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Table of Contents

Articles	
Representing a Veteran After Default of an Assumed VA-Guaranteed Home Loan	3
<i>Major Urs R. Gsteiger, USAR</i>	
x Tips and Observations from the Trial Bench	9
<i>Lieutenant Colonel Gary J. Holland</i>	
* Using Humanitarian Activities as a Force Multiplier and as a Means of Promoting Stability in Developing Countries	16
<i>Major Fran W. Walterhouse</i>	
† Military Rule of Evidence 803 (4): The Medical Treatment Hearsay Exception and Trial Practice	30
<i>Captain Marcus A. Brinks, USAR</i>	
USALSA Report	40
<i>United States Army Legal Services Agency</i>	
Examination and New Trials Division Notes	40
R.C.M. 1112 Review; Service of Authenticated Record of Trial on Accused; Excessive Forfeitures	
TJAGSA Practice Notes	41
<i>Faculty, The Judge Advocate General's School</i>	
Legal Assistance Items	41
State Domicile Note (Does a Wife Automatically Assume the Domicile of Her Husband?); Tax Note (Revised IRS Publications); Wills and Estates Notes (Servicemen's Group Life Insurance; Living Wills); Family Law Note (Using the Uniformed Services Former Spouses' Protection Act to Collect Child Support); The Pitfalls of Using the Visa Waiver Program to Bring Alien Spouses into the United States	
Claims Report	52
<i>United States Army Claims Service</i>	
Tort Claims Notes (Defense Commissary Agency Claims; DCA Memorandum of Understanding; New Standard Form 1145); Commander's Note	

✕ Labor and Employment Law Notes	55
<i>OTJAG Labor and Employment Law Office</i>	
Equal Employment Opportunity Note (EEOC Rules that Compensatory Damages Are Available in the Administrative Process); Civilian Personnel Law Notes (Federal Circuit Rules that an EEO Complaint Does Not Constitute Whistleblowing; Federal Circuit Clarifies Burdens of Proof in Prosecutions of Alleged Retaliating Officials; Installations Need Not Participate in Work Release Programs); Labor Relations Note (Events that Are Inextricably Linked to an MSPB Appealable Action May Not Be Subject to a ULP)	
Professional Responsibility Notes	57
<i>OTJAG Standards of Conduct Office</i>	
Ethical Awareness; Professional Responsibility Opinion 90-1	
CLE News	60
Current Material of Interest	65

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Representing a Veteran After Default of an Assumed VA-Guaranteed Home Loan

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Introduction

Since its inception in 1944, the Department of Veterans' Affairs (VA) home loan guarantee program has helped more than thirteen million service members and former service members to purchase primary residences.¹ A veteran who obtains a VA-guaranteed loan can purchase a home at a fixed mortgage rate with little or no downpayment.²

In the past, service members or veterans who sold homes that they originally purchased with VA-guaranteed loans often permitted the buyers to assume the mortgages on the properties. Unfortunately, many buyers subsequently defaulted. Consequently, legal assistance attorneys (LAAs) frequently have had to aid clients who received deficiency notices in foreclosure actions involving homes that the clients had bought and sold years before. To this day, many legal assistance clients face repayment demands exceeding \$10,000 for which they lack sufficient assets or income to satisfy.

This article will discuss the factors an LAA should evaluate when assisting a client with such a problem. It also will outline the steps the client should follow in seeking a release from liability or a waiver of indebtedness.

The VA Home Loan Program

Over the past ten years, the VA home loan guarantee program has experienced a staggering rise in defaults and their associated costs.³ Defaults on VA-guaranteed loans rose

sharply between 1981 and 1986 and fell only slightly in 1988.⁴ The VA estimated its 1988 losses at \$693 million.⁵ On the average, the VA lost \$14,000 in each foreclosure because it usually could recover only seventy percent of fair market value through the forced sale of the residence.⁶

Historically, the VA has stepped into the shoes of lenders upon defaults, assuming responsibility for foreclosing on, and reselling, the homes securing defaulted loans. Rapidly rising costs, however, have prompted the VA to change its approach. In many recent cases, the VA simply has paid its guarantees and has pursued the original veterans for the deficiencies, leaving the properties with the lenders.

Before 1988, VA loans were fully assumable. A homeowner could sell his or her encumbered property without first obtaining the approval of the lender or the VA.⁷ Consequently, many veteran homeowners sold their homes to buyers who agreed to pay the homeowners' equities and assume their payments. Only rarely did these homeowners investigate the creditworthiness of their buyers. Unfortunately, the VA still considered each veteran liable unless he or she obtained a release from liability or a substitution of eligibility.⁸

Congress reorganized the VA home loan program in 1988. It sharply restricted the free assumptions of VA-guaranteed home loans and required each veteran seeking to obtain a VA loan after 1 March 1988 to pay a funding fee that would be used to mitigate the government's losses in the event of a default.⁹ A VA loan guarantee obtained after the 1988 reorganization is governed by its own statutory and regulatory stan-

¹DEPT OF VETERANS' AFFAIRS, PAMPHLET 26-6, TO THE HOME-BUYING VETERAN (Oct. 1989). The VA loan guarantee protects the lender in the event of a default. The VA will guarantee up to 50% of the purchase price of a home, in amounts up to \$46,000.

²See Bernard P. Ingold, *The Department of Veterans' Affairs Home Loan Guarantee Program: Friend or Foe?*, 132 MIL. L. REV. 231 (1991), for an excellent overview of the VA guarantee program and the various statutory, administrative, and judicial remedies available to a veteran who defaults on a home loan after taking advantage of the program.

³See S. REP. NO. 204, 100th Cong., 2d Sess. 13, reprinted in 1987 U.S.C.C.A.N. 2207, 2214 (summarizing the problems arising from the VA home loan guarantee program).

⁴S. REP. NO. 126, 101st Cong., 1st Sess. 276, reprinted in 1989 U.S.C.C.A.N. 1470, 1682.

⁵*Id.* at 266, 1989 U.S.C.C.A.N. at 1672.

⁶S. REP. NO. 204, *supra* note 3, at 14, 1987 U.S.C.C.A.N. at 2215.

⁷38 C.F.R. §§ 36.4275, 36.4310 (1988).

⁸38 U.S.C.A. § 3710 (West 1991); see also *infra* notes 21-40 and accompanying text (describing the specific procedures for requesting a waiver or release). To obtain a substitution of eligibility, the veteran must persuade the VA and the lender to approve the subsequent purchaser, who also must be eligible for a VA loan guarantee. Upon request by both parties, the VA may substitute the buyer's entitlement for the seller's, and then reinstate the seller's eligibility for future loan guarantees. See generally 38 C.F.R. § 36.4303(i)(3) (1991).

⁹See Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987, Pub. L. No. 100-198, § 10(a)(1), 101 Stat. 1315, 1321 (codified as amended at 38 U.S.C.A. § 3714 (West 1991)); see also 38 C.F.R. § 36.4508 (1991). The funding fee is based on the amount of the downpayment and is similar to the points charged for a conventional loan. See generally 38 U.S.C.A. § 3729 (West 1991). The fee is 1.25% of the loan amount if the purchaser's downpayment is less than five percent of the purchase price, 0.75% if the downpayment equals five to ten percent of the purchase price, and 0.5% if the downpayment is more than ten percent of the purchase price. See *id.* The statute exempts certain veterans from paying the funding fee. See *id.* § 3729(c).

dards. An LAA must analyze such a case differently from cases involving VA loans that predate the reorganization.¹⁰

These recent changes did not affect any VA home loan guarantee that came into existence before 1 March 1988. These loans remain fully assumable. Many homes with these guarantees have been resold several times, with the original veterans remaining fully liable for the original debts. Consequently, having a client enter a legal assistance office with questions about a foreclosure on a home he or she sold ten years ago is not uncommon. An LAA often will discover that his or her client has received a deficiency notice because an individual unknown to the client has defaulted on the assumed mortgage.

Options Before Foreclosure

The VA must notify a veteran that a loan guaranteed by the veteran's eligibility is in default before the lender initiates foreclosure.¹¹ The lender begins the notification process by reporting the default to the VA no more than 105 days after the default initially occurs.¹² The VA then must tell the veteran about the default and must advise the veteran of his or her options.¹³ The veteran's simplest option is to cure the default and recover the property. Unfortunately, this option is too expensive to be feasible for many veterans.

A veteran can enter into a compromise agreement with the VA. In this agreement, the agency promises to release the veteran partially from liability. In return, the veteran executes a written acknowledgment of his or her liability to the VA and a promissory note in which he or she agrees to make regular amortized monthly payments to the VA for no more than five years.¹⁴ The amount of the promissory note is subject to

¹⁰This article discusses only the liabilities of veterans whose loan guarantee commitments predate the 1988 revision of the home loan program.

¹¹See 38 U.S.C.A. § 3732 (West 1991).

¹²38 C.F.R. § 36.4315 (1991).

¹³*Id.*

¹⁴*Id.* § 36.4323(e)(2).

¹⁵*Id.*

¹⁶*Id.* The veteran must pay off the promissory note within a five-year period; however, the note may authorize the veteran to begin payments as long as one year after the note's execution. See *id.* § 36.4323(e)(3). If the VA determines that a veteran has no realistic financial prospects of repaying all or part of the anticipated debt within six years of the sale, the VA may waive any debt the veteran owes to the United States before it approves a foreclosure sale. *Id.* § 36.4323(e)(1).

¹⁷See *infra* notes 21-25 and accompanying text. See generally 38 U.S.C.A. §§ 3713, 3714 (West 1991); 38 C.F.R. § 36.4509(b) (1991) (VA procedures for postsale, preforeclosure releases). The manner in which the VA disposes of preforeclosure requests differs from its approach to handling postforeclosure requests in only one respect: the agency must grant a request for a preforeclosure release if the requestor meets all regulatory requirements, but it need not do so if the requestor has asked for a postforeclosure release. Compare 38 U.S.C.A. § 3713(a) (West 1991) with *id.* § 3713(b).

¹⁸38 U.S.C.A. § 3713(a) (West 1991).

¹⁹A foreclosure can take many forms, depending upon the situs of the property and how the VA and the lender choose to proceed. For an overview of the procedures and the legal issues involved, see generally Ingold, *supra* note 2.

²⁰Although the VA must notify the veteran of an impending foreclosure, it may satisfy this requirement by sending the notice to the veteran's last known address. Consequently, a notice frequently will fail to reach its intended recipient, who may have moved several times without providing forwarding addresses to the VA.

negotiation between the veteran and the VA regional office.¹⁵ Before entering into a compromise agreement, the regional office must find the following: (1) the default was caused by circumstances beyond the veteran's control; (2) no evidence suggests that the veteran has engaged in fraud, misrepresentation, or bad faith; (3) the veteran has cooperated with the VA in exploring realistic alternatives to the agreement; and (4) the veteran's current and future financial prospects should permit the veteran to pay off the debt within six years.¹⁶

Alternatively, the veteran can ask the VA for a postsale, preforeclosure release from liability. This release is governed by the same regulatory standards as a postsale, postforeclosure release.¹⁷ Congress, however, has instructed the VA to issue a preforeclosure release whenever a veteran's loan is current and some subsequent purchaser is liable to the VA.¹⁸ This mandatory language differs sharply from the permissive language governing postsale, postforeclosure requests for release.

Postforeclosure Releases from Liability and Waivers of Indebtedness

Not every veteran can obtain a preforeclosure release from liability. The VA frequently assesses deficiencies against veterans after lenders have foreclosed on the homes securing the debts.¹⁹ A deficiency notice often will be a veteran's first actual notification of his or her liability.²⁰ Once the VA has assessed a deficiency, the veteran's best options are to pay the deficiency or to request a release from liability or a partial or complete waiver of the indebtedness.

Postforeclosure Release from Liability

A veteran who receives notice of indebtedness on a VA-guaranteed home loan should respond by asking the VA for a release from liability.²¹ Congress has expressed its intent that the VA grant such a release pursuant to an appropriate agency determination if any subsequent purchaser of the property securing the mortgage is liable to the VA.²² The VA's regulations provide that a veteran must show the following to prove that he or she is eligible for a release from liability: (1) a transferee is liable to the VA for the debt; (2) the loan was current when the transferee acquired the property; and (3) the transferee was creditworthy when the transfer occurred.²³

To determine a transferee's creditworthiness, the VA will consider the transferee's payment history following the transaction. At present, the agency will adjudge a transferee to be a satisfactory credit risk only if he or she made twelve or more consecutive, timely payments before reselling the property or defaulting on the indebtedness. This requirement, however, may change. After adhering to the twelve-payment standard for years in spite of outspoken judicial disapproval,²⁴ the VA has decided to revise its test for determining creditworthiness.²⁵

Congress has stated that the VA's refusal to issue a post-foreclosure release from liability will not preclude approval of a waiver of indebtedness.²⁶ Because few veterans can meet the VA's requirements for obtaining a release, a veteran more realistically might seek a partial or complete waiver of the debt.

Waiver of Indebtedness

Since 1958, Congress has stated that the VA should waive a veteran's indebtedness after default if the VA determines that collecting the indebtedness would violate "equity and good

conscience."²⁷ In recent years, this mandate has taken on added emphasis. Congress amended the VA waiver statute in 1989, substituting the word "shall" for the word "may" in its instructions to the VA about waivers of indebtedness.²⁸ The VA may disregard the statute's mandatory language only if the VA finds evidence of fraud, misrepresentation, or bad faith on the part of the person seeking a waiver.²⁹ The VA can waive all or part of a veteran's obligation, depending on the VA's analysis of the veteran's current and future financial situation.

Although Congress has ordered the VA to waive deficiencies whenever collections would violate "equity and good conscience," it has left to the agency the task of defining those terms. The VA has not hesitated to do so.³⁰ Interpreting the phrase "equity and good conscience" to mean "arriving at a fair decision between the obligor and the Government,"³¹ the VA has announced that it will consider the following elements in responding to a waiver request:

- the fault of the veteran;
- the faults of other parties;
- the possibility that payment of the debt will inflict undue hardship on the veteran or his or her family;
- the possibility that the waiver will nullify the objectives of the benefits;
- the possibility that granting the waiver will enrich the veteran unjustly; and
- any detrimental change in position the veteran may have made in reliance on a VA benefit.³²

²¹ See generally 38 U.S.C.A. § 3713(b) (West 1991).

²² *Id.*

²³ 38 C.F.R. § 36.4509(c) (1991).

²⁴ See *infra* notes 67, 70 and accompanying text.

²⁵ See *infra* note 71 and accompanying text.

²⁶ 38 U.S.C.A. § 3713(b) (West 1991). A practitioner also must advise his or her client that a release from liability or waiver of deficiency will restore the client's eligibility for a future VA loan guarantee only to the extent that the client has not used all of his or her original entitlement. A veteran may request a reinstatement of eligibility, but this request will be unsuccessful until the veteran has compensated the VA for all its losses and the VA no longer is guaranteeing the original loan. See 38 C.F.R. § 36.4303(i) (1991).

²⁷ 38 U.S.C.A. § 5302(b) (West 1991).

²⁸ See Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, § 311(1), 103 Stat. 2062, 2076 (codified at 38 U.S.C.A. § 5302 (West 1991)).

²⁹ 38 U.S.C.A. § 5302(c) (West 1991).

³⁰ See 38 C.F.R. § 1.965 (1991).

³¹ *Id.*

³² *Id.*

The VA also declared that it will not waive a deficiency when the default has arisen through the "material fault" of the veteran. It has defined material fault as the inexcusable commission or omission of an act that directly results in the creation of a debt to the government.³³ Congress did not address the retroactive effect of the new waiver standard on a pending waiver decision or on a decision in which the VA already had denied a veteran's waiver request. The VA has ruled that the standard does not compel the VA to reconsider final waiver decisions issued before 18 December 1989—the effective date of the change.³⁴ Nevertheless, the VA has acknowledged that its own regulations allow a veteran to seek the reconsideration of an agency decision when a change in the law has occurred.³⁵ Accordingly, a veteran whose request for waiver was denied before 18 December 1989 can ask the VA to reconsider that request.³⁶ The veteran apparently has no time limit within which to seek reconsideration. If the VA subsequently grants the waiver, however, it will refund to the veteran only those sums that it collected on the indebtedness after 18 December 1989.³⁷ The government will retain any money the VA collected before that date.³⁸ The VA issued this decision with implementing guidance to VA regional offices in *Veterans' Benefits Administration Circular 20-90-34*.³⁹

A veteran who receives a deficiency notice by certified mail after 18 December 1989 has one year in which to apply for a waiver of indebtedness.⁴⁰ Before 1991, no statute of limitations for requesting a waiver existed. An LAA should remember this deadline when advising veterans who have received notices of indebtedness.

³³*Id.* § 1.965(b) (2).

³⁴1990 Op. Gen. Counsel No. 22, reprinted in 4 *Veterans' L. Rep.* (Veterans Educ. Project, Inc.) 6516 (1990). Noting that statutes generally are applied only prospectively, the VA general counsel remarked that nothing in the waiver statute or its legislative history shows that Congress expected that statute to be applied retroactively. *See id.*

³⁵*Id.* (citing 38 C.F.R. § 1.969(a) (1991)).

³⁶*See id.*

³⁷*See id.*

³⁸*See id.*

³⁹DEP'T OF VETERANS' AFFAIRS, VETERANS' BENEFITS ADMIN. CIR. 20-90-34, RECONSIDERATION OF FINAL COMMITTEE ON WAIVERS AND COMPROMISES (COWC) WAIVER DECISIONS (Dec. 31, 1990), reprinted in 4 *Veterans' L. Rep.* (Veterans Educ. Project, Inc.) 5515 (1991).

⁴⁰38 U.S.C.A. § 5302(b) (West 1991).

⁴¹Although VA publications often are incomplete, they can be used effectively in a publicity campaign. At a minimum, LAAs should read and have available the following pamphlets from the Department of Veterans' Affairs: DEP'T OF VETERANS' AFFAIRS, PAMPHLET 26-4, VA-GUARANTEED HOME LOANS FOR VETERANS (Aug. 1989); DEP'T OF VETERANS' AFFAIRS, PAMPHLET 26-5, POINTERS FOR THE VETERAN HOMEOWNER (Mar. 1992); DEP'T OF VETERANS' AFFAIRS, PAMPHLET 26-6, TO THE HOME-BUYING VETERAN (Oct. 1989); DEP'T OF VETERANS' AFFAIRS, PAMPHLET 26-68-1, SELLING YOUR GI HOME? (Apr. 1989); DEP'T OF VETERANS' AFFAIRS, PAMPHLET 26-91-1, A QUICK GUIDE FOR HOMEBUYERS & REAL ESTATE PROFESSIONALS (Aug. 1991).

⁴²38 C.F.R. § 36.4334 (1991).

⁴³*Id.* § 36.4323 (g).

Protecting a Client from the Consequences

of a Subsequent Purchaser's Default

Preventive Law

The simplest way to protect the original purchaser of a home under a VA-guaranteed loan from the consequences of a default by a subsequent purchaser is to ensure that the original purchaser knows about the VA's release and waiver provisions before the default occurs.⁴¹ Many soldiers are unaware that they can ask the VA for releases from liability after selling their homes. Few understand the financial impact that the failure to obtain a release could have in the event of a subsequent purchaser's default.

Assistance After Default

When counseling a client who has received a notice of default or deficiency from the VA, an LAA first must determine when the client made the loan guarantee commitment. A veteran's obligation arises when he or she obtains the initial loan—not when the veteran subsequently transfers the property. The LAA then must seek to apply the statutory and regulatory standards that existed on the date of the original guarantee commitment.⁴² If the client obtained the loan before 1988 and a deficiency already exists, the LAA should advise the client to file a request for release from liability in conjunction with a waiver request.⁴³ The veteran must include evidence with both requests to substantiate the following

assertions: (1) any or all of the subsequent transferees are liable to the VA for the debt of the purchasing veteran; (2) the original loan was current when the first transferee acquired the property; and (3) the transferee was a satisfactory credit risk when he or she acquired the property.⁴⁴

The veteran can establish the first two elements with relative ease. The third element, however, probably will be harder to prove than the first two.⁴⁵ The veteran can assist the VA in making this determination by providing the VA with the results of any credit checks or employment verifications that he or she made on the transferee before selling the home, and by disclosing the transferee's occupation and income at the time of the sale. Any evidence the veteran possesses that would help the VA in arriving at its decision could be extremely beneficial to the veteran. The veteran should furnish this information to the VA regional office that maintains the veteran's file. As a general rule, this will be the office that originally approved the loan guarantee.

A request for release or waiver need not follow a specific format. Nevertheless, the request should refer to the appropriate statutory and regulatory sections under which the veteran is seeking relief and should provide all available evidence about the original transaction and the creditworthiness of the transferee. An LAA, however, should caution a veteran that the veteran has only one year after notification of indebtedness to request a waiver.⁴⁶

The one-year limitations period begins when the VA notifies the veteran of the indebtedness by certified mail. Whether the veteran actually must receive this notice to trigger the deadline is unclear. Although the statute apparently requires the veteran to receive the notice,⁴⁷ any veteran who could be liable if a subsequent purchaser defaults on a VA-guaranteed loan should apprise the VA of his or her changes of address. Doing so will obviate any dispute that

could arise if the veteran ever fails to receive a VA notice of indebtedness. A change of address notification should include the veteran's VA loan number. The veteran should send the address change to the VA regional office that initially handled the loan request.

A veteran who seeks a waiver of indebtedness under the "equity and good conscience" standard must present specific evidence to support his or her request.⁴⁸ This evidence should include the veteran's full financial statement and a statement describing how the VA indebtedness will affect the financial well-being of the veteran and his or her family.

A recent decision of the United States Court of Veterans' Appeals may help to illustrate the financial impact requirement. In *Stone v. Derwinski*,⁴⁹ the court affirmed the VA's finding that a veteran would suffer no financial hardship if compelled to pay the deficiency on a VA-guaranteed loan. The court remarked that the veteran was a relatively young individual whose present income approximately equalled his expenses.⁵⁰ The court noted that the veteran owned an expensive, unencumbered automobile and opined that he could reduce his monthly expenses through reasonable financial management.⁵¹ Concluding that the veteran could meet his obligations to the government without having to endure substantial hardship, the court affirmed the VA's decision to waive only one quarter of the veteran's debt.⁵²

Once a veteran and his or her attorney have assembled the necessary information, they must send the veteran's initial request for release or waiver to a hearing officer at the local VA regional office. The veteran may demand a hearing to present evidence supporting his or her request.⁵³ The veteran should not rely on the VA to produce the necessary documentation, but should be prepared to build his or her own record. After the hearing, the VA regional office's committee on waivers and compromises will issue a decision. The veteran

⁴⁴*Id.* § 36.4323 (g)(1)-(3).

⁴⁵See *supra* text accompanying notes 23-25; see also *infra* note 71 and accompanying text.

⁴⁶38 U.S.C.A. § 5302(b) (West 1991). This time period arguably applies only to waiver requests—not to requests for postsale, postforeclosure releases from liability.

⁴⁷"An application for relief under this subsection must be made within one year after the date on which the veteran receives notice by certified mail . . ." *Id.* (emphasis added).

⁴⁸See *Stone v. Derwinski*, 2 Vet. App. 56 (1992) (the Court of Veterans' Appeals will not substitute its judgment for that of the VA when reviewing waiver decisions). *Stone* illustrates that a veteran must build his or her factual record in a hearing before the agency. The evidence a veteran presents should comprise all testimonial and documentary evidence that supports the veteran's claim or request.

⁴⁹*Id.*

⁵⁰*Id.* at 58.

⁵¹*Id.*

⁵²*Id.*

⁵³An excellent text regarding advocacy and case development before the VA is M. WILDHABER ET AL., *VETERANS BENEFITS MANUAL* (1992); see also 38 C.F.R. pt. 19 (1991) (setting forth the Board of Veterans' Appeals rules of practice).

may appeal from this decision to the Board of Veterans' Appeals (BVA or Board). If the veteran is dissatisfied with the Board's decision, he or she can file an appeal with the Court of Veterans' Appeals.⁵⁴

Judicial Review of Release and Waiver Decisions

Created in 1988,⁵⁵ the Court of Veterans' Appeals is the first court to grant independent review of VA decisions. In its brief existence, the court has issued several crucial opinions addressing releases from liability and waivers of indebtedness. These decisions are important to practitioners because they determine the scope and manner of the court's review.

Federal law requires the Court of Veterans' Appeals to reverse a Board decision that is "clearly erroneous."⁵⁶ In applying this standard of review, the court must give the claimant "the benefit of the doubt."⁵⁷ The Court of Veterans' Appeals defined both terms in one early decision.⁵⁸ First, it announced that it will hold an agency finding to be "clearly erroneous" if, despite the existence of evidence supporting the agency decision, "the . . . court on the entire evidence is left with a definite and firm conviction that a mistake has been made."⁵⁹ The court then addressed the "benefit of the doubt" standard. It noted that the Board must resolve an issue in the veteran's favor if that issue was material to the Board's determination and an approximate balance exists between positive and negative evidence on the merits of the issue.⁶⁰ Accordingly, it concluded that the preponderance of the evidence must be against a veteran before the BVA may deny a veteran's claim for benefits or his or her request for release or waiver.

The benefit of the doubt standard differs significantly from the usual civil burden of proof applied in federal courts.⁶¹ The Court of Veterans' Appeals has emphasized that the standard applies only to the merits of an issue that is "material to the determination of a matter after evidence has been presented."⁶² The court also stressed that the benefit of the doubt standard does not ease a veteran's initial burden of submitting evidence sufficient to persuade a fair and impartial individual that the veteran's claim is well founded.⁶³

The Court of Veterans' Appeals also has instructed the VA on the formulation and documentation of the VA's internal decisions. Citing legislative history, the court has stated that the BVA must "identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. These decisions must contain clear analysis and succinct but complete explanations."⁶⁴ A "bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review.'"⁶⁵

Despite this clear guidance, the BVA occasionally will deny a veteran's claim or waiver request without articulating a legal rationale. These decisions provide fertile grounds for appeals.

The Court of Veterans' Appeals has reviewed several VA release and waiver decisions. In *Schaper v. Derwinski*,⁶⁶ the agency sought to collect a deficiency after the foreclosure of a VA home loan. The veteran who originally purchased the property had sold it to third parties who later defaulted on the loan. The VA paid the deficiency and sought indemnification from the veteran. The veteran requested a release from liability, but the VA denied this request, ruling that the subsequent purchaser had been an unsatisfactory credit risk because he had failed to make twelve timely loan payments.

⁵⁴ 38 U.S.C.A. § 7252(a) (West 1991). The Court of Appeals for the Federal Circuit reviews the decisions of the Court of Veterans' Appeals. See *id.* §§ 7261(a)(3), 7292(a).

⁵⁵ See Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, div. B, 102 Stat. 4105, 4122-38 (codified as amended at scattered sections of titles 36 and 38 U.S.C.).

⁵⁶ See 38 U.S.C.A. § 7261(a)(4) (West 1991).

⁵⁷ See *id.* § 5107(b) ("When . . . there is an approximate balance of positive and negative evidence regarding the merits of [a material issue of fact], the benefit of the doubt . . . shall be given to the claimant").

⁵⁸ *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

⁵⁹ *Id.* at 52 (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁶⁰ *Id.* (citing 38 U.S.C.A. § 5107 (West Supp. 1990)).

⁶¹ A civil claimant ordinarily must demonstrate to the fact finder that a preponderance of the evidence supports the claimant's assertion of fact.

⁶² *Gilbert*, 1 Vet. App. at 55.

⁶³ *Id.* (citing 38 U.S.C.A. § 3007(a) (West 1991)).

⁶⁴ *Id.* at 57.

⁶⁵ *Id.* (quoting *International Longshoremen's Ass'n v. National Mediation Bd.*, 870 F.2d 733, 735 (D.C. Cir. 1989)).

⁶⁶ 1 Vet. App. 430 (1991).

The Court of Veterans' Appeals reversed, holding that the agency had violated an express statutory directive when it judged the transferee's creditworthiness by his subsequent payment history.⁶⁷ The court, however, upheld the VA's denial of the veteran's request for a waiver of indebtedness, finding that this decision was supported by the record and was not arbitrary and capricious.⁶⁸

Schaper did not discourage the VA from applying an improper standard in other release decisions. This eventually provoked another rebuke from the Court of Veterans' Appeals. In *Elkins v. Derwinski*,⁶⁹ the VA refused to release a veteran from a debt retroactively after finding that the person to whom the veteran had transferred the property that secured the debt had failed to make twelve consecutive payments without default. Citing *Schaper*, the court condemned the agency decision as improper. It reiterated that basing an evaluation of a transferee's creditworthiness on events occurring after the transfer is a clear misapplication of the law.⁷⁰ The court again instructed the VA to outline more clearly the bases for its decisions in its memorandum statements.

The VA currently is revising its internal standards for determining the creditworthiness of transferees in rulings on

veterans' requests for releases from liability.⁷¹ The new standards will focus solely on the transferee's evident reliability when the property was conveyed.

Conclusion

Assisting a client who has been notified of a debt arising from a VA loan guarantee requires patience and persistence. As is true in all dealings with government agencies, an attorney must follow procedural rules and regulations carefully to maximize the client's chances of success. Nevertheless, congressional directives and the judicial oversight of the Court of Veterans' Appeals now assure that veterans will receive fair hearings.

