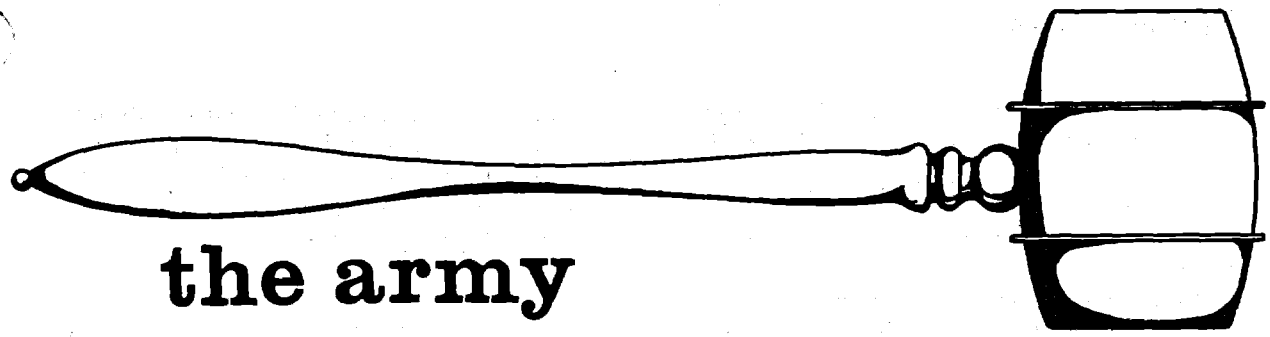

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Ethics of Trial Advocates

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Ethical Standards and Military Counsel. Counsel before courts-martial in the Army must adhere to certain standards of professional responsibility and ethics. These standards are established by the Uniform Code of Military Justice,[1] the Manual for Courts-Martial,[2] and Army Regulations. Paragraph 2-32, Army Regulation No. 27-10, makes "applicable to judges, counsel, and clerical support personnel of Army courts-martial,"[3] the American Bar Association Code of Professional Responsibility and Code of Judicial Conduct,[4] and the American Bar Association Standards for the Administration of Criminal Justice on Fair Trial and Free Press,[5] The Function of the Trial Judge,[6] and The Prosecution Function and The Defense Function,[7] "[u]nless they are clearly inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial, and applicable departmental regulations."[8] The Prosecution Function and The Defense Function each indicate that prosecutors and defense counsel have a "duty" to know and be guided by the "codes and canons of the legal profession."[9]

The Obligation to Maintain High Ethical Standards. Breaches of ethical standards have a detrimental and sometimes insidious effect upon the administration of justice.

Moreover, an attorney's reputation in regard to his or her professional responsibility, be it good or bad, often significantly affects the attorney's effectiveness in dealing with others. Counsel should also be aware that ethical violations may lead to disciplinary action against an individual attorney. Such disciplinary action may range from a reprimand, in the case of a minor transgression, to suspension as counsel before court-martial, withdrawal of certification under Article 27(b), and/or notification of the bar(s) of which the attorney is a member, for possible action by such organization(s).[10] Disbarment by the Court of Military Appeals is also possible.[11] *See also* Article 98, UCMJ.

The Judge Advocate General is responsible for supervising counsel who practice before courts-martial.[12] In exercise of this responsibility he has established a Professional Ethics Committee to advise him on matters involving professional responsibility of military practitioners. The committee investigates, reviews and makes recommendations to TJAG in cases involving possible ethics violations; its capacity is advisory only. By DA Message,[13] before "any command investigation into an alleged ethical violation by a member of The Judge Advocate General's Corps, the supervising Staff Judge Advocate shall obtain approval from The Judge Advocate General." Thus TJAG is vitally interested in, and will be directly involved in the disposition of allegations of ethical wrongdoing by members of the JAGC.

Many ethical violations or ethically questionable activities are not apparent as such to an observer. The difficulty in detecting such derelictions places a greater responsibility on counsel to know and adhere to the applicable standards. Without such adherence, the system cannot function effectively.[14] Ethical violations most often occur when counsel is ignorant or unsure of his or her proper role, and of the rules and standards which define that role. Counsel must maintain familiarity with the applicable standards,[15] and insure that their actions are consistent with their ethical duties.

When counsel is confronted with an ethical question he or she should examine the sources discussed in the first paragraph of this article. Trial counsel should also discuss such problems with the Chief Trial Counsel, Chief of Military Justice, Deputy Staff Judge Advocate, or Staff Judge Advocate. Defense counsel should seek the advice of the Senior De-

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fense Counsel or the Field Defense Services Office; in some situations it may also be appropriate and proper for defense counsel to discuss a problem with the Staff Judge Advocate or his deputy. It is sometimes appropriate to raise ethical difficulties before the military judge at an Article 39*a* session.[16] Counsel who is aware of an ethical violation by another counsel should bring the violation to counsel's attention and, where appropriate, notify the proper authorities of such violations.

DUTIES COMMON TO BOTH TRIAL AND DEFENSE COUNSEL

Duty to Maintain Decorum and to Protect the Adversary Process. As officers of the court, both trial and defense counsel must respect the dignity and decorum of the court.[18] Counsel should *be courteous when addressing the court and witnesses and parties before it.* Counsel may in good faith challenge the rulings of the military judge, but counsel should do so in a manner which reflects the respect which the military judge is owed.[19] Counsel should avoid personal references to opposing counsel or colloquies with opposing counsel in the courtroom.[20] *Counsel must not mistate facts,*[21] or inject facts not in evidence by way of argument[22] or questions for which there is no proper foundation.[23] Counsel is bound to reveal to the court legal authority of which he is aware, that is adverse to his position, unless raised by his opponent, but counsel is free to argue that such authority should be distinguished or overruled.[24] *Counsel must not knowingly*[25] *present false evidence or perjured testimony.*[26] Where counsel becomes aware, after the fact, that perjury has been committed on the court by someone other than his client, counsel has a duty to bring the matter to the attention of the court, or the appropriate convening authority.[27] Counsel may not offer or display in open court evidence which he knows will be inadmissible,[28] nor should he display evidence or items in view of court members before such items are properly admitted.[29]

Argument. *Argument by counsel must be confined to facts in evidence and reasonable inferences therefrom.*[30] Counsel should not attempt to inflame the passions of the jury,[31] and counsel should refrain from stating his personal opinions about the case or the evidence therein.[32]

Counsel as Witness. *One should not appear as a witness in a case in which he is counsel.*[33] In some cases in which counsel is acting, appearing as a witness may be unavoidable; in those rare cases it may be permissible for counsel to testify as to matters of a formal or routine nature and still participate in the trial of the case.[34] Otherwise, counsel may be disqualified from acting as counsel,[35] or his client will have to forego his testimony. Most situations in which counsel may become a potential witness are easily avoided through foresight and planning. The most common such situations are those in which counsel has become part of a chain of custody or in which counsel wishes to impeach a witness with a prior statement made by the witness to counsel.[36] In some situations, testimony by counsel may constitute reversible error.[37]

Relations with Witnesses. "Counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of the opposing counsel or the accused."[38] Counsel may not advise prospective witnesses to refuse to give information to the opposing party or his counsel.[39] *Counsel must not encourage a witness to suppress or deviate from the truth in his testimony,* or to make himself unavailable for trail.[40] Therefore, any attorney must exercise care when interviewing witnesses in formulating his or her questions and in any statements he or she makes about the case. The line between refreshing a prospective witness' recollection or assisting him or her in the articu-

lation of what he or she already knows, and improperly implanting ideas or furthering distortions is extremely thin and transgressions are not easily detectable. Thus the integrity of the system depends heavily on the integrity of the individual attorney. Counsel may caution a witness concerning possible self-incrimination and the need to consult with an attorney,[41] but counsel should not affirmatively urge the witness to exercise his or her right to remain silent as this would be a violation of the *obligation not to suppress evidence.*[42] It is improper to compensate a witness (other than for travel, and expenses as prescribed by paragraph 115, MCM, 1969) for his testimony,[43] except that an expert may be compensated for his work in regard to the case where otherwise eligible.[44] Ordinarily, counsel should interview witnesses only in the presence of a third party unless counsel is willing to forego possible impeachment of the witness with statements made by the witness to him, or seek leave to withdraw as counsel in order to present such evidence.[45]

It is improper to call a witness in the presence of the jury when it is known that the witness will claim a privilege not to testify.[46] The issues of whether the witness will claim the privilege, and whether his assertion of it is valid should be resolved at an out of court hearing.

When questioning a witness in court or in any hearing, counsel should not ask questions solely in order to embarrass to intimidate a witness.[47] The ABA Standards recognize that cross-examination is a powerful weapon which can be abused.[48] The Prosecution Function and The Defense Function each state that counsel "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."[49] This poses special problems for the defense counsel, because of the attorney-client relationship and the client's rights at trial.[50] Counsel should carefully weigh what he or she hopes will be gained by cross examination against both pragmatic considerations of what may be lost thereby, as well as the possible embarrassment or discomfort which the witness is lifely to suffer.[51]

Relations with the Military Judge and Court Members. Ex parte communications about a case with the military judge should generally be avoided.[52] It may be necessary on occasion to *discuss* certain matters about *a case* or cases *with the military judge,* but *unless* these are of a *purely formal* nature, opposing counsel should be afforded the opportunity to be present. Similarly, *communication with court members, except to notify them of place, time, and proper uniform for trial is improper.*[53] A lawyer must reveal to the court or to the convening authority improper conduct by a court-member or improper conduct by another toward a court member of which the lawyer is aware.[54] Court members are, of course, bound by an oath not to reveal "the vote or opinion of any particular member of the court unless required to do so in due course of law."[55] Counsel should respect that oath and should not encourage a court-member to violate it. It is permissible for counsel to discuss a concluded case with court members in order to seek self-improvement,[56] but care must be taken to avoid the appearance of prying into the deliberations or criticism of the results. It is improper to reveal the existence of evidence which was not admitted, such as a suppressed confession, to a court-member after trial.[57] Of course, defense counsel may present appropriate matters to members of the court in seeking a recommendation of clemency.[58] The commentary in The Defense Function indicates that the defense counsel may interview jurors to determine if there are valid grounds to challenge the verdict, unless rules of court prohibit such inquiry.[59] The military rules regarding challenging a verdict or sentence are not entirely clear[60] but seem quite strict.[61] In that narrow class of cases in which a verdict or sentence may be subject to impeachment (*e.g.* where superiority of rank is used to influence the voting[62]) it seems permissible for defense counsel to inquire of individual court members regarding the matter. However, the preferred practice would be, where possible, to bring

the matter to the attention of the convening authority or military judge in order to conduct a hearing into the matter.

Publicity. Publicity about a case, particularly within a relatively homogenous and insulated community such as exists at some military reservations, may prejudice the right of either side to a fair hearing before an impartial court. *Because of this counsel should avoid making public statements about a case.* Normally information should be released only through the information officer of the local command.[64] The ABA Standards, Fair Trial and Free Press, offer the following guidance on the release of information.

> From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:
>
> (1) The prior criminal record (including arrests, indictment, or other charges of crime), or the character or reputation of the defendant, except that the lawyer may make a factual statement of the defendant's name, age, residence, occupation, and family status, and if the defendant has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
>
> (2) The existence or contents of any confession, admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;
>
> (3) The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;
>
> (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;
>
> (5) The possibility of a plea of guilty to the offense charged or a lesser offense;
>
> (6) The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case, except that the lawyer may announce the circumstances of arrest, including time and place of arrest, resistance, pursuit, and use of weapons; may announce the identity of the investigating and arresting officer or agency and the length of the investigation; may make an announcement, at the time of the seizure, describing any evidence seized; may disclose the nature, substance, or text of the charge, including a brief description of the offense charged; may quote from or refer without comment to public records of the court in the case; may announcement the scheduling or result of any state in the judicial process; may request assistance in obtaining evidence; and, on behalf of his client, may announce without further comment that the client denies the charges made against him.
>
> During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.
>
> After the completion of a trial or disposition without trial of any criminal matter, and while the matter is still pending in any court, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a rea-

sonable likelihood that such dissemination will affect judgment or sentence or otherwise prejudice the due administration of justice.

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.[65]

Duty to Perform Competently. *Counsel has an obligation to perform competently*[66] *and to represent his client zealously with the bounds of the law.*[66] This means that a lawyer has an obligation to keep abreast of legal developments,[67] and that simple neglect or carelessness may be ethical violations.[68] While in theory zealous advocacy and professional ethics do not conflict, in practice, given the ambiguity of rules of law as well as some ethical principles, the boundaries between legitimate tactics and questionable activities are often blurred. The Code of Professional Responsibility discusses this problem:

EC 7-1. The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objective through legally permissible means, and to present for adjudication any lawful claim, issue, or defense.

EC 7-2. The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from wellsettled rules through areas of conflicting authority to areas without precedent.

EC 7-3. Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law. (Footnotes ommitted)

No easy answers are found to many ethical problems. It is important to remember, however, that an attorney cannot avoid problems entirely by simply remaining inactive. The duty to be competent and to represent a client zealously requires the attorney to seek answers to potential ethical problems, for if the attorney fails to take certain action in behalf of his client because he erroneously believes such action would be a violation of his professional responsibility, the attorney may have violated the ethical requirement that he represent his client zealously.[69] This is not to be taken as a license to experiment on the boundaries of ethical behavior, but rather as a

requirement that attorneys give serious consideration to their actions and consider the implications of them, in light of ethical principles as well as practical consequences.

DUTIES OF TRIAL COUNSEL

General. "The trial counsel shall *prosecute in the name of the United States . . .* "[70] As prosecutor, trial counsel's primary duty is to see that justice is done.[71] Therefore, although trial counsel is an advocate,[72] he must not misuse the public powers which he exercises.

Prosecutorial Discretion. It must be recognized that the position of trial counsel in the military differs somewhat from the typical civilian prosecutor. The primary difference is that the decision to prosecute rests not with the trial counsel but with the convening authority. This raises two questions: Whom or what does the trial counsel represent, and what is trial counsel's duty with respect to charges which he believes are or may be unfounded?

The *trial counsel represents the sovereignty of the United States;* he is not the personal representative of the covening authority.[73] As such he is to exercise his independent judgment and professional expertise in preparing and presenting the case.[74] Just as defense counsel is not a mere mouthpiece for the accused,[75] neither is trial counsel a mere mouthpiece for the convening authority. He should not consider this to be his role; moreover it is improper for trial counsel to intimate to the court the personal views of the convening authority, either directly or by purporting to speak for him.[76] Nevertheless, although the trial counsel represents the United States government and his loyalty must be devoted to it,[77] his relationship to the convening authority places certain special obligations upon him. Thus trial counsel cannot withdraw charges or specifications on his own,[78] nor should he enter into informal pretrial agreements with the defense as to the disposition of charges.[79] In other matters, such as determining what witnesses he will call, and whether or not to stipulate, trial counsel is generally free to exercise his independent judgment.[80] Trial counsel should be cognizant of the convening authority's official interest in the case, however, so that where trial counsel's decisions have a substantial or unusual effect upon the administration of the case (*e.g.* where trial counsel determines that one or more witnesses will have to be transported at significant expense to the government in order to prove a charged offense) the convening authority should be apprised of such developments.[81]

The trial counsel's duty with respect to unfounded or unprovable charges is also complicated by his relationship with the convening authority. The typical civilian prosecutor is under an ethical obligation not to "institute criminal charges when he knows or it is obvious that the charges are not supported by probable cause."[82] While the prosecutor need not be personally convinced beyond a reasonable doubt of the accused's guilt in order to ethically prosecute,[83] there must be sufficient evidence to establish probable cause, or from which a reasonable person could find guilt. These ethical precepts presuppose that it is the prosecutor who makes the charging decision; this of course is not the case in the military, for the decision whether to prosecute is made by the convening authority when he refers the charges to a court-martial. The trial counsel has an obligation to investigate the facts in the case.[84] If, after a thorough investigation and examination of the case the trial counsel believes that there is insufficient evidence to establish the accused's guilt, this would be a matter rendering trial "inadvisable" which trial counsel has a legal and ethical duty to report to the convening authority.[85] It is improper to proceed to trial upon charges which cannot be proved.[86] Once the trial counsel so reports to the convening authority, his legal obligation is fulfilled and in most situations his ethical duties are discharged. If the convening authority, who is also under an

obligation not to refer unfounded charges to trial,[87] disagrees with the trial counsel, ordinarily the trial counsel should recognize that reasonable men may differ over such questions, and should proceed to present what evidence he has, leaving to the court the final determination of guilt or innocence. In some situations, the trial counsel may wish to request that he be relieved and another counsel detailed in his place, but if this is not possible, the trial counsel should proceed. The Staff Judge Advocate should always be consulted where such conflict exists. In the extremely rare circumstance in which trial counsel is detailed to prosecute charges which he believes are wholly without foundation,. and the convening authority has refused to withdraw them, while there is no guidance from the MCM or case law, it would seem that trial counsel should still represent the government in court, but he could advise the military judge of the situation. Even when charges may have a foundation in evidence, counsel should also advise the convening authority when they may be multiplicious or in case of unfair overcharging.[88]

Conflict of Interest. One who has previously acted as defense counsel in a case may not subsequently act as trial counsel.[89] Such prior action may include advice to the accused on a related matter.[90] In addition, once one has acted as defense counsel, even performing relatively mechanical tasks for the government may be improper.[91] While such prior participation will not invariably result in reversible error as a legal matter[92] it usually will,[93] and the danger that it will create the appearance of evil demands that it be avoided. Similarly, one should not ordinarily serve as trial counsel in a case in which a former client is an accused, nor should one cross examine a witness whom one has previously represented on any matter related to the prior representation.[94]

Investigation. Trial counsel has a duty to investigate the case,[95] and he may not ignore certain avenues of investigation for the reason that they might disclose information favorable to the defense.[96] The trial counsel should seek to insure that evidence is procured by legal means; it is an ethical violation to use or to encourage others to use illegal means to obtain evidence.[97] Trial counsel should not interfere with the accused's relationship with his defense counsel.[98] Trial counsel should never communicate directly with a suspect who has counsel or with an accused.[99]

Relations with the Defense. The trial counsel must be candid in his dealings with the defense.[100] It is unconscionable for a trial counsel, or other representative of the government to deceive or mislead the defense counsel in dealings such as plea negotiations.[101] The prosecution also has an ethical, as well as in many cases a legal, obligation

> to disclose to the defense at the earliest feasible opportunity evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment.[102]

This duty exists even in the absence of a defense request for such information.[103] Since the military rules of discovery are by law[104] and custom[105] quite liberal, problems of disclosure are relatively rare. They may arise, however, when the trial counsel learns of new witnesses or evidence. Determining what tends to negate guilt or to mitigate the punishment is problematical at best,[106] but should be construed liberally within the spirit of ethical standards.

Delays. The trial counsel is obligated to see that charges are brought to trial without undue delay.[107] In particular, trial counsel must not delay proceedings with frivolous motions or dilatory tactics[108] nor may he secure delays or continuances through misrepresentations to the court.[109]

DUTIES OF DEFENSE COUNSEL

General. Defense Counsel:

> . . . will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to

undertake the defense regardless of his personal opinion of the guilt of the accused; to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matters which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity; and not to divulge his secrets or confidence.[110]

The primary role of counsel is to act as champion for his client.[111] It is clear that defense counsel must represent the accused zealously, within the bounds of the law and professional ethics.[112] Counsel may not refrain from exerting every reasonable legitimate effort on behalf of his client regardless of his personal feelings[113] or potentially adverse personal consequences.[114]

Conflict of Interest. Counsel's obligation to represent his clients zealously extends to each client as an individual.[115] Thus an attorney may not forego advancing a claim or position on behalf of one client merely because such an act might adversely affect the interests of another client.[116] Counsel must be particularly sensitive to the problems inherent in representing multiple clients as to the same general matter. While such representation is neither ethically[117] nor legally[118] prohibited it is fraught with risk of conflicting interests and is therefore discouraged.[119] A lawyer who is assigned or requested to represent multiple clients should carefully investigate and evaluate the case at the very outset, preferably before actually meeting with the prospective clients and establishing the attorney client relationship, to determine whether he can represent each client without conflict.[120] At his or her initial meeting with the clients, counsel should explain to them the potential for conflict and the problems involved therein, so that they will be aware of possible adverse impact on their interests, and of their rights to secure multiple representation.[121] In addition to avoiding representation of clients whose interests may be adverse to one another in a single litigation, a lawyer should avoid taking a position in which his or her duties to one client conflict with his or her duties to other clients, past or present. Thus, an attorney should avoid representing an individual where such representation may force the attorney to choose between violating the confidences of another client (*e.g.* where that client may be a witness against the present client) and restricting his representation of his or her present client to avoid violating such confidences.[122] Of course, one who has acted for the accused previously cannot subsequently act as trial counsel against that accused in the same or a related matter,[123] nor, where avoidable, should a lawyer act as trial counsel against any individual with whom he has entered an attorney client relationship, even if the matters are unrelated.[124]

Duties Where the Client is Represented by More Than One Attorney. Counsel may occasionally act as assistant counsel or co-counsel with a civilian attorney or individual military counsel, or both, or counsel may himself be individual counsel acting with detailed counsel. In such situations, the detailed military counsel is not expected to act as a clerk or messenger for the civilian attorney or individual military counsel.[125] Where counsel acting on a case disagree as to tactics, the final decision will be made by whichever counsel the accused has designated as chief counsel;[126] if the accused has not selected a chief counsel, the issue should be presented to the accused for his resolution.[127] With respect to possible ethical violations, AR 27–10 offers the following guidance:

Where the military counsel determines that the civilian counsel is conducting himself contrary to the Code of Professional Responsibility or violating the law, he should first discuss the problem with the civilian counsel. If the matter cannot be resolved, it is the duty of the military counsel to inform the accused of the civilian counsel's actions. The military counsel should inform the civilian counsel of his intention to discuss the matter with the accused. If the accused approves of the civilian counsel's conduct, the military counsel must inform the accused that he

will have to inform the convening authority or request an Article 39(a) session, whichever is appropriate, and ask to be relieved of his responsibilities as counsel. The military counsel must also inform the accused that, as an officer of the court, he has a duty to report any unethical behavior, fraud on the court, or any other impropriety affecting the integrity of the proceedings.[128]

Of course, it is detailed counsel's duty to advise a client at the outset of their relationship of the client's rights to counsel under Article 38(b), UCMJ, and counsel should assist the accused in effectuating his choice.[129]

The Attorney-Client Relationship.

