This presentation provides an overview of the substance of the Manual for Courts-Martial revision project, the structure of the new Manual, and the rationale underlying changes therein.
JA-366-3	**Rules for Courts-Martial, Part II**
47:36	A continuation of JA-366-2.
JA-366-4	**Mental Responsibility**
40:36	Speaker: Captain Lawrence A. Gaydos, Instructor, Criminal Law Division, TJAGSA. This presentation deals with recent changes in the law of mental responsibility and the latest developments in the use of psychiatry/psychology in military criminal trials.
JA-366-5	**Urinalysis Technical Update**
24:56	Speaker: Major Alan K. Hahn, Instructor, Criminal Law Division, TJAGSA. Discussion of factual and scientific urinalysis issues including reliability of the tests, passive inhalation, and involuntary ingestion.
JA-366-6	**Jurisdiction**
25:36	Speaker: Major Kenneth H. Clevenger, Instructor, Criminal Law Division, TJAGSA. This presentation covers significant decisions of the Court of Military Appeals concerning court-martial jurisdiction over persons and offenses. Emphasis is placed upon the broadened view of service-connection.

Tape # Running Time	Title/Speaker/Synopsis
JA-366-7	**Potpourri**
45:30	Pretrial Agreements—Speaker: Major Stephen D. Smith. A brief overview of recent cases dealing with pretrial agreements. The focus is upon recently litigated clauses and interpretation problems. Speedy Trial—Speaker: Major Patrick Finnegan, Instructor, Criminal Law Division, TJAGSA. Presentation deals with recent case law, especially interpretations of the *Burton* rule. Command Control—Speaker: Major Craig Schwender, Senior Instructor, Criminal Law Division, TJAGSA. Presentation is an overview of recent case law and developments in the area of command control/influence.
JA-366-8	**Search and Seizure, Part I**
50:23	Speaker: Major Stephen D. Smith. This presentation deals with recent cases and their impact upon Military Rules of Evidence 311 - 316.
JA-366-9	**Search and Seizure, Part II**
47:45	A continuation of JA-366-8.
JA-366-10	**1983 Justice Act**
38:17	Speaker: Lieutenant Colonel William P. Greene, Jr., Chief, Criminal Law Division, TJAGSA. This presentation gives an overview of the highlights of the 1983 Justice Act.
JA-366-11 53:00	GUEST SPEAKER: Chief Judge Robinson O. Everett, United States Court of Military Appeals.
JA-366-12	**Evidence, Part I**
54:30	Speaker: Major Michael C. Chapman, Instructor, Criminal Law Division, TJAGSA. Presentation deals with recent case law, both military and civilian, and its impact upon the Military Rules of Evidence.
JA-366-13	**Evidence, Part II**
43:55	A continuation of JA-366-12.
JA-366-14	**Sixth Amendment Issues**
28:10	Speaker: Major Alan K. Hahn. Presentation discusses compulsory speaker issues of materiality, standards for witnesses and chemists, timeliness of defense requests, and alternative modes of proof.
JA-366-15	**Ethics**
25:40	Speaker: Captain Lawrence A. Gaydos. Recent case law is analyzed with emphasis on ethical questions that are likely to arise in the Military Justice system.
JA-366-16	**Multiplicity**
18:32	Speaker: Major Craig Schwender. Presentation deals with recent substantive law concerning multiplicity for both findings and sentence, and the procedures for disposing of such issues at trial.
JA-366-17	**Drug Offenses**
51:00	Speaker: Major Alan K. Hahn. Discussion of drug offenses under the 1982 Executive Order and developments in the defense of entrapment.

Tape # Running Time	Title/Speaker/Synopsis
JA-366-18	**Fifth Amendment Issues**
51:00	Speaker: Major Patrick Finnegan. Presentation deals with recent case law in the area of self-incrimination. Discusses Supreme Court cases in addition to military case law.
JA-366-19	**Potpourri**
45:44	Motions—Speaker: Major David W. Boucher, Instructor, Criminal Law Division, TJAGSA. New developments in Jencks Act motions and the effect of failure to give timely notice of Section III, Mil. R. Evid., evidence. Inchoate Crimes—Speaker: Major David W. Boucher. Concerns recent cases on conspiracy. Topics include vicarious liability for substantive crimes, effect of acquittal of co-conspirators, and pleading and proving an overt act. Nonjudicial Punishment—Speaker: Major Kenneth H. Clevenger. Presentation deals with problems encountered in administering nonjudicial punishment and the recent decision in *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983).
JA-366-20	**Findings and Sentencing**
42:16	Speaker: Captain Lawrence A. Gaydos. An overview of recent case law defining the procedural and substantive aspects of findings and sentencing, including a discussion of the military death penalty.
JA-366-21	**Rules for Courts-Martial Seminar, Part I**
50:00	Major Stephen D. Smith: (1) Changes to Military Rules of Evidence relating to search and seizure; (2) Rule 909—Pleas; (3) Rule 705—Pretrial Agreements. Major Craig Schwender: (1) Rule 108—Rules of Court; (2) Rule 601(f)—Referral by Superior Convening Authority; (3) Rule 603—Amendments to Charges. Major David W. Boucher: (1) Rules 701 and 913—Disclosure and Discovery; (2) Rules 905, 914, and 916—Motions; (3) Rule 911—Voir Dire.
JA-366-22	**Rules for Courts-Martial Seminar, Part II**
43:30	Major Alan K. Hahn: (1) Crimes and Defenses; (2) Amendments to Mil. R. Evid. 321. Major Patrick Finnegan: (1) Rule 707—Speedy Trial; (2) Rule 304 and 305—Pretrial Restraint and Confinement; (3) Rule 704—Immunity; (4) Rules 1301-1306—Summary Courts-Martial.
JA-366-23	**Rules for Courts-Martial Seminar, Part III**
42:00	Captain Lawrence A. Gaydos: (1) Rules 405 and 406—Article 32/Pretrial Advice; (2) Findings and Sentencing; (3) Insanity. Major Kenneth H. Clevenger: (1) Rules 1101-1113 and 502—Post-Trial Responsibilities; (2) Rules 1202-1204 and 707—Extraordinary Writs; (3) Rules 201-203 and 307—Jurisdiction; (4) Nonjudicial Punishment.