Most properly documented waiver requests succeed—at least in part.⁷² An attorney should consider even a partial waiver to be a victory for the client. The recent judicial pronouncements of the Court of Veterans' Appeals have tipped the scales in favor of veterans. Astute advocates will take advantage of these new rules to aid their clients.

⁶⁷*Id.*

⁶⁸38 C.F.R. § 1.964(a)(2) (1991); see also *supra* notes 30-33 and accompanying text (discussing the equity and good conscience standard).

⁶⁹2 Vet. App. 422 (1992).

⁷⁰*Id.* at 428.

⁷¹Telephone Interview with Mrs. Misanko, Department of Veterans' Affairs Regional Office, St. Petersburg, Florida (June 3, 1992).

⁷²Agency figures compiled in March 1991 indicate that 73% of waiver requests in the first quarter of 1991 were at least partially successful. 4 Veterans' L. Rep. (Veterans Educ. Project, Inc.) 1005, (1991). These figures, which show a 300% increase in successful waiver requests since 1989, see *id.*, may be attributed primarily to the new statutory standards.

Tips and Observations from the Trial Bench

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Assignment policies in staff judge advocate offices where counsel rotate frequently from one section to another and the waning number of courts-martial often frustrate the efforts of trial counsel and trial defense counsel to gain experience in the mechanics of trying cases. Most trial practitioners learn

the craft by trial and error. In military practice, however, attorneys generally can try only a limited number of cases. Accordingly, trial counsel and defense counsel cannot learn easily all the skills they should. The results can be upsetting not only to counsel, but also to military judges. Although a

trial judge should be "patient, dignified, and courteous to litigants,"¹ an inexperienced counsel—often through no fault of his or her own—can test a judge's abilities to adhere to that standard.

This article comprises one judge's suggestions to counsel on how they may prepare themselves more thoroughly for the rigors of military trial practice. This advice should permit inexperienced trial practitioners to devote their undivided attentions to the cases and the issues before them—not to what military judges will do to them next. The examples used in this article derive from incidents that actually occurred during a three-month period in the summer and fall of 1992.

Pretrial Preparation

A judge usually will receive two important sources of information about a pending case several days before the trial begins. These sources are the charge sheet and the convening orders. Most judges study these documents closely to confirm that the specifications are formatted properly, that each specification actually states an offense, and that the convening orders correspond with the orders recorded in the referral blocks of the charge sheets. When a convening authority has issued several convening orders, a judge will draft a list of the court members who should be present at trial. A judge also will consider whether any of the specifications could be multiplicitous for findings or sentence.

If judges routinely must perform these functions, a trial counsel has no excuse for failing to do the same. If the trial counsel does not draft the charges and specifications personally, he or she at least should review them before the charges are preferred to verify that they are correct and to ensure that sufficient evidence exists to support each specification. Attention to detail is the key to successful pretrial preparation. If the charge sheet contains errors, the trial will not start smoothly and the trial counsel will begin the case at a disadvantage.

This judge recently has witnessed a number of pretrial errors that trial counsel easily could have avoided. In one case, the trial counsel submitted a specification alleging an ending date of "June 31, 1992" for acts occurring over a period of time. In another case, the Government went to court on a specification that the trial counsel obviously failed to review to ensure that it would survive a motion to dismiss on statute of limitations grounds.² In a third case, a trial counsel

prosecuting an accused for failing to obey a lawful order neglected to include in the specification the essential element that the accused had a duty to obey the order. In another prosecution for disobedience, the charge indicated that the accused had violated an order of a particular commander. Unfortunately, testimony from the accused's current commander later revealed that the commander named in the specification had left the unit two months before the incident allegedly occurred and actually did not issue the order that the accused was charged with disobeying. Finally, in one recent case, the convening orders listed a total of twelve members to sit on the case—eight officers and four enlisted members. The defense counsel could have sent the court-martial panel below quorum simply by raising a peremptory challenge against any of the enlisted members. To restore the venire to its proper balance, the trial counsel then would have had to strike two officer members. Because the trial counsel could have exercised only one peremptory challenge, he or she would have had to find a reason to challenge the second officer for cause—a chancy prospect at best. The convening authority probably would have had to detail additional enlisted members to restore the quorum. The military judge and the members well might have found the resulting delay frustrating—particularly because the trial counsel could have precluded this delay by ensuring that the convening authority detailed more than the minimum necessary number of enlisted members when the accused first requested enlisted membership on the court.

In this age of reduced case dockets, counsel have more time to spend in pretrial preparation than they once did. Nevertheless, they should keep in mind the regulatory guidelines for trial times. *Army Regulation 27-10*³ states that a special court-martial should commence within ten days after service of charges on the accused.⁴ Similarly, a general court-martial should begin within twenty days of service of charges.⁵ These guidelines originated in the "old days," when each counsel was trying ten to fifteen cases a month. They certainly should remain valid today.

A trial counsel should have each case substantially ready for trial before the case is referred. At that point, all that he or she should have to do is conduct the final interviews of the witnesses and inform them of the trial date. The trial counsel's staff judge advocate also should make sure that each accused is directed to the local defense counsel's office no later than the day on which charges are preferred. This ensures that the defense counsel has ample opportunity to prepare the accused's defense. Finally, the adage, "justice delayed is justice

¹ MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1990).

² See MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 907(b)(2)(B) (1984) [hereinafter MCM].

³ DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (22 Dec. 1989).

⁴ *Id.* para. 5-18(a)(2).

⁵ *Id.*

denied," is not without merit. Counsel must develop a sense of urgency about their activities. For a defense counsel, this means that a court-martial should have priority over administrative board proceedings.

Uncooperative attitudes and poor pretrial communications all too frequently prevent trial counsel and defense counsel from reaching negotiated settlements. A court-martial should be the culmination of the attorneys' efforts to settle their differences—not the first time that they discuss an issue.

One attribute of military justice is "open file" discovery. Military jurists pride themselves that the counsel in courts-martial do not "hide the ball" from their opponents. Too often, however, belated notifications of pleas, forum selection, witnesses, discovery, and motions disrupt the smooth flow of events at trials. Most judges have published rules of court with which counsel must become familiar. These rules should be an attorney's blueprint for trial preparation. Above all else, a counsel should comply with any time constraints that appear in the rules.

Pretrial preparation and adherence to rules of court are essential to an orderly presentation of evidence at trial. An orderly presentation of evidence allows the court to focus on relevant issues. Furthermore, a coherent and professional presentation of the case will enhance an attorney's credibility before the trier of fact. Accordingly, counsel should show opposing counsel anticipated trial exhibits before trial, including any sentencing exhibits that either counsel might present if the accused is convicted. They also should verify the accused's personal data on the charge sheet. Many judges and members cringe when, during sentencing, they learn for the first time that an accused really is a private first class—not a specialist. Finally, the trial counsel must investigate any pretrial restraint imposed on the accused long before the trial begins. The trial counsel also bears the responsibility of instructing commanders on the proper types, limits, and natures of pretrial restraints.

One final observation about pretrial preparation: the trial counsel has the duty of arranging for the presence of the court members.⁶ He or she must ensure that the members know when and where they must be present and what uniform they must wear. The trial counsel also must impress on the members the need to be prompt. During the court-martial of an accused charged with failure to repair, nothing is more disturbing than a delay in proceedings while the judge and the parties await the arrival of an absent court member. Finally, the trial counsel must prepare the deliberation room for the members—obtaining sufficient chairs and pencils, paper for balloting, a memorandum indicating who should be present, the order of entrance into the courtroom, and a seating chart, and placing them in the room before the members arrive.

Trial

Perhaps the most prolific source of errors for new trial counsel is the trial script, or "boilerplate." A trial counsel must know the sequence of events at trial. He or she cannot afford to muddle through the script. An attorney who must be corrected by the judge while reading the boilerplate appears unprofessional and loses credibility before the court members. Common sense suggests that one's initial impressions of a person have at least an unconscious effect on one's attitude toward that person. In a close factual case, a trial counsel cannot afford to offend the trier of fact during deliberations. Until a trial counsel masters the trial script, he or she should rehearse reading the script before each trial. To ensure that the record is complete, the trial counsel also should include in his or her recitation of the boilerplate the order number, the issuing headquarters, and the date of each court-martial convening order. Finally, in the first session in which court members are present, the trial counsel should list by rank and last name every member who is present. The trial counsel should announce absent members only when they have not been "viced" by another written order. When the counsel must announce an absent member, he or she should state the reason for the member's absence—for example, "Major Smith is absent and has been orally excused by the convening authority from participation at this court-martial."

The trial counsel—not the military judge—should account for the parties at each session of the court-martial. A good trial counsel never will surrender this responsibility to the military judge. Once again, this is an opportunity for the trial counsel to enhance his or her credibility before the court members. If the members infer that the trial counsel is in charge of the proceedings and see that he or she performs his or her duties astutely, this impression may facilitate their acceptance of the Government's case. A trial counsel should relish the opportunity to "perform" in front of the court members—to include giving the oaths and asking preliminary questions of all the witnesses. The trial counsel should not allow the defense counsel to perform these tasks. The trial counsel also can demonstrate his or her control over the courtroom by instructing each witness as soon as the witness enters the courtroom door—stating, for example, "Please step around and face me, raise your right hand to be sworn." The trial counsel then may direct the witness to the witness stand and ask the preliminary questions. The trial counsel never should allow a witness to enter the courtroom unless the witness knows what to do.

When asking preliminary questions, a trial counsel often will neglect to ask the witness's social security number. This information, however, can be very important if a retrial or rehearing is ordered—in our mobile society, a witness's social security number may be the command's only means of finding

⁶CRIMINAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK, JA 310, para. 1-24c (May 1992).

the witness. When asking preliminary questions of a service member, a trial counsel should obtain the witness's full name, rank, social security number, and unit of assignment. If the witness is a civilian, the trial counsel should ask the witness to state his or her full name, social security number, and residence address.

Witnesses often are nervous when they first enter the courtroom. The trial counsel can help to calm a nervous witness, and can ensure that the witness does not forget relevant information, by leading the witness during the preliminary questions—for example, asking, "Are you Mr. John A. Smits, whose social security number is 123-45-6789? Do you reside at 123 Apple Street, Nicetown, Texas?"

A trial counsel can ease the administrative responsibilities of orchestrating the court-martial by using a bailiff. Using a bailiff also may protect the trial counsel's credibility. A trial counsel inadvertently may create an appearance of impropriety by leaving the courtroom to obtain a witness—especially when the trial counsel returns with the witness after a delay of several minutes. Ideally, a bailiff should be a noncommissioned officer who can be respected and who can control the behaviors of witnesses and spectators at the trial. The trial counsel must brief the bailiff fully about the bailiff's duties, cautioning him or her to remain alert throughout the proceedings. The trial counsel also should give the bailiff a list of the witnesses and the order in which they will be called. Using this list, the bailiff can prepare each witness to enter the courtroom immediately after the preceding witness finishes testifying. The court-martial then will proceed smoothly and the court will not have to endure unnecessary delays while it waits for witnesses.

The judge and the court members will appreciate a judicious use of the court's time. One technique that permits an uninterrupted flow of events is the marking of trial exhibits before trial. If an attorney places the numbers or letters on the exhibits before trial, however, he or she must take care to mark the exhibits in the order in which they will be used. The court members and the judge will wonder what has occurred if the trial counsel offers "Prosecution Exhibit 5 for Identification" without even mentioning exhibits 1 through 4. A counsel can avoid nonsequential numbering or lettering by keeping a list of all exhibits and placing the correct number or letter on each exhibit when he or she first uses it.

Exhibits used at a pretrial hearing should be marked only as appellate exhibits if the proponent does not expect to use them during his or her case-in-chief. Any exhibit a proponent intends to present to the trier of fact, however, should be marked as a prosecution or defense exhibit for identification. Counsel also must remember to use the phrase "for identification" whenever they refer to exhibits until these exhibits actually are admitted into evidence.

If the proponent of an exhibit previously has shown it to the opposing counsel—preferably before trial, as suggested above—he or she need not present the exhibit to the opposing counsel again before showing it to a witness. In essence, the proponent need only say, "Sergeant Jots, I now show you Defense Exhibit B for Identification, previously shown to the trial counsel. Do you recognize that?"

In the past, military motions practice best could be described as bare bones. Unlike civilian trial attorneys, military counsel rarely, if ever, provided written briefs on anticipated motions. Although this practice is changing only gradually, counsel currently would be well advised to do more than merely provide a "notice of motion." Each motion should state the particular relief the party seeks and the legal basis for that relief.⁷ Both the trial counsel and the defense counsel should relish the opportunity to place their positions on the motion in writing before the judge.

Each counsel's argument on the motion should include supporting authority. Too often, a counsel will provide notice of a motion without actually revealing the precise basis for the motion to the military judge. Likewise, an opposing counsel rarely will respond to a motion in writing. A judge, however, ordinarily will want to receive as much information as possible on a motion before trial. If the judge can complete any necessary research before the trial begins, he or she should be able to frame the relevant issues, use court time judiciously, and issue a proper ruling. Counsel who actually organize written briefs before trial also tend to frame relevant issues more adeptly at trial than attorneys who argue off the cuff. In this time of reduced case dockets, no excuses should justify hurried or cursory motions practice.

After the judge disposes of motions, the defense counsel must enter a plea on behalf of the accused. Before the trial begins, the defense counsel needs to describe the trial process to the accused and tell the accused what he or she will have to do during the trial. The attorney must emphasize that the defense counsel—not the accused—will enter the plea. The defense counsel and the accused should stand when the judge asks for the plea and should continue standing while the defense counsel enters the plea.

The defense counsel must be able to enter a proper plea. Like many other military proceedings, courts-martial are very formal. Pleas need to be exact. When entering a plea by exceptions, or by exceptions and substitutions, the defense counsel should write out the plea and should provide a copy to the judge and the trial counsel. The plea must reflect an answer to each charge and each specification. If the accused pleads guilty or not guilty to all charges and specifications, however, the defense counsel may adopt a shorthand approach—simply announcing, "Your honor, the accused pleads to all charges and specifications: Guilty [or Not Guilty]." The actual plea

⁷MCM, *supra* note 2, R.C.M. 905(a).

should be the last words spoken when entering the plea; therefore, the defense counsel should not say, "Not guilty to all charges and specifications."

Once the pleas are entered, the trial on the merits begins. At this point, the judge will initiate a guilty plea inquiry, impanel the court members, or permit counsel to present their opening statements. Regardless of the type of trial, the trial counsel must adhere continually to his or her ethical obligations to seek justice. A trial counsel cannot become so involved with his or her role as an advocate that he or she forgets the trial counsel's underlying function as a protector of the military justice system.⁸ A trial counsel may promote military justice most effectively by protecting the record of trial for appeal—not by advancing novel concepts during the trial in an attempt to introduce cumulative evidence before the fact finder. In one recent case, the trial counsel sought to remove three coaccused from the courtroom, where they were watching the trial as spectators, while the alleged victim of a gang rape testified against the fourth coaccused. The trial counsel apparently gave no serious thought to the appellate issue of an accused's right to a public trial. In another case, a trial counsel sought to introduce the victim's sworn statement to the police as residual hearsay, even though the victim was willing and able to testify at trial. One common scenario is the attempted use of uncharged misconduct during trial. Unfortunately, trial counsel who use this tactic often appear to have devoted little thought to the precise grounds for admitting the uncharged misconduct. If an accused's misconduct is important to a case, the accused should be charged with that misconduct unless the statute of limitations prevents this. Even if the trial counsel does not discover the uncharged misconduct until his or her pretrial preparation, he or she might consider bringing an additional charge to aver the misconduct.

The following sections set forth some other suggestions that might help the trial performances of trial counsel and trial defense counsel:

Monitor the Judge

In every guilty plea case, the trial counsel must watch the judge to ensure that the judge inadvertently does not omit necessary explanations or rights advisements. A trial counsel who believes that a providence inquiry is defective must not hesitate to bring the defect to the judge's attention—after all, the identification and correction of defects is part of the trial counsel's duty of protecting the record.

Voir Dire

Many defense counsel ask prospective panel members leading questions during voir dire. This approach, however, may

not be the best option for the defense counsel. Asking non-leading questions encourages members to open up and, therefore, may provide the defense counsel with better insights and grounds for challenges than leading questions would. Accordingly, instead of asking if "all members agree with the principle of law that the accused is presumed to be innocent of the charges against her," a defense counsel could inquire, "Colonel Hart, what are your thoughts about the accused being presumed innocent of the charges against her?"

When a defense counsel asks such a question, the trial counsel should be prepared to protect the record by asking appropriate rehabilitative questions. Alternatively, the trial counsel can undermine the benefits the defense may gain from use of this tactic by asking leading questions in a "preemptive strike" approach before the defense counsel conducts voir dire.

Many trial counsel routinely oppose defense challenges for cause—apparently believing that, because they are trial advocates, they are supposed to thwart the goals of the opposing counsel. Nevertheless, when a legitimate basis for a causal challenge exists, nothing should prevent a trial counsel from joining in a challenge or even exercising that challenge before the defense counsel has the opportunity to do so. Like the judge, the trial counsel has a duty to ensure justice and fairness in the proceedings.

Address the Elements Charged

The trial counsel must ensure that the testimonies of Government witnesses address every element of each offense charged. For example, although the court-martial members may harbor no doubts at all that the victim of an indecent assault⁹ is not married to the accused, the trial counsel *must* introduce evidence to prove that element of the offense.¹⁰ He or she can do so easily by asking the victim, "What was your marital status on [the date of alleged offense]?" If the victim was married, the trial counsel should ask a follow-up question—"Who was your spouse?" The trial counsel and the trier of fact also would benefit if the counsel would describe in his or her closing argument how each piece of evidence proved a particular element of each offense. Too many trial counsel overlook the elements of the offenses after becoming preoccupied with other matters in their cases.

Laying Evidentiary Foundations

Many counsel can lay foundations for evidence only with great difficulty. This task, however, should be accomplished easily. An attorney should rehearse questions with the foundation witness before trial, framing these questions directly from the applicable evidentiary rule. For example, to prove

⁸STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.1(c) (2d ed. 1980).

⁹See UCMJ art. 134 (1988); see also MCM, *supra* note 2, pt. IV, ¶ 63.

¹⁰See MCM, *supra* note 2, pt. IV, ¶ 63(b)(1).

that a chain of custody document is admissible hearsay under Military Rule of Evidence 803¹¹ as a record of a regularly conducted activity, the proponent must establish, *inter alia*, that the entries on the record were made contemporaneously with the events recorded.¹² Nevertheless, an attorney only rarely will ask a witness, "When are entries placed on this form?"¹³

When an attorney struggles to lay a foundation before court members, the members will infer that the attorney lacks competence in the legal profession and his or her credibility will be diminished. If a counsel must ask foundation questions, he or she should ask the questions one after another until the foundation is laid.

Hearsay and Authentication

Counsel need to understand the difference, and the interplay, between the hearsay and authentication rules. The presence of an authenticating or attesting certificate on a document does not make the document admissible automatically. Authentication merely shows that the document is genuine. Accordingly, if the document contains hearsay, authentication is only the first step to entering it into evidence. The proponent also must lay the necessary foundation to admit the document under a hearsay exception.¹⁴

Asking Questions Properly

Many counsel have been remiss at asking nonleading questions. This is especially true in redirect examinations. Generally speaking, leading questions are appropriate only during cross-examinations. A redirect examination is not a cross-examination; therefore, leading questions ordinarily are not permitted in a redirect examination.

As a rule of thumb, counsel may assume that any question beginning with the word "did" is leading. During direct and redirect examinations, an attorney should use questions beginning with how, where, what, when, why, and who. When he or she fails to do so, the opposing counsel should object and should insist that the questioner adhere to the well-established rule forbidding the use of leading questions in direct examinations.

¹¹See *id.* M.L.R. Evid. 803.

¹²See *id.* M.L.R. Evid. 803(6).

¹³A military judge probably would not sustain an objection on grounds that this question is leading. Most military judges will allow even leading questions when counsel are asking foundation questions.

¹⁴For an excellent discussion on this topic, see *United States v. Duncan*, 30 M.J. 1284 (N.M.C.M.R. 1990). For a more recent examination of this issue, see *United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992).

¹⁵That an offense is listed as a lesser-included offense in the *Manual for Courts-Martial* does not mean that it should appear on the findings worksheet. The Government must possess some evidence that could persuade a reasonable fact finder that the accused committed the lesser offense.

The Findings

A judge will notice when a trial counsel depends on the judge to formulate the findings worksheet. Formulating the worksheet is the trial counsel's initial responsibility. A trial counsel should recognize which lesser-included offenses will be in issue before the case begins.¹⁵

By preparing the findings worksheet carefully, a trial counsel can allow the members little or no chance of making an irregular announcement. The language that the court must except or substitute to find the accused guilty of a lesser-included offense should be typed directly onto the sheet. The trial counsel also should provide the draft findings worksheet to the judge and the defense counsel at least one day before the trial begins.

Respect the Court Reporter

Counsel must be considerate of court reporters. An attorney should not continue to talk as he or she gives an exhibit to the reporter to mark. Moreover, both the trial counsel and the defense counsel should provide the court reporter with lists of their witnesses at the beginning of the trial. Each list should disclose the full name of every witness the attorney intends to call. If an attorney expects to call a witness who will use medical or scientific jargon or other arcane terms, the attorney should ask the witness how to spell these terms correctly and should provide this information to the court reporter before the witness testifies. A trial counsel or defense counsel who is courteous to court reporters will be amazed at how much better he or she will appear in records of trial than his or her inconsiderate colleagues.

Counsel should avoid unnecessary conversations during the proceedings. In particular, an attorney should not speak while another person is speaking.

Citation to Authority

When mentioning cases in arguments before judges, many counsel state the names of decisions that support their positions, but fail to give the citations for these decisions. This conduct is excusable only when a case is cited properly in a

written brief to which the counsel refers. As a matter of common courtesy, an attorney who feels compelled to mention a case in oral argument should not hesitate to show the judge where that case may be found.

Potential for Rehabilitation

During sentencing proceedings, many trial counsel seek to elicit opinions on the accused's potential for rehabilitation from witnesses who know very little about the accused.¹⁶ A trial counsel best can protect the record in this area by establishing a proper foundation for the witness's opinion and by declining to attach qualifiers to questions about the accused's rehabilitative potential. In particular, a trial counsel should refrain from asking about the accused's rehabilitative potential "as a soldier" or "as a member of the Armed Forces." The trial counsel's only permissible question is: "In your opinion, what is the accused's potential for rehabilitation?"¹⁷

Case law indicates that "rehabilitative potential" means more than a return to duty. It means a return to society.¹⁸ Only rarely will the Government identify an accused who cannot do anything productive in society. Accordingly, trial counsel would do well to incorporate into their trial practices the following guidance from the judges of the United States Court of Military Appeals: "[W]e believe it to be the rare case where it is necessary for the Government to introduce such opinions unless the accused places such potential in issue Having rehabilitative potential is a mitigating factor. Lacking rehabilitative potential is not an aggravating factor."¹⁹ In many cases, the risks of error arising from use of rehabilitative potential evidence will outweigh any advantages of presenting this evidence.

Posttrial Procedures

Defense Counsel

A defense counsel must prepare his or her client for the potential outcomes of the trial before the trial actually begins. In particular, the defense counsel must tell the accused what will happen if the accused is convicted. If the accused ultimately is convicted, the defense counsel should meet privately with the accused to discuss this matter again. This is especially important when the accused receives punishment other

than confinement, such as restriction or reduction. The defense counsel must tell the accused and the command that these punishments cannot be executed until the convening authority takes action on the case.

Trial Counsel

Judges discussing the posttrial duties of trial counsel often complain of three areas in which many trial counsel are remiss: (1) trial counsel frequently fail to collect the exhibits and give them to court reporters before leaving the courtroom; (2) they neglect to police courtrooms, deliberation rooms, and waiting rooms after their trials end; and (3) they fail to read records of trial carefully. The last offense may be the worst. Although trial counsel often keep records of trial for extended periods before forwarding them to trial judges, they apparently overlook many errors because they pay insufficient attention to details in the records. This neglect detracts substantially from a trial counsel's success at protecting the record.

Conclusion

This article was written in an attempt to improve the performance of counsel at courts-martial. Chiefs of military justice and senior defense counsel must monitor their subordinate attorneys carefully and must train them in the performance of their duties. A supervisory attorney can teach his or her subordinates most effectively by observing and commenting upon their performances at trial—not by sending them into the courtroom supported only by meager pretrial guidance and letting them "sink or swim."

Two recent cases illustrate this principle well. In the first case, a trial counsel who previously had served as a legal assistance attorney for several years was trying his first contested case before court members. The accused was a black female soldier. The inexperienced trial counsel exercised his peremptory challenge against the only black female member of the panel. When the defense counsel requested a racially-neutral reason for the challenge, the trial counsel responded that he need not give a reason because his challenge was peremptory. Although the trial counsel was remiss for not knowing about *Batson v. Kentucky*,²⁰ the trial counsel's chief of military justice also was at fault for allowing the trial counsel to proceed alone without knowing the rules for challenges.

¹⁶See *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990); *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

¹⁷MCM, *supra* note 2, R.C.M. 1001(b)(5); see also *Aurich*, 31 M.J. at 96.

¹⁸*Horner*, 22 M.J. at 294.

¹⁹*Aurich*, 31 M.J. at 95-96 & n.1.

²⁰476 U.S. 79 (1986).

In the second case, a trial counsel conducting the cross-examination of an accused sought to impeach the accused by introducing the written record of a nonjudicial punishment proceeding into evidence under Military Rule of Evidence 609²¹ as proof of a conviction. The defense counsel did not object. The defense counsel also called a military policeman, who testified without objection from the Government about exculpatory statements that the accused had made to him. In the first situation, the defense counsel should have objected because a record of nonjudicial punishment is inadmissible as evidence of a conviction for impeachment purposes.²² In the second situation, both counsel should have realized that the accused could not use the hearsay exemption for the admissions of a party opponent to introduce hearsay evidence of his own admissions.

²¹MCM, *supra* note 2, M.J. R. Evid. 609. ²²*See id.*; United States v. Brown, 23 M.J. 149 (C.M.A., 1986).

Undoubtedly, an attorney should gain experience in the courtroom. Nevertheless, the military justice system cannot afford to allow counsel to perform alone without ensuring that they are trained properly in rudimentary trial procedures and evidentiary rules. What irks judges the most is the inability of counsel to better themselves as trial advocates because they have not mastered the procedural requirements of court-martial practice. Counsel cannot be expected to learn everything they need to know from law school classes or the Judge Advocate Officer Basic Course. The responsibility for training rests with first-line supervisors. Professional development classes for trial counsel and defense counsel should include not only advocacy instruction, but also instruction and scenarios on procedural and evidentiary rules.

Using Humanitarian Activities as a Force Multiplier and as a Means of Promoting Stability in Developing Countries*

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Introduction

In the 1990s, the Department of Defense (DOD) will face challenges that were impossible to imagine several years ago. National social and economic problems, combined with an evolving new world order, have thrust the future role of the

military into the forefront of issues confronting the United States. Conflicts rage over the size of the defense budget and the need for a defense force in the absence of the Soviet threat.¹ Debates abound over what to do with the so-called peace dividend.² At the same time, the drug war continues,³ Iraq and Libya actively taunt world leaders,⁴ civil strife rages in the

*This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements of the 40th Judge Advocate Officer Graduate Course.

¹Barton Gellman, *Keeping the U.S. First*, WASH. POST, Mar. 11, 1992, at A1; David Hackworth, *A Pentagon in Dreamland*, WASH. POST, Feb. 23, 1992, at C3; John Lancaster, *In Today's Army Being All You Can Be May Require Bailing Out*, WASH. POST, Mar. 10, 1992, at A15; John Lancaster, *Top General Supports 150,000 U.S. Troops in Europe as Hedge*, WASH. POST, Mar. 4, 1992, at A20; *Plan Aims to Block New Superpower*, RICHMOND TIMES DISPATCH, Mar. 8, 1992, at A5; Gordon R. Sullivan, *How the Army Sees A New World*, WASH. POST, Feb. 23, 1992, at C3.

²David Hoffman, *Americans' Mood Limits Foreign Aid*, WASH. POST, Mar. 10, 1992, at A1; David Hoffman, *Foreign Aid's Eroding Consensus*, WASH. POST, Nov. 24, 1991, at A4; *Pentagon Spurns Aspin's Budget Cuts as 'Political'*, WASH. POST, Feb. 28, 1992, at A14.

³Michael Isikoff, *Bush, Latin Leaders Agree to Stepped-Up Drug Fight*, WASH. POST, Feb. 28, 1992, at A2; Michael Isikoff, *International Opium Production Up 8% Last Year*, WASH. POST, Mar. 1, 1992, at A4; Eugene Robinson, *Peru's Summit Stance Raises Questions for U.S. Anti-Drug Effort*, WASH. POST, Mar. 3, 1992, at A13.