Formation. An attorney-client relationship is formed when an individual consults with a lawyer for the purpose of receiving professional legal advice or service.[130] Once formed the relationship is not easily broken.[131]

Inception. At the outset of the attorney client relationship, it is imperative that the attorney endeavor to create rapport with his client, and that the client understand the nature of the relationship. Thus, the attorney should explain the necessity for full disclosure of all facts by the client, and the duty of confidentiality upon the attorney which protects such information against further disclosure unless permitted by the client.[132] In creating this atmosphere of trust the attorney should always be honest and straightforward with his client.[133] The client should also be advised of his fundamental rights, such as his rights to counsel,[134] to trial by court with members (including the right, where applicable, to enlisted members on the court) or to request trial by military judge alone,[135] to plead not guilty, and the meaning and effect of a plea of guilty,[136] to present evidence both on the merits and, in the event of conviction, during the sentencing proceedings,[137] his right to testify or not during the proceedings,[138] and his right to present any proper defense or objection.[139] The initial interview with the accused should be conducted as soon as reasonably possible.[140]

Eliciting the Facts. Counsel should seek all relevant facts from the accused. Again, counsel should impress upon his client the need for complete candor. In interviewing the accused, particularly for the first time, counsel must avoid any attempt to "steer" the accused's narration of the facts in any particular direction; [141] it is an ethical violation to avoid full knowledge of the facts by instructing or intimating to the client that he should not be candid in order not to hamper the attorney with knowledge of detrimental facts.[142] Defense counsel must be extremely careful not to lead his client away from the truth.

The duty to guard confidences and secrets. The attorney's obligation to protect the confidences and secrets of his client is the heart of the attorney-client relationship; without this duty the relationship could not survive in its present form, and the adversary system as we now know it could not function. Consequently, the duty to guard confidences and secrets is essential to the administration of justice.[143] Central to this duty is the attorney-client privilege. The privilege, which is narrower than the duty of confidentiality,[144] protects communications made between the client and the attorney (and other bona fide parties to the relationship such as translators and attorney's agents[145]) from any disclosure except under three basic circumstances.[146] First, since the client is the holder of the privilege, disclosure of communications may be made when the client waives the privilege; this waiver may be either express or implied (as where the client reveals theretofore privileged information to someone outside the relationship, but in such a situation, the waiver is limited to those matters revealed and does not extend to all information communicated in the course of the relationship).[147] Second, when the client attacks the attorney's competency (*e.g.* during appellate review) the attorney may reveal privileged information to the extent necessary to protect his professional reputation.[148] Third, when the client announces or makes known to the

attorney his intention to commit a future crime, the lawyer may reveal this and must do so under some circumstances.[149]

The duty to guard confidences and secrets is broader than the attorney-client privilege. This duty extends to all matters discovered in the course of the relationship; the attorney is bound not to disclose confidences or secrets which would be embarrassing to the client or detrimental to his interests.[150] Unlike matters protected by the privilege, however, other matters learned in this course of the relationship (*e.g.*, in investigating the client's background) are not privileged and therefore may be revealed under a slightly wider range of circumstances.[151]

Control of the case. Three basic decisions are the client's to make. These are: first, what plea to enter; second, whether to waive trial by court-members; and third, whether or not to testify in his own behalf.[152] Of course, the attorney owes his client the full benefit of his advice before these decisions are made.[153] Other decisions, such as trial tactics and strategy are ultimately the attorney's,[154] but these decisions should be made in consultation with the accused, and the reasonable desires of the accused should be given consideration.[155] A lawyer is not required to act in a manner that is illegal, unjust, or unethical, simply because his client wishes him to proceed in a certain way.[156] At bottom, control of the case depends more on the foundation of a good relationship between attorney and client than on ethical precepts establishing guidelines for the control of the case. Counsel should strive for mutual respect and trust necessary to a good relationship.

Preparation and Trial.

Duty to investigate. Just as counsel may not engage in calculated ignorance by intimating to his client to be less than candid, neither can counsel deliberately avoid knowledge of other facts in the case. Aside from the practical hazards inherent in such calculated ignorance, counsel is obligated to investigate the case.[157] This duty exists even where the accused intends to enter a plea of guilty; indeed the duty may be even greater in such cases.[158] It is therefore improper, as well as tactically hazardous, for a defense counsel to present, for example, alibi testimony without investigating it when such an investigation can be accomplished without undue difficulty.

Evidence. The handling of evidence by the defense is a particularly sensitive problem. Aside from the obvious prohibitions against tampering with, destroying, or concealing evidence,[159] a particulary difficult problem is raised with respect to evidence in the possession of the accused. It must be recognized, initially, that materials given to counsel by the client such as documents or other evidence are no more protected by the attorney-client privilege while in the attorney's possession than by the privilege against self-incrimination while in the possession of the accused.[160] In other words, such items do not gain greater protection against discovery merely because they are in the possession of the attorney. An even more perplexing problem is presented by potentially incriminating evidence in the possession of the accused. The attorney should not accept such evidence from the accused; if he does so, he must turn it over to proper authorities.[161] The attorney may not keep such evidence "for safekeeping."[162] On the other hand the client is under no legal obligation, absent legal process, to relinquish such evidence to the authorities. Clearly, the attorney may not ethically advise the client to alter, secrete, or destroy such evidence.[163] Thus, the attorney is in a rather unsatisfactory position when he is asked by his client what to do with such evidence. The attorney cannot tell the client to destroy or conceal the evidence; on the other hand, he cannot force the client to relinquish it to the authorities. Beyond advising the client of his rights in the matter, there is little the attorney can do. Ultimately, the decision as to what to do with the evidence is the client's.

c. *Delays.* Just as the prosecution has an ethical, as well as a legal duty to proceed to trial in an expeditious manner, so must the defense counsel avoid unnecessary delays.

Thus a defense counsel should always be punctual.[164] Although delay occasionally works to the advantage of the accused, it must be recognized that in addition to the increased risk of foggier memories or absent witnesses (which can adversely affect the defense as well as the prosecution), the accused must also undergo a lengther period of stigmatization, loss of privileges, and, in some instances, pretrial restraint when trial is delayed. Moreover, counsel should not undermine the administration of justice through needless delay. It is unethical for counsel to obtain a continuance through misrepresentation or deception.[165] It is also unethical for counsel "intentionally to use procedural devices for delay for which there is no legitimate basis."[166] This does not mean that defense counsel must forego a prescribed waiting period, such as that established by Article 35, UCMJ, simply because he feels he is ready to go to trial.[167] Of course, most of the procedures by which the defense counsel may secure or effectuate a delay exist for an independent purpose intended to serve the interests of justice; the defense counsel is in no way precluded from utilizing these tools to serve his client's legitimate interests.[168] While no easy answer may be given to the question when is it improper to use such devices, the attorney should ask himself whether a delay he or she procures will advance an interest of his or her client which it is designed to protect and whether the delay secured thereby will undermine the administration of justice.

Pleas. Every client has a right to plead not guilty, regardless of the client's (or counsel's) belief that the client is guilty, and to force the government to prove its case against him or her. Conversely, a client may not be permitted to plead guilty unless the client believes he or she is guilty and the client is in fact guilty.[170] Although in the military the military judge bears heavy responsibility for the providency of the accused's plea,[171] counsel has an obligation to insure the plea is provident.[172] If counsel is aware of facts which demonstrate that a plea would not be provident, counsel should not permit his or her client to plead guilty.

Negotiated pleas. Counsel should not ordinarily undertake negotiations concerning a possible guilty plea without the accused's consent, and counsel should keep the accused fully apprised of the developments in plea negotiations.[173] According to the ABA Standards, the defense counsel should investigate the alleged offenses at an early stage and, if conviction seems probable, seek the accused's permission to engage in plea discussions if this is desirable.[174] The policies behind this do not seem as compelling in the military where heavy caseloads and judicial backlogs are not as prevalent as in many civilian communities. Nevertheless, counsel should consider the possibility of plea negotiations where a finding of guilty appears likely. Although, as indicated above, counsel may not permit his client to plead guilty unless the client is in fact guilty and hence should not negotiate a plea unless it appears the client can enter a provident guilty plea, counsel should realize that the client's right to plead not guilty and to force the government to bear its burden of proof is not impaired by entering into plea negotiations.[175] Counsel must also recognize the legal and ethical dangers associated with "informal" pretrial agreements and thus should avoid them.[176]

Cross examining a truthful witness. As indicated above the Defense Function cautions against "misus[ing] the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."[177] This presents a special dilemma for the defense counsel since the client has the right, even though he or she may in fact be guilty, to be confronted with the witnesses against him or her;[178] the right of confrontation includes the right to cross-examine witnesses.[179] Moreover, counsel's source of the "truth" is usually the client; thus counsel seems to be using confidental information to his client's disadvantage when he is refuses to cross examine.[180] It does not appear that the ABA Standards can be read as a blanket prohibition

against cross examining the "truthful" witness. Instead they must be viewed as establishing a policy that defense counsel should not embarrass or discredit a witness unnecessarily. Defense counsel may and should explore avenues of testimony which could reasonably tend to establish a reasonable doubt as to his client's guilt; potential cross examination should be weighed against that standard. Indeed, counsel should give similar consideration to the nature and scope of his cross-examination of a witness even where counsel is uncertain where the truth lies.

The Perjuring Client. Ordinarily counsel for either defense or prosecution are prohibited from calling as a witness one who will commit perjury.[181] Special problems are presented, however, when the accused intends to commit perjury. At the outset it must be recognized that defense counsel will often be less than certain of the client's version of the facts in the case. Unless counsel is certain of the client's intent to commit perjury, he or she must normally proceed with the case as though the client's side of the case were true. Nevertheless, there may be situations where defense counsel is certain that the client will commit perjury if he or she takes the stand.[182] In such situations the counsel's first obligation is to apprise the accused of the possible consequences of such an action.[183] Thus counsel should advise the client of potential additional prosecution for perjury as well as of the possible adverse impact his statements will have in the case at hand. Counsel should also advise the client that counsel himself can play no active part in such conduct, and that counsel's own handling of the issue (see below) may lead some to recognize what the client is doing. If counsel cannot dissuade the client, counsel should make a complete record of his or her advice, preferably by having the client sign a statement to the effect of what he or she was told, to be maintained in counsel's files.[184]

If the accused wishes to take the stand at trial, even in order to commit perjury, the ABA Standards indicate that the attorney may not stop him,[185] but they further indicate that the attorney can take no active part in the accused's testimony[186] Defense Function 7.7c reads in pertinent part:

> The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the witness in the conventional manner and may not later argue the defendant's known false version of the facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

In commentary, the standards indicate that counsel should not, if possible, bring the client's intent to the attention of the court.[187] Obviously the solution above is not without drawbacks. It is a compromise between the client's right to testify and the attorney's obligation not to knowingly present perjured testimony. As such, it sacrifices some of each position. The attorney cannot entirely escape being linked to the perjury; the accused's perjury will be apparent to experienced trial observers. Yet such a compromise is necessary in view of the fundamental nature of the principles involved.

Disclosure of Information to the Court. Defense counsel, as an officer of the court, has an obligation not to mislead the court.[188] Yet, defense counsel is frequently in possession of confidential information provided by the client which would aid the court in its decision in the case. Ordinarily the defense counsel is under no obligation to reveal such information to the court.[189] The question sometimes arises, however, whether the defense must make such information known to the court; this question is often asked regarding previous convictions of the accused not otherwise presented during the sentencing portion of trial. There does not appear to be any duty on the defense counsel's part to advise the court of a previous conviction of the client not known to the court.[190] On the other hand, counsel may not affirmatively lead the court to conclude that the client has no prior convictions when in fact he or she does.[191] Thus, counsel may not argue that the

accused's record is "clean" in such instances, nor may counsel present evidence which tends to indicate that the accused's record is unblemished.[192]

Post Trial Duties.

Generally. Completion of the trial does not terminate the defense counsel's duties to his or her client. Indeed, some of the most important services with which counsel can provide the client are performed after the conclusion of the trial. Moreover, in addition to duties related to the criminal proceedings against the accused, counsel should assist (within the limitations of applicable legal assistance regulations[193]) the client (and the client's family) in arranging the client's affairs during any confinement or other disability suffered by the accused as result of the proceedings. If counsel cannot do this, he or she should help the client contact someone who can (such as a legal assistance officer) if the client so desires. This does not mean that counsel should become a messenger service for an incarcerated client; rather counsel, as an attorney, should help the client see to it that his or her legal affairs are in order.

Post trial advice to the accused. Counsel will advise his or her client of the client's appellate rights and when appropriate assist the client to request appellate defense counsel.[194] Counsel should explain the appellate process to the client, including any right he or she may have to appeal to or to petition the Court of Military Appeals.[195] Where appropriate counsel should advise the client concerning and assist the client in preparing a petition to The Judge Advocate General under Article 69, UCMJ, and, where unusual circumstances dictate, similar advice and assistance should be given concerning a petition for extraordinary relief to be presented to an appropriate military court.[196]

Counsel will also advise the client, in the event that confinement has been adjudged, of his or her right to request deferment of the sentence.[197] Counsel should advise the client of the purpose of the post trial interview and of his or her right not to say anything about the offense;[198] counsel should further advise the client of the potential advantages and disadvantages of participation in the interview. Counsel should ordinarily endeavor to be present at the interview. Since the punishment process, particularly where it includes confinement, is usually rather frightening and mysterious counsel should explain to the client what is happening to the client. Further, counsel should explain to the client possible dispositions which he or she may request, or work toward, such as, where appropriate, sentence suspension,[199] excess leave,[200] parole,[201] restoration to duty,[202] etc.

Other post trial duties. After trial counsel should explore the possibility of a clemency petition, and consider whether to submit an Article 38*c*, UCMJ, brief on behalf of the accused, and prepare these if necessary.[203] Counsel also may be afforded the opportunity to view the record of trial before it is authenticated;[204] if so he or she should examine it carefully for errors. Additionally, counsel will be afforded the opportunity to examine the record of trial[205] and, when there is one, the post trial review[206] before submission to the convening authority in order to submit any comments which he or she may have. Counsel should weigh carefully his or her comments, recognizing the obligation to preserve the accused's appellate rights and remedies.[207]

The Appellate Process. Once appellate counsel have been assigned, counsel should assist them in their preparation, should they call upon him to do so, so long as this does not unduly interfere with counsel's own assigned duties. Counsel will answer pertinent questions put to him or her by appellate defense counsel.[208]

If trial defense counsel's competency is attacked in subsequent proceedings,[209] counsel is then free to reveal such confidential information as may be necessary in order to protect his or her own professional reputation.[210] Should such an attack take place, of course counsel should not represent the client in other proceedings in relation to the same case.[211]

Notes

1. Articles 1-140, UCMJ. *See* Articles 27, 37, 38, 48, 98.

2. MCM, 1969, paras. 44, 46, 48, 151*b*(2).

3. Army Reg. No. 27-10, Military Justice, para. 2-32 (C12, 12 Dec. 1972) [hereinafter cited as AR 27-10].

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1975) [hereinafter cited ABA CODE].

5. ABA STANDARDS, FAIR TRIAL AND FREE PRESS (1968).

6. ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE (1972).

7. ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION [hereinafter cited separately as: THE PROSECUTION FUNCTION (or PF); THE DEFENSE FUNCTION (or DF)].

8. AR 27-10, para 2-32.

9. PF §1.1(d); DF §1.1(e). *See also* ABA CODE, CANON 1, ABA CODE, DISCIPLINARY RULE'S 1-101, 1-102, ETHICAL CONSIDERATIONS 1-1, 1-4, 1-5 [Disciplinary Rules are hereinafter cited as DR; Ethical considerations are hereinafter cited as EC].

10. AR 27-10, paras 4-1 through 4-7 (C14, 31 Oct. 1974). *See also* MCM, 1969, para. 43; AR 27-10, para 4-8.

11. MCM, 1969, para 43.

12. *See* Article 27, UCMJ; MCM, 1969, para. 43.

13. Department of Army Message No. DAJA-CL 1976/2238, Sept. 1976.

14. *See* ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971) introduction, at 2-5.

15. *See* United States v. Nelson, 24 C.M.A. 49, 51, 51 C.M.R. 143, 145, n. 2 (1975).

16. E.g., where counsel is detailed to defend multiple clients in the same case. *See* United States v. Blakey, 24 C.M.A. 63, 51 C.M.R. 192 (1976); *Professional Responsibility*, THE ARMY LAWYER, Oct. 1976, at 13.

17. DR 1-102 and 1-103; EC 1-4.

18. MCM, 1969, para. 42*b*; PF 5.2 and commentary; DF 7.1 and commentary; DR 7-106(a); DR 7-106(c) (5), (6), and (7); EC 7-20, 7-22, 7-36; *see also* United States v. Scoles, 14 C.M.A. 14 33 C.M.R. 226 (1963).

19. DR 7-106 (a); EC 7-22; PF 5.2(d); DF 7.1(d). *See also* Sacher v. United States, 343 U.S.1 (1952).

20. MCM, 1969, para. 42*b*; EC 7-37; PF 5.2 (a)(b) and (c); DF 7.1 (a)(b) and (c).

21. MCM, 1969, para. 42*b*; DR 1-102(a) (2) (3) (4) and (5); EC 7-25; PF 2.8 (a); DF 1.1(d). *see also* United States v. Beatty 10 C.M.A. 311, 27 C.M.R. 385 (1959).

22. MCM, 1969, para 44*g*; DR 7-106 (c) (1); EC 7-25; PF 5.8, 5.9; DF 7.8, 7.9. *See also* Berger v. United States, 295 U.S. 78 (1935).

23. DR 7-106 (c) (1) and (2); EC 7-25; PF 5.6 (b), 5.7 (d); DF 7.5 (b), 7.6 (d). *See also* United States v. Valencia, 1 C.M.A. 415, 4 C.M.R. 7 (1952). Compare, MCM, 1969, para. 153*b* (2) (b) ("nonaccusatory questions regarding [previous] convictions . . . may properly be asked in an attempt in good faith to impeach the witness even if the questioner has no definite information that the witness has been convicted . . . ") *with* PF 5.7 (d), DF 7.6 (d) and commentary thereto. *See* United States v. Berthiaume, 5 C.M.A. 669, 18 C.M.R. 293 (1955). Note that unless the questioner does have definite information, the form of the question is very important.

24. DR 7-106 (b) (1); EC 7-23. See ABA Code, p. 43c, n. 79:

. . . .

"We would not confine the opinion to 'controlling authorities'-i.e., those decisive of the pending case-but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

. . . .

" . . . The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?" ABA Opinion 280 (1949).

25. Counsel has a duty to investigate the case. See nn. 95-99 and 157-158 and accompanying text *infra*. Calculated ignorance is an ethical violation of itself. *See also* n. 49 *infra*.

26. AR 27-10, para. 4-4; DR 7-102 (a) (4) (5) and (6); EC 7-26; PF 5.6 (a); DF 7.5 (a). *See also* Napue v. Illinois 360 U.S. 264 (1959); UCMJ, art. 134; MCM, 1969, app. 6c sample specification no. 170. *But see* DF 7.7 and n.n. 181-187 and accompanying text *infra* regarding defense counsel's obligation when the client commits perjury.

27. DR 7-102 (b) (2).

28. DR 7-106 (c); EC 7-26; PF 5.6 (b); DF 7.5 (b).

29. PF 5.6 (c) and (d); DF 7.5 (c) and (d). *See* United States v. Wimberley 16 C.M.A. 3, 36 C.M.R. 159 (1966)

(display of items not admitted in evidence may be reversible error).

30. MCM, 1969, para. 72*b*; PF 5.8 (a); DF 7.8 (a) *See* United States v. Nelson 24 C.M.A. 49, 51 C.M.R. 143 (1975).

31. PF 5.8 (c); DF 7.8 (c). *See* United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1975); United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976); *compare* United States v. Doctor, 7 C.M.A. 126, 21 C.M.R. 252 (1956).

32. MCM, 1969, para 44*g*; DR 7-101 (c) (4); EC 7-24; PF 5.8 (b); DF 7.8 (b). *See also* United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974); H. DRINKER, LEGAL ETHICS, 147 (1953).

33. DR 5-102; EC 5-9. The Court of Military Appeals has strongly condemned such a practice. *See* United States v. Stone, 13 C.M.A. 52, 32 C.M.R. 52 (1962); United States v. McCants, 10 C.M.A. 346, 27 C.M.R. 420 (1959).

34. *See* ABA CANONS OF PROFESSIONAL ETHICS No. 19, which states in part:

> When a lawyer is a witness for his client, except as to merely formal matters, such as attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

35. *See* United States v. Austin, 46 C.M.A. 905 (A.C.M.R. 1972).

36. *See* PF 3.1 (f); DF 4.3 (d). *See* n.45 and accompanying text, *infra*.

37. United States v. Austin, 46 C.M.R. 905 (A.C.M.R. 1972).

38. MCM, 1969, para. 42c. An exception is made, of course, for the accused. *See* n. 99 *infra*.

39. PF 3.1 (c); DF 4.3 (c) and commentary. Both The Prosecution Function and The Defense Function indicate that it is permissible to advise a witness, "in the event a witness asks," that he has no legal duty to submit to an interview. ABA Standards, The Prosecution Function and Defense Function at 78 and 230. The standards also indicate that the attorney should encourage the witness to cooperate with the opposition.

40. MCM, 1969, para 42c; DR 7-109; EC 7-27, 7-28.

41. PF 3.2 (b); DF 4.3 (b). *But see* Chadwick, *The Canons, The Code, and Counsel: The Ethics of Advocates Before Courts-Martial*, 38 MIL. L. REV. 1, 75-81 (1967).

42. *See* n. 40 *supra*. While very little has been written about it, a similar principle would seem to apply to the exercise of other privileges, *e.g.*, the marital testimonial privilege. (*See* MCM, 1969, para 148*e*).

43. DR 7-109 (c); PF 3.2 (a); DF 4.3 (a).

44. *Id.*, *see also* MCM, 1969, para. 116.