4. Regulations & Pamphlets

Number	*Title*	*Date*
AR 140-145	Army Reserve—Individual Mobilization Augmentation Program (Name Changed from Mobilization Designation Program)	15 Jul 83
AR 600-43	Personnel General—Conscientious Objection	1 Aug 83

5. Articles

Babcock, *Product Liability Litigation: The Automobile General Defect Case*, 18 Forum 481 (1983).

Becker, *Prime Contractor/Subcontractor Liability Exposure Under Government Contracts*, 4 Northrup U.L.J. of Aerospace, Energy, & the Environment 29 (1983).

Bloom, *The Supreme Court & Its Purported Preference for Search Warrants*, 50 Tenn. L. Rev. 231 (1983).

Bodensteiner, *Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps*, 5 W. New Eng. L. Rev. 391 (1983).

Bross, *Professional & Agency Liability for Negligence in Child Protection*, 11 Law, Med. & Health Care 71 (1983).

Cohan, *The Rights & Duties of Retail Merchants Under State Consumer Protection Laws*, 18 New Eng. L. Rev. 297 (1982).

Crump, *The Admission of Chemical Test Refusals After* ***State v. Neville****: Drunk Drivers Cannot Take the Fifth*, 59 N.D.L. Rev. 349 (1983).

Elliott, *The Young Person's Guide to Similar Fact Evidence—I*, Crim. L. Rev., May 1983, at 284.

Finn & Martin, *Strict Liability in Military Aviation Cases—Should It Apply?* 48 J. of Air L. & Com. 347 (1983).

Fowler & Wyndelts, *Real Estate Transfers to a Spouse During Marriage & as Part of a Divorce Settlement*, 10 J. Real Est. Tax'n 219 (1983).

Frankel, *Fiduciary Law*, 71 Calif. L. Rev. 795 (1983).

French & Shechmeister, *The Multiple Personality Syndrome & Criminal Defense*, 11 Bull. Am. Acad. Psychiatry & L. 17 (1983).

Gardner, *Searches & Seizures of Automobiles & Their Contents: Fourth Amendment Considerations in a Post-****Ross*** *World*, 62 Neb. L.R. 1 (1983).

Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, U. Ill. L. F. 37 (1983).*

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Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983).

Jonakait, *Will Blood Tell? Genetic Markers in Criminal Cases*, 31 Emory L.J. 883 (1982).

Katz, ***United States v. Ross:*** *Evolving Standards for Warrantless Searches*, J. Crim. L. & Criminology 172 (1983).

Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983).

Levine, *Using Jury Verdict Forecasts in Criminal Defense Strategy*, 66 Judicature 448 (1983).

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Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229 (1983).

Loomis & Mulcahy, *Strikes: Strategy & Tactics for Managers*, 8 Employee Rel. L.J. 618 (1983).

Molash, *If You Can't Save Us, Save Our Families: The* ***Feres*** *Doctrine & Servicemen's Kin*, 1 U. Ill. L.F. 317 (1983).

Samuels, *The New Law on Wills*, Conv. & Prop. Law, Jan-Feb 1983, at 21.

Scholder, *The Argument Against the Use of Hypnosis to Improve or Enhance the Memory of Courtroom Witnesses*, 7 Law & Psychology Rev. 71 (1982).

Weisberg, *The Calabresian Judicial Artist: Statutes & the New Legal Process*, 35 Stan. L. Rev. 213 (1983).

Comment, *The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim Under the Federal Tort Claims Act?* 52 U. Cin. L. Rev. 149 (1983).

Note, *Degree of Immunity Applicable to Senior Aides of the President of the United States in Civil Actions Arising Under the Constitution:* ***Harlow v. Fitzgerald***, 2 B.Y.U. L. Rev. 426 (1983).

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Note, *The United Nations Convention on Contracts for the International Sale of Goods*, 21 Colum. J. Transnat'l L. 529 (1983).

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Note, *Expanding the Scope of a Search Incident to an Arrest: Efficiency at the Expense of Fourth Amendment Rights*, 31 De Paul L. Rev. 581 (1982).

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Note, *Conscientious Objection to Military Service: A Report to the United Nations Division of Human Rights*, 12 Ga. J. Int'l and Comp. L. 359 (1982).

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By Order of the Secretary of the Army:

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Major General, United States Army
The Adjutant General

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