⁴*Gadhafi Says 2 Men Can't Be Extradited*, WASH. POST, Mar. 3, 1992, at A14; *Kurds Flee Area Outside Safety Zone*, WASH. POST, Jan. 19, 1992, at A21; *Members Urging Possible Use of Force Against Iraq*, WASH. POST, Mar. 8, 1992, at A8; Caryle Murphy, *Report on Bombing Suspects Disputed by Libyans*, BRITON, WASH. POST, Feb. 12, 1992, at A26; Trevor Rowe, *Iraqi Official Warns that U.N. Personnel May Become Targets*, WASH. POST, Mar. 3, 1992, at A12; Trevor Rowe, *U.N. Finds 'Evolution' in Libyan Stance*, WASH. POST, Mar. 5, 1992, at A34; Trevor Rowe, *U.N. Set to Warn Iraq Anew*, WASH. POST, Mar. 10, 1992, at A13; Strobe Talbot, *High Noon Minus the Shoot-Out*, TIME, Feb. 10, 1992, at 39.

former Soviet Union with persistent challenges by Communist politicians who call for the downfall of Boris Yeltsin,⁵ peaceful coexistence continues to elude the Middle East,⁶ and Caribbean and Latin American nations persist in their age-old tradition of governmental instability.⁷ Poverty, hunger, and disease continue unabated in underdeveloped countries and are becoming increasingly more problematic in the former Soviet Union.⁸

Expanding the Role of the American Military

In this jumble of world events, the importance of the military in any capacity other than its traditional role may not seem apparent at first glance. Nevertheless, the military is—and will continue to be—involved with every one of these issues. Over the past seven years, Congress substantially has expanded the DOD's involvement in actions normally categorized as foreign assistance. With that expanded involvement has come the difficult task of picking a path through the mine field of constitutional and statutory restrictions that limit the DOD's authority to advance American foreign policy interests by providing disaster relief and humanitarian and civic assistance to other nations.

A Time to End the "Seat-of-the-Pants Approach"

[I]n a fragmented and challenging new world, American foreign policy needs a conceptual overhaul, the kind of coherent vision that it got in a simpler past from such men as Dean Acheson and George Kennan. A seat-of-the-pants approach to international relations, even one with its share of short-term successes, will not preserve American leadership.⁹

Learning the new rules under which it will have to operate is only part of what the DOD must do to adjust to the evolving world situation and to contribute to the development of America's foreign policy. The DOD must develop a cogent and workable strategy to ensure that it can fulfill its warfighting mission in the face of budgetary and personnel

cuts, while continuing to promote regional stability in the numerous trouble spots that threaten American interests. Without a strategy that takes into account the widest range of disciplines—political, psychological, economic, social, legal, and military—the DOD cannot hope to hold its own in this swiftly changing world. The DOD, of course, must develop its strategy in conjunction with other federal agencies, not only to ensure mutual support for national goals, but also to compel the development of goals vital to the United States into a much-needed comprehensive plan. For the United States to declare victory, pack up, and go home to bask in the glow of victory after spending the last forty years fighting the spread of communism would be incongruous. By adopting a policy of benign neglect toward the countries it formerly endeavored to protect, the United States would leave those countries prey to upheaval and instability that inevitably would require American attention and assistance. Devoting energy and money to creating conditions that will lead to permanent changes in those countries and that gradually will stabilize entire regions makes more sense politically and economically. The expanded authority Congress has given to the DOD provides a means of working toward that goal.

To the uninitiated, the DOD's new-found authority to engage in humanitarian and civic assistance may appear clear and unhampered. Statutory provisions and regulations, however, cannot be read in a vacuum. Many authorizations and limitations that affect the DOD's stabilization mission are not found in legislation that generally is considered to be military. This article will examine those authorizations and limitations by exploring the constraints of fiscal law and the statutory authorities for DOD actions. An analysis of these constraints will show the complexity of the expanding authority that Congress has given to the DOD and the need for Congress to allow the DOD a less restricted use of this authority.

The Constraints of Fiscal Authority

Why Worry About Fiscal Law?

A thorough analysis of the role of the military must include an examination of the military's fiscal authority. In the truest

⁵James Carney, *Yeltsin's Enemies*, TIME, Mar. 9, 1992, at 32; Rowland Evans & Robert Novak, *Time of Troubles for Yeltsin*, WASH. POST, Feb. 12, 1992, at A23; Blaine Harden, *Croatia Accused of Rights Violations*, WASH. POST, Feb. 15, 1992, at A29; Fred Hiatt, *Killings Rife in Nagorno-Karabakh, Moldova*, WASH. POST, Mar. 3, 1992, at A12; Laura Silber, *Serbs Place Bosnian City Under Siege*, WASH. POST, Mar. 3, 1992, at A13.

⁶Jill Smolowe, *Vengeance Is Mine*, TIME, Mar. 2, 1992, at 32.

⁷Lee Hockstader, *As Conflicts Wane, Central America Strives for Long-Term Stability*, WASH. POST, Jan. 19, 1992, at A20; Bruce W. Nelan, *No Time for Colonels*, TIME, Feb. 17, 1992, at 41; *3 Policemen Slain in Peruvian Strike*, RICHMOND TIMES-DISPATCH, Feb. 15, 1992, at A5.

⁸Bruce W. Nelan, *A Land of Stones*, TIME, Mar. 2, 1992, at 29; Eleanor Randolph, *Ex-Soviet Aid: How, What and to Whom?*, WASH. POST, Jan. 19, 1992, at A20; Carol Reed, *Albania Hit by Food Riots; Thousands Flee to Port*, WASH. POST, Mar. 1, 1992, at A24; Margaret Shapiro, *GI Rations Lift Moscow Pensioners*, WASH. POST, Feb. 12, 1992, at A1; Margaret Shapiro, *Moscow's Hard-Luck Flea Markets*, WASH. POST, Feb. 15, 1992, at A1; Jill Smolowe, *Bad to Worse*, TIME, Feb. 10, 1992 at 32.

⁹Richard Lacayo, *Boldness Without Vision*, TIME, Mar. 9, 1992, at 25; see also Zbigniew Brzezinski, *The West Adrift: Vision in Search of a Strategy*, WASH. POST, Mar. 1, 1992, at C1.

sense, the military legally cannot act without fiscal authority. Statutes, regulations, and directives may establish the military's mission, but the military is powerless to perform this mission unless Congress authorizes military activities and appropriates money to fund them. This constraint serves as the cornerstone of the fiscal responsibility the Constitution demands of the federal government.

Constitutional Authority

The Constitution is the basis for understanding the issues presented here. From that document flows all authority and responsibility for governing the United States. All legislative authority vests in the Congress.¹⁰ Only Congress can raise money to pay for the operation of the government.¹¹ Although the President is the Commander in Chief of the Army and Navy,¹² only Congress has the power to raise and support these forces.¹³

Congress's greatest power derives from the constitutional mandate that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹⁴ This clause gives Congress control over all the functions of the federal government, for without money, the government cannot function.

Congress has created a complex, yet workable method to ensure that control of the public fisc remains in its hands. In the process of appropriating money from the Treasury to support the operations of the government, Congress inescapably "defines the contours of the federal government."¹⁵

Congressional Authority

The Constitution empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in

any Department or Officer thereof."¹⁶ Congress has used this authority well, enacting statutes which ensure that it will be able to carry out its duties of controlling the expenditure and accounting of public funds. Before examining those statutes, a brief discussion of several elements of the budget process and Congress's use of powers is necessary to assure a full understanding of the issues.

The Budgeting Process¹⁷

Budgeting is a complex and time-consuming process. Congress must complete two steps to give a governmental agency or program money and the authority to spend it. In an appropriation bill, Congress designates a certain amount of money that can be taken from the Treasury and used for a specific purpose. Before appropriated money can be used, however, Congress also must pass an authorization bill allowing the money to be appropriated.¹⁸ Sometimes the authorization and the appropriation are contained in the same legislation, but often they are in separate bills.

The funding process begins with the formulation of proposed budgets by each governmental agency. These budgets are consolidated and submitted by the President to Congress.¹⁹ Separate authorization committees in each house of Congress then hold hearings. Working within the cost ceilings provided by their respective budget committees, they draft legislation to authorize appropriation of funds for agencies and programs in the consolidated budget. After completing its draft legislation, each committee provides it to the full house, which votes on it. If the House and Senate versions of the legislation differ, a conference committee will meet to work out a version that is acceptable to both houses. Both houses then will vote on this compromise version. Once a committee's draft legislation is approved, Congress sends it to the President for signature or veto. Appropriations committees of both houses follow the same procedures to produce legislation appropriating the desired level of funds from the Treasury. Only when Congress and the President have completed both procedures

¹⁰ U.S. CONST. art. I, § 1.

¹¹ *Id.* art. I, § 8, cl. 1.

¹² *Id.* art. I, § 2, cl. 1.

¹³ *Id.* art. I, § 8, cls. 12-14.

¹⁴ *Id.* art. I, § 9, cl. 7.

¹⁵ Kate Stith, *Congress's Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

¹⁶ U.S. CONST. art. I, § 8, cl. 18.

¹⁷ CONTRACT LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 506, FISCAL LAW DESKBOOK 1-16 (Aug. 1991).

¹⁸ 10 U.S.C.S. § 114a (Law. Co-op. 1991).

¹⁹ See 31 U.S.C.S. § 1104 (Law. Co-op. 1991) (requiring the preparation of the budget); *id.* § 1105 (setting forth the required contents of the budget).

will governmental agencies and programs have the funds they need to function.

Congress's Power of the Purse

An authorization act authorizes the expenditure of a specified amount for certain purposes. An appropriation act establishes the specific amount of money that can be used—and not necessarily the full amount authorized—and contains any additional restrictions Congress may wish to impose on the use of the money. To determine the extent to which Congress controls the functioning of the government, one need only take as an example the annual national defense authorization and appropriation acts, which typically comprise hundreds of pages.

The Constitution imposes one very powerful monetary restriction on Congress by limiting to two years the availability of appropriations for the "Armies."²⁰ Congress also can impose the two following limitations on military spending: it can appropriate less than the authorized amount or it can set aside amounts of money within the appropriation for specific purposes. Congress's authority to enact these limitations is virtually without restriction, other than the power of the President to veto the bill. The Supreme Court recently reiterated this point, stating that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."²¹

Statutory Authority

Congress has devised a statutory scheme to control the expenditure of public monies. The statutes cover every conceivable loophole that would allow a government agency to spend public funds without the authorization of Congress. The most important of those statutes are described briefly below.

The Purpose Statute

How does Congress come by its power to control the functioning of the government? Probably the most effective

means Congress has is a statute commonly referred to as the Purpose Statute.²² The key provision of the statute is the simple, but powerful, statement that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."²³ To remove all doubt about whether Congress actually is appropriating money in a piece of legislation, the statute provides, "A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made."²⁴

Congress defines the "objects" for which it makes an appropriation within the text of the authorization or the appropriation bill. It clarifies those "objects" by attaching any limitations it wishes to impose in either bill. When the bills contain different or conflicting limitations, the more restrictive provision governs. Congress also may impose a restriction by using a more specific appropriation within the primary appropriation.

In any case, funds from a general appropriation may not supplement a specific appropriation unless authorized by law.²⁵ That the specific appropriation is contained within the general appropriation does not change this rule.²⁶ Similarly, an agency cannot use a specific appropriation to fund the costs of other programs not named in the appropriation, even if it intends to "repay" the appropriation at a later time.²⁷ On the other hand, if Congress appropriates a lump sum for an agency and does not specify any restrictions on that appropriation, that agency may use the funds in any manner it deems proper, as long as this use comports with the general purpose of the appropriation.²⁸

Augmentation of appropriations is prohibited. An augmentation violates the constitutional prohibition against drawing money from the Treasury without an appropriation, regardless of whether it is effected by spending in excess of the amount that Congress has appropriated, by using one appropriation to pay the surplus costs of another, by retaining funds that the government has received from other sources, or by using unreimbursed details of personnel.²⁹ An augmentation also may violate the Miscellaneous Receipts Act,³⁰ the Anti-Deficiency Act,³¹ and the Purpose Statute.

²⁰U.S. CONST. art. I, § 8, cl. 12.

²¹Rust v. Sullivan, 111 S. Ct. 1759, 1796 (1991).

²²31 U.S.C.S. § 1301 (Law. Co-op. 1991).

²³*Id.* § 1301(a).

²⁴*Id.* § 1301 (d).

²⁵Secretary of Interior—Public Buildings—Supplement from General Appropriations, B-13468, 20 Comp. Gen. 272 (1940).

²⁶Secretary of Interior—Exclusive Availability of Purchase Appropriation, B-14967, 20 Comp. Gen. 739 (1941).

²⁷Secretary of Commerce—Use of Specific Appropriations for Purposes Other than Specified, B-129401, 36 Comp. Gen. 386 (1956).

²⁸LTV Aerospace, Inc., B-183851, 55 Comp. Gen. 307 (1975).

²⁹U.S. CONST. art. I, § 9, cl. 7.

³⁰31 U.S.C.S. § 3302(b) (Law. Co-op. 1991).

³¹*Id.* § 1341.

Why is any of this important to the military? A single illustration should show how easily violations of these statutes can arise for the unwary. Units conducting exercises overseas have medical personnel assigned to care for United States service members during the exercise. If a unit is conducting humanitarian and civic-assistance activities in conjunction with an exercise, the medical personnel responsible for the care of soldiers in the unit lawfully could not provide medical care for local civilians.³² That care may be provided only by medical personnel engaged in a medical readiness training exercise, conducted in conjunction with the main exercise. To mix the medical care would amount to using an appropriation for an improper purpose and would be an impermissible augmentation.

Even when Congress has expressed the purpose of an appropriation clearly, questions may arise about what Congress intended to include within that purpose. The Comptroller General is important in this context. Although the opinions of the Comptroller General are subject to review by the courts and do not bind the courts with regard to statutory interpretation, these opinions are binding on the executive branch.³³ Accordingly, much of the authority for fiscal law is found in Comptroller General opinions.

In determining what is encompassed in the purpose of an appropriation, the Comptroller General will consider that, "under the general rule of appropriation construction[,] an express provision is not necessary for each and every item of expenditure."³⁴ How, then does an agency know which expenditures fall within a congressional purpose? Citing an unprinted decision dated August 12, 1911, the Comptroller General stated,

It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execu-

³² A limited "exception" to this prohibition appears in the legislative history of the humanitarian and civic action statute, which uses as an example of permissible *de minimis* action "a unit doctor's examination of villagers for a few hours with the administration of several shots and the issuance of some medicines." H.R. CONF. REP. NO. 446, 100th Cong., 2d Sess. 333 (1987). The report warns that *de minimis* action "would not include the dispatch of a medical team for mass inoculations." See *id.*

³³ *Greene County Planning Bd. v. Federal Power Auth.*, 559 F.2d 1227, 1233-34, (2d Cir. 1977).

³⁴ *Secretary of Interior—Fire Fighting Servs.*, B-120676, 34 Comp. Gen. 195 (1954).

³⁵ *Major General Anton Stephan—Public Buildings, Erection—Temporary Storehouse*, B-17673, 6 Comp. Gen. 619 (1927).

³⁶ *Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine*, B-226065, 66 Comp. Gen. 356 (1987).

³⁷ *Secretary of Interior—Construction of Sewerage System for Use of Government and General Public*, B-123514, 34 Comp. Gen. 599 (1955).

³⁸ *Id.*

³⁹ *Utility Costs Under Work-at-Home Programs*, B-275159, 68 Comp. Gen. 502, 505 (1989).

⁴⁰ *Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General*, B-231445, 68 Comp. Gen. 337 (1989).

⁴¹ B-139510, 13 May 1959 (unpub.).

⁴² 31 U.S.C.S. § 1535 (Law. Co-op. 1991).

tion of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority.³⁵

The most troublesome part of this pronouncement is the necessary-and-proper requirement. In setting forth a "necessary expenses" test, the Comptroller General stated that "an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law."³⁶ An expenditure need not be for something that is the only way—or even the best way—for an agency to accomplish a specific purpose,³⁷ but the expenditure should pay for something that is more than merely desirable,³⁸ and that supports the agency's mission directly.³⁹ When two appropriations are reasonably available for an expenditure, the agency may choose to draw on either appropriation,⁴⁰ but it then is bound by this election, even after the chosen appropriation is exhausted.⁴¹

The Economy Act

A second statute, commonly called the Economy Act,⁴² also affects fiscal matters. This legislation allows the head of a government agency or a major organizational unit within an agency to obtain goods or services on a reimbursable basis by placing an order with another agency, or with another major organizational unit within its own agency. This is the method the United States Agency for International Development

(USAID) uses to obtain the services of the military in disaster relief efforts. Although this statute provides a limited means for agencies to obtain goods or services more conveniently or more cheaply than by using commercial entities,⁴³ the basic requirement that funds may be applied only to the objects for which they were appropriated still limits these transactions. An agency may not sidestep the Purpose Statute by obtaining goods or services under the Economy Act.

The Miscellaneous Receipts Statute

The Miscellaneous Receipts Statute requires any government official who receives money for the government from any source to deposit the money in the Treasury, unless another law provides otherwise.⁴⁴ This requirement precludes government agencies from using money received from nongovernmental sources to carry out purposes not approved by Congress or to augment congressional appropriations.

Limitations on Voluntary Services

This statutory provision prohibits officers or employees of the government from accepting voluntary services, or employing personal services exceeding those authorized by law, except when these services are needed during emergencies to safeguard human life or to protect property.⁴⁵ The provision is intended to ensure that the government is not open to later claims for payment for the work. It also precludes augmentation of appropriations and the use of voluntary services that have not been approved by Congress. For example, this statute would prohibit the use of United States citizens as volunteers in planning and carrying out humanitarian and civic-assistance activities without prior congressional approval.

The Anti-Deficiency Act

This statute prohibits government officers or employees from making or authorizing expenditures or obligations before

an appropriation is made, or making an expenditure or obligation that exceeds an amount available in an appropriation, unless Congress has authorized them to do so.⁴⁶ Violations of this statute subject the violator to administrative discipline⁴⁷ and criminal penalties.⁴⁸ Additionally, all violations of this statute must be reported immediately to the President and to Congress.⁴⁹

Acceptance and Use of Gifts

Congress has created two limited exceptions to the prohibition against augmenting appropriations. The secretary of each armed service may "accept, hold, administer, and spend any gift . . . of real or personal property, made on the condition that it be used for the benefit, or . . . the establishment, operation, or maintenance, of a school,⁵⁰ hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of his [or her] department."⁵¹ Separate "general gift" funds established for each military department hold deposits of these gifts in the Treasury.⁵² Each service secretary, however, has full discretion to disburse his or her service's funds without congressional approval. This exception is included primarily to illustrate what appears to be a loosened congressional purse string. Actually, however, because of the other requirements discussed in this section, this purse string still is drawn tightly, sharply restricting the use of these gifts.

With the second statutory exception—which deals with contributions for defense programs, projects, and activities—Congress did not adopt the illusory hands-off policy that typifies the first exception. The statute authorizes the Secretary of Defense to accept from "any person, foreign government, or international organization any contribution of money or real or personal property . . . for use by the Department of Defense,"⁵³ but also requires the Secretary to disclose all property accepted under this authority in a quarterly report to Congress.⁵⁴ The DOD may retain and use any property that it receives in the form in which it was donated, or it may sell or convert this property into other useable forms without specific

⁴³*Id.* § 1535(a)(4).

⁴⁴*Id.* § 3302.

⁴⁵*Id.* § 1342.

⁴⁶*Id.* § 1341.

⁴⁷*Id.* § 1349.

⁴⁸*Id.* § 1350.

⁴⁹*Id.* § 1351.

⁵⁰See 10 U.S.C.S. § 2605 (Law. Co-op. 1991) (establishing the Secretary's authority to accept and administer gifts for DOD dependents' education system); cf. *id.* § 2601.

⁵¹*Id.* § 2601.

⁵²*Id.* § 2601(b).

⁵³*Id.* § 2608(a).

⁵⁴*Id.* § 2608(e).

authorization.⁵⁵ Nevertheless, the DOD's use of the property must conform to any limits or restrictions "otherwise applicable to such program, project, or activity."⁵⁶ Moreover, the Secretary must deposit contributions of money and proceeds from the sale of property into the Defense Cooperation Account⁵⁷ and may not obligate or expend these funds "except to the extent and in the manner provided in subsequent appropriations Acts."⁵⁸ In this manner, Congress effectively maintains its control over these contributions. The statute essentially prohibits military personnel from accepting gifts for the government to use in providing disaster relief or humanitarian and civic-assistance missions.

Summary

This cursory review of the most important fiscal statutes clearly demonstrates that this area is complex and that government officials dealing with public monies must possess a certain level of expertise to maneuver within the limits of the law. Few, if any, problems occur at the highest levels of the DOD—the real problems arise at the action level. Well-intentioned, but prohibited, actions most likely will occur at the planning and execution levels—particularly when agencies seek to conduct humanitarian and civic assistance. Regardless of where these actions occur, the DOD's responsibility is to notify Congress and the President of any violations.

Preparing a comprehensive directive to cover all the legal, policy, and fiscal requirements for the conduct of humanitarian and civic assistance and requiring that all participants of these activities receive comprehensive instruction would not be a monumental task. It is, however, a necessary task. Reaching the finance officers, the lawyers, and the commanders is not enough. The soldiers on the ground who participate directly in assistance efforts must be aware of what is and what is not authorized. Otherwise, violations will continue to surface at Comptroller General and congressional levels. In examining the conduct of disaster relief and humanitarian and civic action, the importance of this instruction soon becomes apparent.

Military Operations and Exercises

To understand the relevance and impact of these statutory limitations on military actions overseas, one must define the

actions that are available to the military and how each might be used. An operation is "[a] military action or the carrying out of a strategic, tactical, service, training, or administrative military mission."⁵⁹ Military operations can range from combat missions to operations specifically aimed at providing disaster relief. An exercise is "[a] military maneuver or simulated wartime operation involving planning, preparation, and execution . . . carried out for the purpose of training and evaluation."⁶⁰ Accordingly, an exercise is primarily a training tool. For example, an exercise could be used to train combat engineers in the wartime skills of building roads and rudimentary buildings or medical personnel in the treatment of tropical diseases. Exercises can test many skills—among them, logistics, administration, legal services, public affairs, fiscal management, communications, engineering, and command and control. Additionally, an overseas exercise often will provide an incidental benefit to the local population in the form of humanitarian assistance and can provide a primary means for the DOD to carry out the stabilization activities advocated in this article.

Exercises and operations may take any of several forms. Combined actions involve the forces of two or more nations. Joint actions involve the forces of more than one service of the same nation. Actions may be both joint and combined or they may be unilateral, involving the forces of only one service of one nation.⁶¹ Guided by these basic definitions, an analysis of the use of military forces in the context of disaster relief and humanitarian actions is more productive.

Disaster Relief

Congress recognizes that foreign disaster relief is the responsibility of the nation whose people need assistance, but it also is aware that disasters may overwhelm the relief capabilities of many foreign governments. Accordingly, Congress has acted to provide other countries with necessary assistance and, in doing so, has acknowledged the DOD's unique capability to respond quickly and efficiently to these emergencies.

Congressional policy on international disaster relief is set out in the Foreign Assistance Act.⁶²

The Congress, recognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade

⁵⁵*Id.* § 2608(d), (f).

⁵⁶*Id.* § 2608(f).

⁵⁷*Id.* § 2608(b)(2).

⁵⁸*Id.*

⁵⁹DEPT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (June 1, 1987) [hereinafter DOD DICTIONARY].

⁶⁰*Id.*

⁶¹*Id.*

⁶²See 22 U.S.C.S. §§ 2151 to 2349aa-9 (Law. Co-op. 1991).

disasters is an important expression of the humanitarian concern and tradition of the people of the United States, affirms the willingness of the United States to provide assistance for the relief and rehabilitation of people and countries affected by such disasters.⁶³

This legislation authorizes federal agencies to provide relief in "natural and manmade disasters"—including assistance to refugees⁶⁴ and persons displaced by civil strife.⁶⁵ The President may furnish assistance "on such terms and conditions as he [or she] may determine."⁶⁶ In 1979, President Jimmy Carter created the United States International Development Cooperation Agency (IDCA), delegating to that agency his functions under the Foreign Assistance Act, and allocating to the Director of the IDCA the funds that Congress had made available to carry out this portion of the act.⁶⁷ At the same time, President Carter moved USAID from the Department of State to the IDCA and designated the USAID Administrator as the Special Coordinator for International Disaster Assistance.⁶⁸ In this capacity, the Administrator may "call upon the resources of any agency of the U.S. Government to provide emergency relief or technical assistance in disaster preparedness."⁶⁹ The decision to provide assistance, however, must be made "in consultation with the Secretary of State."⁷⁰

The DOD has no independent authority to engage in foreign disaster relief—although the DOD directive on the subject provides an exception for a military commander "at the

immediate scene of a foreign disaster," who may provide relief "when time is of the essence and when humanitarian considerations make it advisable to do so."⁷¹ Defense Department policy clarifies that, under the authority of the Economy Act,⁷² any such response is "[s]ubject to overriding military mission requirements."⁷³ The Assistant Secretary of Defense for International Security Affairs (ASD(ISA)),⁷⁴ shall decide what action the DOD will take in response to a request for assistance in providing foreign disaster relief. If the ASD (ISA) determines that the DOD should participate in the relief effort, the Joint Chiefs of Staff (JCS) will direct the relief operation.⁷⁵

Congress left indeterminate the types of relief it had authorized, specifying only that the President must "insure that the assistance provided . . . shall, to the greatest extent possible, reach those most in need of relief and rehabilitation as a result of natural and manmade disasters."⁷⁶ Only infrequently, in specific authorizations, does Congress state in detail the relief that should be provided.⁷⁷ The DOD, however, offers some guidance to allow DOD components to plan for relief contingencies, stating that "[n]ormally [relief] includes humanitarian services and transportation; the provision of food, clothing, medicines, beds and bedding, temporary shelter and housing; the furnishing of medical materiel, medical and technical personnel; and making repairs to essential services."⁷⁸ The pertinent DOD directive gives detailed pricing guidance for reimbursement under the Economy Act⁷⁹ and requires the military departments to prepare and forward bills for the assistance they render.⁸⁰

⁶³*Id.* § 2292(a).

⁶⁴*See id.* § 2292f.

⁶⁵*Id.* §§ 2292i, 2292l, 2292o.

⁶⁶*Id.* § 2292(b).

⁶⁷Exec. Order No. 12,163, 44 Fed. Reg. 56,678 (1979), reprinted in 22 U.S.C.S. § 2381 note (Law. Co-op. 1991).

⁶⁸*See* 22 U.S.C.S. § 2292b (Law. Co-op. 1991).

⁶⁹*Id.*

⁷⁰Exec. Order No. 12,163, 44 Fed. Reg. 56,678 (1979), reprinted in 22 U.S.C.S. § 2381 note (Law. Co-op. 1991).

⁷¹DEPT OF DEFENSE, DIRECTIVE 5100.46, FOREIGN DISASTER RELIEF, para. IV.C. (Dec. 4, 1975) [hereinafter DOD DIR. 5100.46].

⁷²31 U.S.C.S. § 1535(a)(3) (Law. Co-op. 1991).

⁷³DOD DIR. 5100.46, *supra* note 71, para. IV.B.

⁷⁴*Id.* para. IV.A.

⁷⁵*Id.* para. V.C.

⁷⁶22 U.S.C.S. § 2292(c) (Law. Co-op. 1991).

⁷⁷For example, Congress has provided that, in dealing with "the longer term rehabilitation and resettlement needs of displaced persons and other innocent victims of civil strife" in Africa, "[f]unds for this purpose should be used to assist African governments in providing semipermanent housing, potable water supply systems, and sanitary facilities which are generally not provided by existing refugee relief agencies." *Id.* § 2292l(a).

⁷⁸DOD DIR. 5100.46, *supra* note 71, para. III.C.

⁷⁹*Id.* para. VII.

⁸⁰*Id.* para. VII.B.

Clearly, the tasks related to assisting disaster victims are uniquely within the capability of the military. No other government agency is as well equipped, trained, supplied, and staffed for operations in adverse conditions as the Armed Forces. The training benefit that accrues to the military from providing such assistance, augmented with full reimbursement for the cost of goods and services provided, more than makes up for the disruption of normal activities.

As stated above, one problem associated with foreign disaster relief activities is that those who carry out the assistance generally are unaware of the fiscal rules. At intermediate levels, a tendency exists in these situations to forget that the normal rules remain in effect despite the emergency. As difficult as this may be to accept—especially when one is dealing with human tragedies—Congress does not fund the Department of Defense to provide international disaster relief. Unless the agencies that are funded for that purpose properly request and pay for DOD materials and services, DOD personnel legally may not be able to provide the victims of disasters with the assistance they need. Transportation, medical care at military facilities, acceptance of voluntary services, and donations to be passed on to victims are areas vulnerable to violations of statutory prohibitions during these situations. The DOD must reemphasize the need for commanders to ensure that everyone connected with foreign disaster relief efforts understands and obeys the fiscal constraints under which the DOD must operate.

Although the DOD can capitalize on the positive effects of its involvement in foreign disaster relief efforts, no good reason exists to press for any extension of authority to conduct these activities. Assuming direct responsibility for planning, coordination, or any other aspect of disaster relief could overtax the military in these days of decreased budgets and personnel strength and could require the hurried development of expertise not currently in the DOD inventory. Even so, the DOD can—and should—emphasize its participation in disaster relief actions when arguing against defense budget cuts.