45. PF 3.1 (f); DF 4.3 (d). *See* n. 35 and accompanying text *supra*.

46. PF 5.7 (c); DF 7.6 (c). *See* United States v. Bolden 11 C.M.A. 82, 28 C.M.R. 406 (1960).

47. DR 7-106(c)(2); EC 7-25; PF 5.7(a); DF 7.6(a). *See also* article 31(c), U.C.M.J.

48. PF 5.7 (b) and DF 7.6 (b) and commentary.

49. *Id.* Note that the definition of the word "know" is crucially important here and elsewhere in the area of professional responsibility. What is meant by "know" or "knowing" is open to various interpretations. A common way to try to avoid ethical problems is to say that the lawyer can never really "know" the truth, and therefore he should leave all issues to the jury. If absolute epistemological certainty were the standard, ethical problems would virtually disappear. Perjury could be suborned because it "might" be true. Clearly this is not the standard. While the adversary process will ferret out some such situations, by itself it cannot always do so.

On the other hand, counsel cannot take the fact finding process into their own hands; the attorney cannot be guided by mere probabilities. Probably a moral certainty or beyond reasonable doubt standard should be applied. *Cf.* EC 7-6.

50. *See* nn. 177-180 and accompanying text, infra.

51. *Compare* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) *with* Bress Professional Ethics in Criminal Trials: A view of Defense Counsel's Responsibility, 64 MICH. L. REV. 1493 (1966).

52. DR 7-110(b); EC 7-35; PF 2.8c. *See also* article 37, UCMJ; United States v. Ledbetter 25 C.M.A. Adv Sn 51, 54 CMR Adv Sn 51 (1976).

53. MCM, 1969, para. 44*f*(2); DR 7-108, EC 7-29, 7-31; PF 5.4; DF 7.3.

54. DR 7-108 (g)

55. MCM, 1969, para 114b. *See* article 51 (a), U.C.M.J.

56. DF 5.4. *See* Chadwick *supra*, n. 41, at 27.

57. PF 5.4 (c); DF 7.4 (c). It should be recognized that military court members are usually sophisticated and will often ask about "missing" evidence. Without being discourteous, counsel should normally avoid responding to such questions, since any answer will be taken to imply more than is intended.

58. MCM, 1969, para. 77.

59. *See* THE DEFENSE FUNCTION commentary at 266.

60. *See* United States v. West, 23 C.M.A. 77, 48 C.M.R. 549 (1974).

61. *Id. See also* United States v. Bourchier, 5 C.M.A. 15, 17 C.M.R. 15 (1954); *but see* United States v. Connors, 23 C.M.R. 636 (N.B.R. 1957); United States v. Thompson, 32 C.M.R. 776 (A.B.R. 1962); *compare* United States v. Harris, 32 C.M.R. 878 (A.B.R. 1962).

62. *See* United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957).

63. MCM, 1969, para. 42*b*; DR 7-107; EC 7-33; PF 1.3(b); DF 1.3 (b); ABA STANDARDS FAIR TRIAL AND FREE PRESS. 1.1.

64. *See* Army Reg. No. 340-19, Release of Information Pertinent to Disciplinary Actions (31 July 1975). *See also* Army Reg. No. 195-2, Criminal Investigation Activities, (15 Oct 1974).

65. ABA STANDARDS, FAIR TRIAL AND FREE PRESS. 1.1.

66. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 6; *compare* PF 1.1(b); DF 1.1(b).

67. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7.

68. EC 6-2.

69. *See* DR 6-101 (a).

70. MCM, 1969, para 44*d*. *See also* article 38(a), UCMJ.

71. EC 7-13; PF 1.1 (c); *see* Berger v. United States, 295 U.S. 78, 89 (1935); United States v. Valencia, 1 C.M.A. 415, 4 C.M.R. 7 (1952); United States v. Johnson, 3 C.M.A. 447, 13 C.M.R. 3 (1953); United States v. Graves, 23 C.M.A. 434, 437, 50 C.M.R. 393, 396 (1975).

72. EC 8-13; *see* United States v. Valencia, 1 C.M.A. 415, 4 C.M.R. 7 (1952).

73. MCM, 1969, para 44*d*. United States v. Olson, 7 C.M.A. 242, 246, 22 C.M.R. 32, 36 (1956) ("At a trial, in no way and under no circumstances does trial counsel represent the convening authority as such. On the contrary, he represents the sovereignty of the United States.") *See also* Chadwick, *supra* n. 41, at 44-45.

74. *See generally* MCM, 1969, para 44. *See also* United States v. Haimson, 5 C.M.A. 208, 17 C.M.R. 208 (1954). (Indicating in dicta that interference by convening authority with trial counsel's actual presentation of the case "would both transgress the provision of Article 37 and deprive the accused of the protections inherent in the requirement that the trial counsel of a general court-martial as well as his learned friend for the defense be a duly qualified attorney." *Id* at 218, 17 C.M.R. at 218).

75. *See* n. 156 *infra*.

76. MCM, 1969, para. 44*g*. *See* United States v. Lackey, 8 C.M.A. 718, 25 C.M.R. 222 (1958); *cf*. United States v. Fowle, 7 C.M.A. 349, 22 C.M.R. 139 (1956). *See also* MCM, 1969, para. 75*f*.

77. UCMJ, art 27(a) states: "No person who has acted for the prosecution may later act in the same case for the defense." *See also* MCM, 1969, para. 61*f*(4). The court of Military Appeals has indicated that these provisions recognize the existence of an attorney client relationship between trial counsel and the government. *See* United States v. Catt, 23 C.M.A. 422, 426, 50 C.M.R. 326, 330 (1975).

78. MCM, 1969, para. 56*a*.

79. United States v. Johnson, CM 432557 (A.C.M.R.28 July 1976). *See also* United States v. Schilf, 24 C.M.A. 67, 51 C.M.R. 196 (1976).

80. *But see* MCM, 1969, para. 1546(1). "[A] stipulation which would if true operate as a complete defense to an offense charged should not be received in evidence."

81. MCM, 1969, para 44*f*(5).

82. DR 7-103(a); PF3.9 (a) and commentary.

83. DR 7-103 (a). *See also* Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance From the ABA*, 71 MICH L. REV. 1145, 1155-59 (1973).

84. MCM, 1969, para. 44*f*(3) and (5); EC 7-13; PF 3.1 (a) and 3.11 (c). *See para.* 19-13 *infra*.

85. MCM, 1969, para. 44*f*(5); EC 7-14. *See* United States v. Phare, 21 C.M.A. 244, 45 C.M.R. 18 (1972); United States v. Whittington, 36 C.M.R. 691 (A.B.R. 1966).

86. United States v. Phare, 21 C.M.A. 244, 45 C.M.R. 18 (1972); United States v. Whittington, 36 C.M.R. 691 (A.B.R. 1966); United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972).

87. United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972). *See* article 30(b), UCMJ.

88. *See* PF 3.9*e* and commentary; United States v. Hughes, 24 C.M.A. 169, 170-71, 51 C.M.R. 388, 389-90, n. 3 (1976); ABA STANDARDS, JOINDER AND SEVERANCE 2.2.

89. UCMJ, art 27(a); EC 4-5; PF 1.2. Similarly, one who has acted for the prosecution in any significant way is disqualified from acting for the defense. UCMJ, art 27(a); United States v. Catt, 23 C.M.A. 422, 50 C.M.R. 326 (1975).

90. United States v. McCluskey, 6 C.M.A. 545, 20 C.M.R. 26 (1955).

91. United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955).

92. *See, e.g.*, United States v. Sulin, 44 C.M.R. 624 (A.F.C.M.R. 1971).

93. *See, e.g.*, United States v. Collier, 20 C.M.R. 261, 43 C.M.R. 101 (1971).

94. *See* EC 4-5.

95. MCM, 1969, para. 44*f*(3) and (5); PF 3.11 (c).

96. PF 3.11 (c).

97. DR 7-102 (a) (8); PF 3.1 (b).

98. MCM, 1969, para 44*h*.

99. *Id;* DR 7-104 (a) (1), PF 4.1. *See also* United States v. McOmber, 24 C.M.A. 207, 51 C.M.R. 452 (1976).

100. MCM, 1969, para 44*h*, DR 7-102(a) (2) (3) (4) and (5); PF 3.11 (a).

101. PF 4.1 (c): *see* United States v. Schilf, 24 C.M.A. 67, 51 C.M.R. 196 (1976).

102. PF 3.11a *See also* DR 7-103 (b). As to the legal obligation to reveal such information, *see* Brady v. Maryland, 373 U.S. 83 (1963) *and* United States v. Agurs, 49 L. Ed. 2d 342 (U.S. 24 June 1976).

103. DR 7-103 (b); PF 3.11a. *Compare* United States v. Agurs, 49 L. Ed. 2d 342 (U.S. 24 June 1976).

104. MCM, 1969, paras. 44*h*, 115*c*, 33*i*(2).

105. H. MOYER, JUSTICE IN THE MILITARY at 437 (1972).

106. PF 3.11*a*. Consider, for example, whether trial counsel has an obligation to reveal evidence of a prior inconsistent statement made orally by one of his witnesses to another (or to himself during an interview). Such a statement does not directly negate guilt, for it cannot be used as such at trial. [*See* MCM 1969, para. 153*b* (2) (c)], but it indirectly negates guilt by undermining the prosecutions case. Is there an obligation to disclose such information in this case?

107. EC 7-38; PF 2.9. *See also* articles 10, 33, 98, UCMJ.

108. DR 7-102 (a) (1) and (2); PF 2.9a. *See also* article 98 UCMJ and United States v. Kidd, 24 C.M.A. 25, 51 C.M.R. 75 (1975).

109. DR 7-102 (a) (5); PF 2.9 (c).

110. MCM, 1969, para. 48. *See also* United States v. Lovett, 7 C.M.A. 704, 23 C.M.R. 168 (1957).

111. *See* ABA STANDARDS, THE DEFENSE FUNCTION, introduction, 141-52. *See also* DF 1.1.

112. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 7.

113. MCM, 1969, para. 48*c*; EC 2-27; DF 1.5 (b).

114. DR 5-101 (a); EC 2-27; 5-1, 5-2, 5-21; *cf.* EC 2—28.

115. EC 5-1, 5-2, 5-14.

116. *E.g.*, counsel often deal on a frequent basis with certain individuals, such as convening authorities. Counsel may, on occasion, feel some reluctance to present a particularly weak position (such as request for a suspension of a sentence or an offer for a pretrial agreement) to such an individual, despite the accused's desire that counsel do so, in order not to antagonize the official and thereby jeopardize future, more meritorious offers. In such circumstances, counsel must thoroughly analyze the client's desire. If it is frivolous or wholly without merit, counsel may decline to advance the client's position: otherwise, and if it will not damage the clients other interests, counsel should make the effort in the client's behalf.

117. EC 5-14, 5-15.

118. United States v. Blakey, 24 C.M.A. 63, 51 C.M.R. 192 (1976); article 27(a), UCMJ; MCM, 1969, para 48*c*.

119. *See* United States v. Evans, 24 C.M.A. 14, 51 C.M.R. 64 (1975); United States v. Faylor, 9 C.M.A. 547, 26 C.M.R. 327 (1958); AR 27-10, para. D-2*a* (C12, 12 Dec 1973).

120. EC5-15; DF 3.5 (c).

121. DF 3.5 (a).

122. DR 4-101 (b) (1) (2) and (3); EC 4-1, 4-5. *See* United States v. Thornton, 8 C.M.A. 57, 23 C.M.R. 281 (1957) wherein the Court said:

> In attempting to convince the court-martial of the accused's innocence, counsel was under an affirmative duty to protect and safeguard the confidences derived from the attorney—client relationship formerly established and still existing between himself and [the witness]. Counsel thus found himself placed in the legally precarious position of having to "walk the tightrope" between safeguarding the interests of the accused on the one hand and retaining the prior confidences of [the witness] on the other, such a rope is too narrow. Such a walk is too long.

Id., at 59, 23 C.M.A. at 283: *See also* United States v. Lovett 7 C.M.A. 704, 23 C.M.R. 168 (1957). It is not necessary for counsel to withdraw from representation of an accused simply because counsel may have to cross examine an individual whom he previously represented. (However, the unseemliness of impeaching a witness with a prior conviction in which counsel represented the witness makes it desirable to avoid such situations). It is only improper for counsel to so act when counsel has

confidential information which could potentially be used in the subsequent case. In both *Lovett* and *Thornton* the respective defense counsel had represented the witness in each case on matters directly related to the issues at trial.

123. Article 27 (a) UCMJ; United States v. McCluskey 6 C.M.A. 545, 20 C.M.R. 26 (1955).

124. Although such a practice does not appear to be improper *per se* as long as no possibility exists that the trial counsel will in any way need to breach the duty of confidentiality in the course of the prosecution, the potential for such a breach is so great as to render it advisable for a lawyer to prosecute a former client. Moreover, the appearance of such a practice, in the eyes of the accused if no one else, does not enhance the image of military justice.

125. AR 27-10, para. D-2b (2).

126. *Id.*, para. D-2b (3).

127. *Id.*

128. *Id.*

129. MCM, 1969, para 46*d*. *See* article 38(b), UCMJ. Counsel should not, however, suggest names of individual civilian counsel. AR 27-10, para. D-2b (1).

130. *See* United States v. McCluskey, 6 C.M.A. 545, 20 C.M.R. 261 (1955); United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955). *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 88 (2d ed. 1972). Note that information may be privileged where an individual reveals it to a person whom he reasonably believes to be an attorney, seeking legal advice from that person.

131. *See, e.g.*, United States v. Eason, 21 C.M.A. 335, 45 C.M.R. 109 (1972); United States v. Zimmerman, 47 C.M.R. 800 (N.C.M.R. 1973).

132. MCM, 1969, para 48*c*; ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4; DF 3.1.

133. DF 5.1 (a).

134. MCM, 1969, para. 46*d*. *See* note 129 *supra*.

135. MCM, 1969, para. 48*e*.

136. MCM, 1969, para. 48*g*.

137. *Id.*

138. *Id. See also* MCM, 1969, para. 75*c* (2).

139. MCM, 1969, para. 48*g*.

140. DF 3.6 (a).

141. DF 3.2a.

142. *Id.*

143. *See* EC 4-1; DF 3.1 (a).

144. EC 4-4.

145. *See* MCM, 1969, para. 151*b*(2). Attorney's agents may include investigators and paralegal assistants acting for the attorney. Where part of the relationship, these individuals are bound by the privilege to the same extent that the attorney is. Note that the known presence of third parties will ordinarily negative the privilege. MCM, 1969, para 151*b*(2), United States v. McCluskey, 6 C.M.A. 545, 20 C.M.R. (1955). In such event the duty of confidentiality may still remain however.

146. MCM, 1969, para. 151*b*(2). DR 4-101; EC 4-4; DF 3.7.

147. MCM, 1969, para. 151*b*(2). *See generally* McCormick, *supra* n. 130, § 93 at 194-97.

148. DR 4-101 (c) (4); United States v. Allen, 8 C.M.A. 504, 28 C.M.R. 8 (1957).

149. DR 4-101 (c) (3); *compare* DF 3.7 (d). Clearly a defense counsel may reveal the client's intention to commit a future crime under almost any circumstances (except the client's intent to commit perjury at his or her own trial, *see* DF 7.7). There is some conflict between the ABA Code of Professional Responsibility and the ABA Standards, The Defense Function as to when the attorney *must* reveal such an intention. DR 4-101 (c)(3) merely removes the duty of confidentiality from such communications; it does not appear to create any affirmative duty to reveal them. *But see*, ABA Code of Professional Responsibility, Canon 4, n. 16 at 23C which quotes ABA Opinion No. 314 (1965) and says a lawyer must disclose such information if " 'the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed.' " It will be relatively rare that counsel can be sure, beyond a reasonable doubt, that a future event will occur. DF 3.7 (d) indicates that a lawyer must reveal his client's intention to commit a future crime if the crime

> . . . would seriously endanger the life or safety of any person or corrupt the processes of the court and the lawyer believes such action on his part is necessary to prevent it.

The ABA Standard does not discuss the degree of certainty which counsel must feel in order to have an obligation to disclose. In reality, this would seem to depend to some extent upon the nature of the intended activity. A bomb threat or other life endangering activity would seem to create a duty disclose at a lower threshold than would an intent to disrupt the court by shouting at the judge.

Of course, counsel's first effort should be to attempt to dissuade the client from carrying out the contemplated activity.

150. DR 4-101 (a).

151. *See* DR 4-101 (c).

152. DF 5.2(a). *See also* EC 7–7 and EC 7–11. EC 7–11 indicates that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition, or age of a client . . ."

153. EC 7–8; DF 5–1.

154. DF 5.2.

155. DR 7–101 (b); DF 5.1 (a). *See also* DF 3.8.

156. DR 7–101 (b); EC 7–9.

157. DF 4.1 (a).

158. DF 4.1 (a). *See also* United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

159. DR 7–102 (a) (3); EC 7–27. Indeed, such activities may give rise to criminal charges under article 134, UCMJ.

160. *See* Fisher v. United States, 44 U.S.L.W. 4514 (U.S. 21 Apr. 1976). *See also McCormick*, *supra* n. 130 § 89, at 182–85.

161. *See* DR 7–109; EC 7–27. *See also* In re Ryder 381 F. 2d 713 (4th Cir. 1967). A more extensive version of the facts is found in the district court's *en banc* opinion, 263 F. Supp. 360 (E.D. Va. 1967).

162. *Id.*

163. DR 7–102, *see* UCMJ, art 134. *See also* Clark v. State, 159 Tex. Crim. 187, 261 S.W. 2d 339 (1953), *cert. denied*, *rev. denied*, *sub. nom.*, Clark v. Texas, 346 U.S. 855 (1953).

164. EC 7–39; DF 1.2 (a). See also article 86, UCMJ.

165. DR 7–102 (a) (1) (2) and (5); DF 1.2 (b).

166. DF 1.2 (c). *See also* AR 27–10, para. 4–4.

167. *See* United States v. Pergande, 49 C.M.R. 28 (A.C.M.R. 1974). Of course, counsel may waive such a waiting period if he deems it in the best interests of his client to do so. (*See* MCM, 1969, para 58c.) Query whether the five day period prescribed in United States v. Goode, 23 C.M.A. 367, 50 C.M.R. 1 (1975) for defense counsel to prepare comments in the past trial review is mandatory in the same sense that those under article 35 are. *See* United States v. Forsyth, SPCM 11727 (A.C.M.R. 1976) (unpublished opinion) "To us it is clear that the Court of Military Appeals in *Goode* requires the Government to serve a copy of the post trial review upon defense counsel and must allow him a minimum of five days to respond before taking final action." *Id.*, slip op. at 2, (dicta). May the defense counsel ethically use the entire five day period when he knows he has no comments, in order to give rise to a violation of the ninety day rule under Dunlap v. Convening Authority 23 C.M.A. 135, 48 C.M.R. 751 (1974)? Clearly, if counsel does in fact have matters to prepare, necessitating that he use the five days, no problem arises. Otherwise, the question involved is a legal one: is the *Goode* five day rule mandatory in nature like the rules under article 35, or does *Goode* merely give the defense counsel up to five days without having to request a delay within that time?

168. *See* DF 1.2 (c) and commentary.

169. Article 45, UCMJ; MCM, 1969, para. 70*a*.

170. United States v. Johnson, 23 C.M.A. 416, 50 C.M.R. 320 (1975). *See also* article 45, UCMJ; MCM, 1969, para 70*b*, as amended; 40 Fed. Reg. 4247, 49 (1975).

171. MCM, 1969, para 70*b*; United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

172. DF 5.3. *See* United States v. Johnson, 23 C.M.A. 416, 50 C.M.R. 320 (1975).

173. DF 6.2 (a).

174. DF 6.1 (b).

175. *See* DF 6.2 (a) and commentary.

176. *See* United States v. Schilf, 24 C.M.A. 67, 51 C.M.R. 197 (1976); United States v. Johnson, CM432557 (A.C.M.R. 28 July 1976).

177. DF 7.6 (b). It should be noted that this provision does not describe such cross-examination as "unprofessional conduct."

178. U.S. CONST. amend. VI.

179. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

180. See EC4–5; Freedman, *supra* n. 51.

181. DR 7–102 (a) (4); DF 7.5 (a); *see also* PF 5.6 a.

182. See n. 49 *supra*. It should be noted that the commentary accompanying DF 7.7 seems to contemplate that counsel can "know" his client will commit perjury on the basis of conflicting stories from the client and his investigation of the case; this implies that an avowed intent to commit perjury is not necessary for the lawyer to conclude that the client intends to commit perjury.

183. DF 7.7 (a), DF 7.7 (b) also indicates that counsel should seek leave to withdraw from the case if possible. In the military setting this is often difficult for detailed defense counsel to do, especially once the attorney client relationship has been formed. Moreover, this course of action may be criticized as merely shifting the problem to another counsel who is ignorant of the situation. Nevertheless, in view of the provision in the Defense Function, counsel should, if he cannot dissuade his client from his perjurious intentions, explore the possibility of withdrawal.

184. DF 7.7 (c).

185. DF 7.7 (c); *cf.* DR7-102 (b).

186. DF 7.7 (c).

187. DF 7.7 (c) commentary at 275–77. *See also* United States v. Winchester, 12 C.M.A. 74, 30 C.M.R. 74 (1961).

188. DR 7–102 (a) (5).

189. DR 4–101 (b) (2), EC 4–5. *But see* DR 4–10 (c) (2).

190. *See* United States v. Boese, 6 C.M.R. 608 (A.B.R. 1952).

191. DF 8.10. *See also* DR 7–102 (a) (3) and ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 4, n. 15 at 23*c*.

192. Whether the client's perjury on such matters during sentencing should be treated differently from perjury on the merits is unclear. Commentary to DF 8.1 (b) implies that it should be in view of the difference in the nature of the proceedings. Yet in the military, sentencing proceedings are clearly adversarial in nature. *See also* DR 7–101 (b).

193. *See* Army Reg. No. 608-50, Legal Assistance (22 Feb. 1974).

194. MCM, 1969, para. 48*k* (3).

195. *Id.*

196. *See* Army Reg. No. 27–40, Litigation (15 June 1973) with respect to collateral attacks on court-martial proceedings or convictions, and the assistance military counsel may render.

197. MCM, 1969, para. 48*k* (4).

198. *See* article 31, UCMJ.

199. DF 8.2 (a). *See* MCM, 1969, para 88*e*.

200. DF 8.2 (a). *See* Army Reg. No. 630–5, Personnel Absences, para 5–2c (4) (1 June 1975).

201. DF 8.2 (a). *See* Army Reg. No. 190–47 The United States Army Correctional System, Chap. 6 (15 Dec. 1975, with cl, 3 Mar. 1976).

202. *Id.*

203. MCM, 1969, para. 48*k* (1) and (2).

204. MCM, 1969, para. 82*e*.

205. United States v. Cruz-Rijos, 24 C.M.A. 71, 51 C.M.R. 723 (1976).

206. United States v. Goode, 23 C.M.A. 367, 50 C.M.R. 1 (1975).

207. DF 8.2 (b). Counsel should realize that if he or she fails to comment upon a defect in the post trial review, errors may be waived. See United States v. Myhrberg, SPCM 11830 (A.C.M.R. 16 July 1976) (en banc).

208. AR 27–10, para. D–2d.

209. Counsel should not attack his or her own competency, since the inherent conflicts involved place too great a strain on his or her duties to the client, to the administration of justice, and to his or her own reputation, as well as to the reputation of the legal profession. *See Professional Responsibility*, THE ARMY LAWYER, May 1976, at 21.

210. DR 4–101 (c) (4), DF 3.1 (a) and commentary; AR 27–10, para. D–2e.

211. See United States v. Laskowski, N.C.M. 782832 (N.C.M.R. 26 Apr. 1976) (unpublished opinion).

The Impact of Cost-Effectiveness Considerations Upon the Exercise of Prosecutorial Discretion

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Records of trial reviewed by the Government Appellate Division indicate that commanders often refer charges to courts-martial empowered to adjudge punitive discharges when other, equally viable options would be more expeditious, as effective and less costly. The purpose of this article is to explore alternatives for criminal case disposition which are efficient as well as consistent with the disciplinary needs of the Army. This discussion is based on the premise that considerations of cost-effectiveness should properly impact upon the exercise of prosecutorial discretion in referring charges to trial and upon the post-trial action of the convening authority.

Prosecutors have long been charged with the duty of conserving resources while seeking justice. Paragraph 44*g* (1) of the *Manual*[1]

contains the following provision:

> With a view to saving time and expense, he [trial counsel] should join in appropriate stipulations as to unimportant or noncontested matters.

This provision manifests military concern with expeditious orchestration of the court-martial itself. Other authority applies to the decision to bring the case to trial. In a regulatory provision,[2] the Army has adopted the *American Bar Association Standards Relating to the Prosecution Function and the Defense Function*. Two of these standards, reproduced below, indicate that the public interest must be considered in the exercise of prosecutorial discretion:

> 3.8 *Discretion as to non-criminal disposition*
>
> (a) The prosecutor should explore the availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.
>
> (b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.
>
> 3.9 *Discretion in the charging decision*
>
> . . .
>
> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction.

In the military environment, "non-criminal" disposition has traditionally consisted of the decision to administratively eliminate a soldier from the service. This difference between military and civilian practice merits discussion.

Although military "prosecutorial" discretion is exercised by the commander concerned, his or her decision to refer charges to trial should be heavily influenced by the convening authority's legal advisor. Whereas an accused must be represented by a qualified attorney at a special court-martial (Article 27, Uniform Code of Military Justice), the government need not be. Accordingly, the installation staff judge advocate, by refusing to make an attorney available to prosecute, is afforded a degree of control over the recalcitrant commander who injudiciously refers minor offenses to trial. When forced to provide their own trial counsel, special court-martial convening authorities usually lose their enthusiasm for inappropriate trials. In today's Army, this lever is important because overreferral is a luxury which can no longer be tolerated.

During the post-Vietnam era, the public interest has been concerned with conservation of personnel and fiscal resources as the Department of Defense endeavors to improve its combat efficiency by converting "tail" to "teeth." In 1975, when discussing the future goals of the Army, The Judge Advocate General, Major General Prugh, emphasized the Army's concern with economy and efficiency:

> The second Army goal for 1975 is to *obtain maximum benefit from all resources.* This is an enormous challenge for every one of us. This goal includes conservation of physical resources, economy of funds, and constrained use of personnel. Wasteful procedures must be eliminated and redundant or marginal activities ended.[3]

Later that year, Major General Prugh dispatched a letter to the Army general court-martial convening authorities urging that consideration of alternatives other than punitive discharges be considered for eliminating unsatisfactory soldiers from the service. The following portions of that letter are especially important:

> The Secretary of the Army recently noted to senior commanders the undesirability of retaining on duty individuals who cannot or will not be effective soldiers. This

leads me to suggest that, in considering the appropriate course of action in dealing with such individuals, commanders take into account that court-martial processes must inevitably consume a considerable amount of manpower, time, and effort, often requiring that the individual be retained on duty in a pay status until protracted statutory appellate processes are completed. Sometimes, of course, this is a necessary and proper action if it is determined that court-martial is the only appropriate disposition available.

. . .

There are also cases in which other alternatives to court-martial would have resulted in an earlier departure from the service of an ineffective soldier, with consequent savings of Army spaces, time, and effort and without any substantial difference in the fairness and justice insofar as the individual is concerned.

. . .

All during . . . [the period of appellate review], the individual is carried on the rolls and charged against the Army strength. Unless he is in confinement or on excess leave, the individual will be carried as a duty solider, probably drawing full pay and allowances after any forfeiture, fine, or confinement portion of the sentence has been served. There are currently about 1,400 general or BCD special court-martial cases in some stage of appellate processing. It is obvious that, as this number is reduced, effective Army strength can be proportionately increased.

. . .

If . . . [the number of trials] could be reduced by employing alternative administrative actions where appropriate, there would be fewer people tied up in the trials and the processing of trials, fewer persons in confinement, and more rapid return of the individual to useful duty or else his early departure from the service so that a more effective soldier can promptly take his place [OTJAG letter DAJA-CL: 1975 (1566)].

For the reasons which follow, Major General Prugh's observations are more pertinent today than they were in 1975.

The desirability of appropriate utilization of alternatives to courts-martial empowered to adjudge punitive discharges is illustrated by consideration of two fact situations. The first illustrates poor management of a disciplinary problem by a commander, and the second reveals creative and efficient utilization of an alternative mode of disposition by the convening authority.

In the first case, Private First Class *A*[4] was tried by a BCD special court-martial for a 35 day AWOL. At the time of trial he had served in the Army for less than two years, and had previously received a special court-martial conviction for a 15 day AWOL as well as nonjudicial punishment on three occasions for minor military derelictions. Pursuant to a pretrial agreement, the convening authority suspended the adjudged confinement and bad conduct discharge. The record of a 39(a) session at which a speedy trial motion was litigated disclosed that *A*'s request for discharge for the good of the service had not been approved by the convening authority. During extenuation and mitigation, a psychiatrist testified that he had examined *A*, whom he diagnosed as suffering from a character and behavior disorder.

A's trial illustrates several commonly-encountered problems in the administration of the military justice system. It is apparent that trial by court-martial was not the most appropriate disposition for this disciplinary problem because: it was costly; time-consuming, wasteful, uncertain, in that it may be reversed on appeal; and it did not achieve the desirable management end of eliminating an unproductive soldier from the service.[5]

The convening authority obviously did not believe that confinement and a punitive discharge were appropriate. Therefore, rather than agreeing to suspend portions of the sentence, it would have been more efficient for

him to enter into a pretrial agreement to have the charges tried by a summary or regular special rather than a BCD special court-martial. Such a disposition would have conserved resources by authorizing a summarized record of trial and final review by a local judge advacate, thereby avoiding protracted appellate litigation. Traditionally, the suspension of punishment has been deemed to be desirable because it provides a strong motive for rehabilitation in that the convening authority could easily vacate the suspension if the accused committed additional acts of misconduct. However, on 23 May 1977, the Court of Military Appeals decided *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977), and *United States v. Rozycki*, 3 M.J. 127 (C.M.A. 1977), holding that proceedings to vocate a suspended sentence must conform with certain due process requirements, including an initial probable cause hearing, a subsequent hearing similar to an Article 32 investigation before the special court-martial convening authority personally, and approval of the general court-martial convening authority, with a written statement of the reasons for his or her decision. The court also indicated that it was empowered to review suspension vactions. *See also United States v. Andreason*, 23 C.M.A. 25, 48 C.M.R. 399 (1974); *United States v. Williams*, 21 C.M.A. 292, 45 C.M.R. 66 (1972). With this change, the continued vitality of the suspension vacation proceeding is doubtful because, as a practical matter, it would ordinarily be more expeditious simply to try by court-martial those few accused who commit infractions while in a probationer status rather than to routinely expose most cases involving a negotiated plea to the hazards of prolonged appellate review. As sentence suspension has become impractical, *A*'s case should have been referred to a tribunal with more limited sentencing powers.

The convening authority also failed to perceive the benefits of taking administrative action to eliminate *A* from the service, either in conjunction with an inferior court-martial proceeding or even in lieu of court-martial. Under the facts of *A*'s case, the convening authority could have taken any of the following actions: accepted the accused's request for discharge for the good of the service and approved a discharge under other than honorable conditions (Chapter 10, Army Regulation Number 635-200, Personnel Separations-Enlisted Personnel, with changes); imposed field grade nonjudicial punishment, including reduction of the accused to the lowest enlisted grade, and initiated expeditious discharge proceedings (Chapter 5, Army Regulation Number 635-200, Personnel Separations-Enlisted Personnel, with changes); or tried the accused by inferior court-martial and then instituted an administrative elimination action for either misconduct or personality disorder resulting in a possible other than honorable or general discharge (Chapter 13, Army Regulation Number 635-200, Personnel Separations—Enlisted Personnel, with changes).[6] Any of these alternatives quickly would have eliminated the accused from the service, at low cost, while satisfying the disciplinary needs of the Army. The efficacy of these individual alternatives will obviously vary with each case. Suffice it to say, however, that any of these options would have been preferable to a BCD special court-martial because, in the opinion of the author, it is less costly and easier to follow an inferior court-martial with an administrative elimination proceeding than it is to try the accused by court-martial empowered to adjudge a punitive discharge. The difficulties associated with appellate review, which will subsequently be set forth, outweigh the liabilities involved even in those cases where administrative elimination is contested by the accused or respondent, necessitating dual proceedings.

Another consideration supports this conclusion. When an inferior court-martial is followed with an administrative elimination proceeding, separation is more likely because the honorable, general, and other than honorable administrative discharge which can be imposed allow greater latitude for the member's decision than does a punitive discharge. The administrative double jeopardy rule (paragraph 1-13*a*(3), Army Regulation Number 635-200, Personnel Separations–Enlisted Per-

sonnel, change 42, dated 14 December 1973) prevents a commander from initiating a board action against a soldier for the same misconduct which was considered by a tribunal authorized to adjudge a punitive discharge, but which did not include a discharge in its sentence. Thus, a soldier who does not receive a punitive discharge from such a court will remain on active duty.

Another example illustrates the manner in which an administrative discharge can efficiently be utilized after a court-martial sentence is adjudged. A sentence which included incarceration and a punitive discharge was adjudged on 4 June 1976 in *United States v. Welch*, CM 435124. Acting upon the advice of the staff judge advocate, the convening authority approved the confinement which had been served, disapproved the adjudged bad-conduct discharge, and approved *B*'s previously submitted request for discharge for the good of the service. The action of the convening authority was dated 31 August 1976, and two weeks later the conviction was final, having been reviewed by The Office of the Judge Advocate General in accordance with Article 69 on 13 September 1976.[7] In contrast, the sentence of *C*, *B's* co-conspirator (consisting of, *inter alia*, five years of confinement and a dishonorable discharge) was approved by the convening authority on 28 August 1976. Approximately one year later, on 19 August 1977, the conviction was affirmed by the Army Court of Military Review. *United States v. Watson*, CM 435145 (A.C.M.R. 19 August 1977). *C* submitted a Petition for a Grant of Review to the Court of Military Appeals on 11 October 1977, which, if granted, may cause one and perhaps several more years to elapse before his conviction becomes final. A comparison of *Welch* and *Watson* illustrates a method for convening authorities to expedite processing of courts-martial in which a severe sentence is not adjudged. Contrary to a widely held belief, a convening authority is empowered to accept a request for discharge for the good of the service *after* trial, but before his or her review action.[8] When the confinement adjudged is not substantial, the difference between several weeks and two or more years beofre completion of review provides a strong incentive to utilize a Chapter 10 separation in lieu of a punitive discharge. Obviously, because of the serious sentence adjudged, it would have been inappropriate to approve a Chapter 10 discharge for *C*. However, when an accused is sentenced to a bad-conduct discharge and three months of confinement, it would be sound management for the convening authority to accept a request for discharge for the good of the service, disapprove the punitive discharge, and reduce the period of confinement to that already served. In the opinion of the author, a comparison of the cumulative punishment of a federal conviction, three months of incarceration, and a bad-conduct discharge with a federal conviction, up to ninety days of incarceration, and an other than honorable discharge, does not reveal a significant qualitative difference justifying the additional time and expense involved. To be sure, technical distinctions exist between punitive and other than honorable discharges, but the practical difference between them is not greatly significant. It is submitted that protracted appellate litigation should be avoided unless the adjudged sentence to confinement is sufficiently lengthy to justify the resulting delay and expense. Moreover, it would be appropriate for the defense to submit a Chapter 10 request, urging substitution of a discharge for the good of the service for a punitive discharge, with either an offer of pretrial agreement or a petition for clemency.

Other factors exist which indicate the desirability of post-trial administrative discharges. The longer the delay before a conviction becomes final, the greater are the chances for reversal by an appellate tribunal because the Court of Military Appeals, as it is presently constituted, does not consistently apply the doctrine of *stare decisis et non quieta movere*. As a result, existing precedent is regularly repudiated, and the continuing viability of any legal doctrine is uncertain. This premise is quickly illustrated by reference to the following recent decisions: *United States v. McCarthy*, 25 C.M.A. 30, 54 C.M.R.

30 (1976), overturning the rationale enunciated in *United States v. Beeker*, 18. C.M.A. 563, 40 C.M.R. 275 (1969) for resolving drug offense jurisdictional questions; *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977), repudiating the sanity test set forth at Paragraph 120 of the *Manual; United States v. Mosely* and *Sweisford*, 24 C.M.A. 173, 51 C.M.R. 392 (1976), prohibiting the trial counsel from arguing that the members consider the deterrence of others when imposing sentence, making courts-martial virtually the only American jurisidction in which this practice is improper [*see United States v. Foss*, 501 F.2d 522, 527 (1st Cir. 1974) and the authority cited therein]; and *United States v. Courtney*, 24 C.M.A. 280, 51 C.M.R. 796 (1976), holding that charging a drug offense under Article 134, Uniform Code of Military Justice, rather than under Article 92, constitutes a denial of equal protection of the law. That court also has expressed an unusual interpretation of the standard to be applied in ascertaining whether reversal is required:

> The mere fact that upon appeal harm to the accused may be found nonexistent, in no sense lessens the obligation to see that he receives those benefits which are rightly his (citation omitted). *United States v. Hill*, 3 M.J. 295, 297 (C.M.A. 1977).

But see, Article 59(a), Uniform Code of Military Justice ("A finding or sentence of a court-martial may not be held incorrect unless the error materially prejudices the substantial rights of the accused."). Indeed, that court has even reversed a conviction because the trial judge was not sufficiently "sensitive":

> A problem which has characterized military trial practice and distinguishes it from its federal counterpart is an *insensitivity* to situations of dual representation, and the attendant conflicts of interests and divisions of loyalty (emphasis supplied). *United States v. Davis*, 3 M.J. 430, 433 (C.M.A. 1977).

This "insensitivity" test is apparently a reformulation of the standard enunciated in *United States v. Powell*, 24 C.M.A. 267, 269, 51 C.M.R. 719, 721 (1976) wherein the charges were dismissed because the government had demonstrated "a lack of concern . . . for expeditious prosecution." It is evident that the court tests for "prejudice" in light of the judges' own moral sensibilities. The apparent unwillingness of the military court of last resort to adhere to precedent renders the appellate process unpredictable.

Despite this uncertainty, it is beyond cavil that justice demands that serious offenses, such as rape or robbery, be referred to trial by court-martial and vigorously contested throughout every stage of the legal process. The necessity for prosecuting serious cases, even though the process is both difficult and expensive, has long been recognized: *prosecutio legis est gravis vexatio; executio legis coronat opus* (litigation is vexatious, but an execution crowns the work). Nevertheless, the author contends that because it is impossible for even the most conscientious staff judge advocate or military judge to insure that good faith compliance with established precedent will be sustained, it is unwise for commanders to risk reversal on appeal in less serious cases in which a substantial period of confinement has not been adjudged.

Another hazard of appellate review pursuant to Article 66 is the phenomenon of the "trailer case". The Court of Military Appeals granted review of the issue of whether charging drug offenses under Article 134 rather than Article 92 was violative of the equal protection doctrine on 1 October 1975. The decision of that court was announced on 2 July 1976, in *United States v. Courtney*, 24 C.M.A. 280, 51 C.M.R. 796 (1976), overturning *United States v. Walter*, 20 C.M.A. 43 C.M.R. 207 (1971), but resolving little else. The issue was relitigated, and on 16 May 1977, the court decided *United States v. Jackson*, 3 M.J. 101 (C.M.A. 1977). Between 1 October 1975, and 16 May 1977, every general court-martial involving a heroin offense charged under Article 134 with an approved sentence which included confinement in excess of two years was held in abeyance. While *Jackson* was ultimately a victory for the government in that the charg-

ing decision was not applied retroactively, a number of convictions which otherwise would have been final nevertheless were reversed, because on 19 March 1976, the court overruled *United States v. Meyer*, 21 C.M.A. 310, 45 C.M.R. 84 (1972) in *United States v. Hughes*, 24 C.M.A. 169, 51 C.M.R. 388 (1976), holding that the simultaneous possession of a variety of drugs constituted one offense for sentencing purposes. This decision resulted in the reversal of a number of guilty pleas. Under the newly-enunciated rule, the pleas were held to have been based upon a substantial misunderstanding concerning the maximum imposable sentence because the offenses were multiplicious. Additionally, some of the cases which were held in abeyance are still undergoing appellate litigation on the issue of military jurisdiction over off-post drug offenses which was generated by *United States v. McCarthy*, 25 C.M.A. 30, 50 C.M.R. 30, decided 24 September 1976. This phenomenon is also illustrated by consideration of the trial of Air Force Sergeant *D* who was convicted on 22 May 1975 for multiple drug offenses, receiving an approved sentence which included nine months of confinement and a subsequently-suspended bad conduct discharge. The highest military court reversed his conviction over two years later because his offense was not service connected. *United States v. Alef*, 54 C.M.R. 480 (A.F.C.M.R. 1976), *reversed* 3 M.J. 414 (C.M.A. 1977). Decisions of the Court of Military Appeals, even if prospective in nature, may be applied to all other cases currently pending direct review. *See Mercer v. Dillon*, 19 C.M.A. 264, 41 C.M.R. 264 (1970), cited with approval in *United States v. Alef*, 3 M.J. 414 419 n. 19 (C.M.A. 1977). This author does not believe that the wise commander will thoughtlessly choose to encounter these risks.

Appellate review of short confinement sentences also creates a personnel problem. After an accused has served his or her sentence to confinement, his or her adjudged punitive discharge cannot be executed until appellate review has been completed. Unless she or he requests excess leave,[9] the accused who is released from prison is restored to duty where there is an opportunity to resume selling heroin to the troops, to steal from fellow soldiers, or to otherwise subvert military order and discipline. This possibility is not remote. On 5 and 6 November 1975, Staff Sergeant *E*[10] was convicted by general court-martial at Fort Richardson, Alaska, for the offenses of possession of heroin and marihuana in violation of Article 134, Uniform Code of Military Justice. He was sentenced to a bad-conduct discharge, reduction to the lowest enlisted grade, and confinement at hard labor for one year. Having been released from confinement, then Private *E*[11] was subsequently convicted by general court-martial convened at Fort Richardson, Alaska, for the offense of possession of heroin in violation of Article 134, and sentenced to a bad-conduct discharge, total forfeitures, and confinement at hard labor for one year. *E* has now served this second sentence to confinement, and it is conceivable that he could be restored to duty and commit yet another offense while these two prior convictions are undergoing appellate review. *E's* experience is not unique in that it is fairly common for two courts-martial of the same accused to be undergoing appellate review simultaneously. Moreover, appellate review can, in some instances, require years. For example, in *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977), 448 days elapsed between The Judge Advocate General's appointment of appellate defense counsel and the filing of the initial defense pleading with the Court of Military Review, and that court did not render its decision for over another year. After a lengthy delay before the Court of Military Appeals, that court noted that " . . . the interests involved at the appellate level and the very functions of appellate courts make a certain amount of delay 'normal.' " *United States v. Johnson*, 3 M.J. 143, 150 n. 23 (C.M.A. 1977).

In conclusion, commanders should place increased reliance upon administrative alternatives to courts-martial for resolution of disciplinary problems in order to improve efficiency, conserve manpower, and save money.

Such administrative separations can be used either as substitutes for, or in conjunction with, inferior courts-martial as a device to avoid the difficulties caused by trials involving protracted appeals. This goal may be summarized: *discretio est discernere per legem quid sit justum* (discretion is to know through law what is just), which is consistent with effective management of military resources.

Notes

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), [hereinafter cited as *Manual*].

2. Army Reg. No. 27-10, Military Justice, para. 2-32*c*, (C 17, 15 Aug. 1977).

3. Prugh, *Judge Advocate Support of Army Goals for 1975*, THE ARMY LAWYER, Jan. 1975, at 1 (emphasis in original).

4. Although this example is based upon actual records of trial which disclose facts virtually identical to those here presented, Private *A*, for obvious reasons, represents a composite of several cases.

5. The allied papers included properly authenticated personnel records establishing the AWOL alleged. Under these circumstances, a negotiated plea is ordinarily undesirable because a trial counsel should be able to prove AWOL with documentary evidence more quickly than the military judge can conduct a proper providence inquiry. Therefore, the pretrial agreement did not benefit the government. This observation, however, is not germane to the instant issue.