Humanitarian and Civic Assistance

DOD Violations Lead to Change

Before 1985, the DOD had no independent authority to provide humanitarian or civic assistance. It could conduct

these activities only at the request of another government agency under the authority of the Economy Act, or incidentally to its participation in security assistance programs.⁸¹ After the Comptroller General opined that the DOD had violated the Purpose Statute and—possibly—the Anti-Deficiency Act when DOD personnel conducted humanitarian and civic-assistance activities during combined exercises in Honduras,⁸² Congress included in the 1985 DOD Appropriations Act a provision giving the DOD limited authority to conduct activities of this kind “incidental[ly] to authorized operations.”⁸³ In 1986, Congress gave the DOD permanent authority to conduct broad humanitarian and civic-assistance activities in conjunction with military operations.⁸⁴

Background and Development

The actions of United States forces during a six-month, joint, combined military exercise in Honduras became the focus of intense scrutiny by Congress and the Comptroller General when DOD personnel used operation and maintenance (O&M) appropriations for construction activities, training of Honduran military forces, and humanitarian and civic assistance to Honduran civilians. The Comptroller General concluded that the DOD improperly used O&M appropriations to fund security assistance and foreign aid—activities specifically provided for in other appropriations—and that it had exceeded the statutory \$200,000 limit on construction projects.⁸⁵

The Comptroller General pointed out that American service members had provided humanitarian and civic assistance “on an almost daily basis” throughout the exercise. Medical personnel treated “over 46,000 Honduran civilian medical patients [and] 7000 dental patients,”⁸⁶ and administered “approximately 200,000 immunizations.”⁸⁷ Veterinary personnel treated “more than 37,000 animals.”⁸⁸ United States “forces [also] transported U.S.-donated medical supplies, clothing, and food” throughout Honduras and, “[i]n one case, a team of 15-20 Navy Seabees constructed a 20 foot-by-80 foot schoolhouse at the Village of Punta Piedra, using AID-supplied materials.”⁸⁹

In response to a Comptroller General request for an opinion, the DOD General Counsel acknowledged that the DOD had no authority other than the Economy Act to conduct humanitarian and civic assistance. At the same time, perhaps unaware of the General Counsel’s letter, the Deputy Secretary

⁸¹ Honduras Military Exercises, B-213137, 63 Comp. Gen. 422 (1984).

⁸² *Id.*

⁸³ Department of Defense Appropriations Act of 1985, Pub. L. No. 98-473, § 8103, 98 Stat. 1837, 1942 (1984) [hereinafter Stevens Amendment].

⁸⁴ 10 U.S.C.S. § 401 (Law. Co-op. 1991).

⁸⁵ Honduras Military Exercises, B-213137, 63 Comp. Gen. 422, 422-429 (1984).

⁸⁶ *Id.* at 472.

⁸⁷ Letter from Comptroller General to Rep. Bill Alexander, para. IIIB, n.17 (Jan. 30, 1986) [hereinafter Comp. Gen. Letter] (updating Honduras Military Exercises, B-213137, 63 Comp. Gen. 422 (1984)).

⁸⁸ Honduras Military Exercises, B-213137, 63 Comp. Gen. 422, 472 (1984).

⁸⁹ *Id.* at 472.

of Defense asserted that these activities were "permissible under current law when they [were] incidental to legitimate exercise activities and [were] conducted at no incremental cost . . . solely to accomplish an exercise mission."⁹⁰ After considering that assertion, the Government Accounting Office responded that the DOD's actions in Honduras "went beyond a level of assistance that could be described as incidental, but were instead designed as major exercise activities in their own right."⁹¹

The two houses of Congress had very different reactions to the Comptroller General opinion. The House Committee on Appropriations stated that "such [a] diversion of funding from properly appropriated purposes is unwarranted" and "direct[ed] that the Department of Defense take such steps as necessary to prevent recurrence of such improprieties in the future."⁹² The Senate, however, provided an unusual twist to the issue. A Senate committee acknowledged the Comptroller General's finding that the DOD had violated the Purpose Statute but—taking an approach that differed greatly from that adopted by the House—went on to say,

The Committee agrees that such activities should be carried out primarily by agencies of the Federal Government assigned responsibility. However, the Committee does not believe that Congress intended completely to foreclose Defense Department activities which yield social, humanitarian, or civic benefits. To the extent that such benefits are incidental to authorized operations, reasonable expenditures of this kind should be allowable.⁹³

The full Congress responded to the Comptroller General decision by enacting what commonly is referred to as the Stevens Amendment to the 1985 Defense Appropriations Act.⁹⁴ This legislation authorized the DOD to use operation and maintenance (O&M) funds for "humanitarian and civic assistance costs [that are] incidental to authorized operations." Significantly, the conference report on the Stevens Amendment suggested that the DOD limit this authorization to activities incidental to exercises that are directed or coordinated by the JCS⁹⁵ and the DOD has accepted and implemented that limitation.⁹⁶

⁹⁰Comp. Gen. Letter, *supra* note 87, para. III.B.

⁹¹*Id.*

⁹²*Id.*

⁹³S. REP. No. 636, 98th Cong., 2d Sess. 37 (1984).

⁹⁴Stevens Amendment, *supra* note 83.

⁹⁵H.R. REP. No. 1159, 98th Cong., 2d Sess. 386 (1984).

⁹⁶Comp. Gen. Letter, *supra* note 87, para. III.B.

⁹⁷*Id.* para. III.C.

⁹⁸10 U.S.C.S. § 401 (Law. Co-op. 1991).

The Comptroller General subsequently interpreted the Stevens Amendment in an unusual way. Rather than accepting the amendment as an acknowledgement that the DOD already had authority to conduct humanitarian and civic assistance, the Comptroller General saw it as legislation intended "to ensure that [the Comptroller General's 1984 decision] did not prevent DOD from carrying out otherwise authorized O&M-funded activities merely because they yield social, humanitarian, or civic benefits."⁹⁷ This interpretation placed the Stevens Amendment in a favorable light and avoided the issue as the Senate committee actually had posed it. Nevertheless, because the Comptroller General opinion that prompted the legislation focused on the DOD's lack of authority to conduct these activities under any legislation other than the Economy Act, it necessarily found that the DOD had violated the Purpose Statute by using O&M funds to conduct these activities. When the Senate committee said that it did not believe that "Congress [had] intended completely to foreclose Defense Department activities which yield social, humanitarian, or civic benefits," it had to mean that Congress did not intend to foreclose these actions when it enacted the Purpose Statute. Combined with the committee's earlier statement that it "agree[d] that such activities *should* be carried out *primarily* by the agencies . . . assigned responsibility," this statement strongly implies that the committee intended to recognize an exception to the Purpose Statute and associated fiscal laws. This "exception," of course, is not law, but it might as well be, given the legislation that subsequently developed in this area. Without openly recognizing that providing humanitarian and civic assistance is within the purview of USAID—which receives specific appropriated funds to carry out that work—the committee created an atmosphere that ultimately brought about legislation giving the DOD much broader authority.

DOD Authority

During the Comptroller General's investigation of the Honduran exercise, the DOD pressed for, and obtained, permanent statutory authority to provide humanitarian and civic assistance "in conjunction with authorized military operations" in foreign countries.⁹⁸ This authority is available only if the secretary of the military department concerned

"determines that the activities will promote—(A) the security interests of both the United States and the country in which the activities are to be carried out; and (B) the specific operational readiness skills of the members of the armed forces who participate in the activities."⁹⁹ The key provision is the second one, which mandates that the primary purpose of an exercise must be to train United States personnel. The Secretary of State specifically must approve these activities and must give Congress a full report on their conduct in any foreign country.¹⁰⁰ Moreover, activities carried out under this authority "shall complement, and may not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States."¹⁰¹

The emphasis on training, and the lack of emphasis on long-term development programs, provide the only distinctions between military humanitarian and civic assistance and assistance provided by USAID and other governmental agencies. Congress's insertion of this requirement, which already existed in other fiscal laws, would have been puzzling, were it not for the legislative history of the Stevens Amendment. In effect, the requirement is creative legislation that signals congressional understanding and acceptance of the similarities and possible duplications in authority between the actions that Congress has authorized the DOD to carry out and the actions for which USAID is responsible. Whatever the reason, the requirement easily is met by emphasizing the training focus of military actions—that is, the DOD may use O&M appropriations to conduct humanitarian and civic assistance in conjunction with exercises that are conducted primarily to train United States forces. Because these activities are not covered by a more specific appropriation and are not otherwise prohibited by law, they do not violate the Purpose Statute.

Types of Activities Authorized

The pertinent federal statute defines humanitarian and civic assistance as "(1) medical, dental, and veterinary care provided in rural areas of a country; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of basic sanitation facilities; and (4) rudimentary con-

struction and repair of public facilities."¹⁰² Coincidentally, each of these actions are direct mission requirements of United States forces for which the military services realistically cannot train within the United States, often because of statutory restrictions.

The benefits that may accrue to developing countries—even if one discounts the improvements that American troops leave behind—are easy to see. In working with United States forces to plan and carry out civic-assistance projects, foreign participants—be they civil engineers, health care providers, or foreign military personnel—will gain valuable experience in planning, logistics, accounting, and other skills that can be used in building the infrastructure of their country.

Funding Issues

Congress created a morass by providing three distinct authorities for spending under this statute. The first provides that expenses that are "a direct result of providing humanitarian and civic assistance" must be paid from "funds specifically appropriated for such purposes."¹⁰³ The next sentence provides the second authority, stating, "Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated pursuant to paragraph (1)."¹⁰⁴ The conference report provided some guidance on the meaning of this provision, although it did not put a dollar figure on what the report terms "de minimis expenditures." The conferees emphasized that "they had in mind activities that have been commonplace on foreign exercises for decades" and gave two specific examples of these activities.¹⁰⁵ The third authority is the Stevens Amendment, which authorizes costs "incidental to authorized operations."¹⁰⁶ Neither Congress, nor the Comptroller General, has provided any definition or guidance on what "incidental" means. The DOD also has been silent on this issue.

Because appropriations for humanitarian and civic assistance are relatively small, exercise participants always are looking for additional money for projects. Providing cogent advice on what expenditures are authorized under each of these three authorities is a challenge. The DOD either should adopt the

⁹⁹*Id.* § 401(a)(1).

¹⁰⁰*Id.* § 401(b), (d).

¹⁰¹*Id.* § 401(a)(2).

¹⁰²*Id.* § 401(e).

¹⁰³*Id.* § 401(c)(1).

¹⁰⁴*Id.* § 401(c)(2).

¹⁰⁵See generally REPORT, *supra* note 32.

¹⁰⁶Stevens Amendment, *supra* note 83.

language of the conference report officially to clarify the meaning of "minimal expenditures" or should press Congress to codify a definition of that term. Furthermore, it should ask Congress to clarify or to eliminate the incidental expenditure authority. As a practical matter, both authorities arguably generate more confusion, and take more time to interpret, than they are worth.

As is the case with DOD actions in disaster relief efforts, a general lack of knowledge of applicable fiscal constraints exists among participants in exercises involving humanitarian and civic action projects. A complex procedure exists for cost allocation, complicated by statutory funding constraints on construction costs, rules limiting the authority of federal agencies to fund the expenses of foreign countries, restrictions that apply when the United States deals with nonmilitary personnel for the provision of subsistence and medical care, and DOD regulations dealing with transportation costs and authorizations. Each of these areas provides the potential for violations of the fiscal laws discussed above. The DOD has not published a directive on humanitarian and civic assistance and has not provided comprehensive guidance on these complex and confusing issues. This has resulted in reduced planning efficiency and has left the DOD open to inadvertent and even deliberate violations of fiscal laws.

Continuing Expansion of DOD Authority

Congress obviously has become convinced of the DOD's ability to manage the humanitarian and civic-assistance exercise program because it consistently has given the DOD more control over this program with fewer monetary constraints. The first appropriation under the humanitarian and civic action authority was for \$3 million for one fiscal year.¹⁰⁷ The second appropriation was for \$16.4 million over a five-year period.¹⁰⁸ The most recent appropriation carries no limit, but is merely a part of the Commander in Chief's contingency fund appropriation.¹⁰⁹ Although the DOD still must report to Congress in great detail the assistance that the Armed Forces have provided to foreign nations, this merging of the appro-

priation into the contingency fund has given the DOD greater flexibility to manage the program. Moreover, Congress has authorized the DOD to assist in funding the expenses of foreign participants in combined exercises.¹¹⁰ The DOD can use this authority to increase the exercise program.

Interaction with Security Assistance¹¹¹

Security assistance serves a number of purposes: it helps allies and friendly countries to defend themselves and to deter threats of outside interference; it gives us influence to help mediate conflicts; it helps sustain our access to valuable bases in strategic areas; and it gives us the opportunity to promote the importance of respecting civilian government and human rights. Security assistance also enables allies and friends to accept defense responsibilities that we might otherwise have to assume ourselves—at much greater cost in funds and manpower. Dollar for dollar, it's the most cost-effective security money can buy.¹¹²

From this statement of the purposes of security assistance, one easily can see how the conduct of humanitarian and civic-assistance exercises dovetails with national security objectives. The security assistance program falls under the Foreign Assistance Act¹¹³ and the Arms Export Control Act.¹¹⁴ It has programs covering grants and loans to foreign nations, foreign military sales of defense materials and services, international education and training for foreign military personnel, peacekeeping operations, and economic support. Security assistance is a highly regulated and complex area that is covered by a web of statutory prohibitions, such as the general prohibition against providing training for police.¹¹⁵ Explained in very general terms, security assistance initiatives usually require a foreign nation to pay for the materials and services that it receives from the United States. American participants in exercises involving humanitarian and civic assistance

¹⁰⁷ *Id.*

¹⁰⁸ 10 U.S.C.S. § 401(f) (Law. Co-op. 1991).

¹⁰⁹ National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 902, 105 Stat. 1290, 1450 (1991).

¹¹⁰ 10 U.S.C.S. § 2010 (Law. Co-op. 1991).

¹¹¹ For an overview of the security assistance program, see Carl J. Woods, *An Overview of the Military Aspects of Security Assistance*, 128 MIL. L. REV. 71 (1990).

¹¹² DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT, *THE MANAGEMENT OF SECURITY ASSISTANCE*, at 1-1 (9th ed. 1989) (quoting former Secretary of State George P. Schultz).

¹¹³ See 22 U.S.C.S. §§ 2301 to 2349aa-9 (Law. Co-op. 1991).

¹¹⁴ *Id.* §§ 2751-2796d.

¹¹⁵ *Id.* § 2420(a).

frequently violate security assistance restrictions simply because they are unaware of these prohibitions. Nevertheless, security assistance programs can be used in conjunction with combined training exercises to enhance the effect of humanitarian and civic-assistance programs.¹¹⁶

Military Civic Action

The purpose of military civic action is tied closely to the purposes of security assistance and humanitarian and civic assistance. Military civic action is defined as follows:

The use of preponderantly indigenous military forces on projects useful to the local population at all levels in such fields as education, training, public works, agriculture, transportation, communications, health, sanitation, and others contributing to economic and social development, which would also serve to improve the standing of the military forces with the population. (U.S. forces may at times advise or engage in military civic actions in overseas areas.)¹¹⁷

Because military civic action focuses on helping the military forces of a foreign nation to gain the support of the civilian population to combat "subversion, lawlessness, and insurgency,"¹¹⁸ United States civil affairs personnel serve primarily as advisors in peacetime.¹¹⁹ Accordingly, military civic action forms a part of the security assistance program and is done on a reimbursable basis. The importance of military civic action to the issues of this article is the use that can be made of civil affairs personnel during combined exercises in which humanitarian and civic action activities are conducted.

One issue discussed in the 1984 Comptroller General opinion arose from the training that American service members provided to Honduran forces. The DOD argued that this training was intended merely to enhance interoperability and safety. The Comptroller General, however, found that the training was comparable to training normally and properly provided to foreign military personnel under a security assistance program and concluded that this training should have been funded from security assistance appropriations.¹²⁰ With this restriction in mind, civil affairs personnel can provide valuable support to exercises in which humanitarian and civic-assistance projects are carried out. They can use these exercises to train for the

varied tasks that they must perform in wartime or when acting as advisors in connection with security assistance programs.

Stability: How Do We Get There from Here?

A Need to Rethink Our Approach

For the American foreign policy establishment, as it has expressed itself in decades of working with Latin militaries, it is a matter of principle that American values will, with enough exposure, rub off on the Latins, who will gradually come to embrace the American way of life.¹²¹

Clearly, the state of Latin America today demonstrates that this ethnocentric way of viewing the world is not the solution. Other countries that come into their own through their fights for democracy need not become "little Americas." What they must become are countries dedicated to developing a stability and humanity that fits within their own cultural and social histories. The chaotic conditions that exist in so much of the world are a continuing reminder that democracy sometimes does not equate to stability and prosperity. With all the evidence before us, we have yet to devise a workable solution to these problems. Although we have ample evidence of solutions that have no lasting effect, we seem unwilling to try approaches that deviate from a mind-set that says ours not only is the best way, but also is the only way—because we hold the purse strings.

That the United States take the lead in working toward global stability is imperative. Despite those who advance isolationist views, the United States cannot turn its back on the world and its needs by arguing that the communist threat no longer exists. We must face the reality of a much more powerful global threat that, if left unchecked, will be more destructive than communism ever could have been. The chaos in virtually every part of the world that confronts us daily in the media may seem far removed from our relatively stable society, but these conditions quickly can escalate into events that will affect us profoundly—for example, terrorist bombings, the taking of hostages, the Haitian refugee situation, Grenada, Panama, and the Gulf War. Failing to confront these issues and to use all the resources we have at hand will be costly. It will cost us money and it will cost us lives.

¹¹⁶See Jeffrey F. Addicott, *Developing a Security Strategy for Indochina*, 128 MIL. L. REV. 35 (1990).

¹¹⁷See generally DOD DICTIONARY, *supra* note 59.

¹¹⁸DEPT OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS ch. 3 (17 Dec. 1985).

¹¹⁹Civil affairs personnel also are trained to support general military forces, special operations forces, and foreign internal defense operations and to provide civil administration in friendly and occupied territories. See generally *id.*

¹²⁰Honduras Military Exercises, B-213137, 63 Comp. Gen. 422, 466-67 (1984).

¹²¹Tina Rosenberg, *Inside Central America: Its People, Politics, and History*, THE NEW REPUBLIC, Sept. 2, 1991, at 37.

What are the causes of international instability and chaos? A good summary of the problem is found in *A Time to Build*:¹²²

It is true that poverty and lack of opportunity have been the lot of the masses in most of the underdeveloped states for centuries past. The present difference lies in the fact that this poverty—flouted as a battle symbol in struggles for independence, used as political propaganda by domestic office seekers . . . and brought more sharply into relief by the ever widening gap between the haves and the have-nots—has become a nagging source of popular discontent.

Dissatisfaction, in turn gives rise to varied symptoms of instability and disorder. Governments topple with alarming frequency and without recourse to the medium of franchise. Strikes, riots, and clamorous protest movements flare up in cities and at institutions of learning. Violent revolutions explode and, in some instances, drag on for years of internecine blood-letting.¹²³

The author observes that "governments are inclined to be unstable and not infrequently corrupt," that "[n]ational leaders camouflage their own incompetence," and that those "who led the struggles for political independence often have not been as well qualified for leadership in the less glamorous business of nation building."¹²⁴ These conditions, described in this manner nearly thirty years ago, remain with us today. The seeds of discontent often develop in varying degrees into what we have come to call low intensity conflict¹²⁵—characterized at the lowest level by disruptive actions against the government and at the highest level by outright belligerency. Although no easy answers to complex problems exist, we can do better than we have done so far to alleviate these core problems.

¹²²HARRY F. WALTERHOUSE, *A TIME TO BUILD* (1964).

¹²³*Id.* at 2.

¹²⁴*Id.* at 4.

¹²⁵The Army defines low intensity conflict as follows:

A political-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low intensity conflict ranges from subversion to the use of armed force. It is waged by a combination of means, employing political, economic, informational, and military instruments. Low intensity conflicts are often localized, generally in the Third World, but contain certain regional and global security implications.

DEPT OF ARMY, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT, at 1-1 (5 Dec. 1990).

¹²⁶WORKING GROUP ON REGIONAL CONFLICT, COMMISSION ON INTEGRATED LONG-TERM STRATEGY, COMMITMENT TO FREEDOM: SECURITY ASSISTANCE AS A U.S. POLICY INSTRUMENT IN THE THIRD WORLD (1988) (extract of a paper presented to the Commission on 25 May 1988; later photocopied and distributed to the author as a handout during the Operational Law Course at The Judge Advocate General's School in April 1990).

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹Don Oberdorfer, 'Isolated' AID Should Be Merged with State Dept., Study Panel Says, WASH. POST, Mar. 3, 1992, at A15.

Is the United States's system for dealing with international instability really broken or does it simply confront problems that cannot be solved? Essentially, the system can be improved substantially.

The Security Assistance Program

The Commission on Integrated Long-Term Strategy, established by the Secretary of Defense, presented its findings on the current security assistance program in 1988. A perhaps innocuous statement in the Commission's paper is as damning an indictment of the effectiveness of the system as can be found. In discussing the changing views of the United States over the past forty years, the Commission remarked, "The needs of the recipients of our aid have changed less over time than we who have given it."¹²⁶ The Commission concluded that the present security assistance program is "seriously underfunded for pursuing an integrated, long-term strategy[,] . . . too micromanaged by Congress to enable any Administration to deal with crises," and "so encumbered with legal and administrative tendrils as to deprive it of credibility either here or abroad."¹²⁷ It recommended twelve basic legislative reforms, including a revised pricing system to allow the DOD to absorb more of the costs of security assistance as the "costs of doing business," more capable security assistance personnel at the unified command and embassy level, more involvement by the unified commanders in the program, and more use of DOD training exercises.¹²⁸ Unfortunately, these recommendations have not been implemented to any great degree.

United States Agency for International Development

In a preliminary report, a presidential study group assigned to the task of examining "U.S. foreign aid programs"¹²⁹ found that USAID is "isolated from the rapidly flowing political events of the 1990's" and is hampered by "too many objectives—39 at last count—imposed by the executive branch and

Congress.¹³⁰ The study group probably will recommend that USAID be integrated into the State Department, in a reversal of the 1979 reorganization plan discussed above, to give it more political clout.

DOD Humanitarian and Civic-Assistance Exercises

Apparently, the only form of foreign assistance—although many dare not call it that—which gradually is freeing itself from congressional micromanagement is the DOD humanitarian and civic-assistance exercise program. Although Congress continues to attach specific appropriations to humanitarian and civic action appropriations, these requirements are not burdensome. The legislation is focused clearly on limited, defined activities and, although it evidently infringes on USAID and its specific assistance appropriations, Congress has approved these apparent overlaps.

The Need for an Interim Strategy

Reform of the security and foreign assistance programs will take a massive effort and a great deal of time. The DOD must continue to press for those needed changes, but it also must act within the authority it now possesses to work toward stability when it can. Eschewing the all-too-typical shotgun approach, it must formulate a comprehensive strategy, press Congress for reforms based on that strategy, and begin working immediately in whatever ways it can on the implementation of that strategy.

Conclusion

The world today often appears to be in chaos, but at the same time, it never has been closer to the stability that is the goal of the world community. Of course, areas of the world exist in which nothing less than military force ever will be effective in producing anything like stability. The vast major-

ity of developing countries, however, are capable of attaining peace and stability if they can find means to lessen the underlying causes of civil discontent. The United States must provide the guidance and the funding to achieve those goals. At present, no other country is willing or able to do so. Other nations eventually may be convinced to assist, but the United States must take the lead.

The United States has in place foreign and security assistance programs intended to provide the support that developing countries need. The rhetoric is in place; the programs, however, in their present states, are too unfocused to provide any real help. They are in dire need of rethinking and overhaul. The United States must develop a comprehensive, workable, integrated program aimed at the causes of instability in the context of a changing world.

The DOD has the means to begin providing long overdue basic assistance aimed at the root causes of instability. It can use these programs to counter the budget and personnel cuts that will hamper its ability to perform its wartime mission if alternate means of training the remaining forces are not found. With several simple changes to the system, the DOD can have the basis of a strategy that will serve it well as it moves into its place in the new world order.

At the same time, the DOD has an obligation to press for a national strategy that is aimed at undercutting the forces that have led to instability in so many developing countries. It must persuade Congress that national pride will cause most countries to maintain military forces and that those forces can be used to build developing nations. The DOD must persuade Congress to reexamine its policy against encouraging extensive civic action by military forces in foreign countries.¹³¹ Only by using these forces constructively can most countries hope to reach stability. These, and other approaches based on an integrated, intelligent assessment of America's global needs, are our only hopes of achieving the peace and stability that is within our grasp.

¹³⁰*Id.*

¹³¹22 U.S.C.S. § 2754 (Law. Co-op. 1991).

Military Rule of Evidence 803(4): The Medical Treatment Hearsay Exception and Trial Practice

Captain Marcus A. Brinks, USAR

Introduction

Assume that a soldier marries the divorced mother of a ten-year-old girl. Several weeks after the wedding, the soldier

begins to abuse his stepdaughter sexually. After escalating for several months, this abuse culminates in sexual intercourse between the soldier and the girl. Hoping to find help, the girl reports the abuse to a counselor at school the day after the

intercourse occurred. The counselor refers the girl to a local physician for a medical examination. During the examination, the girl describes the pattern of abuse to the physician and identifies her stepfather as the perpetrator.

At the court-martial of the soldier on charges stemming from the abuse, the girl refuses to testify. The trial counsel attempts to introduce into evidence the girl's statements to the school counselor and the physician. The trial defense counsel immediately objects. This response brings Military Rule of Evidence (MRE) 803(4)¹ into play.

This article explains the requirements for admitting a patient-declarant's statements into evidence at trial. It also identifies the personnel who may testify about statements elicited from a patient during diagnosis or treatment. Finally, the article discusses the issue of perpetrator identification, the impact of the Confrontation Clause,² and the standard of review for a military judge's decision to admit medical hearsay evidence. To assist practitioners in the field, the article also includes trial practice tips and a checklist.

Military Rule of Evidence 803(4)

As a general rule, MRE 802 prohibits the admission of hearsay into evidence in courts-martial.³ The *Manual for Courts-Martial* defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁴ The reason for the evidentiary rule's proscription of hearsay is clear—to prevent an accused's conviction through the admission of out-of-court statements that lack the attendant guarantees of trustworthiness secured by confrontation, oath, and cross-examination.

Like most general rules, MRE 802 has numerous exceptions. One important exception covers statements made to facilitate medical treatment. Military Rule of Evidence 803(4) specifies that statements "made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excludable as hearsay.⁵ This exception applies regardless of the declarant's availability as a witness.⁶

Conditions for Admissibility

Two conditions must be satisfied before a patient's statements to a health care provider may be admitted into evidence. The Court of Military Appeals readily deduced these conditions from the language of MRE 803(4) in *United States v. Edens*.⁷ First, the patient must make the statements for purposes of medical diagnosis or treatment.⁸ Second, the patient must convey this information "with some expectation of receiving a medical benefit."⁹

The Court of Military Appeals and the lower military appellate courts continue to use these two conditions to determine the admissibility of medical hearsay evidence.¹⁰ This is entirely appropriate. The conditions reflect the premise supporting the medical treatment hearsay exception—that is, that a declarant has every incentive to be truthful when his or her physical well-being may depend on the accuracy of his or her statement.¹¹

The proponent of the hearsay statement bears the burden of establishing that both conditions are met.¹² The proponent also must establish the patient's state of mind when he or she uttered the statements. This is a subjective issue of critical

¹MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803(4) (1984) [hereinafter MCM].

²U.S. CONST. amend. VI.

³MCM, *supra* note 1, MIL. R. EVID. 802.

⁴*Id.* MIL. R. EVID. 801(c).

⁵*Id.* MIL. R. EVID. 803(4).

⁶*Id.* MIL. R. EVID. 803.

⁷31 M.J. 267 (C.M.A. 1990).

⁸*Id.* at 269.

⁹*Id.* (quoting *United States v. Deland*, 22 M.J. 70, 75 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986)).

¹⁰*See, e.g.*, *United States v. Williamson*, 26 M.J. 115 (C.M.A. 1988); *United States v. Deland*, 22 M.J. 70 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986); *United States v. Armstrong*, 33 M.J. 1011 (A.C.M.R. 1991); *United States v. Dean*, 28 M.J. 741 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 196 (C.M.A. 1990); *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987).

¹¹*United States v. White*, 25 M.J. 50 (C.M.A. 1987); *see also United States v. Nelson*, 25 M.J. 110 (C.M.A. 1987), *cert. denied*, 484 U.S. 1061 (1988). If the party opposing the introduction of the patient's statement produces evidence of an improper motive on the patient's part, the hearsay statement may not be admissible. *See White*, 25 M.J. at 53 (Everett, C.J., concurring).