6. Considering the accused's record, an alert commander would have administratively eliminated him from the service long before he committed the instant offense.

7. Article 66(b) provides that a court of military review will review every court-martial in which an enlisted member receives a sentence including either confinement of one year or a punitive discharge. When such a sentence is approved by the convening authority, a subsequent administrative discharge of the accused does not affect the jurisdiction of the military appellate tribunals. United States v. Jackson, 3 M.J. 153 (C.M.A. 1977). However, reduction of sentence at action does have such an effect by triggering the Article 69 reviewing responsibility of The Judge Advocate General.

8. Army Reg. No. 635-200, Enlisted Personnel, para. 10-1*a*, (Ic 3O2228Z Mar 76). Note, however, that paragraph 1c of this regulation states that the convening authority may "approve only so much of any adjudged sentence to confinement at hard labor or hard labor without confinement as has been served at the time of his action." A sample action achieving this result is set forth at *Military Justice*, THE ARMY LAWYER, May 1973 at 18.

9. *See* Army Reg. No. 630-5, Leave, Passes, Administrative Absence, and Public Holidays, para. 5-2*d*(4) (C2, 18 Mar. 1977); *see also* United States v. Larenard, 3 M.J. 76, 78 n. 2 (C.M.A. 1977).

10. United States v. Reed, CM 434451, is currently pending before Panel 2 of the Army Court of Military Review.

11. United States v. Reed, CM 434590, was affirmed by Panel 4 of the Army Court of Military Review on 30 June 1977. However, this conviction has not become final because the decision of that court has not yet been personally served on Reed because the authorities at the Disciplinary Barracks have been unable to locate him. See United States v. Larneard, 3 M.J. 76, 80 (C.M.A. 1977).

Judiciary Notes

U.S. Army Judiciary

ADMINISTRATIVE NOTES

1. For the month of October 1977, the following errors in the initial promulgating orders were corrected by the Army Court of Military Review:

a. Failure to properly set forth the proper wording in the specification of a charge.—Three cases.

b. Failure to indicate that trial was by military judge alone by including the words "By military judge" after the word "sentence."—Two cases.

2. The Office of the Clerk of Court has received several inquiries from staff judge advocate offices concerning "authorized deductions" that may be allowed under item 6 of the Chronology Sheet (DD Form 490). Although appellate review of a case may reveal other excusable delays, for purposes of computing

statistical data for the jurisdictional Workload and Processing Report, only the times for items listed on the Chronology Sheet (Accused sick, in hospital, or AWOL; Delay at request of defense) should be deducted.

Information from the Chronology Sheet is used for computing statistical data for the Jurisdictional Workload and Processing Report, not for determination of speedy trial or review issues. To be meaningful, it must be reported uniformly.

Forwarding Trial Records After Convening Authority Action

Criminal Law Division, OTJAG

Delay in forwarding records of trial to USALSA after the convening authority's action continues to be a significant problem. SJA's must insure the appellate review process is not prolonged unnecessarily because of administrative breakdowns.

USALSA is now sending copies of its Quarterly Jurisdictional Workload and Processing Report to each general court-martial jurisdiction. This report reflects processing time averages for each jurisdiction. Previously, it reflected the average time lag between convening authority action and receipt of the trial record by USALSA in a column headed "CA ACT/REC'D JAGO." Effective November 1977 this column was replaced by two columns headed "CA ACT TO DSPCH" and "DSPCH TO REC'D JALS-CC." The change was made to differentiate delays attrcbutable to SJA processing from those attributable to postal authorities. This quarterly report will serve as a useful management tool for SJA's by permitting them to compare their average processing times with those of other jurisdictions. In addition, the report provides Army-wide averages.

Article 138 Index

Administrative Law Division, OTJAG

The Freedom of Information Act (FOIA) requires that agencies maintain, and make available for public inspection and copying, indexes of all final opinions made in the adjudication of cases. The opinions and orders themselves also must be made available for public inspection and copying, subject to deletions to prevent a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552 (a) (2)).

The United States District Court for the District of Columbia, held on 13 May 1977, that the Department of the Army was in violation of the FOIA by refusing to publish or make available an index of final dispositions of Article 138 complaints. The Army was ordered to prepare and make available an Article 138 Index. (*Hodge v. Alexander*, Civil Action No. 77-288.) The Department of Justice determined that it would not appeal the order.

In compliance with the court order, an Article 138 Index and an accompanying Introductory Statement on its use have been prepared. The Introductory Statement and the list of topics under which Article 138 complaints are filed accompany this article.

Over 600 Article 138 cases are on file in the Office of The Judge Advocate General, and many of them are voluminous. Most of the cases are decided entirely on the facts of the particular case (*e.g.*, did the commander abuse his discretion) and are of little or no precedential value. Army Regulation 27-14, published in December 1973, contains the applicable law

and policy. A knowledge and understanding of Army Regulation 27-14 and the facts of a specific complaint are the best tools in assisting the complaintant and the commander in resolving such matters.

INDEX OF FINAL DISPOSITIONS OF COMPLAINTS FILED PURSUANT TO ARTICLE 138, UCMJ

Article 138, Uniform Code of Military Justice (10 USC § 938), provides a means by which a member of the Armed Forces may seek redress of grievances from his commanding officer, and, if redress is denied, file a formal complaint against that commanding officer. The officer exercising general court-martial jurisdiction over the officer against whom the complaint is made is charged with taking initial action on the complaint. After initial action, proceedings on the complaint are forwarded to the appropriate service Secretary. The Judge Advocate General of the Army is the designee of the Secretary of the Army to review and make final disposition of such complaints.

The following index, published pursuant to section 552 (a) (2), title 5, United States Code, includes all final dispositions of complaints from 4 July 1967. The index itself, however, was not designed and compiled until August 1977. Dispositions prior to that time were indexed retroactively. The index will be updated effective 31 December 1977 and quarterly thereafter. A copy is available for public inspection and copying in the Armed Forces Discharge Review/Correction Boards Reading Room, located in the concourse of The Pentagon. Copies of individual opinions may be obtained by mail, for the cost of reproduction, by writing HQDA (DAJA-ASR), The Pentagon, Washington, D.C. 20310.

JURISDICTION AND PROCEDURE

ALTERNATE CHANNELS
COMMANDING OFFICER
GCM AUTHORITY
REQUEST FOR REDRESS
TIME LIMIT

SUBJECT MATTER OF COMPLAINT

ACTIVE DUTY ORDERS
ADMONITIONS AND REPRIMANDS
Appearance (see HAIRCUTS AND APPEARANCE)
Article 15, UCMJ (See NONJUDICIAL PUNISHMENT)
ASSIGNMENTS AND TRANSFERS
BOARD PROCEEDINGS (See also ELIMINATION PROCEEDINGS)
COMMISSARY AND POST EXCHANGE
CONFINEMENT
  (1) Pretrial
  (2) Post-trial
CONSCIENTIOUS OBJECTOR STATUS
DEPENDENTS
DISCRIMINATION
  (1) Race
  (2) Sex
  (3) Other
EFFICIENCY REPORTS
  (1) Enlisted (EER)
  (2) Officer (OER)
ELIMINATION PROCEEDINGS
EMPLOYMENT, OUTSIDE
HAIRCUTS AND APPEARANCE
HARASSMENT BY SUPERIORS
HOUSING
  (1) Bachelor Quarters (BOQ/BEQ)
  (2) Family
IMPROPER INFLUENCE
INDEBTEDNESS
LEAVE AND PASSES
MEDICAL CARE
MILITARY JUSTICE (see also NONJUDICIAL PUNISHMENT; CONFINEMENT)

MILITARY OCCUPATIONAL SPECIALTY (MOS)
NONJUDICIAL PUNISHMENT (Art 15, UCMJ)
PERSONAL INTEGRITY
POLITICAL ACTIVITIES
Post Exchange (see COMMISSARY AND POST EXCHANGE)
POST REGULATIONS
PROMOTIONS
RELIEF FROM COMMAND OR DUTY POSITION
Reprimands (see ADMONITIONS AND REPRIMANDS)
SECURITY CLEARANCES
SEPARATIONS (see also ELIMINATION PROCEEDINGS)
(1) Involuntary
(2) Voluntary
Transfers (see ASSIGNMENTS AND TRANSFERS)

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA
The Judge Advocate General's Opinions

1. (Information and Records, Release and Access) **Courts-Martial Are Excluded From The Provisions Of The Privacy Act.** DAJA-AL 1977/3889, 8 Apr. 1977. An opinion was requested of The Judge Advocate General as to the impact of the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552*a*) on access to personnel and other files by military and civilian counsel in courts-martial. The Judge Advocate General concluded that the Privacy Act does not apply to courts-martial, in that 5 U.S.C. § 551 defines "agency" for the purposes of subchapter II, chapter 5, Title 5, U.S.C. (5 U.S.C. §§ 551-559) and as defined specifically excludes, except as to the requirements of 5 U.S.C. § 552, courts-martial and military commissions. The 1974 Amendments to the FOIA redefined agency but, as noted in the Attorney General's Memorandum on the Amendments, a review of the legislative history indicates that the redefinition in 5 U.S.C. § 552(e) was intended to clarify and expand the class of organizational entities subject to the FOIA and not to remove the exception for courts-martial found in 5 U.S.C. § 551 for all of subchapter II (except § 552). Based on this rationale it was The Judge Advocate General's opinion that a court-martial has the authority to utilize available records without regard to the provisions of the Privacy Act, even though such records would otherwise be subject to the Act.

Thus, once a case is referred to trial (because a court-martial does not exist until convened and has no authority in a case until the case is referred to the court) a military judge may grant a motion for discovery, without concern for Privacy Act restrictions or requirements, of Military Personnel Records Jackets (Field 201 files), medical files, finance files, or any other records, the disclosure of which is required in order for an accused to receive a fair trial or is otherwise required in the interest of justice. It was also The Judge Advocate General's opinion that the trial counsel, in a case which has been referred to trial, acting in his or her capacity as an officer of the court, could disclose records, otherwise subject to the Privacy Act, to military or civilian defense counsel to ease the administration of justice. The Judge Advocate General noted that, even though the Privacy Act did not apply to courts-martial, officers of the court must still be concerned with the privacy of witnesses and court members and abide by the American Bar Association Standards for the Administration of Criminal Justice relating to the Prosecution Function and the Defense Function. The opinion does not support the position taken by the Air Force Court of

Military Review in *United States v. Credit*, ACM 21959 (1 July 1976) that the ABA Standards serve as a limitation on the type of information to be disclosed. Rather, it was The Judge Advocate General's opinion that the Standards limit investigatory *methods* to those which will not unnecessarily invade privacy. Disclosure of personnel files when appropriate would enhance compliance with the Standards, because it would be the least intrusive method of investigation. For instance, disclosure of personnel files is proper where investigation of court members is justified.

It was The Judge Advocate General's opinion that, before a case is referred to trial, the Freedom of Information Act provides a means for military and civilian counsel to seek to obtain personnel records for use in preparing for trial. Under the Freedom of Information Act a determination must be made whether disclosure would constitute a clearly unwarranted invasion of personal privacy. (5 U.S.C. § 552 (b) (6)) This determination involves balancing the public interest served by disclosure against the individual's right to privacy. It was noted that usually the only public interest to be served by granting a FOIA request made in connection with a court-martial case is the public interest of ensuring that those accused of a crime receive a fair trial. Therefore, the only information which is required to be disclosed by the Freedom of Information Act, in addition to that specified in para. 3-2*b*, AR 340-21, is that which is necessary to satisfy the above discussed public interest. Information discoverable in a criminal proceeding to ensure a fair trial is not exempt from release under the Freedom of Information Act.

2. (Enlisted Personnel, Promotion) **Determination That EM Should Have Been In A Nonpromotable Status UP AR 600-31 And AR 600-200 Will Not Void Executed Promotion.** DAJA-AL 1976/4611, 22 June 1977. EM was selected for promotion to E8 in November 1974. In a sworn statement to the CID in March 1975, he admitted he had been involved in "blackmarketeering" in Korea from September 1974 until March 1975. He became the subject of a CID investigation, but his records were never flagged and he was promoted to E8 in November 1975. The final CID ROI was forwarded to EM's commander in May 1976, at which time his records were flagged. EM accepted punishment UP Article 15, U.C.M.J., in November 1976 for the mentioned offenses. In March 1977, a request was initiated to revoke his promotion to E8 on the basis that he was in a non-promotable status on the effective date of his promotion, because he *should* have been flagged UP para. 3*a*(3), AR 600-31.

The Judge Advocate General affirmed the basic rule that the purported promotion of a member in a nonpromotable status is void and without legal effect. However, it was pointed out that the language of paragraph 7–6*e*, AR 600–200 (to the effect a member would not be promoted when a GCMCA or higher authority determines a member should be flagged because of the existence of criteria in AR 600–31), was not intended to authorize a post-promotion determination that a member should have been in a non-promotable status. TJAG held that the failure to flag EM's records meant that he was in a promotable status on 1 November 1975 and his promotion could not be voided now UP para. 7-4*d*, AR 600–200.

3. (Military Installations) **Seasonal Display of Nativity Scenes, Menorahs, Christmas Trees Or Similar Devices Is Not Prohibited.** DAJA-AL 1977/4871, 19 July 1977. An opinion was requested of The Judge Advocate General concerning the legality of seasonal displays of nativity scenes, menorahs, Christmas trees or similar devices.

TJAG expressed the view that such displays do not violate the "Establishment Clause" of the First Amendment of the United States Constitution and are within the legitimate scope of the commander's responsibility for the religious life, morals, and morale of his command. The ministration to the religious needs of service members by the Army is nearly as old as the Republic. Though no challenges on constitutional grounds could be located, such activity was determined to be con-

stitutional because of the recognition of the validity of the government's ministry to service member's religious needs by Congress, the Courts and the Executive. See 10 U.S.C. § 3547 (1970 ed.); AR 165-20 and AR 230-36. Displays of such religious symbols are important contributions to the religious life and morale of soldiers, especially those stationed far from home on holidays of great religious and emotional significance. Such displays are no more violations of the Establishment Clause than are the existence of chapels on Army posts.

4. (Military Installations, Law Enforcement) **Military Police Personnel Are Authorized To Administer Oaths Under The Provisions Of Article 136, U.C.M.J., Only If Specifically Ordered Or Directed To Conduct Investigations By Competent Authority.** DAJA-AL 1977/4922, 20 July 1977. Article 136 (b) (4), U.C.M.J., provides that all persons detailed to conduct an investigation may administer oaths necessary in the performance of their duties. Further, Article 136 (b) (6), U.C.M.J., provides that "all other persons designated by regulations of the armed forces or by statute" may administer oaths necessary in the performance of their duties. The fact that military police personnel are required, as a part of their duties, to perform investigative functions (*see* page 3-95-5, AR 611-201) does not in and of itself mean that the person is detailed to conduct an investigation. A person is detailed to conduct an investigation, either generally or specifically, only by being ordered or directed by competent authority to conduct an investigation.

5. (Information and Records, General) **Waiver of FOIA Fees Refused Because Of Lack Of Benefit To The General Public.** DAJA-AL 1977/5072, 4 Aug. 1977. In response to a request to waive the fees for processing a Freedom of Information Act request The Judge Advocate General noted that waiver of the fee is required only "where the agency determines that waiver . . . is in the public interest because furnishing the information can be considered as primarily benefiting the general public." The Judge Advocate General advised that a number of factors should be considered in determining whether this standard has been met. Those factors include, but are not limited to, the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, and the likelihood that tangible public good will be realized. A decision was made not to waive the fees in conjunction with a request from a private military counseling organization for copies of Article 138 complaints. The Judge Advocate General pointed out that waiver of the fees was not seen as primarily benefiting the public at large. In addition, the significance of the benefit to be derived from the waiver as well as the usefulness of the material to be released or the tangible public good to be realized was viewed as profiting or furthering the interests of a limited number of private groups or individuals and not the general public.

6. (Information and Records, Release and Access) **Posting Of Bar To Reenlistment On Unit Bulletin Board Would Violate The Privacy Act.** DAJA-AL 1977/5133, 19 Aug. 1977. In response to an inquiry from the field, The Judge Advocate General advised that bar to reenlistment certificates (DA Form 4126-R) are records contained within a system of records within the meaning of the Privacy Act of 1974. Since the Privacy Act prohibits disclosure of such records they may not be posted on unit bulletin boards. The opinion discussed two exceptions to the disclosure prohibition but found that neither applied. It was pointed out that disclosure of the records to officers and employees of the agency that have a need for the record in the performance of their duties is permissible. Unit personnel other than the unit commander, the member involved and those personnel involved in processing and reviewing the DA Form 4126-R do not need to have access to the record in order to discharge their duties. It was also noted that, while the Privacy Act does not prohibit disclosure of records which are required to be disclosed by the Freedom of Information Act,

the DA Form 4126-R contains a substantial amount of personal data which would not be required to be disclosed under the Freedom of Information Act.

7. (Information and Records, Release and Access) **Release of Home Address To Military Banking Facility Not Permitted.** DAJA-AL 1977/5197, 25 Aug. 1977. In response to an inquiry from the field, The Judge Advocate General advised that paragraph 3-5*a*, AR 340-21 generally prohibits the release of home addresses of service members without their consent. It was pointed out that disclosure to creditors is specifically included within this prohibition. The Judge Advocate General noted that waiver of this prohibition requires a compelling and overriding interest sufficient to outweigh privacy protection considerations and stated that the fact that the requester is a military banking facility is not sufficiently compelling or overriding.

Legal Assistance Items

Major F. John Wagner, Jr. and Captain Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA

1. ITEMS OF INTEREST

Administration—Legal Assistance. (The following is the text of DA Message 301950Z Sep 77, Subj: Expanded Legal Assistance Program.)

1. Unless prior approval of The Judge Advocate General is obtained court representation under the Army Expanded Legal Assistance Program (ELAP) will be limited to active duty members who are unable to pay legal fees for the services involved without substantial hardship to themselves or families. This limitation is intended to preclude ELAP representation by Department of the Army attorneys, military or civilian, of a dependant who is pursuing a legal action against a member of the Army.

2. This message does not preclude the representation under ELAP of a dependant who is acting on behalf of a member on active duty who is hospitalized or serving an unaccompanied tour, if the member has designated the dependant as his or her agent.

[Ref: Chapter 1, DA PAM 27-12.]

Commercial Affairs—Commercial Practices And Controls. Chapter 10 of the *Legal Assistance Handbook*, Commercial Practices and Controls, is the subject of Change 1 of DA PAM 27–12. The change is dated 18 August 1977 and should have been distributed to all legal assistance offices. [Ref: Chapter 10, DA PAM 27–12.]

Commercial Affairs—Commercial Practices And Controls—Federal Statutory and Regulatory Consumer Protections—Preservation Of Consumers' Claims And Defenses. The Federal Trade Commission has issued an advisory opinion regarding compliance with the Trade Regulation Rule concerning Preservation of Consumers' Claims and Defenses (commonly known as the "Holder-in-Due-Course" Rule).

The request for the advisory opinion was made by Montgomery Ward. Specifically, Montgomery Ward asked whether, in order to comply with the Rule, it had to provide the Rule's Notice directly to consumers, and at what point in the consumer credit transaction the Notice must be affixed to the consumer credit contract.

In its response, the Commission cited the language of Section 433.2(a) that it is an unfair or deceptive act or practice to "take or receive a consumer credit contract which fails to contain" the Notice specified by the Rule. The Commission reasoned that a consumer credit contract "contains" the Notice when the Notice is a legally enforceable term of the contract under applicable state law. The Commis-

sion further advised Montgomery Ward that incorporation of the Notice at the time of making the consumer credit contract was the only certain means of protecting the consumer's rights. The Commission rejected the suggestion that creditors might comply with the Rule by including the Rule's Notice prior to negotiation or assignment of the contract to a third party. In so doing, the Commission referred to its recent denial of petitions for examption filed by the National Retail Merchants Association and the American Retail Federation, 42 F.R. 45509, 46512 (September 16, 1977).

The material submitted by Montgomery Ward is available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C. 20580 (Telephone No. (202) 523-3598). [Ref: Chapter 10, DA PAM 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Preservation of Consumers' Claims and Defenses. The Federal Trade Commission has reopened the public record on its proposal to extend coverage of its Holder-in-Due-Course rule to creditors. The record has been reopened until November 30, 1977, to receive additional written comment.

The rule (officially entitled "Preservation of Consumers' Claims and Defenses") became effective May 14, 1976, and applies to retail sellers of consumer goods and services. It requires that a Notice be inserted in all consumer credit contracts expressly preserving the buyer's right to assert legally sufficient claims and defenses against the seller as against any third party (finance company, bank, etc.) which subsequently acquires the credit contract.

When it issued the rule on November 14, 1975, the FTC proposed an amendment that would extend coverage to creditors. The closing date for submission of comments on the amendment was March 5, 1976 and public hearings were completed in April of 1976.

The Commission said, "Because the written record on the proposed amendment was closed and hearings completed before the effective date of the original rule, May 14, 1976, the record on the proposed amendment does not include information based on experience under the rule. Over a year of such experience has now been accumulated. While ordinary procedures are adequate for the development of the record needed for decision on a proposed rule, the Commission has decided that, in the unusual situation presented by the circumstances of this proposal, it should exercise its discretion to reopen the record. This will provide an opportunity for interested parties to bring to its attention any relevant information that has been developed as a result of experience under the existing rule. In addition, comments on any aspect of the proposed amendment will be accepted."

The Commission noted that it is not "reopening any issues concerning the original rule." Comments should be sent to C. W. Keller, Presiding Officer, Federal Trade Commission, Washington, D.C. 20580. [Ref: Chapter 10, DA PAM 27-12.]

Commercial Affairs—Commercial Practices And Controls—Federal Statutory And Regulatory Consumer Protections—The Fair Debt Collection Practices Act. On 20 September 1977 President Carter signed the Fair Debt Collection Practices Act, which will become effective on 20 March 1978. The Act pertains solely to agencies who collect debts for third parties, not to creditors who collect their own debts. More will follow in *The Army Lawyer* on the Fair Debt Collection Practices Act when the Administrative and Civil Law Division receives a copy of the Act. [Ref: Chapter 10, DA PAM 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Truth in Lending. The Board of Governors of the Federal Reserve System postponed the effective date of a section of the Truth in Lending Regulation Z dealing with rules for the billing of

credit transactions, such as cash advance checks.

The section of the regulation involved, § 226.7 (k) (3) (ii) was scheduled to go into effect on 28 October 1977. The date for full implementation of this section of the regulation is being postponed to 28 March 1978.

The action was taken because the Board is considering proposals designed to facilitate compliance with the regulation by creditors, while maintaining requirements for description of transactions adequate to allow customers to identify them.

At present, full implementation of this part of Regulation Z calls for the creditor to send a bill to the customer showing the date of the transaction of the date on the credit document (such as a cash advance check) the amount of the transaction and stating what type of non-sale credit transaction is involved, such as a cash advance check, an overdraft credit or other.

Until full implementation on 28 March 1978, creditors may substitute for the transaction date of the date on the credit document the date the transaction is debited to the customer's account, or the creditor may omit any of the required information that is not available and treat any resulting inquiry from the customer as a billing error, triggering the billing error requirements of Regulation Z.

Any change in § 226.7 (k) (3) (ii) of the Regulation Z will be published for comment and possible revision before final action by the Board. [Reference Chapter 10, DA PAM 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory And Regulatory Consumer Protections—Truth-In-Warranties Act. The Federal Trade Commission has ruled that the Federal Warranty law preempts some parts of a State warranty law and does not preempt others.

At specific issue are the warranty provisions of several California laws and § 111 (c) of Title I of the Magnuson-Moss Warranty—FTC Improvement Act. The Commission initiated the proceeding on 9 July 1976, at the request of the State of California.

The Warranty Act provides for preemption only of state warranty laws which (1) concern warranty labeling and disclosure, (2) do not create consumer rights or remedies, (3) fall within the scope of federal requirements, and (4) differ from the federal requirements.

The Commission published in the Federal Register on 4 October 1977 its determination that California Civil Code §§ 1797.3 (requiring a mobile home written warranty entitled "Mobile Home Warranty") and 1797.5 (requiring pre-sale display of those state-mandated mobile home written warranties that differ from federal pre-sale display requirements) are preempted under § 111 (c) (1) of the Federal Act.

Section 111(c)(2) of the Warranty Act preserves State provisions that the Commission determines give consumers greater protection than the federal requirements and do not unduly burden interstate commerce. The Commission determined, that California Civil Code § 1797.3(d) (requiring disclosure of telephone numbers in state-mandated mobile home written warranties) is preserved under this standard.

Finally, the Commission found that the entire Song-Beverly Act including the 1976 amendments to the Act (California Civil Code §§ 1790-1795), the remaining provisions of the California Civil Code relating to mobile home warranties, and other state provisions relating to warranties (California Commercial Code § 2801, Health and Safety Code §§ 39156-39157, and Vehicle Code §§ 1975 and 34715) are not subject to preemption under § 111 of the federal Act.

The Commission's ruling includes an explanation of the federal scheme of preemption and preservation of state warranty laws.

For further information contact the Office of Public Information (202) 523-3830, Federal Trade Commission, Washington, D.C. 20580. [Ref: Chapter 10, DA PAM 27-12.]

Commercial Affairs—Commercial Practices And Controls—State Statutory And Regulatory Consumer Protections. The California Debt Collection law, formerly limited to debt collection agencies such as those covered by the new federal Fair Debt Collection Practices Act, has been amended to include any person regularly engaged in the business of collecting debts on behalf of himself or others. This would include merchants and other creditors who have a collection department. The amendment becomes effective on 1 January 1978. [Ref: Chapter 10, DA PAM 27-12.]

Decedent's Estates And Survivor's Benefits—Survivors Benefits. The address in Appendix XII, "Survivor Benefits: A Checklist," *The Army Lawyer*, September 1977, at 22, should be deleted and the following address added in its place:

Commander
US Army Finance and Accounting Center
ATTN: FINCY
Indianapolis, Indiana 46249

[Ref: Chapter 43, DA PAM 27-12.]

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlements—Alimony; Child Support. (Our thanks to Major Charles K. Hyter JA, USAR for this update on Kansas law. The following is an exerpt of a letter from Major Hyter to TJAGSA.) Effective July 1, 1977, K.S.A. 60-2310 has been amended by adding subsection (g) thereto. This particular subsection reads as follows:

> The restrictions on the amount of disposable earnings subject to wage garnishment shall apply to an order of support in the form of alimony, but on motion of the person seeking garnishment and notice thereof to the person whose wages are to be garnished, the Court after hearing thereon may order that such restriction or a portion thereof shall not apply to such order of support or a portion thereof, except that no Court may order that the restrictions on the amount of disposable earnings subject to wage garnishment or a portion thereof shall not apply when a wage garnishment for child support has been made for the same pay period for which the garnishment for support in the form of alimony is sought and such garnishment for child support has taken wages in excess of restrictions provided for in subsection (b).

The restrictions on wage garnishments in Kansas are set forth in K.S.A. 60-2310 (b) and are not to exceed 25% of the individual's aggregated disposable earnings for the work week or a multiple thereof.

Therefore, it would seem that the government is now faced with the task of determining, so far as Kansas garnishments are concerned, whether the garnishment is for child support, or alimony and if the same is for alimony and no order lifting the restrictions is attached to the garnishment papers, then only 25% of the soldier's net disposable earnings need be withheld. [Ref: Chapter 20, DA PAM 27-12.]

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlements. The earth-shaking case of *Marvin v. Marvin*, 134 Cal. Rptr. 815 (1977), is not the law in Georgia. The Georgia Supreme Court in the case of *Rehak v. Mathis* considered the plight of a mereticious cohabitrix whose meretricious cohabitor, after moving out of their jointly purchased residence, ordered her to vacate the premises. The cohabitrix stated that in return for cooking, cleaning, and caring for her man she was promised shelter, support and care and satisfaction of her financial needs for the rest of her life; therefore she was seeking $100 a month child support and exclusive title to and possession of the jointly purchased residence. The court looked at Georgia Code § 20-501, and explained that the Georgia law barred enforcement of contracts founded upon an immoral consideration. The court further determined that the immoral consideration in the instant case was the illicite cohabitation of this particular couple. Dissenting Justices Hill

and Hall would have held as the California Court did that sex was not the consideration for the agreement and that the woman should have been paid under equitable principles for services rendered other than sex during the meretricious cohabitation. [1977] 3 FAM. L. REP. (BNA) 1185. [Ref: Chapter 20, DA PAM 27-12.]

Family Law—Domestic Relations—Marriage. The Colorado District Court of Jefferson County has held that Colo. Rev. Stat. § 4-2-110(1)(b), which prohibits marriage between brothers and sisters by adoption, is unconstitutional because the state has failed to show a compelling state interest for denying brothers and sisters by adoption the fundamental right of marriage. The court hangs its opinion on the fact that there is no genetic risk involved since the persons are not biologically related. Thus, a statute prohibiting the marriage of a brother and sister by adoption denies the parties equal protection under the law. *Isreal v. Alan,* Colorado District Court of Jefferson County, July 14, 1977. The exact opposite opinion is reached by the Pennsylvania Court of Common Pleas for Allegheny County where it held, even though there was no specific statutory provision which prohibited a marriage between persons who are brother and sister by adoption, that the court has the duty to protect family integrity. To encourage or allow such a marriage would "undermine the fabric of family life and would be the antithesis of the social aim and purposes which the adoption process is intended to serve." *In re M.E.W. and M.L.B.,* April 12, 1977. [1977] 3 FAM. L. REP. (BNA) 2601. [Ref: Chapter 20, DA PAM 27-12.]

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlements. The Maryland Court of Appeals applied the mandate of Maryland Code Article 72A, § 1 and Article 46 of the Maryland Declaration of Rights (Maryland's Equal Rights Amendment) plus case law from Washington, Pennsylvania, Colorado, Illinois, Texas, Virginia, and Louisiana to "hold that the parental obligation for child support is not primarily an obligation of the father but is one shared by both parents. The clear import of the language of Art. 72A, § 1, standing alone, seemingly compels that result. Any doubt remaining from the past failure of the courts to so interpret that statutory provision is removed by the gloss impressed upon it by the E.R.A. The common law rule is a vestige of the past; it cannot be reconciled with our commitment to equality of the sexes. Sex of the parents in matters of child support cannot be a factor in allocating this responsibility. Child support awards must be made on a sexless basis." *Rand v. Rand,* ___ M.D. ___, ___ A.2d ___ (1977); [1977] 2 FAM. L. REP. (BNA) 2588. Note: There was a similar holding in the State of New York. *See Carter v. Carter,* New York App. Div. (2nd Dep't), August 2, 1977; [1977] 3 FAM. L. REP. (BNA) 2612. [Ref: Chapter 20, DA PAM 27-12.]

Taxation—State And Local Income Tax—Rhode Island. On 29 August 1977 the Supreme Court of Rhode Island, in *Flather v. Tax Administrator* (No. 75-136-M.P.), ruled that the fact a taxpayer is "an active member of the armed services living on or off a base should not be solely determinative of whether he has established and maintained a "permanent place of abode" in a state other than Rhode Island." This decision overturns the Rhode Island State Division of Taxation position (Memorandum of State Division of Taxation, dtd. 22 Sept. 1972) that "absence from the state on duty in the armed force is of a transitory and temporary nature, irrespective of the period of service[,]" and, consequently, except in "rare instances" a serviceman will be unable to establish a "permanent place of abode" for tax purposes.

Resident, as used in the Rhode Island income tax statute, is defined as:

> (a) Resident individual.—A resident individual means an individual:
>
> (1) Who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode

> elsewhere, and spends in the aggregate not more than thirty (30) days of the taxable year in this state. . . .

Commander Flather, a career naval officer, was domiciled in Rhode Island but assigned outside the state since September 1956 as a member of the United States Navy. The Rhode Island Tax Administrator notified Commander Flather that he owed personal income tax for the year 1972 plus interest and penalty. Commander Flather petitioned for a redetermination of the deficiency and argued he was not a resident of Rhode Island for the tax year 1972 because he met the provisions of the three part exclusion test mentioned above. The hearing officer ruled that "permanent place of abode," as used in the definition of residence, was determined by physical presence and the intent of the taxpayer to establish a permanent abode, and applying this standard determined that Commander Flather failed to meet the test. The decision was affirmed in Superior Court and appealed to the Rhode Island Supreme Court.

The Supreme Court reversed the Superior Court decision and held that Commander Flather maintained a permanent place of abode outside the State of Rhode Island. In so holding the court ruled that the "establishment of a permanent place of abode requires the maintenance of a fixed place of abode over a sufficient period of time to create a well-settled physical connection with a given locality." The court listed the following "significant factors, among others to be considered in determining whether an individual maintains such a permanent place of abode . . .": "(1) the amount of time he spends in the locality; (2) the nature of his place of abode; (3) his activities in the locality; and (4) his intentions with regard to the length and nature of his stay."

Legal assistance officers should advise their clients who are domiciled in Rhode Island and meet the three part nonresident domiciliary test of the above decision. It appears that some Rhode Island service members would be entitled to tax refunds for the years they paid Rhode Island income tax and at the time met the three part nonresident domiciliary test. [Ref: Chapter 43, DA PAM 27-12.]

Law of the Sea Negotiations Status Report

(U.S. State Department GIST September 1977)

International Affairs Division, OTJAG

For three years the United States and over 150 other nations, meeting in the Third United Nations Conference on the Law of the Sea, have been negotiating a comprehensive treaty to govern national and international use of the oceans and their resources. Following preparatory work by the United Nations Seabeds Committee, sessions were held in New York (1973), Caracas (1974), Geneva (1975), and again in New York (two in 1976 and the latest in July 1977). The next session is tentatively scheduled for March 1978 in Geneva.

The issues are complex and negotiations have been prolonged. Nevertheless, the Sixth Session of the Conference in New York last July produced an "Informal Composite Negotiating Text" (ICNT) containing approximately 300 draft articles and seven annexes. The ICNT addressed various issues, including deep seabed mining, navigation, fisheries, preservation of the marine environment, scientific research, and dispute settlement. Broad agreement still exists on a 12-mile territorial sea; transit through, over, and under straits used for international navigation; and

coastal state rights over resources in a proposed 200-mile exclusive economic zone (EEZ). The ICNT shows some progress on issues relating to international security and freedom of navigation in the EEZ. However, it substantially sets back prospects for agreement on an international regime for the conduct of seabed mining. At the conclusion of the last New York session, Ambassador Elliot L. Richardson, Chairman of the US Delegation, found the section on seabeds fundamentally unacceptable and expressed concern with the way in which it was prepared. Besides seabed mining, there remain at least two other contentious issues bearing on US interests: the EEZ's legal status and marine scientific research in the EEZ.

Mining the deep seabed: The success of the negotiations now depends largely on the solution of this issue. The industrialized and the developing states differ widely on rules for mining manganese nodules, found in huge quantities on the deep seabed. These nodules contain enough nickle, copper, cobalt, and manganese to constitute an important potential source of world supplies.

In 1970 the UN adopted a resolution declaring the deep seabed to be "the common heritage of mankind." The US supports this resolution as well as a provision in the proposed treaty that will assure all nations of the opportunity to mine the deep seabed. However, we consider the ICNT unsatisfactory with regard to: (1) conditions for national access to the deep seabed; (2) powers granted to an International Seabed Authority governing exploration and exploitation of the deep seabed; (3) the financing of this Authority; and (4) the transfer of technology to developing countries, and several other issues.

The 200-mile economic zone: The US seeks to protect freedom of navigation and overflight in the zone, the right to lay submarine pipelines and cables there and many other rights of interest to the international community. However, we recognize that specific resource and other rights may be delegated to the coastal states.

Marine scientific research: The US is also working to establish rules to facilitate marine research. Most developing coastal states, and some developed ones, support a treaty provision requiring coastal state consent for all marine scientific research conducted within the EEZ or on the continental shelf. We have expressed our willingness to accept a consent regime for certain types of research, including research of direct significance to the coastal state's economy, but we have opposed an overall consent regime.

CLE News

1. Iowa. The Iowa Commission on Continuing Legal Education requires annual certification by Iowa attorneys of their attendance at Continuing Legal Education programs. Each Iowa attorney should receive the certification forms in December of each year from the Commission. The forms are to be completed and returned by 1 March of the following year. The annual CLE requirement is 15, 60 minute periods of educational activity. Each attorney must certify his actual attendance. CLE programs sponsored by TJAGSA, including the 1977 JAG Conference and Seminars, are accredited by the State of Iowa. Questions concerning the certification process and the maximum number of credit hours which may be claimed for specific courses may be directed to Lieutenant Colonel Fred K. Green, Deputy Director, Academic Department (804) 293-2028.

2. Minnesota. The Minnesota Board of Continuing Legal Education has approved the 1977 Judge Advocate General's Conference and CLE Seminars for up to 12.25 hours of credit against the Minnesota requirement. Members of the Minnesota Bar who attended all sessions of the Conference and the full seminar program may claim full credit when they file the required certification. Partial

credit may be claimed for sessions attended. Questions may be addressed to Lieutenant Colonel Fred K. Green, Deputy Director, Academic Department (804) 293-2028.

3. 1st Procurement Law Workshop. The 1st Procurement Law Workshop held on 26 and 27 October 1977 was an unqualified success. Serious consideration and discussion occurred on problems commonly encountered at installations, including utility contract payment problems, specification interpretation and development, mistakes in bid, bid protests, termination for convenience and contract disputes preperation.

The success of the workshop was in large measure the result of the fine participation by the seminar leaders who developed and presented problems. These individuals were

Lieutenant Colonel Thomas Knapp, HQ TRADOC, Fort Monroe, Virginia

Mr. Herbert E. Hood, HQ TRADOC, Fort Monroe, Virginia

Mr. Emanuel Coleman, USA Missile Material and Readiness Command, Redstone Arsenal, Alabama

Mr. Billy Chappell, USA Missile Material and Readiness Command, Redstone Arsenal, Alabama

Captain James H. Roberts, USA Missile Material and Readiness Command, Redstone Arsenal, Alabama

Mr. Jim Bauer, USA Signal Center and Fort Gordon, Georgia

Captain Michael J. Marchand, HQ FORSCOM, Fort McPherson, Georgia

Staff judge advocates and command counsel are encouraged to begin consideration of problems that would be valuable for use in the next workshop which will be held in 1978.

4. TJAGSA CLE Courses.

January 3–6: 2d Claims Course (5F–F26).

January 9–13: 8th Procurement Attorneys' Advanced Course (5F–F11).

January 9–13: 6th Law of War Instructor Course (5F–F42).

January 16–18: 4th Allowability of Contract Costs Course (5F–F13).

January 16–19: 1st Litigation Course (5F–F29).

January 23–27: 37th Senior Officer Legal Orientation Course (5F–F1).

February 6–9: 6th Fiscal Law Course (5–F12).

February 6–10: 38th Senior Officer Legal Orientation Course (5F–F1).

February 13–17: 4th Criminal Trial Advocacy Course (5F–F32).

February 27–March 10: 74th Procurement Attorneys' Course (5F–F10).

March 13–17: 7th Law of War Instructor Course (5F–F42).

April 3–7: 17th Federal Labor Relations Course (5F–F22).

April 3–7: 4th Defense Trial Advocacy Course (5F–F34).

April 10–14: 40th Senior Officer Legal Orientation Course (5F–F1).

April 17-21: 8th Staff Judge Advocate Orientation Course (5F–F52).

April 17–28: 1st International Law I Course (5F–F40).

April 24–28: 5th Management for Military Lawyers Course (5F–F51).

May 1–12: 7th Procurement Attorneys' Course (5F–F10).

May 8–11: 7th Environmental Law Course (5F–F27).

May 15–17: 2d Negotiations Course (5F–F14).

May 15–19: 8th Law of War Instructor Course (5F–F42).

May 22–June 9: 17th Military Judge Course (5F–F33).

June 12–16: 41st Senior Officer Legal Orientation Course (5F–F1).

June 19–30: Noncommissioned Officers Advanced Course Phase II (71D50).

July 24–August 4–: 76th Procurement Attorneys' Course (5F–F10).

August 7–11: 7th Law Office Management Course (7A–173A).

August 7–18: 2d Military Justice II Course (5F–F31).

August 21–25: 42d Senior Officer Legal Orientation Course (5F–F1).

August 28–31: 7th Fiscal Law Course (5F–F12).

September 18–29: 77th Procurement Attorneys' Course (5F–F10).

5. TJAGSA Course Prerequisites and Substantive Content. This list of courses is in numerical order by course number.

SENIOR OFFICERS' LEGAL ORIENTATION COURSE (5F—F1)

Length: 4½ days.

Purpose: To acquaint senior commanders with installation and unit legal problems encountered in both the criminal and civil law field.

Prerequisites: Active duty and Reserve Component commissioned officers in the grade of Colonel or Lieutenant Colonel about to be assigned as installation commander or deputy; service school commandant; principal staff officer (such as chief of staff, provost marshall, inspector general, director of personnel) at division, brigade or installation levels; or as a brigade commander. As space permits, those to be assigned as battalion commanders may attend. Security clearance required: None.

Substantive Content: Administrative and Civil Law: Judicial review of military activities, installation management, labor-management relations, military personnel law, nonappropriated funds, investigations, legal assistance, claims and litigation.

Criminal Law: Survey of legal principles relating to search and seizure, confessions, and nonjudicial punishment. Emphasis is placed on the options and responsibilities of convening authorities before and after trial in military justice matters, including the theories and practicabilities of sentencing.

International Law: Survey of Status of Forces Agreements and Law of War.

PROCUREMENT ATTORNEYS' COURSE (5F–F10)

Length: 2 weeks.

Purpose: To provide basic instruction in the legal aspects of government procurement at the installation level. Completion of this course also fulfills one-half of the requirements of Phase VI of the nonresident/resident Judge Advocate Officer Advanced Course and covers one-half of the material presented in the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase VI.

Prerequisites: Active duty or Reserve Component military attorneys or appropriate civilian attorneys employed by the U.S. Government, with six months' or less procurement experience. Security clearance required: None.

Substantive Content: Basic legal concepts regarding the authority of the Government and its personnel to enter into contracts; contract formation (formal advertising and negotiation), including appropriations, basic contract types, service contracts, and socio-economic policies; contract performance, including modifications; disputes, including remedies and appeals.

PROCUREMENT ATTORNEYS' ADVANCED COURSE (5F–F11)

Length: 1 week.

Purpose: To provide continuing legal education and advanced expertise in the statutes and regulations governing government procurement. To provide information on changes at the policy level.

Prerequisites: Active duty or Reserve Component military attorneys or appropriate civilian attorneys employed by the U.S. Government. Applicants must have successfully completed the Procurement Attorneys' Course (5F–10), or equivalent training, or have at least one year's experience as a procurement attorney. Security clearance required: None.

Substantive Content: Advanced legal concepts arising in connection with the practical aspects of incentive contracting, funding, competitive negotiation, socio-economic policies, government assistance, state and local taxation, modifications, weapons system acquisition, truth in negotiations, terminations, labor relations problems, contract claims, and litigation. Course will normally be theme oriented to focus on a major area of procurement law. Intensive instruction will include current changes in the laws, regulations and decisions of courts and boards.

FISCAL LAW COURSE
(5F–F12)

Length: 3½ days.

Purpose: To provide a basic knowledge of the laws and regulations governing the obligation and expenditure of appropriated funds and an insight into current fiscal issues within the Department of the Army. The course covers basic statutory constraints and administrative procedures involved in the system of appropriation control and obligation of funds within the Department of Defense. This course emphasizes the methods contracting officers and legal and financial personnel working together can utilize to avoid over-obligations.

Prerequisites: Active duty commissioned officer of an armed force, or appropriate civilian employee of the U.S. Government actively engaged in procurement law, contracting or administering funds available for obligation on procurement contracts. Must be an attorney, contracting officer, comptroller, Finance & Accounting Officer, Budget Analyst or equivalent. Attendees should have completed TJAGSA Procurement Attorney's Course, a financial manager's course, a comptrollership course or equivalent.