¹²*Edens*, 31 M.J. at 269; *Williamson*, 26 M.J. at 118.

importance. The patient's statement is inadmissible unless he or she understood that he or she was being diagnosed or treated by a health care provider when he or she made the statement.¹³ The quantum of proof for this issue, however, may be somewhat relaxed in a case involving the statement of a child.¹⁴

Not all statements that a patient communicates to a health care provider are admissible automatically under MRE 803(4). In *United States v. Oldham*,¹⁵ for example, a school principal referred a ten-year-old girl to an Air Force social worker after the girl complained that her father had molested her sexually.¹⁶ The social worker asked the victim about the sexual abuse in an "automatic response" to the allegations.¹⁷ Observing that the social worker had contacted the victim, had questioned her on occasion in the presence of law enforcement personnel, and had not provided any medical diagnosis, the Air Force Court of Military Review found the victim's hearsay statements to the social worker inadmissible.¹⁸

The Army Court of Military Review considered a similar situation in *United States v. Armstrong*.¹⁹ A psychologist was counseling a sexually abused child as part of a regular course of therapy. A trial counsel attended one session to ask the victim about the abuse. The Army court found the statements the victim made in the presence of the trial counsel to be inadmissible because they had been made for the purpose of trial preparation.²⁰ The court, however, held that the trial judge properly admitted the more detailed statements that the victim made to the psychologist during a subsequent session.²¹

These cases provide counsel with several lessons. First, MRE 803(4) does not exclude a patient's hearsay statement to a health care provider from the hearsay rule unless the patient made the statement to the proper person for the proper purposes. In particular, the statement must have been made to a person the patient knew to be a health care provider. Second, statements elicited primarily to aid in trial preparation, rather than diagnosis or treatment, are not admissible under MRE 803(4).

Significantly, although a patient's statements to a health care provider may be admissible under the medical treatment hearsay exception, the reverse may not be true. In *United States v. Williams*,²² the patient testified that a doctor had tested her blood and had told her that her blood type was A positive. The doctor did not testify at trial. The Court of Military Appeals found that the military judge correctly excluded the patient's testimony despite the proponent's claim that this testimony was admissible under MRE 803(4).²³

Health Care Provider Definitions

Many different kinds of health care providers may testify about a patient's statements. That individuals who possess advanced medical degrees and who specialize in medical care may testify is well established. Accordingly, medical doctors²⁴ and pediatricians²⁵ clearly are proper witnesses. In a similar vein, nurses providing medical care in hospitals²⁶ and

¹³ *Quarles*, 25 M.J. at 772-73; *Deland*, 22 M.J. at 73.

¹⁴ *United States v. Ayila*, 27 M.J. 62 (C.M.A. 1988); *United States v. Lingle*, 27 M.J. 704 (A.F.C.M.R. 1988).

¹⁵ 24 M.J. 662 (A.F.C.M.R. 1987).

¹⁶ *Id.* at 663.

¹⁷ *Id.* at 664.

¹⁸ *Id.* at 664-65.

¹⁹ 33 M.J. 1011 (A.C.M.R. 1991).

²⁰ *Id.* at 1014.

²¹ *Id.*

²² 26 M.J. 487 (C.M.A. 1988).

²³ *Id.* at 491. Noting that MRE 803(4) "covers statements made by an out-of-court declarant 'for purposes of medical treatment' and is grounded in the self interest of the patient," the court concluded that "the doctor's statements to the patient do not qualify as reliable under this rule." *Id.* (citing *United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987)).

²⁴ *United States v. Rudolph*, 35 M.J. 622 (A.C.M.R. 1992).

²⁵ *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990).

²⁶ *United States v. Evans*, 23 M.J. 665 (A.C.M.R. 1986), *aff'd*, 27 M.J. 447 (C.M.A. 1988), *cert. denied*, 490 U.S. 1092 (1989).

schools²⁷ are entitled to testify. These individuals, who often dress distinctively in clothing that proclaims the medical profession, typically provide care in these settings; therefore, most patients who encounter nurses will expect them to perform their traditional duties of caring for the sick and injured.

An individual who ministers to a patient's mental well-being also may testify under appropriate circumstances. In particular, psychiatrists²⁸—including those who specialize in the treatment of children²⁹—can testify about the statements a patient makes during diagnosis or treatment. In *United States v. Tornowski*,³⁰ the Air Force Court of Military Review expanded this class, finding the testimony of a psychiatric social worker to be acceptable.

A witness does not have to be a medical specialist to testify. In various cases, the Court of Military Appeals has found the testimonies of psychologists about the statements their patients uttered during interviews and treatment sessions to be admissible.³¹ Psychotherapists also can be proper witnesses.³² Social workers³³ and family counselors,³⁴ who provide valuable primary assistance to families suffering from internal turmoil or abuse, are qualified to testify as well.

Relying in part on the drafter's analysis to MRE 803(4),³⁵ the Court of Military Appeals has suggested that trial judges should permit ambulance drivers, hospital attendants, and even family members and other nonmedical personnel to testify

about the statements of patients.³⁶ Importantly, MRE 803(4) does not permit the admission of every statement a patient may make during an encounter with health care personnel.³⁷ Nevertheless, when an encounter results in the declarant's referral, diagnosis, or actual treatment, or otherwise facilitates the patient's treatment and care, a witness usually may repeat the patient's statements in court as evidence on the truth of the matter the patient asserted.

Permissible Topics of Testimony

Patients seek the assistance of health care professionals for a variety of reasons. Accordingly, appropriate witnesses may testify about a broad range of patient statements. The most logical tenet is that, under MRE 803(4), a patient's "statements describing *how* and *when* [an] injury occurred will be admissible."³⁸ The Army Court of Military Review provided a trenchant example of this principle in *United States v. Evans*.³⁹ Evans was charged, *inter alia*, with raping and forcibly sodomizing his four-year-old daughter. During the victim's treatment at a hospital for vaginal injury, the attending nurse asked the victim whether she felt better. The victim responded that she did, just as she had when her father removed his penis from her.⁴⁰ When a psychologist later asked the victim how Evans had hurt her, the victim implied that the accused had penetrated her anally and vaginally.⁴¹ The Army court found that the victim's statements to the

²⁷ *United States v. Fink*, 32 M.J. 987 (A.C.M.R. 1991).

²⁸ *United States v. Deland*, 22 M.J. 70, 73 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986).

²⁹ *Id.*

³⁰ 29 M.J. 578 (A.F.C.M.R. 1989), *petition for review denied*, 30 M.J. 214 (C.M.A. 1990).

³¹ *United States v. Welch*, 25 M.J. 23 (C.M.A. 1987); *United States v. White*, 25 M.J. 50, 51-52 (C.M.A. 1987); *see also United States v. Nelson*, 25 M.J. 110, 112 (C.M.A. 1987).

³² *Welch*, 25 M.J. at 26.

³³ *United States v. Cottriel*, 21 M.J. 535 (N.M.C.M.R. 1985), *aff'd*, 25 M.J. 376 (C.M.A. 1986).

³⁴ *United States v. Austin*, 32 M.J. 757 (A.C.M.R.), *petition for review granted in part*, 34 M.J. 19 (C.M.A. 1991).

³⁵ MCM, *supra* note 1, MIL. R. EVID. 803(4) analysis, app. 22, at A22-48.

³⁶ *Welch*, 25 M.J. at 25.

³⁷ *United States v. Oldham*, 24 M.J. 662 (A.F.C.M.R. 1987).

³⁸ STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 643 (2d ed. 1986).

³⁹ 23 M.J. 665 (A.C.M.R. 1986), *aff'd*, 27 M.J. 447 (C.M.A. 1988), *cert. denied*, 490 U.S. 1092 (1989).

⁴⁰ *Id.* at 670.

⁴¹ *Id.* at 671. The victim stated that "her daddy . . . placed his 'pee-pee . . . in her pee-pee,' pointing to her genital area, and he also placed his penis in her rectum." *Id.* (quoting from the psychologist's testimony at trial).

nurse were admissible.⁴² It further suggested that the victim's statements to the psychologist would have been admissible, had the Government introduced evidence establishing that the victim's "psychological examination . . . was more oriented to diagnosis or treatment [than to] trial preparation, and that the victim had uttered the statements with some expectation of receiving medical benefit."⁴³

In *United States v. Rudolph*,⁴⁴ a physician examined the accused's stepdaughter after allegations arose that the accused had assaulted her.⁴⁵ During this examination, the girl described when and how the accused had abused her.⁴⁶ At the accused's court-martial, the military judge permitted the doctor to repeat the girl's hearsay statements in his testimony against the accused.⁴⁷ The court-martial convicted the accused for raping the girl. The Army Court of Military Review later affirmed the accused's conviction.⁴⁸ Noting that the doctor had questioned the victim to ensure that she was "okay," to determine the symptoms for which he should look during the examination, and to determine a course of care, the Army court held that the military judge properly admitted the victim's statements.⁴⁹ *Rudolph* comports well with *United States v. Nelson*,⁵⁰ in which the Court of Military Appeals concluded that the information a victim conveys to a health care provider is admissible if the health care provider sought to obtain this data "to insure [sic] that [the victim was] in no physical danger, [was] not suffering from infection, and [was] free from medical distress."⁵¹

A victim's statements to a psychiatrist or a psychologist also may be admissible. In *United States v. Edens*,⁵² a pediatrician seeking to develop a therapy plan questioned two young victims about the sexual abuse they had endured. The Court of Military Appeals found that the statements in which the children had described the abuse and had implicated the accused were admissible into evidence. Similarly, the court has found that the statements a victim utters while receiving sustained treatment after completing an initial examination may be admitted under MRE 803(4).⁵³

In the past, courts were uncertain whether a witness could testify about the patient's identification of a particular individual as his or her assailant. Commentators once believed that "statements concerning *who* caused the injury [were] unlikely to be admissible."⁵⁴ Contrary case law, however, since has dispelled any uncertainties about this issue.

In *United States v. Deland*,⁵⁵ the Court of Military Appeals upheld the introduction into evidence of the victim's statement to a child psychiatrist, in which the victim identified her father as her sexual abuser. The court, however, characterized *Deland* as an "unusual case," emphasizing that the identity of the perpetrator was an important factor in the psychiatrist's diagnosis and treatment of the victim.⁵⁶

In *United States v. Brown*,⁵⁷ the military judge excluded statements in which two children told medical personnel that their father had abused them physically. The Army Court of Military Review disapproved, remarking that the failure of

⁴²*Id.* at 674.

⁴³*Id.* at 676.

⁴⁴35 M.J. 622 (A.C.M.R. 1992).

⁴⁵*Id.* at 625.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸See *id.* at 623.

⁴⁹*Id.* at 625; accord *United States v. Fink*, 32 M.J. 987, 991-92 (A.C.M.R. 1991) (upholding admission of victim's statements to a pediatrician during an examination that ultimately led to the victim's hospitalization).

⁵⁰25 M.J. 110 (C.M.A. 1987), *cert. denied*, 484 U.S. 1061 (1988).

⁵¹*Id.* at 112.

⁵²31 M.J. 267 (C.M.A. 1990).

⁵³*United States v. Welch*, 25 M.J. 23, 26 (C.M.A. 1987); cf. *United States v. Armstrong*, 33 M.J. 1011, 1014 (A.C.M.R. 1991); *United States v. Cottriel*, 21 M.J. 535 (N.M.C.M.R. 1985), *aff'd*, 25 M.J. 376 (C.M.A. 1986).

⁵⁴SALTZBURG ET AL., *supra* note 38, at 643.

⁵⁵22 M.J. 70 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986).

⁵⁶*Id.* at 74.

⁵⁷25 M.J. 867 (A.C.M.R. 1988).

medical personnel to ascertain an assailant's identity in a child abuse case "hinder[s] diagnosis of injuries and proper medical treatment and allow[s] the recurrence of abuse."⁵⁸

The Air Force Court of Military Review soon adopted the Army court's reasoning. In *United States v. Lingle*,⁵⁹ the Air Force court ruled expressly that a child victim's statement to a doctor identifying the accused as her assailant was relevant to her medical treatment for injuries resulting from an assault.⁶⁰ The court observed that a doctor's success in treating psychological and physical problems stemming from child abuse often requires knowledge of the abuser's identity.⁶¹ In *United States v. Ortiz*,⁶² the Air Force court applied the same rationale to the statements of adult victims. It pointed out that the identity of an abuser is an important datum for health care providers, remarking that a medical practitioner must consider this fact when determining whether a patient can return home to recuperate.⁶³ Obviously, if the abuser is the patient's spouse, sending the patient home would be most undesirable.

The military appellate courts, however, recognize some limits on proper topics of testimony. The Court of Military Appeals, for instance, has emphasized that a health care provider should not testify that he or she believes the patient.⁶⁴ The Air Force court agrees.⁶⁵ Clearly, a health care provider should testify only about a patient's pertinent statements without commenting on his or her veracity. Appellate courts also view conjecture on the parts of health care witnesses with disfavor.⁶⁶

⁵⁸*Id.* at 869.

⁵⁹27 M.J. 704 (A.F.C.M.R. 1988).

⁶⁰*Id.* at 707.

⁶¹*Id.* (citing *Brown*, 25 M.J. at 869).

⁶²34 M.J. 831 (A.F.C.M.R. 1992).

⁶³*Id.* at 834.

⁶⁴*United States v. Deland*, 22 M.J. 70, 75 (C.M.A.), cert. denied, 479 U.S. 856 (1986). But see *United States v. White*, 25 M.J. 50 (C.M.A. 1987) (holding as harmless error the admission of a psychiatrist's testimony that she believed her patient).

⁶⁵See, e.g., *United States v. Tomowski*, 29 M.J. 578, 581-82 (A.F.C.M.R. 1989), petition for review denied, 30 M.J. 214 (C.M.A. 1990).

⁶⁶See *United States v. Brown*, 33 M.J. 706 (A.C.M.R. 1991).

⁶⁷U.S. CONST. amend VI.

⁶⁸110 S. Ct. 3139 (1990).

⁶⁹IDAHO R. EVID. 803(24)

⁷⁰See *id.*; see also MCM, *supra* note 1, MIL. R. EVID. 803(24).

⁷¹*Wright*, 110 S. Ct. at 3145.

⁷²*Id.* at 3146.

The Confrontation Clause

The Sixth Amendment identifies a number of rights that protect the accused in a criminal prosecution—among them, the right "to be confronted with the witnesses against him [or her]."⁶⁷ When a victim raises allegations against an individual in statements to health care providers, and then refuses to testify when that individual is brought to trial—a course of action that occurs frequently in family abuse cases—tension develops between the Confrontation Clause and MRE 803(4).

In *Idaho v. Wright*,⁶⁸ the Supreme Court considered the admissibility of a child victim's hearsay statements to a pediatrician. The trial judge admitted these statements under Idaho's residual hearsay rule.⁶⁹ This rule, like MRE 803(24), permits a proponent to introduce hearsay statements that are not covered expressly under a hearsay exception if those statements "have equivalent circumstantial guarantees of trustworthiness."⁷⁰

The Court initially noted that a literal reading of the Confrontation Clause would require a court to exclude hearsay statements implicating criminal defendants whenever those statements were uttered by unavailable declarants.⁷¹ The Court rejected this extreme view. Instead, it found that the Confrontation Clause bars some evidence that otherwise would have been admissible under an exception to the hearsay rule.⁷²

The Court then identified the requirements for admission of a hearsay statement under the residuary provision. The prosecutor either must produce the declarant or must prove that the declarant is unavailable.⁷³ If the declarant is unavailable, his or her hearsay statement is admissible only if it is supported by sufficient "indicia of reliability."⁷⁴ Significantly, the Court acknowledged that a trial judge may infer the necessary reliability if the statement comes under a "firmly rooted hearsay exception."⁷⁵ Otherwise, the statement must have "particularized guarantees of trustworthiness" or face exclusion.⁷⁶

The Court rejected the argument that the admissibility of an unavailable declarant's hearsay statement may be based, not only on the circumstances surrounding the making of the statement, but also on trial evidence corroborating the statement.⁷⁷ That approach, it opined, would promote bootstrapping.⁷⁸ Instead, it held that a court may consider only the circumstances surrounding the making of a statement to determine whether the statement is sufficiently trustworthy to justify its admission.⁷⁹ Statements admitted under firmly rooted, specific exceptions to the hearsay rule, such as the "excited utterance"⁸⁰ or "dying declaration"⁸¹ exceptions, possess adequate guarantees of reliability because of the circumstances under which these statements are made.⁸²

The Court later considered the relationship between the Confrontation Clause and the medical treatment hearsay exception in *White v. Illinois*.⁸³ The child victim identified

the accused in statements she made to an emergency room nurse and a physician while being treated for injuries she suffered in a sexual assault. At trial, the victim was highly distraught and could not testify. In lieu of her testimony, the Government offered the testimonies of the nurse and the physician. Citing the spontaneous declaration and medical treatment hearsay exceptions, the trial judge permitted the two health care witnesses to repeat the victim's statements in their testimonies.

The accused appealed, claiming that a proponent must demonstrate a declarant's unavailability at trial before the trial judge may admit the declarant's statement under the medical treatment hearsay exception. The Court disagreed. It noted that a showing of unavailability is appropriate when the challenged hearsay statement was made in an earlier judicial proceeding and exclusion is sought at trial.⁸⁴ Under those circumstances, the declarant should testify personally at trial if possible because he or she then is subject to cross-examination, which enhances the truth-finding process.⁸⁵ The Court, however, opined that, when "proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."⁸⁶ Cross-examination will add nothing to the statement's reliability, and compelling the proponent to replace the out-of-court statement with live testimony could diminish the evidentiary value of the statement substantially.⁸⁷ Noting that a patient ordinarily knows that a false statement to a health

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.* at 3148-49.

⁷⁸*Id.* at 3149.

⁷⁹*See id.* at 3148.

⁸⁰*See* MCM, *supra* note 1, M.L. R. Evid. 803(2).

⁸¹*See id.* M.L. R. Evid. 804(b)(2).

⁸²*See* *Wright*, 110 S. Ct. at 3149. The Court noted in passing that the medical treatment hearsay exception stems from the view that the person making such a statement is quite unlikely to falsify. *See id.*

⁸³112 S. Ct. 736 (1992).

⁸⁴*See id.* at 743.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* The Court remarked, "A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with the trier of fact than a similar statement offered in the calm of the courtroom." *Id.*

care provider could result in a faulty diagnosis and improper treatment, the Court concluded that medical statements possess a reliability that in-court testimony would neither enhance, nor replace.⁸⁸

Military appellate decisions comport with the Court's views. Obviously, a witness may testify at an accused's trial about the witness's own out-of-court statement without offending the Confrontation Clause if the witness's trial testimony is subject to cross-examination.⁸⁹ Furthermore, a medical treatment hearsay statement is readily admissible even if the declarant is unavailable.⁹⁰ The Confrontation Clause should not prevent a party from introducing the statement because statements made in the furtherance of medical treatment ordinarily are admissible under a firmly rooted exception to the hearsay rule.⁹¹ The statement's reliability may be inferred without further inquiry.⁹²

Military appellate courts are reluctant to provide relief based on allegations of Confrontation Clause violations. In *United States v. Lingle*,⁹³ for example, the Air Force Court of Military Review found that the appellant was not entitled to relief in a case involving medical treatment hearsay statements. Emphasizing the reliability of the hearsay statements and the child-victim's availability to testify at the article 32 hearing⁹⁴ the court found no requirement for the prosecution to call the child-victim as a witness at trial. The courts also require trial defense counsel to raise express objections on Confrontation Clause grounds against admitting medical treatment hearsay statements.⁹⁵ The courts wish to minimize trial gamesmanship, in which defense counsel intentionally

fail to raise matters at trial in hopes of providing their clients with immediate appellate issues.⁹⁶

Standard of Review

The military judge must determine whether proffered evidence is relevant under MRE 401 before admitting this evidence at trial.⁹⁷ The judge also must determine whether a hearsay statement is admissible under the medical treatment hearsay exception.⁹⁸ The military judge enjoys great discretion in determining whether evidence is admissible under the Military Rules of Evidence. An appellate court may reverse the judge's evidentiary determinations only if the judge has abused that discretion.⁹⁹ Establishing judicial abuse of discretion on appellate review can be very difficult. The record is critically important in determining whether sufficient evidence supported the admission of a statement under the medical treatment exception to the hearsay rule.

Even if the military judge has abused his or her discretion, an accused is not entitled to reversal automatically.¹⁰⁰ Reversible error occurs only if the judge's erroneous admission of the hearsay statement actually prejudiced the accused's case.¹⁰¹ An appellate court will disregard an error as harmless unless the accused can show a reasonable probability that the improperly admitted statement affected the adjudication of the accused's guilt or innocence.¹⁰² When a court-martial finds an accused guilty, and the only evidence against the accused consists of medical treatment hearsay statements that were admitted erroneously, the harm is obvious. On the other hand,

⁸⁸*Id.*

⁸⁹*United States v. Nelson*, 25 M.J. 110, 112 (C.M.A. 1987), *cert. denied*, 484 U.S. 1061 (1988); *United States v. Fink*, 32 M.J. 987, 990 (A.C.M.R. 1991).

⁹⁰A witness may be deemed unavailable for a variety of reasons, including physical absence from the trial situs or a refusal to testify at trial. *United States v. Quarles*, 25 M.J. 761, 767-68 (N.M.C.M.R. 1987); *see also* MCM, *supra* note 1, MIL. R. EVID. 804(a).

⁹¹*United States v. Armstrong*, 33 M.J. 1011, 1014 (A.C.M.R. 1991).

⁹²*Id.*

⁹³27 M.J. 704 (A.F.C.M.R. 1988), *petition for review denied*, 28 M.J. 455 (C.M.A. 1989).

⁹⁴*See generally* UCMJ art. 32 (1988).

⁹⁵*Lingle*, 27 M.J. at 709; *United States v. Evans*, 23 M.J. 665, 675 (A.C.M.R. 1986), *aff'd*, 27 M.J. 447 (C.M.A. 1988), *cert. denied*, 490 U.S. 1092 (1989).

⁹⁶*Evans*, 23 M.J. at 675.

⁹⁷MCM, *supra* note 1, MIL. R. EVID. 401; *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 111 S. Cl. 1074 (1991).

⁹⁸*United States v. Deland*, 22 M.J. 70, 73 (C.M.A.), *cert. denied*, 479 U.S. 856 (1986).

⁹⁹*United States v. Fink*, 32 M.J. 987, 993 (A.C.M.R. 1991) (military judge did not abuse discretion in admitting statements under MRE 803(24)); *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990) (military judge did not abuse discretion in admitting medical records under MRE 803(6)).

¹⁰⁰*United States v. Oldham*, 24 M.J. 662, 664 (A.F.C.M.R. 1987).

¹⁰¹*Id.*

¹⁰²*Id.*

if the military judge properly admitted other evidence, with which the hearsay statements are merely cumulative, the judge's error in admitting the hearsay statements may be harmless.

Trial Practice Implications and Checklist

Both trial counsel and trial defense counsel bear substantial responsibilities when they attempt to admit medical treatment hearsay statements at trial. If one party seeks to admit these statements, the military judge generally will conduct a separate evidentiary hearing before trial on the merits, or during the trial outside of the hearing of the fact finder. The party offering the statement will call witnesses to establish its admissibility and both counsel will question these witnesses carefully.

The trial counsel typically will be the proponent of medical treatment hearsay statements. Consequently, the Government will bear the burdens of going forward and establishing admissibility.¹⁰³ Ideally, the trial counsel should have the declarant testify that he or she made the statement to aid in medical diagnosis or treatment, with the expectation of receiving a medical benefit. The declarant should describe the setting in which the statement was made, disclosing how he or she knew that the person with whom he or she communicated was a health care provider and stating that he or she actually was seeking medical help.

If the patient is a child, or an adult with diminished mental capacity, the proponent should ask the patient to explain his or her perceptions of the medical process. A trial judge may infer that an abused child who has visited a hospital for treatment several times actually understood the purpose of a subsequent trip, even if the child cannot articulate an explanation conforming with the precise wording of MRE 803(4).¹⁰⁴

If the declarant provides inadequate testimony, or does not testify at all, the health care provider should testify about his or her perceptions of what the patient understood. This approach, however, creates the following problem: the health care provider should not speculate about what he or she *thinks* the patient understood. Accordingly, the proponent must ensure that the health care provider testifies objectively about the facts and circumstances surrounding the making of the statement. In particular, the health care provider should describe

the information he or she conveyed to the patient and the patient's specific responses.

In *United States v. Rudolph*, the Army court upheld the admission of medical treatment hearsay statements.¹⁰⁵ The health care provider testified that he identified himself as a doctor to the patient, wore a white coat, was in a hospital when he examined the patient, and advised the patient of the purposes of the examination. From the record, the court concluded that the patient had understood the purposes of the meeting with the doctor.¹⁰⁶ *Rudolph* suggests that counsel should elicit testimony that the witness identified himself or herself as a health care provider to the declarant, was dressed in distinctive garb (if appropriate), and operated in a medical or therapeutic setting.¹⁰⁷ If the health care provider assured the patient that his or her purpose was to help the patient, or provided other explanations for the encounter, he or she also should be encouraged to raise these points.

The health care provider should testify about the examination, diagnosis, and treatment of the declarant. This information has its own significance, independent of its value as a foundation for the hearsay statement. If the trial judge later finds the statement inadmissible, the medical evidence, considered with other evidence of record, may support conviction or acquittal. If multiple health care providers can testify about various patient statements, the proponent should call all of them as witnesses. On the one hand, if all the statements are admissible, any cumulative effect will be harmless. On the other hand, if an appellate court later finds that the trial judge should not have admitted some of the statements, the court may conclude that the remaining statements were admitted properly and may find that the trial judge's error was harmless. Whenever possible, the proponent should advance alternate theories of admission to ensure that an admitted medical hearsay statement cannot be attacked easily on appeal.

The proponent should establish that statements were elicited for purposes of medical treatment and care, rather than for trial preparation. If the declarant's identification of the perpetrator in the hearsay statement is at issue, the proponent should ask the health care provider to explain the ways in which knowing an assailant's identity could facilitate treatment. Finally, although the health care provider should not render an opinion on the patient's veracity, he or she may explain why the patient had an incentive to be truthful under the circumstances.

¹⁰³ Trial defense counsel certainly can be proponents in appropriate cases. If, during the course of medical treatment, a patient identified someone other than the accused as the perpetrator, the defense counsel would want to admit this statement at trial—especially if the patient later identified the accused at trial. The trial defense counsel then would bear the burden of laying the proper foundation for admission.

¹⁰⁴ See *United States v. Lingle*, 27 M.J. 704, 707 (A.F.C.M.R. 1988).

¹⁰⁵ See 35 M.J. 622, 625 (A.C.M.R. 1992).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*; see also *Lingle*, 27 M.J. at 707; cf. *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988) (finding child victim's statements to a psychologist inadmissible because the psychologist concealed her profession from the victim and presented herself as "just another Mommy").

The opposing counsel must be prepared to cross-examine the declarant and health care providers thoroughly. He or she must attempt to establish that the patient did not understand the reason for the medical encounter; that the encounter actually promoted an improper purpose, such as criminal investigation or trial preparation; and that the health care provider concealed his or her purpose from the patient. If the trial proponent attempts to admit the hearsay statement simply to bolster the patient's credibility after the patient has testified, the opposing counsel must raise the appropriate objection.¹⁰⁸ If the patient does not testify at trial, the opposing counsel also should raise an objection based on the Confrontation Clause. This objection will be especially effective if the patient did not testify previously at an article 32 hearing and, therefore, escaped cross-examination entirely. The opposing counsel should attack the proponent's presentation at every step. Even if he or she cannot persuade the military judge to exclude the hearsay statement, the counsel can ensure that the record provides a sound basis for appellate relief.

The following checklist should help counsel in the field to frame the medical treatment hearsay exception issues in their cases, to identify necessary witnesses, and to determine whether they reasonably might expect statements to be admitted. If one can answer the threshold question affirmatively, the probability that the statement will be admitted—and that it will withstand appellate scrutiny—increases proportionally to the number of "yes" answers to the questions that follow.

1. Did the patient-declarant make the statement for medical diagnostic or treatment purposes with the attendant expectation of medical benefit?
2. Is the patient available to testify at trial about the circumstances surrounding the making of the statement?
3. If the patient is not available to testify at trial, did the patient testify at an article 32 hearing?
4. If the patient is unavailable at trial, can the health care provider who heard the statement testify about the circumstances existing when the statement was made?

¹⁰⁸MCM, *supra* note 1, MIL. R. EVID. 403.

5. Are two or more health care providers available to testify?
6. Did the health care provider elicit information from the patient primarily for diagnosis and treatment, rather than for trial preparation?
7. Did the patient initiate contact with the health care provider?
8. Did the health care provider identify himself or herself and his or her purpose to the patient?
9. Did the patient engage in a course of treatment in which he or she repeated the statement consistently? If so, did the patient's subsequent declarations expand on the original statement, repeating it in greater detail?
10. Can the proponent identify alternate grounds for admitting the statement?
11. Did the health care provider ascertain the identity of the perpetrator to facilitate diagnosis or treatment?

Conclusion

Military Rule of Evidence 803(4) is a valuable tool for both trial counsel and trial defense counsel. The hearsay statement of a patient-declarant may be admitted, regardless of whether the declarant actually is available at trial, *if* the statement meets both requirements for admission. When a proponent can produce no physical evidence to support his or her case, a medical treatment hearsay statement can provide the basis for conviction or acquittal. This can be critically important in child and sexual abuse cases.