Substantive Content: Practical legal and administrative problems in connection with the funding of government contracts. Basic aspects of the appropriations process, administrative control of appropriated funds, the Anti-Deficiency Act, Industrial and Stock Funds, and the Minor Construction Act will be covered.

ALLOWABILITY OF CONTRACT COSTS COURSE
(5F–F13)

Length: 2½ days.

Purpose: The Allowability of Contract Costs Course is a basic course designed to develop an understanding of the nature and means by which the Government compensates contractors for their costs. The course focuses on three main areas: (1) basic accounting for contract costs; (2) the Cost Principles of ASPR § 15; and (3) the Cost Accounting Standards Board and the Costs Accounting Standards. The course is a mixture of lectures and panel discussions aimed at covering substantive and practical issues of contract costs. This course is not recommended for attorneys who are experienced in application of cost principles.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the U.S. Government, with at least one year of procurement experience. Applicants must have successfully completed the Procurement Attorneys' Course (5F–F10) or equivalent.

Substantive Content: This introductory course will focus on three main areas: functional cost accounting terms and application, the Cost Principles, and Cost Accounting Standards.

NEGOTIATIONS COURSE
(5F–F14)

Length: 2½ days.

*Purpose:*The Negotiations Course is designed to develop advanced understanding of the negotiated competitive procurement method. The course focus on the attorney's role in negotiated competitive procurement, including: (1) when and how to use this method; (2) development of source selection criteria; (3) source selection evaluation process; (4) competitive range; (5) oral and written discussions; and (6) techniques.

Prerequisites: Active duty or Reserve Component military attorney, or appropriate civilian attorney employed by the U.S. Government, with at least one, but not more than five years of procurement experience. Applicants must have successfully completed the Procurement Attorneys' Course (5F–F10) or equivalent. Security clearance required: None.

Substantive Content: The course will focus on solicitation and award by negotiation including selection of the procurement method, use of the negotiation process in the development of source selection, discussion and techniques.

PROCUREMENT LAW WORKSHOP (5F–F15)

Purpose: The workshop provides an opportunity to examine in the light of recent developments in the law and discuss in depth current procurement problems encountered in installation SJA offices. Attorneys will be asked to submit problems in advance of attendance. These will be collected, researched and arranged for seminar discussion under the direction of the procurement law faculty.

Prerequisites: Active duty or Reserve Component military attorneys or appropriate civilian attorneys employed by the U.S. Government with not less than 12 months' procurement experience who are currently engaged in the practice of procurement law at installation level. Security clearance required: None.

Substantive Content: Discussion of current developments in procurement law and their application to the problems currently experienced in installation level procurement.

FEDERAL LABOR RELATIONS COURSE (5F–F22)

Length: 4-½ days.

Purpose: To provide a basic knowledge of personnel law pertaining to civilian employees, and labor-management relations.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Advanced Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. The student is expected to have experience in the subject area or have attended the Basic or Advanced Course. Security clearance required: None.

Substantive Content: Law of Federal Employment: Hiring, promotion and discharge of employees under the FPM and CPR; role of the Civil Service Commission; procedures for grievances, appeals and adverse actions; personal rights of employees; and equal employment opportunity complaints.

Federal Labor-management Relations: Rights and duties of management and labor under Executive Order 11491, as amended, and DOD Directive 1426.1; representation activities; negotiation of labor contracts; unfair labor practice complaints; administration of labor contracts and procedures for arbitration of grievances.

Government Contractors: An overview of the responsibility of military officials when government contractors experience labor disputes.

LEGAL ASSISTANCE COURSE (5F–F23)

Length: 3-½ days.

Purpose: A survey of current problems in Army legal assistance providing knowledge of important legal trends and recent developments involved in areas of legal assistance rendered to service members.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Advanced Course. Although appropriate for reservists, enrollment is not recommended unless the in-

dividual is working in the area covered by the course. The student is expected to have experience in the subject area or have attended the Basic or Advanced Course. Security clearance required: None.

Substantive Content: New developments in the areas of legal assistance rendered military personnel including consumer protection, family law, state and federal taxation, civil rights, survivor benefits, bankruptcy, and small claims. The instruction is presented with the assumption that students already have a fundamental knowledge of legal assistance.

MILITARY ADMINISTRATIVE LAW DEVELOPMENTS COURSE (5F-F25)

Length: 3-½ days.

Purpose: To provide knowledge of important legal trends and recent developments in military administrative law, judicial review of military actions, and decisions relating to the operation of military installations.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Advanced Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. The student is expected to have experience in the subject area. Security clearance required: None.

Substantive Content: New developments in the areas of military administrative law including military personnel, civilian personnel, military assistance to civil authority, legal basis of command (military installation law) and nonappropriated funds, with particular emphasis on developing case law in the areas of administrative due process, vagueness, and constitutionality of regulations, including first and fourteenth amendment considerations. Developments in the area of judicial review of military activities, including procedures for control and management of litigation involving the Army as required by AR 27-40. The instruction is presented with the assumption that students already have a fundamental knowledge of the areas covered.

CLAIMS COURSE (5F-F26)

Length: 3-½ days.

Purpose: To provide advanced continuing legal education in claims and instruction in recent judicial decisions, statutory changes and regulatory changes affecting claims.

Prerequisites: U.S. Army active duty or Reserve Component attorney or appropriate civilian attorney employed by the Department of the Army. Reserve officers must have completed the Judge Advocate Officer Advanced Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. The student is expected to have experience in the subject area. Security clearance required: None.

Substantive Content: Claims against the government. Analysis of claims relating to Military Personnel and Civilian Employees Claims Act, Federal Tort Claims Act, National Guard Claims Act, Foreign Claims Act, and Nonscope Claims Act. Recent developments in foregoing areas will be emphasized. Claims in favor of the Government. Analysis of Federal Claims Collection Act and Federal Medical Care Recovery Act with emphasis on recent developments.

ENVIRONMENTAL LAW COURSE (5F-F27)

Length: 3-½ days.

Purpose: To provide instruction in the basic principles of environmental law as they affect federal installations and activities.

Prerequisites: Active duty or Reserve Component military lawyer or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the

Judge Advocate Officer Basic Course. Security clearance required: None.

Substantive Content: Basic principles of environmental law as it applies to military installations, including the National Environmental Policy Act and its requirement for preparation of environmental impact statements, the Clean Air Act, and the Federal Water Pollution Control Act. The course also includes a brief discussion of other environmental laws and the roles of the Environmental Protection Agency and the Army Corps of Engineers in environmental regulation.

GOVERNMENT INFORMATION PRACTICES COURSE (5F–F28)

Length: 2-½ days.

Purpose: To provide basic knowledge of the requirements of the Freedom of Information Act and the Privacy Act.

Prerequisites: Active duty or Reserve Component military lawyer or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Basic Course. Security clearance required: None.

Substantive Content: The disclosure requirements of the Freedom of Information Act; the exemptions from disclosure and their interpretation by the federal courts; the restrictions on the collection, maintenance, and dissemination of personal information imposed by the Privacy Act; the relationship between the two Acts and their implementation by the Army.

LITIGATION COURSE (5F–F29)

Length: 3-½ days.

Purpose: To provide basic knowledge and skill in handling litigation against the United States and officials of the Department of Defense in both their official and private capacities.

Prerequisites: Active duty military lawyer or civilian attorney employed by the U.S. Government. Enrollment is not recommended unless the individual is responsible for monitoring, assisting or handling civil litigation at his or her installation. Anyone who has completed the Army Judge Advocate Officer Advanced Course (resident) within two years of the date of this CLE course is ineligible to attend. Security clearance required: None.

Substantive Content: The following areas will be covered: Reviewability and justifiability, federal jurisdiction and remedies, scope of review of military activities, exhaustion of military remedies, Federal Rules of Civil Procedure, civil rights litigation, FTCA litigation, and official immunity. There will be a practical exercise in the preparation of litigation reports and pleadings.

MILITARY JUSTICE II COURSE (5F–F31)

Length: 2 weeks.

Purpose: To provide a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps officers in the area of military criminal law and trial advocacy. This course is specifically designed to fulfill one-half of the requirements of Phase II of the nonresident/resident Judge Advocate Officer Advanced Course. It also covers one-half of the material presented in the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase II.

Prerequisites: Active duty or Reserve Component military attorney, 02–04. Although appropriate for active duty personnel, enrollment is not recommended unless the individual is working toward completion of the Advanced course by correspondence. Security clearance required: None.

Substantive Content: Pretrial procedure, trial procedure, post trial procedures and review, appellate review.

CRIMINAL TRIAL ADVOCACY COURSE (5F–F32)

Length: 4-½ days.

Purpose: To improve and polish the experienced trial attorney's advocacy skills.

Prerequisites: Active duty military attorney certified as counsel under Article 27b(2) UCMJ, with at least six months' experience as a trial attorney.

Substantive Content: Intensive instruction in trial practice to include problems confronting trial and defense counsel from pretrial investigation through appellate review.

MILITARY JUDGE COURSE (5F–F33)

Length: 3 weeks.

Purpose: To provide military attorneys advance schooling to qualify them to perform duties as full-time military judges at courts-martial.

Prerequisite: Active duty or Reserve Component military attorneys. Security clearance required: None. Army officers are selected for attendance by The Judge Advocate General.

Substantive Content: Conference, panel, and seminar forums cover substantive military criminal law, defenses instructions, evidence, trial procedure, current military legal problems, and professional responsibility.

DEFENSE TRIAL ADVOCACY COURSE (5F–F34)

Length: 4-½ days.

Purpose: To improve and polish the experienced trial attorney's defense advocacy skills.

Prerequisites: Active duty military attorney certified as counsel under Artice 27b(2), UCMJ, with 6–12 months' experience as a trial attorney and with present or prospective immediate assignment as a defense counsel at the trial level. Security clearance required: None.

Substantive Content: Conference, panel discussions, seminars, and videotape exercises cover military criminal law substantive and procedural topics. Evidence, professional responsibility, the role and duties of a defense counsel, extraordinary writs, and trial advocacy are included to provide polish to defense advocates.

CRIMINAL LAW NEW DEVELOPMENTS (5F–F35)

Length: 2 days (15 hours).

Purpose: To provide counsel and criminal law administrators with information regarding recent developments and trends in military criminal law. This course is revised annually.

Prerequisites: This course is limited to active duty Judge Advocates and civilian attorneys who serve as counsel or administer military criminal law in a judge advocate office. Students must not have attended TJAGSA resident criminal law CLE, Basic or Advanced courses within the twelve month period immediately proceding the date of the course.

Substantive Content: Government/defense counsel post trial duties; speedy trial; SIDPERS; pretrial agreements; extraordinary writs; 5th Amendment and Article 31; applications of the privilege against self incrimination and issues in self incrimination; search and seizure; recent trends in the United States Court of Military Appeals; subject matter jurisdiction; witness production; mental responsibility; military corrections.

INTERNATIONAL LAW I COURSE (5F–F40)

Length: 2 weeks.

Purpose: To provide knowledge of the sources, interpretation and application of international law. This course fulfills approximately one-third of the requirements of Phase VI of the nonresident/resident Judge Advocate Officer Advanced Course. It also covers approximately one-third of the materials presented in the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase VI.

Prerequisites: Active duty or Reserve component military attorney, 02–04, or appropriate civilian attorney employed by the U.S. Gov-

ernment. Enrollment of active duty personnel is not recommended unless the individual is working toward completion of the Advanced Course by correspondence. Security clearance required: None.

Substantive Content: The International Legal System: nature, sources and evidences of international law; state rights and responsibilities; recognition; nationality; the United Nations and the International Court of Justice; international rules of jurisdiction; status of forces agreements, policies, practices and current developments; foreign claims operations; overseas procurement operations; and private aspects of international law.

LAW OF WAR INSTRUCTOR COURSE (5F-F42)

Length: 4-½ days.

Purpose: To prepare officers to present Law of War instruction by providing basic knowledge of the law of war and working knowledge of the method of instruction skills necessary for the presentation of effective instruction.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the Department of Defense, and officers with command experience who are assigned the responsibility of presenting formal instruction in the Geneva Conventions of 1949 and Hague Convention No. IV of 1907. The attorney and the officer with command experience must attend the course as a teaching team. Security clearance required: None.

Substantive Content: International customs and treaty rules affecting the conduct of U.S. Forces in military operations in all levels of hostilities; the Hague and Geneva Conventions and their application in military operations and missions, to include problems on reporting and investigation of war crimes, treatment and control of civilians, and the treatment and classification of prisoners of war; the substantial change to the law of war impending as a result of the recent adoption by the Geneva Conference of the Protocols Updating the Law of War. Special emphasis is placed on the preparation of lesson plans, methods of instruction, and appropriate use of training materials available for law of war instruction. Participation in team teaching exercises is required.

This course is designed to fulfill the requirement of AR 350-216 that commanders assure that formal law of war instruction at their unit/installation be conducted by a qualified team consisting of a judge advocate officer and an officer with command experience, preferably in combat. Commanders and Staff Judge Advocates should assign high priority to the qualification and maintenance of a law of war teaching team especially in view of the substantive law of war changes and expanded instructional requirements bound to result from the new Protocols.

Graduates of the four prior Law of War Instructor Courses have reported from the field that the technique, substance and innovation gained through this course have been well received by trainee audiences, and that the course materials and the training aids and plans developed by them during the course have substantially professionalized the training efforts of both JAG and non-lawyer instructors. Most conspicuously valued by attendees is the opportunity of teaching teams jointly to discuss and resolve difficult law of war teaching questions. Non-lawyer officers are especially affirmative on these points, suggesting the real value to the sponsoring command of designating to their teaching team and sending to this course, along with a judge advocate, a retainable non-lawyer whose continued utilization in law of war instruction can be projected. Organizations unable at this time to send a teaching team, or which wish to qualify a replacement for a team already trained in this course are invited to send individual designees.

Unit/installation SJA's should coordinate with the appropriate local commander or training officer for the qualification of law of war teaching teams adequate to local training demands.

MANAGEMENT FOR MILITARY LAWYERS COURSE (5F-F51)

Length: 4-½ days.

Purpose: To provide military lawyers with basic concepts of military law office management and supervision.

Prerequisites: Active duty military attorney in or about to assume a supervisory position in a judge advocate office. Security clearance required: None.

Substantive Content: Army management principles and policies, management theory and practice, formal and informal organizations, motivational management styles, communication, and civilian law office management techniques. A review of JAGC personnel management.

STAFF JUDGE ADVOCATE ORIENTATION COURSE (5F-F52)

Length: 4-½ days.

Purpose: To inform newly assigned staff judge advocates of current trends and developments in all areas of military law.

Prerequisites: Active duty field grade Army judge advocate whose actual or anticipated assignment is as a staff judge advocate or deputy staff judge advocate of a command with general court-martial jurisdiction. Security clearance required: None.

Selection for attendance is by the Judge Advocate Attorney General.

Substantive Content: Major problem areas and new developments in military justice, administrative and civil law, procurement, and international law.

LAW OFFICE MANAGEMENT COURSE (7A-713A)

Length: 4-½ days.

Purpose: To provide a working knowledge of the administrative operation of a staff judge advocate office and principles involved in managing its resources.

Prerequisites: Active duty or Reserve Component warrant officer or senior enlisted personnel of an armed force serving in grade E-8/E9 and currently performing or under orders to an assignment which will require the performance of law office management duties. Personnel who have completed this course within the two-year period immediately preceding the date of the course are not eligible to attend. Security clearance required: None.

Substantive Content: Office management; management of military and civilian personnel; criminal law administrative procedures, administrative law procedures, Army management system; office management of a law office, and fundamentals of management theory.

Civilian Sponsored CLE Courses.

JANUARY

7-14: CPI, Trial Advocacy Seminar, Samford Univ., Cumberland Law School, Birmingham, AL. Contact: Court Practice Institute, Inc., 4801 W. Petersen Ave., Chicago, IL 60646. Phone (312) 725-0166. Cost: $700.

10-12: LEI, Paralegal Workshop, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St., NW, Washington, DC 20415. Phone (202) 254-3483.

12-13: PLI, Remedies for Breach of Contract, Americana Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175.

12-13: PLI, Consumer Credit 1978, Americana Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175.

12-13: PLI, Government Information [Freedom of Information Act, Sunshine Act, Privacy Act], Americana Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175. Course Handbook Alone: $20.

12-14: PLI, New Trends in Drug Liability and Litigation, New York Sheraton Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY. Phone (212) 765-5700. Cost: $275.

12-14: PLI, New Trends in Drug Liability and Litigation Workshop, New York Sheraton Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $200. Course Handbook Alone: $20.

15–20: NCDA, Prosecutor's Office Administrator Course, Part III, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

17–19: LEI, Seminar for Attorney-Managers, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

18–20: PLI-Copyright Society of the U.S.A., Practicing Under the Copyright Law of 1976, Waldorf Astoria Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $200. Course Handbook Alone: $20.

18–20: PLI, Fundamental Concepts of Estate Planning, Americana Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $250. Course Handbook Alone: $20.

19–21: ALI-ABA-State Bar of Arizona, Labor Law for the General Practitioner, Phoenix, AZ. Contact: Donald M. Maclay, Director, Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

24–25: LEI, Preparation of Litigation Reports Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

26-27: PLI, Consumer Credit 1978, Continental Plaza Hotel, Chicago, IL. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175.

29–1 Feb.: NCDA, Major Fraud, San Diego, CA. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

FEBRUARY

1-2: LEI, Legal Aspects of Grants Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

1–3: PLI, Fundamental Concepts of Estate Planning, Olympic Hotel, Seattle, WA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $250. Course Handbook Alone: $20.

2–3: PLI, Consumer Credit 1978, Century Plaza Hotel, Los Angeles, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175.

4–11: CPI, Trial Advocacy Seminar, Ramada O'Hare Inn, Chicago, IL. Contact: Court Practice Institute, Inc., 4801 W. Peterson Ave., Chicago, IL 60646. Phone (312) 725-0166. Cost: $700.

8–15: American Bar Association, Midyear Meeting, New Orleans, LA.

9–11: ALI-ABA-Environmental Law Institute—Smithsonian Institution, Environmental Law, Washington, DC. Contact: Donald M. Maclay, Director, Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

12–15: NCDA, Pretrial Problems Seminar, Denver, CO. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

13–14: George Washington Univ. National Law Center, Labor Standards [requirements of government contractors and subcontractors], George Washington Univ. Library, 2130 H St. NW, Room 729, Washington, DC. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington DC 20052. Phone (202) 676-6815. Cost: $275.

13–14: PLI, Government Information [Freedom of Information Act, Sunshine Act, Privacy Act], Stanford Court Hotel, San Francisco, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: $175. Course Handbook Alone: $20.

15–16: LEI, Seminar for Attorneys on FOI/Privacy Acts, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

18–25: CPI, Trial Advocacy Seminar, McGeorge School of Law, Univ. of the Pacific, Sacramento, CA. Contact: Court Practice Institute, Inc., 4801 W. Peterson Ave., Chicago, IL 60646. Phone (312) 725-0166. Cost: $700.

21–22: Georgetown Univ. Continuing Management Education Seminars, E.E.O./A.A. (Equal Employment Opportunity/Affirmative Action), Ground Floor, RCA Building, 1901 N. Moore St., Rosslyn, VA. Contact: Continuing Management Education—SSCE, Georgetown Univ., Washington, DC 20057. Phone (703) 525-6300. Cost: $250.

23–25: FBA, Southwestern Regional Conference [Seminars on Anti-trust and Trade Regulation, Bankruptcy and Federal Trial Practice], Hyatt Regency Houston, Houston, TX. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H St. NW, Washington, DC 20006. Phone (202) 638-0252.

26–2 Mar.: NCDA, Organized Crime, Indianapolis, IN. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

27–28: FBA, Shipping Law Conference, Washington, DC. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H St. NW, Washington, DC 20006. Phone (202) 638-0252.

27-3 Mar.: George Washington Univ. National Law Center, Contract Formation [government procurement], George Washington Univ. Library, 2130 H St. NW, Room 729, Washington, DC. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington, DC 20052. Phone (202) 676-6815. Cost: $475.

28–2 Mar.: LEI, Institute for New Government Attorneys, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

Schedule Change in Reserve Components Technical Training (On-Site) Program For Academic Year 1977–78

Reserve Affairs Department, TJAGSA

The Reserve Components Technical Training (On-Site) trip to Houston and San Antonio originally scheduled for 7 and 8 January 1978 has been changed as follows:

From	To
Houston 7 January 1978	San Antonio 25 February 1978
San Antonio 8 January 1978	Houston 26 February 1978

Subject matter, times, and action officers all remain the same. The location of the training site in San Antonio remains the same, however, the training site in Houston will be changed. At the present time the location has not been selected. For additional details with regard to the site, contact the action officer, Major Donald M. Bishop, (713) 666-8000. The widest possible dissemination of this change is encouraged.

Law School Liaison Program

Reserve Affairs Department, TJAGSA

The Law School Liaison Program was established four years ago and continues to provide a source of information for law school students interested in the Judge Advocate General's Corps. Under this program, Reserve Component judge advocate officers voluntarily act as the Corps' liaison at law schools throughout the country. These officers are available to provide interested law students with pertinent information concerning assignment with the Judge Advocate General's Corps, both active duty and Reserve Component. Material is distributed by the Director, Reserve Affairs Department to each liaison officer which provides him with information necessary to answer the wide range of inquiries which he can expect to receive.

Since the program has been in effect, the number of participants has increased to 63 volunteers who represent the Corps as liaison to 99 law schools in 34 states, the District of Columbia and Puerto Rico.

The program provides an excellent opportunity for Reserve Component judge advocate officers to participate in a vitally important Corps activity. Greater Reserve participation in the recruiting of new judge advocate officers will bring beneficial results to both the Active Army and the Reserve Components.

The following list contains the law schools which are presently served by a liaison officer. Reserve judge advocate officers who wish to assist in this program at other schools or who would like additional information should contact the Director, Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, Virginia 22901.