The proponent bears the burden of proving the admissibility of a medical treatment hearsay statement. Many pitfalls, however, may impede this process. A wise trial practitioner will be aware of the requirements and will prepare accordingly, recognizing that the medical treatment hearsay exception can make or break the counsel's case.

Examination and New Trials Division Notes

R.C.M. 1112 Review

In a recent application for relief under Uniform Code of Military Justice article 69(b),¹ the Examination and New Trials Division had to return the case to the servicing staff judge advocate's office for a second review under Rule for Courts-Martial (R.C.M.) 1112.² This delayed The Judge Advocate General's action on the application for relief.

Rule for Courts-Martial 1112 provides that a judge advocate must review each general court-martial in which the accused withdrew or waived appellate review; each special court-martial in which the accused withdrew or waived appellate review, or in which the approved sentence did not include a bad-conduct discharge; and each summary court-martial.³ This review is essentially judicial; therefore, the reviewing judge advocate must not have been involved in the case before conducting the review and he or she should not receive technical guidance from any interested party.⁴

The review must include the judge advocate's conclusions about the court-martial's jurisdiction over the accused and the offense, the legal sufficiency of the charges and specifications, and the legality of the sentence.⁵ Moreover, the reviewing

judge advocate must respond specifically to each of the accused's written allegations of error.⁶ The accused may file these allegations in posttrial submissions under R.C.M. 1105 or R.C.M. 1106,⁷ or may provide them directly to the reviewing judge advocate.⁸ Captain Kee.

Service of Authenticated Record of Trial on Accused

In several recent cases, records received for posttrial review did not include documentation attesting that the accused had been served with copies of the records of trial. Rule for Courts-Martial 1104 requires that an accused be served with a copy of the authenticated record of trial in any general or special courts-martial⁹—even in a case resulting in an acquittal or in an alternative disposition, such as a discharge for the good of the service.¹⁰ Substitute service, normally on the accused's trial defense counsel, is authorized under certain prescribed conditions.¹¹ Whenever a trial counsel uses substitute service, he or she must attach a statement to the record explaining why the accused was not served personally.¹²

This office suggests that a trial counsel serve a copy of the record of trial on the accused immediately after the record is authenticated. Proof of service generally should be documented on *Department of Defense Form 490*.¹³ Even if the trial counsel sends the record of trial to the accused by certified

¹UCMJ art. 69(b) (1988).

²See MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1112 (1984) [hereinafter MCM].

³*Id.* R.C.M. 1112(a).

⁴See *id.* R.C.M. 1112(c).

⁵*Id.* R.C.M. 1112(d)(1).

⁶*Id.* R.C.M. 1112(d)(2).

⁷See generally *id.* R.C.M. 1105 (accused's posttrial submissions to the convening authority); *id.* R.C.M. 1106(f) (accused's response to staff judge advocate's posttrial recommendations to the convening authority).

⁸See generally *id.* R.C.M. 1112(d)(2).

⁹*Id.* R.C.M. 1104(b); see also *United States v. Dickerson*, 32 M.J. 1008 (A.C.M.R. 1991).

¹⁰See DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, ch. 10 (15 Dec. 1988).

¹¹See MCM, *supra* note 2, R.C.M. 1104(b)(1)(C). The accused's copy of the record "shall be forwarded to the accused's defense counsel, if any," if serving the record on the accused is "impracticable because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record . . . or in writing." *Id.*

¹²*Id.*

¹³Dep't of Defense, Form 490, Index to Record of Trial (Oct. 1984).

mail, return receipt requested, the trial counsel should receive the signed receipt before the publication of the promulgating order. Records of trial should not be forwarded to the reviewing authority without proof of service plainly documented in the record. Captain Kee.

Excessive Forfeitures

In a recent case, the Department of the Army had to remedy legally excessive forfeitures that had been adjudged at trial and approved by the convening authority. The approved forfeitures amounted to \$750 per month from a soldier whose approved sentence also included a reduction to private (E-1). Because the accused's sentence did not include confinement,

the convening authority could not approve forfeitures exceeding two-thirds of the soldier's monthly pay, computed at the grade to which he was reduced.¹⁴ Accordingly, the maximum monthly forfeiture that the convening authority lawfully could have withheld from the accused was \$523.

Once The Judge Advocate General has taken supplemental action in a case, excessive forfeitures may be corrected only by publishing a Department of the Army order over the signature of the Adjutant General. This time-consuming process can be avoided if criminal law personnel are attentive to this forfeiture limitation, which applies whenever the approved sentence includes a reduction or forfeitures, but not confinement. Captain Kee.

¹⁴See MCM, *supra* note 2, R.C.M. 1107(d)(2), discussion; see also *United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys (LAAs) of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

State Domicile Note

Does a Wife Automatically Assume the Domicile of Her Husband?

A person's choice of domicile determines his or her state income tax liability, his or her eligibility to vote and to hold

an elected position in state or local government, his or her obligation to perform jury service, and the laws that will govern the testamentary or intestate distribution of his or her estate. Because of the mobility of our military population, an LAA advising a married couple often will find that the spouses come from different states. When this occurs, the LAA must determine the domiciles of both clients.

"Domicile" refers to the state a person calls home—the state in which he or she resides permanently, or to which he or she intends to return. A person has but one domicile; to change it, he or she intentionally must end his or her association with the current state of domicile and establish ties to a new state.

One might think that these general rules would apply equally to husband and wife, but in some states they do not.¹ Following arcane common law, several states hold that a wife automatically assumes her husband's domicile, regardless of her own domiciliary intent.² More states, however, provide that a woman

¹This note is based on an *Army Lawyer* article that briefly discussed the issue of a military spouse's domicile. See Albert Veldhuyzen & Samuel F. Wright, *Domicile of Military Personnel for Voting and Taxation*, *ARMY LAW.*, Sept. 1992, at 18.

²See ILL. ANN. STAT. ch. 23, para. 2-10 (Smith-Hurd 1992) (the residence of a married woman shall be that of her husband unless they are living separate and apart, in which case she may acquire a separate residence); see also *RESTATEMENT (SECOND) OF CONFLICTS* § 21 (1988). Section 21 remarks that

at least two reasons for the common law rule [existed. First, the rule assumed that] the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband . . . This view is no longer held. The second reason for the common law rule was the desirability of having the interests of each member of the family unit governed by the same law . . .

See *id.*

may establish her own domicile independently of her husband.³ States adhering to the latter view include California,⁴ Colorado,⁵ Georgia,⁶ Minnesota,⁷ New Jersey,⁸ New York,⁹ North Dakota,¹⁰ Pennsylvania,¹¹ Virginia,¹² and Washington.¹³

The disparate approaches various states have adopted to determine a wife's domicile may cause problems for legal assistance clients. For example, consider the following situation: Ellen, a domiciliary of State X, marries Bob, a military officer domiciled in State Y. Ellen owns property in X and has voted there in the past. Both Bob and Ellen wish to maintain their domiciles in their respective states, no matter where they may be transferred pursuant to Bob's military orders.

Ellen and Bob live in Y for several years, until Bob is transferred to State Z. Ellen begins working in Z shortly after her arrival in that state.

State X law provides that a married woman's domicile is not affected by that of her husband. State Y follows the common-law rule that a woman automatically assumes her husband's domicile. In Z, the law provides that both spouses may have independent domiciles; however, it also declares that anyone who lives in Z for more than 180 days will be considered a "statutory resident" and will be liable to pay state income tax as if he or she were a domiciliary of Z.¹⁴

Ellen visits the legal assistance office at the installation to which Bob is assigned. There, she asks an LAA to prepare a will for her, to advise her where to file her tax returns, and to tell her where she is eligible to vote. She also asks whether her registration to vote in Z could compromise the claims of Bob and herself to be domiciliaries of X and Y. To assist Ellen with these matters, the LAA must consider a number of questions.

Is Ellen still a domiciliary of X? Unless its own laws provide otherwise, X may consider Ellen to be an X domiciliary. Some states, however, provide that when a person moves to another state, that action evinces an intent to relinquish domiciliary status.

May State Y consider Ellen to be a Y domiciliary because she married Bob and lived in Y for several years? Unless state law provides otherwise, Y may consider Ellen to be a Y domiciliary. Ellen then may have to convince State Y that she actually should be considered a domiciliary of X.

What ties has Ellen established to State Z? State Z will consider Ellen to be its "statutory resident" once she has lived there for 180 days. This will subject Ellen to State Z taxes even though she is not a domiciliary of that state.

³See RESTATEMENT (SECOND) OF CONFLICTS § 21 (1988).

⁴CAL. ELEC. CODE § 209 (West 1992) (the domicile of one spouse shall not be presumed to be that of the other, but shall be determined independently); see also CAL. GOV'T. CODE § 244 (West 1992) ("a married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse").

⁵COLO. REV. STAT. ANN. § 14-2-210 (West 1992) ("the common-law rule that the domicile of a married woman is that of her husband shall no longer be in effect in this state").

⁶GA. CODE ANN. § 19-2-3 (Michie 1992) (the domicile of a married person shall not be presumed to be the domicile of that person's spouse).

⁷MINN. STAT. ANN. § 519.01 (West 1992) (a woman shall retain the same legal existence and legal personality after marriage as she had before the marriage).

⁸N.J. STAT. ANN. § 37:2-3 (West 1992) (the domicile of a married woman shall be established by the same facts and rule of law as that of any other person for the purposes of voting, office holding, testacy, intestacy, jury service, and taxation).

⁹N.Y. DOM. REL. LAW § 61 (McKinney 1992) (the domicile of a married man or woman shall be established for all purposes without regard to gender); see also *Lansford v. Lansford*, 465 N.Y.S.2d 583 (App. Div. 1983). In *Lansford*, the court remarked that, although wives once had to adopt the domiciles of their husbands, husbands no longer may assert overriding control over the choice of matrimonial domicile. *Id.* at 585. On the contrary, the relevant New York statute provides that a wife has the same capacity to acquire the domicile of her choice as does her husband. See *id.* (citing N.Y. DOM. REL. LAW §§ 61, 231 (McKinney 1992)). Accordingly, the court found no legal barrier to a wife continuing her domicile after her marriage. *Id.*

¹⁰N.D. CENT. CODE § 54-01-26 (1992) (an individual's residence does not change automatically upon marriage; the residence can be changed only by the union of act and intent).

¹¹See PA. STAT. ANN. tit. 53, § 6913 comment (1992). The Pennsylvania legislature amended section 6913 to define domicile as "the voluntarily fixed place of habitation of a person." See *id.* The statute previously had defined domicile as "the place in which a man has voluntarily fixed the habitation of himself and his family." See *id.* Under current Pennsylvania law, "the domicile of a woman cannot be limited by her husband's residence." *Id.*

¹²See VA. CODE ANN. § 20-91 (Michie 1992), *Kerr v. Kerr*, 371 S.E.2d 30 (Va. Cl. App. 1988) (rejecting as unconstitutional the common-law rule that a wife must follow her husband's change of domicile).

¹³WASH. CONST. art. 31, § 1 (equality of rights and responsibility under the law shall not be denied or abridged on account of gender); see also WASH. REV. CODE ANN. § 26.16.160 (West 1992).

¹⁴As a general rule, a state may tax the income of its domiciliaries wherever that income may have been earned.

Revised IRS Publications

Could Ellen be subject to taxation by all the states? If Ellen is considered to be a domiciliary or statutory resident of several states, she probably will have to file tax returns in each state, receiving credits for the income tax payments she has made to the other states.

When drafting Ellen's will, what domicile should the attorney choose for Ellen? Because Ellen still owns property in State X, that state arguably has the greatest interest in the testamentary distribution of her estate. Accordingly, the LAA probably should name X as Ellen's domicile in the will, unless Ellen intends to establish domicile elsewhere.

Could Ellen affect her domiciliary status by registering to vote in State Z? Some states consider registering to vote in a state to imply the registrant's intent to establish domicile there. The LAA should advise Ellen to think carefully before registering to vote in a state other than X.

What about Bob? Is he subject to the same confusing laws of domicile and statutory residence? The Soldiers' and Sailors' Civil Relief Act (SSCRA)¹⁵ protects Bob from losing his original domicile in State Y and inadvertently acquiring domicile in State Z when he moves to Z pursuant to military orders. Likewise, the SSCRA protects Bob's military income from taxation by State Z.¹⁶ Bob can lose his domiciliary status in State Y only by forming the intent to change his domicile and by taking affirmative steps to establish ties to a new state. Accordingly, if Ellen registers to vote in State Z, Bob will remain a domiciliary of Y. If Bob registers to vote in Z, however, he may risk losing his status as a State Y domiciliary. State Z may interpret Bob's decision to register to vote in Z as evidence of his intent to establish domicile there.¹⁷

An attorney faced with a case similar to the hypothetical situation described above should research the laws of each state carefully, paying close attention to conflicts of law provisions, before advising his or her clients. The LAA well may find that no clear-cut answers exist; if so, he or she must take care to explain this ambiguity to the clients. Major Hostetter.

The Internal Revenue Service (IRS) recently revised two publications that LAAs may find of interest when discussing tax matters with clients. Legal assistance attorneys may order these publications from the IRS by calling (800) 829-3676.

Publication 448¹⁸ describes federal tax law provisions governing estate, gift, and generation-skipping transfer taxes. It discusses many estate and gift tax questions that commonly confront LAAs. Publication 594,¹⁹ which typically accompanies a bill for overdue taxes, advises taxpayers of their rights and responsibilities with respect to unpaid taxes. The publication also contains telephone numbers that taxpayers may call for assistance and describes the IRS's Problem Resolution Program, payment arrangements, liens, levies, releases of levies, and seizures and sales of property to satisfy tax debts. Major Hancock.

Wills and Estates Notes

Servicemen's Group Life Insurance

Congress recently increased the maximum available coverage for Servicemen's Group Life Insurance (SGLI) from \$100,000 to \$200,000.²⁰ This note sets forth some of the factors that a client should consider before signing up for SGLI, or increasing his or her existing SGLI coverage.

Many soldiers do not need significant life insurance coverage. Similarly, many soldiers who are not married and who have no children are overinsured. Even soldiers who are married or who have children may find that other government death benefits²¹ eliminate the need for significant insurance coverage. These soldiers might profit more from saving or investing their money than they would from spending it on insurance premiums.

¹⁵50 U.S.C. app. § 574 (1988).

¹⁶If Bob has lived in Z long enough to be considered a "statutory resident," the SSCRA will not bar State Z from taxing his income from civilian sources. See *id.*

¹⁷Many states provide that registering to vote may be considered evidence of intent to establish domicile. See, e.g., Veldhuyzen & Wright, *supra* note 1, at 16.

¹⁸INTERNAL REVENUE SERV., PUB. 448, FEDERAL ESTATE AND GIFT TAXES (1992).

¹⁹INTERNAL REVENUE SERV., PUB. 594, UNDERSTANDING THE COLLECTION PROCESS (1992).

²⁰Veterans' Benefits Act of 1992, Pub. L. No. 102-568, § 201, 106 Stat. 4320, 4324.

²¹Significant benefits ordinarily available to service members include Dependency and Indemnity Compensation, Social Security, Dependents' Educational Assistance, and the death gratuity. A former service member who has retired after completing more than 20 years' active military service, or who would be eligible for Reserve Component retired pay if he or she were not less than 60 years old, also may elect to participate in the Survivor Benefit Plan.

If a soldier does need significant insurance coverage, he or she should compare the respective advantages of commercial coverage and SGLI. Unlike commercial insurance premiums, SGLI premiums do not increase with the age of the insured.²² Considering cost as the only criterion, soldiers in their twenties or low thirties may find commercial term insurance to be a better deal than SGLI. Older soldiers, however, usually will find SGLI to be cheaper than commercial insurance.²³

Price aside, SGLI and commercial insurance policies often differ substantially. Unlike commercial insurance, SGLI proceeds are payable regardless of the cause of the insured's death.²⁴ Serviceman's Group Life Insurance has no "war clause," nor does it contain a clause withholding policy proceeds from a soldier's beneficiaries if the soldier has contributed to the cause of his or her death. Moreover, SGLI ordinarily does not require proof of insurability. As a general rule, a soldier must provide proof of insurability only if he or she wishes to increase SGLI coverage.²⁵ Significantly, the recent changes in maximum available SGLI protection introduced an exception to that rule—anyone who wishes to increase SGLI coverage between now and 31 March 1993 may do so without providing proof of insurability.²⁶ This exception extends not only to service members who currently are insured at \$100,000, but also to those who had lesser coverage or no coverage.²⁷

Because SGLI is administered by an agency of the federal government, very little possibility exists that a valid SGLI claim will not be paid fully and promptly. Commercial insurers, on the other hand, often vary in the efficiencies with which they handle claims.

Soldiers with sizable assets²⁸ may obtain a benefit from commercial insurance that SGLI cannot offer. Both SGLI and commercial life insurance proceeds are includable in an insured's gross taxable estate.²⁹ Proceeds from commercial life insurance, however, can be placed in an irrevocable life insurance trust. If properly drafted, this trust will exclude the life insurance proceeds from the insured's gross taxable estate.³⁰ Conversely, SGLI proceeds cannot be placed in a trust that would exclude them from federal taxation.³¹ Because the marginal estate tax rate can exceed fifty percent,³² the decision to purchase SGLI may have a significant tax impact on a large estate. Major Peterson.

Living Wills

An LAA often will have to draft a living will for a client who wants to ensure that health care providers and family members comply with the client's directions about the care the client should receive if he or she becomes terminally ill or enters into a vegetative condition. *Army Regulation 27-3*³³ requires an LAA to assist clients in preparing various health care directives, including living wills, powers of attorney for health care, and anatomical gift designations.³⁴ Attorneys and paralegals may find the following questionnaire useful for informing clients about living wills and helping them to organize their thoughts before legal assistance interviews.

LIVING WILL QUESTIONNAIRE

DEFINITION: A Living Will is different from a Last Will and Testament. A

²²The current monthly rate for all SGLI coverage—regardless of the age of the insured—is \$0.80 per \$10,000 of coverage. Message, Headquarters, Dep't of Army, DAPE-MB, subject: Servicemen's Group Life Insurance Program Change, para. 5 (070027Z Nov 92).

²³*A Look at Three Insurers*, AIR FORCE TIMES, Nov. 23, 1992, at 11A.

²⁴See DEP'T OF ARMY, REG. 608-2, PERSONAL AFFAIRS: GOVERNMENT LIFE INSURANCE, ch. 2 (15 Oct. 1989).

²⁵*Id.* para. 2-26.

²⁶Message, *supra* note 22, para. 2.

²⁷Draft Message, Headquarters, Dep't of Army, DAJA-LA, subject: Legal Assistance on Servicemen's Group Life Insurance (SGLI) Elections, para. 6 (8 Dec. 1992).

²⁸The unified credit protects the first \$600,000 of a decedent's estate from federal taxation. See I.R.C. § 2010 (1988). Certain key members of Congress want to reduce the unified credit substantially, which would reduce the \$600,000 tax shelter.

²⁹See *id.*; see also *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1987); *United States Trust Co. v. Helvering*, 307 U.S. 57 (1939).

³⁰To exclude life insurance proceeds from his or her gross taxable estate, a policy holder must divest himself or herself of all "incidents of ownership" in the insurance policy. I.R.C. § 2042 (1988); see also *Dorson's Estate v. Commissioner*, 4 T.C. 463 (1944).

³¹Certain "incidents of ownership," such as the right to designate and change beneficiaries, see I.R.C. § 2042 (1988), are vested in the soldier by statute. 38 U.S.C.A. § 1970(a) (West 1991). Because the statute does not provide for an irrevocable assignment of these powers to a third party or a trust, see *id.*, soldiers are legally incapable of divesting themselves of these incidents of ownership.

³²I.R.C. § 2001 (1988).

³³DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992).

³⁴See *id.* para. 3-6b.

Living Will is a document authorizing or mandating the withholding or withdrawal of specified medical treatment in the event of catastrophic illness.

The document states the signer's desire to be allowed to die a natural death when two or more physicians have determined that the signer's death is imminent because of incurable disease, terminal illness, or injury. The document also may state the signer's decision not to be kept alive by medicines, heroic measures, or artificial means.

Most states require a patient's physical condition or prognosis to be terminal or to "reach a state of deterioration sufficient to trigger the authorization [to withhold medical treatment]" before they will give effect to a Living Will. This requirement advances a state's interests in preserving life, preventing suicide, and protecting the integrity of the medical profession.

REQUIREMENTS. Requirements for enforcing Living Wills vary from state to state. Many states require that the declaration be executed before being used. On the other hand, some states require that a patient be terminally ill when the declaration is executed. A state-by-state guide is available for your reference.

PROXY. A proxy is a person you appoint to be your Health Care Agent. Your decision to appoint a proxy must be entirely voluntary. Moreover, you should choose a person whom you trust and who you know will respect your decisions. Select an alternate proxy if possible. You cannot appoint an employee of a hospital, clinic, nursing home, rest home, or any other state-licensed health care facility to be your primary or alternate proxy.

Your Name _____

State of Legal Residence _____

Social Security Number _____

Name and Address of Proxy

Relationship _____

Name and Address of Alternate Proxy

Relationship _____

Other Directions/Instructions:

Legal assistance attorneys should remember that living wills may be filed in the medical records of a soldier or his or her family members.³⁵ The client must ensure that a copy of the living will is given to medical treatment facility personnel. Copies of the living will should be filed with administrative documents on the left-hand side of the client's inpatient medical treatment record and on the right-hand side of the client's health record and outpatient medical treatment record. Major Webster.

Family Law Note

Using the Uniformed Services Former Spouses' Protection Act to Collect Child Support

One of the simplest ways for the former spouse of a retired soldier to collect child support payments is to invoke the Uniformed Services Former Spouses' Protection Act (USFSPA).³⁶ Unlike other child support enforcement mechanisms, the USFSPA enables support obligees to initiate collection actions by themselves. The prior accumulation of support arrearages is not required. In addition, the collection process is fairly quick. If a custodial parent follows all the necessary steps to initiate withholding, he or she should begin to receive payments within ninety days.³⁷

³⁵See DEP'T OF ARMY, REG. 40-66, MEDICAL SERVICES: MEDICAL RECORDS ADMINISTRATION (20 July 1992). *Army Regulation 40-66* currently states, "Living wills are not legal, binding documents." *Id.* para. 8-2c(2). The Legal Assistance Division, Office of The Judge Advocate General (OTJAG), has alerted the Legal Advisor to the Surgeon General to this error, and the Office of the Surgeon General will issue a correction to the regulation.

³⁶Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982) (codified as amended at scattered sections of 10 U.S.C.). The portion of the USFSPA dealing with payment of disposable retired pay to satisfy child and spousal support may be found at 10 U.S.C.A. § 1408 (West, 1983 & Supp. 1992).

³⁷See 32 C.F.R. § 63.6(b)(4) (1992).

To begin receiving support payments pursuant to the USFSPA, a custodial parent must send the appropriate designated agent³⁸ a letter, or a signed *Department of Defense (DD) Form 2293*,³⁹ requesting that the amount due in support be withheld from the retiree's retired pay and sent directly to the custodial parent. The custodial parent either must serve the request on the designated agent, or must send the request to the agent by certified or registered mail, return receipt requested.⁴⁰

The former spouse also must enclose a copy of the decree ordering the retiree to pay child support.⁴¹ This document must be certified by court personnel within ninety days of service on the designated agent.⁴² If the court order was issued while the retiree was on active duty, and he or she was not represented in court, the order—or other court documents supplied with the order—must certify compliance⁴³ with the SSCRA.⁴⁴

If the former spouse presents his or her request for withholding in a letter, the letter must include the following items:

- A statement that the court order has not been amended, superseded, or set aside.
- The retiree's full name, social security number, and former uniformed service.
- The full name, address, and social security number of the former spouse.
- A statement acknowledging that the former spouse and his or her estate will be liable for any future overpayments and that all overpayments may be recovered through use of involuntary collection methods.
- A promise that the former spouse will notify the designated agent promptly if the operative order is vacated, modified, or set aside.⁴⁵

Certain limitations may limit a former spouse's ability to use the USFSPA to collect child support. For example, only

³⁸The designated agents, and their addresses, for the military services and the United States Coast Guard are as follows:

Army:

Defense Finance and
Accounting Center
Indianapolis Center
ATTN: DFAS-IG-GG
Fort Harrison, IN 46249-0160
(317) 542-2155

Air Force:

Defense Finance and
Accounting Center
Denver Center
ATTN: GL
Denver, CO 80279
(303) 370-7524

Coast Guard:

Commanding Officer (LGL)
U.S. Coast Guard Pay and Personnel Center
Federal Building
444 S.E. Quincy Street
Topeka, KS 66683-3591
(913) 295-2520

Marine Corps:

Defense Finance and
Accounting Center
Kansas City Center
Kansas City, MO 64197
(816) 926-7103

Navy:

Defense Finance and
Accounting Center
Cleveland Center
Cleveland, OH 44199
(216) 522-5301

³⁹See Dep't of Defense, Form 2293, Request for Former Spouse Payments from Retired Pay. This form is available at local military finance offices.

⁴⁰32 C.F.R. § 63.6(b)(3) (1992).

⁴¹*Id.* § 63.6(b)(1)(ii).

⁴²*Id.* § 63.6(c)(2).

⁴³*Id.* § 63.6(c)(4).

⁴⁴50 U.S.C. app. §§ 501-591 (West 1983 & Supp. 1992).

⁴⁵32 C.F.R. § 63.6(b) (1992). The custodial parent also must give notice if a child named in the original support order no longer is eligible for support because of emancipation, adoption, or death. *See id.*

"disposable retired pay" is subject to withholding.⁴⁶ Consequently, a retiree can shield a significant portion of his or her gross retired benefits from attachment under the USFSPA by electing to participate in the Survivor Benefit Program⁴⁷ or by waiving retired pay in lieu of veteran's disability payments.⁴⁸ Moreover, unless the former spouse obtains a garnishment order, he or she can attach only half of the retiree's disposable retired pay.⁴⁹ Finally, a former spouse can use the USFSPA to collect support arrearages, only to the extent that arrearages are ordered to be satisfied in the underlying order and quantified in the order or in ancillary court documents.

After a retiree receives notice that his or her former spouse is seeking payment of support obligations from the retiree's retired pay, he or she has only thirty days to respond before the finance center will begin withholding. A retiree's defenses to withholding are limited. He or she may avoid withholding only by presenting the designated agent with court-certified documents showing that the former spouse's underlying support order has been satisfied, vacated, modified, or otherwise set aside. Major Connor.

The Pitfalls of Using the Visa Waiver Program to Bring Alien Spouses into the United States

American soldiers who marry citizens of other countries sometimes experience difficulties when they return to the United States with their alien spouses.⁵⁰ Occasionally, soldiers will aggravate these problems by failing to follow

correct immigration procedures. This note discusses the steps American citizens must follow when bringing their alien spouses into the United States and the problems they may encounter if they try to circumvent Immigration and Naturalization Service (INS) procedures.

An Example of an Incorrect Entry and Its Consequences

Recently, an American soldier stationed in Germany travelled to the United States with his fiancée to be married. The fiancée, a German citizen, entered the United States as a tourist under the Visa Waiver Pilot Program (VWPP).⁵¹ After their wedding, the soldier and his wife returned to Germany. The soldier later was reassigned to a military installation in the United States. Planning to join him, his wife again entered the country through the VWPP. She then was three months pregnant and the soldier did not want to leave her alone in Germany. He wanted to be with his wife throughout her pregnancy and he hoped that their baby would be born a United States citizen on American soil.

Officials of the INS allowed the soldier's wife to leave the airport temporarily after she arrived in America. Ultimately, however, neither a team of lawyers, nor an intense media campaign, could deter the INS from forcing the wife to depart the United States. She then had to spend several months in Germany, waiting for the INS and the State Department to process the documentation necessary to grant her a visa and permanent resident status.⁵²

⁴⁶ 10 U.S.C.A. § 1408(a)(4) (West Supp. 1992), defines disposable retired pay as follows:

[T]he total monthly retired pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

⁴⁷ See *id.* ch. 73.

⁴⁸ See *Mansell v. Mansell*, 490 U.S. 581 (1989). "[U]nder the [USFSPA's] plain and precise language, state courts have been granted authority to treat disposable retired pay as community [or marital] property; they have not been granted authority to treat total retired pay as community [or marital] property." *Id.* at 589.

⁴⁹ 32 C.F.R. § 63.6(e) (1992).

⁵⁰ Unless the context indicates otherwise, the term "alien spouse" as used in this note includes any foreign national who has married an American citizen while living in a foreign country, or who attempts to enter the United States with the intention of marrying his or her American fiancée or fiancée.

⁵¹ See 8 U.S.C.A. § 1187 (West Supp. 1992); 8 C.F.R. § 217.1 (1992); see also Immigration & Naturalization Serv., Form I-791, Visa Waiver Pilot Program Information Form (26 May 1988).

⁵² The desire to avoid a delay of several months, during which the United States consulate and the INS process an alien spouse's entry documentation, prompts many couples to try to circumvent the established legal procedure for obtaining permanent resident status for alien spouses. When an alien spouse is pregnant, this delay assumes added significance because the duration of the processing time may determine whether the child is born in the foreign country or the United States.