RESERVE COMPONENT LAW SCHOOL LIAISON OFFICERS

	Institution	*Liaison Officer and Address*	*Telephone Number*
ARIZONA			
Tempe	Arizona State University College of Law	CPT Don Zillman College of Law, ASU Tempe, AZ 85281	602–965-7491
ARKANSAS			
Fayetteville	University of Arkansas School of Law	MAJ John C. Hawkins, Jr. Hitt and Pesek P.O. Box 18 Texarkana, TX 75501	214–793-6571

	Institution	*Liaison Officer and Address*	*Telephone Number*
Little Rock	University of Arkansas School of Law	MAJ John C. Hawkins, Jr.	214–793-6571
CALIFORNIA			
Anaheim	Pepperdine University School of Law	MAJ John L. Moriarity 14123 Victory Boulevard Van Nuys, CA 91401	213–873-1333
Davis	University of California Law School (Davis)	CPT John A. Dougherty District Attorney's Office Room 301, Court House Sacramento, CA 95814	916–444-0520
Los Angeles	University of California Law School (UCLA)	CPT James L. Racusin Los Angeles County Public Defenders Office, Room 402 Los Angeles, CA 90002	213–629-2451
	Loyola University of Los Angeles School of Law	CPT Michael Shapiro 22150 Crenshaw Boulevard Torrance, CA 90505	213–530-7933
Los Angeles	Southwestern University School of Law	CPT Andrew D. Amerson Attorney General's Office 800 Tishman Building 3580 Wilshire Boulevard Los Angeles, CA 90010	213–736-2200
	University of Southern California Law Center	CPT Richard Elias 600 Hall of Justice 211 West Temple Los Angeles, CA 90012	213–626-3888
Sacramento	McGeorge Law School	CPT John A. Dougherty District Attorney's Office Room 301, Court House Sacramento, CA 95814	916–444-0520
San Diego	University of San Diego School of Law	LTC David M. Gill 220 West Broadway San Diego, CA 92101	714–236-2121
San Francisco	Hastings College of Law	MAJ John G. Milano Milano & Cimmet Civic Center Building 507 Polk Street San Francisco, CA 94102	415–441-4410
COLORADO			
Boulder	University of Colorado Law School	LTC William L. Carew 15 South Weber Colorado Springs, CO 80903	
Denver	University of Denver Law School	LTC William L. Carew	
CONNECTICUT			
New Haven	Yale Law School	LTC Ernest S. Auerbach 123-2 Richmond Hill Road New Canaan, CT 06840	716–546-4500 Ext 4717

	Institution	*Liaison Officer and Address*	*Telephone Number*
Stamford	University of Connecticut Law School	LTC Ernest S. Auerbach	"
DELAWARE			
Wilmington	Delaware Law School	LTC Richard F. Plechner 351 Main Street Metuchen, New Jersey 08840	201-548-4457
FLORIDA			
St. Petersburg	Stetson University Law School	MAJ Thomas C. Marks, Jr. 2582 60th Avenue South St. Petersburg, FL 33712	813-867-6136
ILLINOIS			
Champaign	University of Illinois School of Law	LTC Richard H. Mills Circuit Court 8th Judicial Circuit Cass County Court House Virginia, IL 62691	217-452-3220
Chicago	University of Chicago School of Law De Paul University College of Law Loyola University College of Law Northwestern University College of Law	LTC Michael I. Spak De Paul University School of Law 25 East Jackson Boulevard Chicago, IL 60606	312-929-3525
	John Marshall School of Law	CPT Michael Cahill States Attorney Office Room 500, Chicago Daley Center Chicago, IL 60602	312-443-5442
IOWA			
Des Moines	Drake Law School	MAJ Harold L. Van Voorhis 1100 Savings and Loan Building 206 Sixth Avenue Des Moines, IA 50309	515-283-2241
Iowa City	University of Iowa College of Law	CPT Edmund E. Barry 112½ East 3rd Street West Liberty, IA 52776	319-627-4797
KANSAS			
Lawrence	University of Kansas Law School	COL Jack N. Bohm 950 Home Savings Building 1006 Grand Avenue Kansas City, MO 64106	816-842-6422
KENTUCKY			
Lexington	University of Kentucky College of Law	CPT Timothy R. Futrell Law Offices of Wyatt, Grafton and Sloss 28th Floor—Citizens Plaza Louisville, KY 40202	512-589-5235

	Institution	*Liaison Officer and Address*	*Telephone Number*
Louisville 502-683-3535 Nunley	University of Louisville School of Law	CPT James F. Gordon, Jr. Bartlett, McCarroll & 302 Masonic Building P.O. Box 925 Owensboro, KY 42301	
LOUISIANA			
Baton Rouge	Louisiana State University Law School Southern University School of Law	COL Harold L. Savoie Duson Bar, Inc. 304 West Convent Street Lafayette, LA 70504	318-CE5-7371
New Orleans	Loyola University School of Law	COL Harold L. Savoie Tulane University School of Law	"
MAINE			
Portland	University of Maine School of Law	LTC Peter A. Anderson Anderson & Norton 50 Columbia Street Bangor, ME 04401	207-947-0304
MARYLAND			
Baltimore	University of Maryland Law School University of Baltimore School of Law	MAJ William S. Little Stark & Little 1500 Tower Building Baltimore & Guilford Streets Baltimore, MD 21202	301-539-3545
MASSACHUSETTS			
Boston	New England School of Law Boston College Law School Suffolk University Law School Boston University Law School	CPT Kevin J. O'Dea 548 Great Elm Way Nagog Woods Alton, MA 01718	617-494-4061
Cambridge	Harvard Law School	CPT Kevin J. O'Dea	
MICHIGAN			
Ann Arbor	University of Michigan Law School	CPT Frederick J. Amrose 16075 Kinross Birmingham, MI 48009	313-961-0473
Detroit	University of Detroit School of Law	CPT Frederick J. Amrose	
	Wayne State University Law School	MAJ Estes D. Brockman 21519 Virginia Drive Southfield, MI 48076	313-256-2519
Lansing	Thomas Cooley School of Law	1LT John Hays Farhat, Burns & Story, P.C. Thomas More Building 417 Seymour Avenue Lansing, MI 48933	

	Institution	*Liaison Officer and Address*	*Telephone Number*
MINNESOTA			
Minneapolis	University of Minnesota Law School	MAJ Thomas J. Lyons 2114 Seventeenth Avenue North St. Paul, MN 55109	612–291-9511
St. Paul	William Mitchell College of Law Hamline University School of Law	MAJ Thomas J. Lyons	
MISSISSIPPI			
University	University of Mississippi School of Law	COL Aaron S. Condon (Ret) School of Law University of Mississippi University, MS 38677	601–232-7421
MISSOURI			
Columbia	University of Missouri Law School	COL Jack N. Bohm 950 Home Savings Building 1006 Grand Avenue Kansas City, MO 64106	816–842-6422
NEBRASKA			
Lincoln	University of Nebraska Law School	CPT Walter E. Zink II Suite 1200 Sharp Building Lincoln, NB 68508	402–475-1075
NEW HAMPSHIRE			
Manchester	Franklin Pierce Law Center	MAJ Richard L. Burstein P.O. Box 28 South Royalton, VT 05068	802–763-8320
NEW JERSEY			
Newark	Rutgers University School of Law	LTC Joseph S. Ziccardi Suite 710, Two Penn Center Plaza 15 and John F. Kennedy Boulevard Philadelphia, PA 19102	215–568-5057
		MAJ James B. Smith Smith & Dembling 296 Amboy Avenue Metuchen, NJ 08840	201–494-8404
	Seton Hall University School of Law	LTC Joseph S. Ziccardi MAJ James B. Smith	
NEW YORK			
Albany	Albany Law School Union University	LTC Thomas J. Newman 99 Washington Avenue Suffern, NY 10901	914–357-2660
Brooklyn	Brooklyn Law School	CPT James E. O'Donnell, Jr. District Attorney's Office Kings County Municipal Building Brooklyn, NY 11201	212–643-5100

	Institution	*Liaison Officer and Address*	*Telephone Number*
Buffalo	State University of New York at Buffalo	WO Joseph G. Kihl 3141 South Park Avenue Lackawanna, NY 14218	716–825-0850
Hempstead	Hofstra University School of Law	LTC Thomas J. Newman 99 Washington Avenue Suffern, NY 10901	914–357-2660
Ithaca	Cornell Law School	CPT Mike Manheim 306 Loew Building Syracuse, NY 13202	315–422-3078
Jamaica	St. John's University School of Law	LTC Thomas J. Newman 99 Washington Avenue Suffern, NY 10901	914–357-2660
	St. John's University School of Law	COL Joseph Calamari Utopia and Grand Central Jamaica, NY 11432	212–969-8000
New York	Columbia University School of Law	LTC Thomas J. Newman 99 Washington Avenue Suffern, NY 10901	914–357-2660
	Columbia University School of Law	MAJ Stephen Davis 250 Broadway New York, NY 10007	212–227-6640
	Fordham University School of Law	LTC Thomas J. Newman 99 Washington Avenue Suffern, NY 10901	914–357-2660
	New York University Law School	MAJ Basil N. Apostle 9 Boulder Place Yonkers, NY 10705	212–726-7070
Syracuse	Syracuse University College of Law	CPT Mike Manheim 306 Loew Building Syracuse, NY 13202	315–422-3078
NORTH CAROLINA			
Chapel Hill	University of North Carolina School of Law	MAJ John Wall Hanft NML - West Building, Suite 304 University Square Chapel Hill, NC 27514	919–929-0391
Durham of Law	Duke University School	MAJ John Wall Hanft	"
	North Carolina Central University School of Law	MAJ Malcolm J. Howard P.O. Box 859 Greenville, NC 27834	202–456-6684
Winston-Salem	Wake Forest Law School	MAJ Malcolm J. Howard	"
NORTH DAKOTA			
Grand Forks	University of North Dakota School of Law	CPT Murray G. Sagsveen Executive Office State Capitol Bismarck, ND 58505	701–224-2200

	Institution	*Liaison Officer and Address*	*Telephone Number*
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Columbus	Ohio State University Law School	COL Charles E. Brant The Midland Building 250 East Broad Street Columbus, Ohio 43215	614–221-2121
	Capitol University Law School	COL Charles E. Brant	
OKLAHOMA			
Norman	Oklahoma City University School of Law	LTC Stewart Hunter Juvenile Judge Oklahoma City Court House Oklahoma City, OK 73102	405–236-2727
Oklahoma City	University of Oklahoma College of Law	LTC Charles Elder Professional Building Box 667 Purcell, OK 73080	405–527-2137
Tulsa	University of Tulsa College of Law	CPT William W. Hood, Jr. Center Office Building Tulsa, Oklahoma 73101	918–583-2624
OREGON			
Eugene	University of Oregon School of Law	MAJ Gary E. Lockwood P.O. Box 325 Hood River, OR 97031	503–386-1811
Portland	Lewis and Clark College Northwestern School of Law	COL Charles S. Crookham Fourth Judicial District Circuit Court of Oregon Multnomah County Courthouse Portland, OR 97204	503–248-3198
Salem	Willamette University School of Law	MAJ Gary E. Lockwood P.O. Box 325 Hood River, OR 97031	503–386-1811
PENNSYLVANIA			
Carlisle	Dickinson School of Law	LTC Joseph S. Ziccardi Suite 710 Two Penn Center Plaza 15 and John F. Kennedy Blvd Philadelphia, PA 19102	215–568-5057
	Temple University School of Law	LTC Joseph S. Ziccardi	"
Villanova	Villanova University School of Law	LTC Joseph S. Ziccardi	"

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PUERTO RICO			
Ponce	Catholic University of Puerto Rico Law School	CPT Charles A. Cuprill Calle 15-T #1 URB Jardines Fagot Ponce, Puerto Rico 00731	842-3382
San Juan	University of Puerto Rico Law School Inter American University Law School	MAJ Otto J. Riefkohl II P.O. Box S-949 Old San Juan, Puerto Rico 00902	
TENNESSEE			
Nashville	Vanderbilt University School of Law	LTC Abram W. Hatcher (Ret) Suite 202 1700 Hayes Street Nashville, TN 37203	615–327-1010
TEXAS			
Austin	University of Texas Law School	MAJ John M. Compere 2000 Frost Bank Tower San Antonio, TX 78205	212–225-3031
Dallas	Southern Methodist University School of Law	CPT Evan Thomas Office of the General Counsel HQ Army-Airforce Exchange Serv-ice Dallas, TX 75222	214–330-3642
Houston	Bates College of Law	COL John Jay Douglass (Ret) College of Law University of Houston Houston, TX 77004	713–749-1571
Lubbock	Texas Tech University School of Law	CPT David C. Cummins School of Law, Texas Tech University P.O. Box 4030 Lubbock, TX 79409	806–742-6121
San Antonio	St. Mary's University School of Law	MAJ John M. Compere 2000 Frost Bank Tower San Antonio, TX 78205	512–225-3031
Waco	Baylor University School of Law	Hulen D. Wendorf Baylor University School of Law Waco, TX 76703	
VERMONT			
South Royalton	Vermont Law School	MAJ Richard L. Burstein P.O. Box 28 South Royalton, VT 05068	802–763-8320
WISCONSIN			
Madison	University of Wisconsin Law School	LTC Richard Z. Kabaker University of Wisconsin-Madison Law School Madison, WI 53706	608–262-2441
Milwaukee	Marquette University Law School	LTC Richard Z. Kabaker	

	Institution	*Liaison Officer and Address*	*Telephone Number*
WASHINGTON, DC	American University Law School	MAJ W. Peyton George 1701 Pennsylvania Avenue, N.W. Suite 350 Washington, D.C. 20006	202-293-5325
	Georgetown University Law Center	LTC Stanley J. Glod Suite 314 1126 Sixteenth Street Washington, D.C. 20036	202-659-8855

JAGC Personnel Section

PP&TO, OTJAG

1. Court Reporter Vacancy. A GS9 Verbatim Court Reporter vacancy exists in the SJA Office, Fort Sill, Oklahoma. Interested DA civilian or military personnel who are retiring or completing military service may apply, if qualified, to the Federal Job Information Center, 210 NW 6th Street, Oklahoma City, Oklahoma 73102.

2. Assignments

MAJORS

NAME	*FROM*	*TO*	*APPROX DATE*
DEKA, David J.	82d ABN Div Ft Bragg, NC	Sup Cmd Hawaii	Jan 78
RICHARDSON, Quentin W.	82d ABN Div Ft Bragg, NC	OTJAG	Jan 78

CAPTAINS

BABOIAN, Richard	Korea	S&F TJAGSA	Mar 78
DICHARRY, Michael J.	7th Com Arms APO NY 09114	USALSA	Apr 78
HORTON, Larry B.	Stu USAE Pres of Mont CA	Berlin Bde APO 09742	Feb 78

WARRANT OFFICERS

CW-4

LATHERS, Frank	USAREUR	QM Ctr Ft Lee, VA	Jul 78
YOUNG, Seburn V.	V Corps APO 09079	9th Inf Div Ft Lewis WA	Aug 78

CW-3

CUSHING, William G.	Elect Cmd Ft Monmouth, NJ	USATC Ft Jackson, SC	Jan 78
JONES, Robert E.	9th Inf Div Ft Lewis, WA	USAREUR	Jul 78
RAMSEY, Alzie E., Jr.	Admin Ctr, Ft Ben Harrison, IN	V Corps APO 09079	Aug 78

CW-2

ALLRED, Charles H.	2d Armd Div Ft Hood, TX	101st ABN Div Ft Campbell, KY	Dec 77

BETTERIDGE, Kendall J.	FA Ctr Ft Sill, OK	Claims Svc Eur APO 09166	Jul 77
CAMIRE, Walter L.	2d Inf Div APO 96224	MDW WASHDC	Aug 78
COLEMAN, Sidney L.	25th Inf Div Hawaii	Air Def Ctr Ft Bliss, TX	Mar 78
DANFORD, Clark D.	MDW WASHDC	3d Armd Div APO 09039	May 78
GILLIS, James L.	QM Ctr Ft Lee, VA	VII Corps APO 09107	Jul 78
HALL, William T.	VII Corps APO 09107	Fld Arty Ctr Ft Bliss, TX	Aug 78
LARGESSE, Richard L.	3d Armd Div APO	Elect Cmd Ft Monmouth, NJ	Apr 78
LINDOGAN, Rosauro L.	Retraining Bde, Ft Riley, KS	2d Inf Div APO 96224	Jun 78

REVOCATION

BAUER, Bruce R.	3d Armd Div APO 09039	USALSA	Dec 77

3. RA Promotions

COLONEL

HAWLEY, Richard S. 20 Nov 77

LIEUTENANT COLONEL

HENSON, Hugh E., Jr. 11 Nov 77
SCHEFF, Richard P. 30 Nov 77
STEWART, Ronald B. 4 Nov 77
STONE, Frank R. 28 Nov 77

Enlisted Personnel Section

Congratulations are in order for the following chief legal clerks who have been selected for promotion to the grade of Sergeant Major (E-9).

MSG Thomas G. Davis	US Army Training Center, Ft. Eustis, VA
MSG Kenneth D. Judy	US Army Claims Service, Europe
MSG Leo F. May	US Army Representative, Naval Justice School, Newport, RI
MSG Charles W. Peterson	HQ, USASETAF, Vicenza, Italy
MSG Nelson	HQ, Health Services Torresrivara Command, Ft. Sam Houston, TX

Additional congratulations to MSG Torresrivara for selection for the Sergeant Major's Academy.

The following table depicts the degree of success of our promotion-eligible chief legal clerks in competing for promotion to grade E-9 within career management field 71.

CMF 67	Prev PZ Cons			First PZ Cons			Primary Zone Total			Secondary Zone			Totals		
MOS	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Cons	Select	%
67Z	30	6	20.0	27	14	51.9	57	20	35.1	92	4	4.3	149	24	16
TOTS	30	6	20.0	27	14	51.9	57	20	35.1	92	4	4.3	149	24	16

§ Reflects MOS/CMF held by individuals when recommended for promotion. In some instances, individuals were recommended in an MOS/CMF other than their current PMOS/CMF.

CMF 67	Prev PZ Cons			First PZ Cons			Primary Zone Total			Secondary Zone			Totals		
MOS	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Nr in Zone	Nr Sel	%	Cons	Select	%
CMF 71															
03Z	1	0	0.0	2	1	50.0	3	1	33.3	2	1	50.0	5	2	40
71D	0	0	0.0	10	4	40.0	10	4	40.0	11	1	9.1	21	5	23
71E	0	0	0.0	0	0	0.0	0	0	0.0	1	0	0.0	1	0	0
71G	1	0	0.0	1	0	0.0	2	0	0.0	11	0	0.0	13	0	0
71L	36	2	5.6	143	80	55.9	179	62	45.8	318	21	6.6	497	103	20
71M	0	0	0.0	1	1	100.0	1	1	100.0	10	2	20.0	11	3	27
73Z	8	0	0.0	34	17	50.0	40.5	40	1	2.5	82	18	22		
75Z	16	2	12.5	128	78	60.9	144	60	55.6	103	12	11.7	247	92	37
TOTS	62	4	6.5	319	181	56.7	381	185	48.6	496	38	7.7	877	223	25

Current Materials of Interest

Articles

Comment, *The Developing Common Law of "Major Federal Action" Under the National Environmental Policy Act*, 31 ARK. L. REV. 254 (1977).

Friedman, *The Environmental Impact Statement Process*, CASE & COM., Nov.-Dec. 1977, at 28.

Case Notes

Middendorf v. Henry: *The Right to Counsel at Summary Courts-Martial*, 31 ARK. L. REV. 345 (1977).

Military Jurisdiction—Service Connection—Military Status of Transferor and Transferee of Controlled Substance Held Not Sufficient to Establish Service Connection Requisite to Court-Martial Jurisdiction. United States v. McCarthy, *25 C.M.A. 30, 54 C.M.R. 30 (1976)*, 55 TEX. L. REV. 1115 (1977).

Book Review

Parks, *Book Reviews*, U.S. NAVAL INST. PROC., Nov. 1977, at 93. [Reviews of MAJOR JAMES N. ROWE, U.S. ARMY, FIVE YEARS TO FREEDOM; JOHN G. HUBBELL, P.O.W.; LIEUTENANT COMMANDER JOHN M. MCGRATH, U.S. NAVY, PRISONER OF WAR; and REAR ADMIRAL JEREMIAH A. DENTON, JR., WHEN HELL WAS IN SESSION, by Major W. Hays Parks, U.S. Marine Corps.]

Bound CMRs Available

The 103d Corps Support Command has an excess number of bound volumes of the CMRs and would like to give them away to any unit having a need or use for them. "The condition varies from very good to worse than average but still useable." The available bound volumes are:

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17	5		
18	3		
19	3		
21	1		
22	2		
24	1		

Interested parties should write directly to Headquarters, 103d Corps Support Command, 225 East Army Post Road, Des Moines, Iowa 50315, ATTN: Judge Advocate Section.

Errata

The following statement of the I&E Construction decision should be substituted for the text on page 3 of the article Late Bid Prestidigitation, The Army Lawyer, *October 1977:*

This extended requirement for determining whether the government mishandled a bid was graphically demonstrated in I&E Construction Company Incorporated (I&E) (Comp. Gen. Dec. B-186766, August 9, 1976, 1976–2 C.P.D. ¶139). That decision involved an attempt by Western Union to deliver a telegraphic modification to a bid. Bid opening was scheduled for 2 P.M. on 27 May 1976. At 12:24 A.M., on 27 May, Western Union received a telegraphic modification to Conrad Weihnacht, Inc.'s previously submitted bid. Between 1:30 P.M. and 1:45 P.M. Western Union attempted to deliver the modification, but found the Purchasing and Contracting Office (P&C) closed. Western Union retained the modification and delivered it the next day. The modification, if timely, would have made Weihnacht the low bidder. I&E Construction Company, Inc., otherwise the low bidder, protested to the GAO against award to any other bidder. During the course of its consideration of the protest, GAO discovered that the P&C office was closed for a farewell party for an employee. The office reopened before bid opening time, but after 1:45 P.M. The GAO, relying upon Hyrdo Fitting Manufacturing Corporation, Comp. Gen. Dec. B-183438, June 2, 1975, 1975-1 CPD ¶331, concluded that the modification should have been considered even though there was no government mishandling after receipt.

By Order of the Secretary of the Army:

Official:

BERNARD W. RODGERS
General United States Army
Chief of Staff

J. C. PENNINGTON
Brigadier General, United States Army
The Adjutant General

*U.S. GOVERNMENT PRINTING OFFICE: 1977