Proper Procedure for Obtaining an Immigrant Visa for an Alien Spouse

An American citizen seeking to obtain an immigrant visa for his or her alien spouse—or “beneficiary,” in INS parlance⁵³—must begin by filing a petition⁵⁴ asking the Attorney General⁵⁵ to establish the alien spouse’s immediate relative⁵⁶ status.⁵⁷ The beneficiary and the petitioner also must complete INS Form G-325A⁵⁸ and submit it with the petition.⁵⁹ An INS official then will investigate the information set forth in the petition. If the official denies the petition,⁶⁰ the petitioner can appeal to the Board of Immigration Appeals within fifteen days of the mailing of the denial notification.⁶¹ On the other hand, if the INS official determines that the beneficiary

actually is an immediate relative of the petitioner, he or she will approve the petition and will forward one copy of it to the State Department.⁶² The State Department then will authorize the United States consulate serving the area in which the beneficiary resides to grant immediate relative preference status to the beneficiary.⁶³ The consulate will provide the beneficiary with a Form OF-171⁶⁴ and an immigrant visa application packet.⁶⁵

After filling out an application for an immigrant visa,⁶⁶ completing a biographic data form,⁶⁷ and gathering all necessary documentation,⁶⁸ the beneficiary may send a completed Form OF-169⁶⁹ to the consulate to advise the consular officers that he or she is ready for an interview.⁷⁰ After the

⁵³ Generally speaking, a beneficiary may be any alien on whose behalf an American citizen files a petition with the INS. See, e.g., 8 C.F.R. § 204.1(a) (1992) (using term to describe an alien for whom an American petitioner requests preference or immediate relative status); *id.* § 214.2(k)(1) (using term to describe an alien affianced to an American citizen, for whom the citizen is seeking a visa).

⁵⁴ See Immigration & Naturalization Serv., Form I-130, Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa (28 Feb. 1987). Along with the petition, the petitioner must submit proof that he or she and the beneficiary are lawfully married, see 8 C.F.R. § 204.2(c)(2) (1992), and must pay a fee of \$75, see *id.* § 103.7.

⁵⁵ An American citizen residing in Austria, Germany, Greece, Hong Kong, India, Italy, Kenya, Korea, Mexico, the Philippines, the Republic of Panama, Singapore, Thailand, or the United Kingdom must file his or her petition with the overseas INS office designated to act on that petition. See 8 C.F.R. § 204.1(a)(3)(ii) (1992). The beneficiary need not reside in the same jurisdiction as the petitioner. *Id.* A petitioner residing in any other country may file a Form I-130 at the United States consulate that has jurisdiction over the petitioner, regardless of the beneficiary’s residence or physical presence at the time of filing. See *id.* § 204.1(a)(3)(iii). A petitioner residing in the United States must file his or her petition at the INS office having jurisdiction over his or her place of residence. See *id.* § 204.1(a)(3)(i); see also 22 C.F.R. § 42.42 (1991).

⁵⁶ See 8 U.S.C.A. § 1151(b)(2)(A)(i) (West Supp. 1992) (defining “immediate relatives” as the children, spouses, and parents of an American citizen); see also *id.* § 1151(b) (providing that immediate relatives are not subject to the direct quotas that Congress ordinarily places on aliens to whom federal authorities may issue immigrant visas).

⁵⁷ *Id.* § 1154(a); 8 C.F.R. § 204.1 (1992). See generally 2 GORDON & MAILMAN, IMMIGRATION LAW AND PROCEDURE § 41.01 (1992); AUSTIN T. FRAGOMEN, JR., & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 3.2 (1992).

⁵⁸ Immigration & Naturalization Serv., Form G-325A, Biographic Data Form (1 Oct. 1982).

⁵⁹ See 8 U.S.C.A. § 1154(a) (West Supp. 1992); 8 C.F.R. § 204.1 (1992).

⁶⁰ See 8 U.S.C.A. § 1154(c) (West Supp. 1992) (discussing the restrictions on future entries of aliens involved with marriage fraud). Section 1154(c) states that a petition will not be approved if

(1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) if the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Id.

⁶¹ 8 C.F.R. § 204.1(a)(4) (1992).

⁶² 8 U.S.C.A. § 1154(b) (West Supp. 1992).

⁶³ *Id.*

⁶⁴ Dep’t of State, Form OF-171, Immigration Visa Appointment Form.

⁶⁵ DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, § 42.63, P.N.9, app. J, at J-731 (Matthew Bender & Co. 1991) [hereinafter FAM].

⁶⁶ Dep’t of State, Form OF-230, Application for Immigrant Visa. See generally 8 U.S.C.A. § 1202 (West Supp. 1992); 22 C.F.R. § 42.63(a)(2) (1991).

⁶⁷ See Dep’t of State, Form OF-179, Biographic Data Form for Visa Purposes; see also 9 FAM, *supra* note 65, § 42.63, N.1.1, app. J, at J-724.

⁶⁸ See 8 U.S.C.A. § 1202(b) (West Supp. 1992); 22 C.F.R. § 42.65 (1991).

⁶⁹ Dep’t of State, Form OF-269, Visa Document Transmittal Letter.

⁷⁰ 9 FAM, *supra* note 65, § 42.63, P.N.4.1-2(a), P.N.8(1), app. J, at J-728, J-730; see also *id.* § 42.63, ex. VII.

interview, the consulate will approve or deny the beneficiary's visa application.⁷¹ If it approves the application, the consulate will issue a visa that will be valid for four months.⁷² The application and approval process can take from several weeks to several months to complete.⁷³

When a beneficiary enters the United States, he or she is classified conditionally as a permanent resident⁷⁴ unless he or she has been married to the petitioning spouse for two years or longer. In that case, the beneficiary will receive full permanent resident status.⁷⁵

Procedure for Obtaining Visas for Alien Fiances and Fiancees

A United States citizen who wishes to get married in America to an alien residing outside of the United States must

file a petition⁷⁶ on behalf of that beneficiary⁷⁷ with the INS district office for the citizen's state of residence.⁷⁸ With this petition, the citizen must submit evidence that the citizen and the beneficiary met personally no more than two years before the filing of the petition⁷⁹ and that each has the intention and the legal capacity to marry the other within ninety days of the beneficiary's entry into the United States.⁸⁰ The beneficiary cannot apply for adjustment of status to permanent resident if he or she fails to marry the petitioner within ninety days of entry.⁸¹ If the INS approves the petitioner's request, it will send the petition to the United States consulate in the country in which the beneficiary resides. The beneficiary then will have to submit a nonimmigrant (K-1) visa application on *Form OF-156*,⁸² along with the necessary supporting documentation.⁸³ Consular officials will arrange an interview with the beneficiary and, if they approve his or her application, the consulate will grant the beneficiary a K-1 visa that will be valid for four months.⁸⁴

⁷¹ See 22 C.F.R. § 42.11(b) (1991). The alien spouse is granted conditional resident (CR-1) visa status. See *id.*

⁷² 8 U.S.C.A. § 1201(c) (West Supp. 1992); 22 C.F.R. § 42.72(a) (1991). A visa may be replaced when an immigrant can prove to the satisfaction of consular officers that he or she could not use the original visa during the four-month validity period because of the occurrence of events beyond the immigrant's control, for which the immigrant was not responsible. See *id.* § 42.74(a).

⁷³ See generally 2 GORDON & MAILMAN, *supra* note 57, § 55.01(3); FRAGOMEN & BELL, *supra* note 57, § 3.3; 5 GORDON & GORDON, IMMIGRATION LAW AND PROCEDURE §§ 114.02 to .03, 114.09 (1992), for an overview of the time frame involved in visa processing.

⁷⁴ 8 U.S.C.A. § 1186a(a) (West Supp. 1992); see Immigration Act of 1990, Pub. L. 101-649, §§ 701-702, 104 Stat. 4978, 5085-86. The 1990 act introduced provisions limiting alien spouses, fiances, fiancees, and other categories of individuals to conditional permanent resident statuses in an attempt to stem the increasing number of sham marriages between United States citizens and foreigners. See generally 9 FAM, *supra* note 65, § 42.63, P.N.5, app. J, at J-729.

⁷⁵ 8 U.S.C.A. § 1186a (West Supp. 1992); 8 C.F.R. §§ 216.1 to .4 (1992). The INS will remove the conditional status if, "during the 90-day period before the second anniversary of the alien's obtaining the status of permanent resident on a conditional basis," the alien spouse and the citizen spouse jointly submit a petition to the INS district director having jurisdiction over the alien's place of residence. See 8 U.S.C.A. § 1186a(c)(1)(A) (West Supp. 1992); see also 8 C.F.R. § 216.5(a) (1992) (authorizing waiver of requirement to file petition for removal of conditional status in certain situations). The alien spouse of a soldier stationed in the United States may file for naturalization three years after entering the United States if he or she meets the following conditions: (1) he or she lived continuously in a married status with the citizen spouse during the three-year period; (2) he or she was present physically in the United States for 18 months of the three-year period; (3) he or she resided within the United States for six months before filing his or her petition for naturalization; (4) he or she can meet the requirements for lawful admission to the United States as a permanent resident, as well as the age, character, loyalty, literacy, and education requirements for naturalization; and (5) he or she agrees to take the oath of allegiance to the United States. See 8 U.S.C.A. § 1430(a) (West Supp. 1992); see also DEP'T OF ARMY, REG. 608-3, PERSONAL AFFAIRS: NATURALIZATION AND CITIZENSHIP OF MILITARY PERSONNEL AND DEPENDENTS, para. 2-4 (15 May 1979).

⁷⁶ Immigration & Naturalization Serv., Form I-129F, Petition to Classify Nonimmigrant as Fiancee (7 Oct. 1987).

⁷⁷ See *supra* note 53.

⁷⁸ 8 U.S.C.A. § 1184(d) (West Supp. 1992).

⁷⁹ The Attorney General has the discretion to waive the requirement that the petitioner and the beneficiary must have met personally within two years of filing. See *id.* The federal government will waive this requirement only when enforcing strict compliance would cause the petitioner extreme hardship, or would violate strict traditional customs of the beneficiary's culture. See 8 C.F.R. § 214.2(k)(2) (1992).

⁸⁰ See 8 C.F.R. § 245.1(b) (1992). If the citizen and the alien do not marry within 90 days of the alien's entry into the United States, the alien will have to leave the country. See *id.* If the alien refuses to do so, he or she may be deported. See generally 8 U.S.C.A. §§ 1252-1253 (West Supp. 1992).

⁸¹ 8 C.F.R. § 245.1(b)(13) (1992).

⁸² See 22 C.F.R. § 41.103 (1991); Dep't of State, Form OF-156, Nonimmigrant Visa Application; see also 8 U.S.C.A. § 1202(c) (West 1970).

⁸³ 22 C.F.R. § 41.105 (1991); see 8 U.S.C.A. § 1202(d) (West 1970).

⁸⁴ See 22 C.F.R. § 41.81 (1991).

The VWPP—Its Background and Conditions

Authorized by the Immigration Reform and Control Act of 1986,⁸⁵ the VWPP⁸⁶ allows visitors from various designated countries⁸⁷ who seek to travel to the United States solely for purposes of business or tourism⁸⁸ to apply for admission to America without first obtaining nonimmigrant visitor visas.⁸⁹ The designated countries are Andorra, Austria, Belgium, Denmark, Finland, France, Germany,⁹⁰ Iceland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland, and the United Kingdom.⁹¹

To be eligible for admission into the United States under this program, an alien must fulfill all of the following requirements:

- he or she must possess a valid passport from a designated country;⁹²
- he or she must be a national of a designated country;⁹³

- he or she must seek entry as a nonimmigrant visitor for ninety days or less;⁹⁴
- he or she must possess a round-trip, non-transferable transportation ticket that will be valid for at least one year;⁹⁵
- he or she must complete and sign *Form I-94W*;⁹⁶ and
- he or she must waive all rights of review of, or appeal from, an INS admissibility determination and all rights to contest a deportation action.⁹⁷

An alien may not enter the United States under the VWPP if he or she has violated conditions of previous entries under the program,⁹⁸ is "excludable" from the United States,⁹⁹ or is a threat to the welfare, health, safety, or security of the United States.¹⁰⁰

⁸⁵ Pub. L. No. 99-603, § 313(a), 100 Stat. 3359, 3435.

⁸⁶ The VWPP terminates on 30 September 1994. See 8 U.S.C.A. § 1187(f) (West Supp. 1992).

⁸⁷ Congress no longer limits the number of countries that can participate in VWPP. The citizens of any country that grants reciprocal privileges to American citizens now may take advantage of the program. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; see also 8 U.S.C.A. § 1187(c) (West Supp. 1992) (setting forth the criteria the Attorney General and the Secretary of State must use to designate a foreign country as a participant in the VWPP).

⁸⁸ 8 C.F.R. § 212.1(i) (1992).

⁸⁹ 8 U.S.C.A. § 1187 (West Supp. 1992); 8 C.F.R. § 217.1 (1992); see also Immigration & Naturalization Serv., Form I-791, Visa Waiver Pilot Program Information Form (26 May 1988).

⁹⁰ German citizens who hold valid passports and who reside in the former East German region of the Federal Republic of Germany also are eligible to enter the United States under this program. Before German reunification in 1991, the VWPP was available only to citizens of West Germany.

⁹¹ See 8 C.F.R. § 217.5(a) (1992). But cf. *id.* § 217.5(b) (restricting the VWPP eligibilities of some subjects of the United Kingdom).

⁹² 8 U.S.C.A. § 1187(a)(2) (West Supp. 1992); 8 C.F.R. § 217.2(a)(3) (1992).

⁹³ 8 U.S.C.A. § 1187(a)(2) (West Supp. 1992); 8 C.F.R. § 217.2(a) (1992).

⁹⁴ 8 U.S.C.A. § 1187(a)(1) (West Supp. 1992); 8 C.F.R. § 217.2(a)(2) (1992). If an emergency prevents an alien from leaving the United States within the 90-day time limit, the INS district director having jurisdiction over the place of the alien's temporary stay may grant the alien an extension of up to 30 days. See *id.* § 217.3(b).

⁹⁵ 8 U.S.C.A. § 1187(a)(7) (West Supp. 1992); 8 C.F.R. § 217.2(a)(3) (1992); see also *id.* § 217.6.

⁹⁶ Immigration & Naturalization Serv., Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form.

⁹⁷ 8 U.S.C.A. § 1187(b) (West Supp. 1992); 8 C.F.R. §§ 217.2(a)(5) to (6), 236.9 (1992). This waiver shall not affect an alien's right to claim political asylum. See *id.* §§ 217.2(a)(5) to (6), 236.9 (1992); see also 8 U.S.C.A. § 1187(b)(2) (West Supp. 1992).

⁹⁸ 8 U.S.C.A. § 1187(a)(6) (West Supp. 1992); see also *infra* notes 101-104 and accompanying text.

⁹⁹ 8 U.S.C.A. § 1187(a)(4) (West Supp. 1992). An alien who applies for admission and is found to be ineligible because he or she is excludable, or who presents fraudulent or counterfeit travel documents, will be refused admission into the United States and will be removed from the country without resort to an immigration judge. 8 C.F.R. § 217.4(b) (1992). An alien may be deemed excludable if he or she suffers from a dangerous mental illness, narcotics addiction, or a serious contagious disease; has been convicted for one or more of a variety of criminal offenses, including drug trafficking; has been deported from the United States within the last five years; or is a member of a terrorist or subversive organization. See 8 U.S.C.A. § 1182(a) (West Supp. 1992) (enumerating specific classes of excludable aliens).

¹⁰⁰ 8 U.S.C.A. § 1187(a)(5) (West Supp. 1992).

Limitations of the VWPP

An alien admitted into the United States under the VWPP may not:

- extend his or her stay;¹⁰¹
- change his or her nonimmigrant status;¹⁰²
- adjust his or her status to that of a permanent resident, unless he or she is eligible to do so as the spouse, parent, or child of an American citizen;¹⁰³ or
- accept employment in the United States as a skilled or unskilled laborer.¹⁰⁴

Adjustment of Status After Marriage to an American Citizen

An alien entering the United States under the VWPP as a bona fide visitor¹⁰⁵—neither intending, nor expecting, to change his or her nonimmigrant status—who marries an American citizen while staying in the United States may remain in the United States after the ninety-day VWPP deadline expires.¹⁰⁶ To adjust the alien spouse's status to that

of a lawful permanent resident, the American spouse must file Forms I-130 and I-485¹⁰⁷ before the expiration of the deadline.¹⁰⁸ Pending approval¹⁰⁹ of the alien's adjustment of status,¹¹⁰ the alien may remain in America for more than ninety days.

Conclusion

Many American citizens residing outside of the United States will encounter difficulties when they try to bring their alien spouses into this country under the VWPP. An alien who travels to this country under the VWPP, expecting to obtain permanent resident status after marrying an American, will face similar problems.¹¹¹ Alien fiances and fiancées entering the country under the VWPP to marry American citizens cannot remain in the United States longer than ninety days. They must return to their countries of residence to process the necessary documentation for K-1 visas.

An LAA should advise a client who harbors any of the rosy expectations described above that the INS will not resolve the client's problems automatically upon his or her arrival in America. Although INS officers have broad discretion in these cases,¹¹² they are not required to allow alien spouses seeking permanent resident status to enter the United States under the VWPP. Many INS officials zealously will seek to

¹⁰¹ 8 C.F.R. § 217.3(a) (1992). An alien who fails to maintain nonimmigrant status may be deported. See 8 U.S.C.A. § 1251(a)(1)(C) (West Supp. 1992). Moreover, he or she later may be denied reentry under the VWPP. See *id.* § 1187(a)(6).

¹⁰² 8 C.F.R. § 217.3(a) (1992).

¹⁰³ *Id.* This exception applies only if the applicant can establish that he or she entered the United States lawfully as a visitor and that an explainable change in circumstances has occurred since that entry.

¹⁰⁴ *Id.* (an alien admitted into the United States as a nonimmigrant "visitor" under the VWPP "must not engage in activities in the United States which are inconsistent with that status"); see 8 U.S.C.A. § 1101(a)(15)(B) (West 1970) (describing a visitor as "an alien (other than one coming for the purpose of . . . performing skilled or unskilled labor [in the United States] . . .)").

¹⁰⁵ The INS officer at the alien's port of entry into the United States may determine whether the alien is a bona fide visitor who is eligible for admission into the country through the VWPP. See generally 8 U.S.C.A. § 1225 (West 1970 & Supp. 1992), for a discussion of the inspection powers of INS officers.

¹⁰⁶ See 8 C.F.R. § 217.3(a) (1992) (aliens admitted into the United States under the VWPP may not extend their periods of stay unless they are eligible for adjustments of status as immediate relatives).

¹⁰⁷ Immigration & Naturalization Serv., Form I-485, Application for Permanent Residence Status or Creation of a Record of Lawful Permanent Residence (27 Feb. 1987).

¹⁰⁸ See 8 C.F.R. § 245.2(a)(2)(i) (1992); see also *id.* § 204.1(a)(5)(ii). The petitioner may file the petition for adjustment of status either in the INS office that has jurisdiction over the petitioner's place of residence in the United States or in the INS office having jurisdiction over the place in which the beneficiary resides. See *id.* § 204.1(a)(3).

¹⁰⁹ See *id.* § 245.2(a)(5)(ii) (an applicant for adjustment of status cannot appeal from the INS district director's decision to deny his or her application, but he or she may renew the application).

¹¹⁰ See *id.* § 245.1(d)(2)(iv)(B). If the INS approves the citizen's petition, the State Department will grant the alien conditional permanent resident status. *Id.* § 245.1(g).

¹¹¹ See 5 GORDON & GORDON, *supra* note 73, § 114.02(2)(k).

¹¹² See *id.* §§ 114.03, 114.09(3)(d), 115.03(3)(a) to (c).

ensure that individuals follow INS procedures precisely in obtaining immigrant visas for spouses, or nonimmigrant visas for fiances or fiancées. If the petitioner and the beneficiary fail to abide by the law, they may face unpleasant repercussions. The INS may ask the beneficiary to choose between departing the country voluntarily¹¹³ and being deported.¹¹⁴ Any soldier who intends to return to America with his or her

alien spouse must abide at all times by the instructions of the United States consulate in the foreign country in which the spouse resides or—if the soldier seeks to bring his or her spouse into this country while the soldier is stationed in the United States—by the instructions of the appropriate INS district office. Ms. Sandulescu.¹¹⁵

¹¹³8 U.S.C.A. § 1254(e) (West Supp. 1992).

¹¹⁴See *id.* § 1251(a)(1)(C).

¹¹⁵Cynthia G. Sandulescu wrote this note while working as a summer intern for the Legal Assistance Division, OTJAG.

Claims Report

United States Army Claims Service

Tort Claims Notes

Defense Commissary Agency Claims

Before the establishment of the Defense Commissary Agency (DCA), each of the military departments processed, investigated, and resolved administrative claims involving its own commissary system. With the DCA's establishment on 1 October 1991, the Army automatically assumed responsibility for handling administrative claims arising from DCA activities.¹ Unfortunately, requiring the Army to handle DCA claims arising on Navy, Marine Corps, and Air Force installations hindered the expeditious dispositions of those claims by increasing the Army claims "load" substantially without concurrently increasing the Army's claims management resources. Accordingly, to expedite the handling of DCA claims, the United States Army Claims Service (USARCS), the Air Force Legal Services Agency, the Navy's Office of The Judge Advocate General, and the Office of the General Counsel for the Department of Defense entered into a memorandum of understanding (MOU) to reallocate responsibilities for handling DCA claims.

The MOU comprises four major provisions. First, it provides that each military department will handle personnel claims presented by DCA personnel employed by the commissaries on its installations, including claims for shipment damage for employees transferring to commissaries on those installations. Second, it states that each military department will handle tort claims and attendant litigation support arising from the acts or omissions of DCA personnel employed on its installations. Third, each military department will assert affirmative claims for damage to DCA property located on its installations. Finally, each military department will follow its own rules and regulations in handling DCA claims. Significantly, the third and fourth provisions do not apply to DCA claims arising in foreign countries for which a particular military department has "single service" responsibility.²

The effective date of the agreement was 1 June 1992. Army claims offices should forward DCA claims arising on Navy, Marine Corps, and Air Force installations that were filed after 1 June to the claims offices responsible for those installations.³ Claims personnel should address questions about the implementation of the MOU to the Tort Claims Division, USARCS. Lieutenant Colonel Kirk.

¹See DEP'T OF DEFENSE, DIRECTIVE 5515.9, SETTLEMENT OF TORT CLAIMS (Sept. 12, 1990) (the Army has the responsibility of processing claims arising from the operations of Department of Defense components other than the military departments).

²DEP'T OF DEFENSE, DIRECTIVE 5515.8, SINGLE SERVICE RESPONSIBILITY FOR PROCESSING OF CLAIMS (June 9, 1990).

³See DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 2-26 (28 Feb. 1990) [hereinafter AR 27-20]; DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, paras. 5-20, 5-23 (15 Dec. 1989).

DCA Memorandum of Understanding

**MEMORANDUM OF UNDERSTANDING
BETWEEN
U.S. ARMY CLAIMS SERVICE, OFFICE OF THE
JUDGE ADVOCATE GENERAL
AIR FORCE LEGAL SERVICES AGENCY
OFFICE OF THE JUDGE ADVOCATE GENERAL,
DEPARTMENT OF THE NAVY
AND
OFFICE OF THE GENERAL COUNSEL
OFFICE OF THE SECRETARY OF DEFENSE**

SUBJECT: Defense Commissary Agency Claims

1. Purpose. To adopt procedures for processing claims involving Defense Commissary Agency employees.

2. References. DODD 5105.55 (9 November 1990)
DODD 5515.9 (12 September 1990)
DODD 5515.10 (6 July 1965)

3. Problem. DOD Directives 5515.9 and 5515.10 empower the Army to settle tort and personnel claims against and by DOD employees who are not employees of the Departments of the Army, Navy, or Air Force. Prior to consolidation of Army, Navy and Air Force commissaries into the Defense Commissary Agency, each of the military services investigated and settled claims involving that service's commissaries. Requiring Army claims activities to investigate commissary claims arising on Navy, Air Force, and Marine Corps installations would hinder settlement of these claims.

4. Scope. To expedite processing of claims from commissary employees or arising out of commissary activities, each military service agrees to investigate and, if appropriate, settle claims involving commissary personnel permanently or temporarily employed on that service's installations, regardless of where such claims occur.

5. Understanding, agreements, support, and resources.

a. Each military service will investigate and settle personnel claims presented by civilian employees of the Defense Commissary Agency employed by commissaries on that service's installations. In addition, each service will investigate and settle claims for shipment damage presented by Defense Commissary Agency employees who are transferring to commissaries on that service's installations.

b. Except for claims arising in overseas countries where DODD 5515.8 has assigned single-service responsibility, each service will process and, if appropriate, settle tort claims presented under the Federal Tort Claims Act, the Military Claims Act, the Nonscope Claims Act, and the Foreign Claims Act which allege negligent or wrongful acts and omissions by commissary personnel employed on its installations. Each service will provide litigation support for claims involving commissary personnel assigned to its installations.

c. Each service will assert pro-Government claims for damage to Defense Commissary Agency property located on its installations, except in overseas countries where DODD 5515.8 has assigned single-service responsibility.

d. Each service will follow its own rules and regulations in investigating and settling claims. The Department of the Navy will assign responsibility for settling commissary claims arising on Marine Corps installations.

6. Effective date. The effective date of this agreement is 1 June 1992.

"JOSEPH C. FOWLER, JR."
JOSEPH C. FOWLER, JR.
Colonel, U.S. Army
Commanding
U.S. Army Claims Service

"MILTON D. FINCH"
MILTON D. FINCH
Captain, U.S. Navy
Deputy Assistant Judge
Advocate
General (Claims and
Tort Litigation)

"PHILLIP A. MEEK"
PHILLIP A. MEEK
Colonel, U.S. Air Force
Chief, Claims and Tort
Litigation Division
Air Force Legal Services
Agency

"ROBERT L. GILLIAT"
ROBERT L. GILLIAT
Deputy General
Counsel (P&HP)
Office of the
Secretary of Defense

New Standard Form 1145

When a federal agency, such as the Army, settles an administrative claim under the Federal Tort Claims Act (FTCA) in an amount greater than \$2500,⁴ the funds with which the agency pays the settlement come from the "Judgment Fund."⁵ To obtain payment of an FTCA settlement from the "Judgment Fund," a federal agency must forward a completed *Standard Form (SF) 1145* to the General Accounting Office.⁶

⁴See 28 U.S.C. §§ 1346(b), 2671-2680 (1988).

⁵The "Judgment Fund" is the popular name for the permanent indefinite appropriation established by Congress to pay awards, compromises, and settlements under the FTCA and certain other statutes. See generally 31 U.S.C. § 1304 (1988).

⁶28 C.F.R. § 14.10 (1991).

The Department of Justice (DOJ) recently issued a new version of the SF 1145.⁷ The major difference between the new form and the previous version of SF 1145, which was published in September 1973, appears in the language in the "ACCEPTANCE" block. The new form states that a claimant's acceptance of an award, compromise, or settlement is binding, not only on the claimant, but also on the claimant's heirs, executors, administrators, and assigns. This new language is the DOJ's response to *Schwarder v. United States*.⁸ In *Schwarder*, the United States Court of Appeals for the Ninth Circuit held that the heirs of a deceased medical malpractice claimant could assert a cause of action against the federal government for wrongful death, even though the deceased had settled his FTCA claim before he died.⁹ Consequently, the government had to pay twice for the same error. By revising SF 1145, the DOJ hopes to avoid this result in future cases.

The DOJ has informed USARCS that the Army should begin using the 1992 version of SF 1145 immediately. The 1973 version of the form is obsolete and should not be used unless modified. If the 1992 version is not available through distribution channels, claims personnel should superimpose the new acceptance language on the 1973 version of SF 1145 before using it.

The DOJ also has informed USARCS that both the claimants and the settlement authority must sign the SF 1145. The claimants must sign in the "ACCEPTANCE" block and the settlement authority must sign the form in the lower left block as the "authorized designee" of the Secretary of the Army.¹⁰ This guidance modifies past practice, in which a claims office often would not obtain a claimant's signature on the SF 1145 if the claimant already had signed a settlement agreement. When a claim requires both a settlement agreement and an SF 1145, the claimant and the settlement authority now should sign both documents.

The Claims Service is prepared to help claims offices to implement the new settlement procedures reflected in the revised SF 1145. Contact your area action officer at USARCS if you have questions concerning the use of the new form. Lieutenant Colonel Kirk.

Commander's Note

In the August 1992 Claims Report, I asked for your assistance in making soldiers more aware of the limits in the claims system and of the need for private insurance.¹¹ As I continue to review requests for reconsideration and the innovative arguments that claimants make to convince me to waive various limitations, I have become convinced that we must become more involved in a "preventive claims system."

Clearly, we cannot make every claimant happy. Requiring substantiation and applying rules of depreciation and maximum amounts per item or category invariably will annoy a certain percentage of claimants, regardless of how much information we give them before their moves. Nevertheless, adequate, accurate information will help most soldiers to protect themselves and will make them more satisfied with you and the claims system. With that in mind, I ask each claims office to establish a system to monitor outbound transportation briefings and to ensure that soldiers receive accurate and understandable information about the claims system, its limits, and the insurance options available to service members. Insist that transportation counselors show the film "It's Your Claim" to every transferring soldier. If premove counseling is not adequate and your suggestions for improvements are ignored, ask your staff judge advocate to raise the issue with the transportation officer or—if necessary—with the installation commander. We all owe it to our soldiers to provide sufficient information to enable them to protect themselves. This is a very important quality of life issue and our soldiers need your help. Colonel Fowler.

⁷The upper left corner of the 1992 version of SF 1145 is marked "(Revised 1/92)."

⁸974 F.2d 1118 (9th Cir. 1992).

⁹*Id.* at 1124.

¹⁰See also AR 27-20, *supra* note 3, paras. 2-12d(3), 2-24b, 4-10b.

¹¹See Claims Report, *Commander's Note*, ARMY LAWYER, Aug. 1992, at 39.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office

Equal Employment Opportunity Note

EEOC Rules that Compensatory Damages Are Available in the Administrative Process

On 12 November 1992, the Equal Employment Opportunity Commission (EEOC) held that the Civil Rights Act of 1991 (CRA)¹ makes compensatory damages available to federal sector administrative complainants.² In *Jackson v. United States Postal Service*,³ the Postal Service certified full relief to a complainant even though the complainant's request for compensatory damages had not been addressed. The EEOC disagreed with this approach. Addressing the argument that "the term 'action' as used in the CRA refers only to a civil action in court," the EEOC decided that this "interpretation is not supported by the statutory language of the CRA as a whole [or by] the principles of statutory interpretation."⁴ Accordingly, the EEOC concluded that, before making an offer of full relief, the Postal Service

should have requested from the appellant objective evidence of the alleged damages incurred. In this case, such proof could have taken the form of receipts or bills for medical care, medication and transportation to the doctor. In addition the agency should have requested that appellant provide objective evidence linking these damages to the alleged unlawful discrimination.⁵

This issue undoubtedly will be the subject of further scrutiny and review. Labor counselors should check the Labor and Employment Conference of the Legal Automation Army-Wide System Bulletin Board System for the latest information

in this volatile area. In the meantime, prudent advocates should be prepared to address the issue of compensatory damages by using the EEOC's new discovery rule⁶ to obtain receipts or bills from the complainant. Mr. Meisel.

Civilian Personnel Law Notes

Federal Circuit Rules that an EEO Complaint Does Not Constitute Whistleblowing

In its second decision in *Williams v. Department of Defense (Williams II)*, the Merit Systems Protection Board (MSPB or Board) held that the Whistleblower Protection Act of 1989 (WPA) does not afford whistleblower status to employees who file discrimination complaints.⁷ The Court of Appeals for the Federal Circuit recently affirmed this interpretation of the WPA.

In *Spruill v. Merit Systems Protection Board*,⁸ the Federal Circuit reviewed a Board decision that followed the *Williams II* rationale in resolving an individual right of action complaint.⁹ The court held that, although an equal employment opportunity (EEO) complaint is a disclosure of information about a perceived violation of law, the WPA contemplates only disclosures about potential health and safety hazards or the overall administration of government funds—not individual employee disputes.¹⁰ The court noted that the WPA's statutory scheme entrusts the EEOC with the role of expert agency for the enforcement of federal equal employment rights.¹¹ Accordingly, the WPA does not bring these allegations within the purview of the Office of Special Counsel (OSC).¹² Mr. Meisel.

¹ Pub. L. No. 102-166, 105 Stat. 1071.

² *Jackson v. United States Postal Serv.*, No. 01923399 (Equal Employment Opportunity Comm'n 1992).

³ *Id.*

⁴ *Id.* slip op. at 4.

⁵ *Id.* slip op. at 3.

⁶ 29 C.F.R. § 1614.109 (1992).

⁷ *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1990), *rev'g* 45 M.S.P.R. 146 (1990).

⁸ 978 F.2d 679 (Fed. Cir. 1992).

⁹ *See* 5 U.S.C. § 1221 (1988).

¹⁰ *Spruill*, 978 F.2d at 692.

¹¹ *Id.* at 692 & n.17.

¹² *Id.* at 692.

Federal Circuit Clarifies Burdens of Proof in Prosecutions of Alleged Retaliating Officials

The Federal Circuit has clarified the essential elements of proof in disciplinary actions against federal employees who allegedly have engaged in prohibited reprisals against whistleblowers. In *Eidmann v. Merit Systems Protection Board*,¹³ the court reviewed the OSC's prosecution of a personnel advisor who had recommended the removal of a probationer for going outside the chain of command to complain about smoking in the workplace. The MSPB found that this recommendation constituted reprisal and directed the agency to downgrade the advisor by two grades for two years.¹⁴ The Federal Circuit affirmed the downgrade, but it also pointed out several errors in the Board's legal analysis.

After reviewing the WPA and the facts of the case, the court agreed with the Board's holding that the WPA does not require that an alleged retaliating official actually know that the disclosures at issue were protected.¹⁵ The official only must know that these disclosures were made.¹⁶ The court also held, however, that the Board and the OSC erred in requiring the retaliating official to show by "clear and convincing" evidence that the whistleblower would have been subjected to the same action had the employee not engaged in the whistleblowing.¹⁷ The court distinguished between the burden of proof that the OSC must apply when reviewing a personnel action that penalizes a whistleblower and the burden that the OSC must apply when initiating a personnel action against a retaliating official.¹⁸ The WPA permits the OSC to order an agency to take corrective action on behalf of a whistleblower if the OSC shows that a protected disclosure was a "contributing factor" in a personnel action against the whistleblower and the agency fails to show by "clear and convincing" evidence that it would have taken the same personnel action

absent the whistleblowing.¹⁹ When prosecuting an alleged retaliating official, however, the OSC must show that the disclosures were a "significant factor" in the official's decision to initiate an adverse personnel action against the whistleblower.²⁰ After noting this error in the Board's analysis, the court affirmed the decision because the record showed that the OSC actually had met the appropriate burden of proof.²¹ Mr. Meisel.

Installations Need Not Participate in Work Release Programs

When an employee repeatedly has run into trouble with "the law" in a civilian community, the Army may be asked to facilitate the employee's enrollment in a work release program. If the installation declines to "babysit" the criminal employee, the employee might be incarcerated. As a general rule, an agency may remove an employee for absence without leave (AWOL), including an AWOL resulting from incarceration. What are the employee's rights to continued government employment, however, when the agency could have prevented his or her incarceration by agreeing to participate in a work release program?

Faced with this issue, one administrative judge sustained a charge of prolonged AWOL, but mitigated the employee's removal for this second offense to a sixty-day suspension because the agency had failed to facilitate the errant employee's participation in a work release program. On review, the Board overturned the initial decision and reinstated the removal.²² The Board found that an agency is not obliged to accept an employee for duty under a work release program.²³ Mr. Meisel.

¹³976 F.2d 1400 (Fed. Cir. 1992).

¹⁴*Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991).

¹⁵*Eidmann*, 976 F.2d at 1406.

¹⁶*Id.*

¹⁷*See id.*

¹⁸*See id.* at 1405. Compare 5 U.S.C. § 1214 (Supp. II 1990) (governing corrective actions to prevent reprisals from harming whistleblowers) with *id.* § 1215 (disciplinary actions against employees who commit reprisals against whistleblowers).

¹⁹*See* 5 U.S.C. § 1214 (Supp. II 1990).

²⁰*See id.* § 1215.

²¹*Eidmann*, 976 F.2d at 1407.

²²*Huetner v. Department of the Army*, 54 M.S.P.R. 472, 475 (1992).

²³*Id.* at 474 (citing *Winslow v. Department of the Navy*, 46 M.S.P.R. 246, 251 (1990), *aff'd*, 935 F.2d 280 (Fed. Cir. 1991); *Abrams v. Department of the Navy*, 22 M.S.P.R. 480, 486 (1984), *aff'd*, 770 F.2d 181 (Fed. Cir. 1985); *Poe v. Department of the Army*, 22 M.S.P.R. 506, 509 (1984)).

Labor Relations Note

Events that Are Inextricably Linked to an MSPB Appealable Action May Not Be Subject to a ULP

Recently, the United States Court of Appeals for the Fourth Circuit addressed an extremely complicated area of labor counselor practice—duality of fora. In *Department of Commerce v. Federal Labor Relations Authority*,²⁴ the Fourth Circuit held that the Federal Labor Relations Authority (FLRA) may not exercise jurisdiction over complaints of unfair labor practices (ULPs) in actions appealable to the MSPB, or in matters that are linked inextricably to these appealable actions.

In the instant case, the employee had been a very active union organizer for more than three years—filing fifty-five ULP charges (of which four resulted in favorable FLRA decisions), six lawsuits, and dozens of Freedom of Information Act (FOIA) requests. The employee received a written “record of infraction”²⁵ for unauthorized use of government computers, conducting personal business on government time, insubordination, and misuse of administrative and judicial procedures. The employee filed a ULP charge upon receiving the “record of infraction.”

Before acting on the ULP charge, the agency proposed the employee’s removal for the same misconduct. The employee amended the ULP charge to include the removal proposal. When the agency later removed the employee, he filed a concurrent appeal with the MSPB to protest the actual removal.

²⁴ 976 F.2d 882 (4th Cir. 1992).

²⁵ In the context of this case, a “written record of infraction” appears to be equivalent to a memorandum for record or similar document and not a disciplinary action such as a “letter of reprimand.”

²⁶ *Department of Commerce v. Federal Labor Relations Auth.*, 976 F.2d at 886.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 890.

³⁰ See 5 U.S.C. § 7116(d) (1988) (“Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section”).

³¹ *Department of Commerce v. Federal Labor Relations Auth.*, 976 F.2d at 888.

The FLRA General Counsel issued a complaint on the ULP charge. An FLRA administrative law judge (ALJ) subsequently ruled in favor of the employee, noting that, although removal was an adverse action that fell under MSPB jurisdiction, the ULP charge challenged only the “record of infraction” and the proposal letter—not the actual removal.²⁶ In an exercise in circumlocutory logic, the ALJ found that his decision did not impinge on the MSPB’s dominion over removals, stating that the decision did not preclude the agency from removing the employee, but only forbade it from relying on the “record of infraction” or the proposal letter as bases for that removal.²⁷ The FLRA affirmed the ALJ’s decision.²⁸

The Fourth Circuit overturned the FLRA decision.²⁹ The court agreed with the agency that the proper forum for this employee was the MSPB. Citing 5 U.S.C. § 7116,³⁰ the court held that, because the subject matter of the ULP complaint was linked inextricably to a matter appealable to the MSPB, the sole jurisdiction over the dispute lay with the MSPB.³¹ Mr. Meisel.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team. Share this information with your civilian personnel officer and your equal employment opportunity officer.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The Standards of Conduct Office normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. These inquiries, which involve isolated

instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings, typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General’s Professional Responsibility Committee (PRC).

The following PRC opinion, which applies the Army's Rules of Professional Conduct for Lawyers¹ to a case involving a legal assistance attorney's inappropriate sexual comments to, and conduct toward, a domestic relations client,² is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for judge advocates. To stress education and to protect privacy, neither the identity of the office, nor the name of the subject will be published. Mr. Eveland's

**Professional Responsibility
Opinion 90-1**

**The Judge Advocate General's Professional
Responsibility Committee**

Factual Situation

This opinion involves matters arising from an Army legal assistance attorney's initial interview with a client, the wife of an active duty enlisted soldier. The client met with the attorney in the legal assistance office in anticipation of receiving advice about her marital problems, and seeking information about a possible separation and divorce. The attorney provided [her with] legal advice regarding spousal support, responsibility for marital debts, property division, [and the] grounds and forum for divorce. He also explained the mechanics of having the client and her husband complete a "separation worksheet" [that the attorney provided to the client].

During the interview, the client indicated that her husband had admitted [to] committing adultery and [that he] no longer desired to remain married. The discussion brought forth the facts that the client had [not engaged in] sexual relations with her husband [during the previous] three months and was not herself having an extramarital affair. At some point after learning these facts, the attorney "jokingly" suggested that the client begin an affair. Further, after the client questioned the attorney about the possibility of her having to vacate government quarters, the attorney "jokingly" stated that the client could move in with him. (The attorney previously had informed the client that he was married and had no children.)

The attorney admits to making both of the statements in jest [T]he client indicates that she initially thought the attorney [was] joking, but as the interview progressed, she became displeased with his comments. The attorney indicates that he made the first statement—about having an affair—in

an attempt to explore whether the client was having an extramarital affair, [noting that] the existence of such a relationship would affect his subsequent advice to the client. The attorney further indicates that he made the second statement—about the client moving in with him—in an effort to pacify the client by injecting humor into an otherwise serious conversation.

When the interview was about over, the attorney shook the client's hand (holding onto her hand longer than the client deemed necessary). Then he hugged the client. Realizing that the client did not appreciate his embrace, the attorney immediately apologized. The attorney admits to embracing the client, but says that [the embrace] was intended only as a goodwill gesture to reassure the client of his support for her situation.

[The client also alleges that, as] the two stood and continued discussing the separation worksheet, . . . the attorney again hugged her and then kissed her on the mouth. The attorney denies this allegation. The factual inquiry provided [to] this Committee did not resolve the inconsistent testimony in this area and the Committee has no fact-finding powers. [R]esolution of this inconsistency [, however,] is not necessary for disposition of the case.

During the ensuing weekend, the client discussed the occurrences in the attorney's office with another soldier's wife and decided to report the episode to the authorities. She reported the incident to her husband's company commander on the Monday following the legal assistance appointment. The company commander referred her to the Office of the Inspector General, where she filed a formal complaint. [Moreover,] because the client made it known that she did not want to see the same legal assistance attorney again, the staff judge advocate made another attorney available to the client.

Regulatory Guidance

[Army Regulation (AR) 27-3 provides,] "[Legal assistance attorneys] must exhibit professionalism. The appearance of the office, the demeanor of office personnel, and the appearance and quality of the work product must reflect this professionalism."³ While it is laudable that a legal assistance attorney may attempt to ease the emotional discomfort of a client while discussing the client's marital problems, the Committee is of the opinion [that] the attorney in the present situation . . . exercised poor judgment by injecting inappropriate comments (even if intended to be humorous) along with an embrace, into an otherwise stressful situation for the client. A military legal assistance attorney has an obligation to maintain, both in

¹See DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA Pam. 27-26]. When the opinion was published, *Department of the Army Pamphlet (DA Pam.) 27-26* was the controlling version of the Rules of Professional Conduct. On 1 June 1992, *Army Regulation 27-26* superseded *DA Pam. 27-26*. See generally DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

²See also Professional Responsibility, Op. 81-4, as digested in *ARMY LAW*, Dec. 1983, at 15 (holding that a legal assistance attorney who shared his apartment with, and provided financial assistance to, a domestic relations client and her child engaged in conduct adversely reflecting on his fitness to practice law).

³DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 1-6 (10 Mar. 1989) [hereinafter AR 27-3].

appearance and in fact, the integrity of the Army's legal assistance program. The program is designed to maintain military effectiveness [To] do so, [it] must enjoy complete confidence within the military, [from] both . . . [the service] members and their families. The image or perception of a legal assistance attorney taking advantage of a client [who is] undergoing an emotional and vulnerable time in [his or] her life undermines the professionalism required by AR 27-3. In the present situation, the appearance of impropriety is as devastating as the actual existence of impropriety.

The Committee further opines that the attorney's remarks about the client having an affair and moving in with him not only were inappropriate, but also—when coupled with the unsolicited and unwanted embrace—constituted a violation of the regulatory proscription against sexual harassment.

Sexual harassment is a form of sex discrimination that involves unwelcomed sexual advances . . . and other verbal or physical conduct of a sexual nature, when . . . such conduct . . . creates an intimidating, hostile, or offensive environment. . . . [Any soldier who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment].⁴

Rules of Professional Responsibility

[The] Rules of Professional Conduct for Lawyers (Army Rules) appl[y] to legal assistance attorneys.⁵ Army Rule 8.4 states that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" [6] The Committee finds this provision applicable to the present factual situation.

Article 133, Uniform Code of Military Justice,^[7] prohibits an officer from engaging in conduct that is unbecoming of an officer and a gentleman. An officer violates Article 133 when [his or her] behavior in an official capacity brings dishonor or disgrace upon the officer by seriously compromising the

officer's character as a gentleman.⁸ The Army Rules indicate that "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."⁹ The Committee finds that the attorney's words and actions in this case, when considered in their entirety, especially in the officer's capacity as a legal assistance attorney at a time when [his] client was clearly vulnerable, represent the type of offense that the Army Rules seek to address. Moreover, the Army Rules remind judge advocates that they hold commissions as Army officers and that they have assumed obligations and responsibilities going beyond those of ordinary citizens. "A judge advocate's abuse of such [a] commission can suggest an inability to fulfill the professional role of [a] judge advocate and [a] lawyer."¹⁰ In the factual situation presented [here], the conduct of the attorney was not conduct that would be expected of an officer or an attorney. Acting in an official capacity and in a formal office setting, the attorney should have recognized that his behavior was not that which a reasonable member of the legal profession or the officer corps would think permissible by the Army Rules or the Uniform Code of Military Justice. This is especially true [when] society's news media [are] replete with criticism of professionals who take advantage of clients in vulnerable situations.

Attorneys whose conduct falls outside the temperate and dignified behavior owed to a client lower the public perceptions of the legal profession. In a similar factual situation, a state bar found [that] an attorney who questioned a divorced, female client about dating married men, and who hugged and kissed the client on the cheek before she left the office, [committed] professional misconduct because [the attorney's] actions reflected adversely on his fitness to practice law.¹¹ As evidenced by the [client's] timely complaint against the attorney's actions in the present factual situation and the client's noticeable uneasiness with the attorney's actions, this legal assistance attorney brought discredit upon himself and the legal profession. [This] conduct [might have been] innocuous in a setting outside of the attorney-client relationship . . . [; however,] within [a] professional setting, the attorney's actions reflect adversely upon [his] ability to maintain a professional relationship and . . . destroy the integrity of the legal profession.

⁴DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, para. 6-4 (30 Mar. 1988) (01, 13 Sept. 1989).

⁵AR 27-3, *supra* note 3, para. 1-5a.

⁶DA PAM. 27-26, *supra* note 1, rule 8.4.

⁷UCMJ art. 133 (1988).

⁸See MANUAL FOR COURTS-MARTIAL, United States, pt. IV, ¶ 59 (1984).

⁹DA PAM. 27-26, *supra* note 1, rule 8.4 comment.

¹⁰*Id.*

¹¹Courtney v. Alabama State Bar, 492 So. 2d 1002 (Ala. 1986).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Armywide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

22 February-5 March: 130th Contract Attorneys' Course (5F-F10).

8-12 March: 32d Legal Assistance Course (5F-F23).

15-19 March: 53d Law of War Workshop (5F-F42).

22-26 March: 17th Administrative Law for Military Installations Course (5F-F24).

29 March-2 April: 5th Installation Contracting Course (5F-F18).

5-9 April: 4th Law for Legal NCOs Course (512-71D/E/20/30).

12-16 April: 117th Senior Officers' Legal Orientation (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

18-21 April: Reserve Component Judge Advocate Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys' Course (5F-F10).

17-21 May: 36th Fiscal Law Course (5F-F12).

17 May-4 June: 36th Military Judges' Course (5F-F33).

18-21 May: 1993 USAREUR Operational Law CLE (5F-F47E).

24-28 May: 43d Federal Labor Relations Course (5F-F22).

7-11 June: 118th Senior Officers' Legal Orientation (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JAOAC, Phase II (5F-F58).

14-25 June: JATT Team Training (5F-F57).

14-18 June: 4th Legal Administrators' Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys' Course (5F-F10).

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officers' Legal Orientation (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

April 1993

1-2: EEI, Chemical Labeling and Regulation for 1993, Washington, D.C.

1-2: EEI, SARA Title III Briefing, Washington, D.C.

1-3: UCCI, 26th Annual Uniform Commercial Code Institute, Chicago, IL.

5-6: ESI, Changes, Washington, D.C.

6-9: ESI, Continuous Improvement and Total Quality Management, Washington, D.C.

7: ESI, Protests, Washington, D.C.

8-9: ESI, Claims and Disputes, Washington, D.C.

12: GWU, Suspension and Debarment, Washington, D.C.

12-13: ESI, Terminations, Washington, D.C.

13: MICLE, Like Kind Exchanges and Other Real Estate Tax Problems, Novi, MI.

13-14: GWU, International Government Procurement, Washington, D.C.

13-14: GII, OSHA Compliance Course, Arlington, VA.

13-16: ESI, Contract Pricing, Washington, D.C.

14-16: ESI, Just-in-Time and Systems Contracting, Washington, D.C.

15-16: GII, Advanced Environmental Laws and Regulations Course, San Francisco, CA.

15-16: SLF, Risk Management Workshop: Deadly Force and Pursuit Driving, Dallas, TX.

15-16: GII, Advanced Environmental Laws and Regulations Course, San Francisco, CA.

15-16: LSU, Annual Environmental Law Institute, Baton Rouge, LA.

18-22: NCDA, Office Administration, Lake Tahoe, NV.

19-23: GWU, Government Contract Law, Washington, D.C.

20: MICLE, Bankruptcy Hazards for the Real Estate Practitioner, Grand Rapids, MI.

20-21: EEI, Water Quality Standards for Toxic Pollutants, Chicago, IL.

20-23: SLF, Securities Regulation Short Course, Dallas, TX.

22: MICLE, Bankruptcy Hazards for the Real Estate Practitioner, Troy, MI.

22: MICLE, Like Kind Exchanges and Other Real Estate Tax Problems, Grand Rapids, MI.

22-23: GII, TSCA Compliance Course, Arlington, VA.

26-30: ESI, Federal Contracting Basics, Washington, D.C.

27-30: ESI, Preparing and Analyzing Statements of Work and Specifications, Denver, CO.

27-30: ESI, Contract Accounting and Financial Management, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are in the August 1992 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-six states currently have mandatory continuing legal education (MCLE) requirements. In these states, all active attorneys are required to attend approved continuing legal education (CLE) programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance, or reasons for exemptions from compliance, with their CLE requirements. Due to the variety of MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most MCLE jurisdictions.

Listed below are jurisdictions that have adopted some form of MCLE. This list includes a brief description of each state's requirement, the address of the local official to whom the attorney must report, and the state's CLE reporting date. The "*" indicates that a state has approved TJAGSA *resident* CLE courses.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 (205) 269-1515	-Twelve hours per year. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 31 December.
Arizona	Director, Programs and Public Services Division 363 N. First Ave. Phoenix, AZ 85003 (602) 252-4804	-Fifteen hours each year, including two hours professional responsibility. -Reporting date: 15 July.
*Arkansas	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 (501) 664-8737	-Twelve hours per year. -Reporting date: 30 June.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
California	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 (415) 241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the Federal Government are exempt. -Reporting date: 1 February	*Indiana	Indiana Commission for CLE 101 W. Ohio Suite 410 Indianapolis, IN 46204 (317) 232-1943	-Thirty-six hours within a three-year period (minimum six hour per year). -Each new admittee by examination is given a three-year grace period, beginning on 1 January before his or her admission. -Reporting date: 31 December.
*Colorado	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 (303) 893-8094	-Forty-five hours— including two hours of legal ethics—during a three-year period. -Newly admitted attorneys also must complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Any time within three-year period.	*Iowa	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 (515) 281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.
*Delaware	Commission on CLE 831 Tatnall St Wilmington, DE 19801 (302) 658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.	*Kansas	CLE Commission Kansas Judicial Center 301 W. 10th St. Room 23-S Topeka, KS 66612-1507 (913) 357-6510	-Twelve hours each year, including two hours of ethics. -Reporting date: 1 July.
*Florida	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Pkwy. Tallahassee, FL 32399-2300 (904) 561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military are exempt, but must declare their exemptions during their reporting periods -Reporting date: Assigned month every three years.	*Kentucky	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
*Georgia	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Twelve hours per year, including one hour of legal ethics, one hour of professionalism, and three hours of trial practice (trial attorneys only). -Reporting date: 31 January.	*Louisiana	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military are exempt, but must declare their exemptions. -Reporting date: 31 January.
*Idaho	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701-0898 (208) 3428959	-Thirty hours during three-year period. -Reporting date: Every third year after year of admission.	Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 (517) 372-9030	-Thirty or thirty-six hours (depending on whether the attorney was admitted in the first or the second half of the fiscal year) within three years of becoming an active member of bar. An attorney must complete

State **Local Official** **CLE Requirements**

- Michigan (con't)** six or twelve CLE hours the first year, twelve hours in the second year, and twelve hours in the third year. Courses must be taken in the sequence identified by the CLE Commission.
 -Reporting date: 31 March.
- *Minnesota** Director, Minnesota State Board of CLE
 One W. Water St., Suite 250
 St. Paul, MN 55107
 (612) 297-1800
 -Forty-five hours during three-year period.
 -Reporting date: 30 August.
- *Mississippi** CLE Administrator
 Mississippi Commission on CLE
 P.O. Box 2168
 Jackson, MS 39225-2168
 (601) 948-4471
 -Twelve hours per year.
 -Active duty military attorneys are exempt, but must declare their exemptions.
 -Reporting date: 1 August.
- *Missouri** Director of Programs
 P.O. Box 119
 Jefferson City, MO 65102
 (314) 635-4128
 -Fifteen hours per year, including three hours of legal ethics every three years.
 -New admittees must complete three CLE hours of professionalism, legal and judicial ethics, or malpractice in twelve months.
 -Reporting date: 31 July.
- *Montana** MCLE Administrator
 Montana Board of CLE
 P.O. Box 577
 Helena, MT 59624
 (406) 442-7660
 -Fifteen hours per year.
 -Reporting date: 1 March.
- *Nevada** Executive Director
 Board of CLE
 295 Holcomb Ave.
 Suite 5-A
 Reno, NV 89502
 (702) 329-4443
 -Ten hours per year.
 -Reporting date: 1 March.
- *New Mexico** MCLE Administrator
 P.O. Box 25883
 -Fifteen hours per year, including one hour of legal ethics.

State **Local Official** **CLE Requirements**

- *New Mexico (con't)** Albuquerque, NM 87125
 (505) 842-6132
 -Reporting date: 30 days after completing each CLE program.
- *North Carolina** Executive Director
 The North Carolina State Bar
 208 Fayetteville Street Mall
 P.O. Box 25148
 Raleigh, NC 27611
 (919) 733-0123
 -Twelve hours per year, including two hours of legal ethics. Each attorney must complete a special three-hour block of ethics once every three years.
 -New attorneys must complete nine hours of practical skills training in each of their first three years of practice.
 -Service members on active duty are exempt, but must declare their exemptions.
 -Reporting date: 28 February.
- *North Dakota** North Dakota CLE Commission
 P.O. Box 2136
 Bismarck, ND 58502
 (701) 255-1404
 -Forty-five hours during three-year period.
 -Reporting date: the reporting period ends on 30 June; affidavit must be received by 31 July.
- *Ohio** Secretary of the Supreme Court
 Commission on CLE
 30 E. Broad St.
 Second Floor
 Columbus, OH 43266-0419
 (614) 644-5470
 -Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle—including instruction on substance abuse.
 -Active duty military attorneys are exempt, but must pay filing fees.
 -Reporting date: biennially, no later than 31 January.
- *Oklahoma** MCLE Administrator
 Oklahoma State Bar
 P.O. Box 53036
 Oklahoma City, OK 73152
 (405) 524-2365
 -Twelve hours per year, including one hour of legal ethics.
 -Active duty military attorneys are exempt, but must declare their exemptions.
 -Reporting date: 15 February.
- *Oregon** MCLE Administrator
 -Forty-five hours during three-year period,

State	Local Official	CLE Requirements	State	Local Official	CLE Requirements
*Oregon (con't)	Oregon State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97034-0889 (503) 620-0222- ext. 368	including six hours of legal ethics. Each new admittee must complete fifteen CLE hours in his or her first year of practice—ten hours must be in practical skills and two in ethics. -Reporting date: Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; all attorneys report triennially thereafter.	*Texas	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 (512) 463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth, annually.
			*Utah	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 (801) 531-9077 (800) 662-9054	-Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: End of two-year period.
Pennsylvania	Pennsylvania CLE Board c/o Administrative Office of Pennsylvania Courts 5035 Ritter Rd. Suite 700 Mechanicsburg, PA 17055 (717) 795-2119	-Five hours per year. -Active attorneys must complete a minimum of five CLE hours on ethics and professionalism each year. Up to ten hours may be carried forward and applied against the minimum requirement for either of the two succeeding years. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: Annually as assigned.	*Vermont	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 (802) 828-3281	-Twenty hours during two- year period, including two hours of legal ethics. -Reporting date: 15 July.
			*Virginia	Director of MCLE Virginia State Bar 801 E. Main St. 10th Floor Richmond, VA 23219 (804) 786-5973	-Twelve hours per year, including two hours of ethics. -Reporting date: 30 June (annual license renewal).
*South Carolina	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Twelve hours per year, plus six hours of ethics or professional responsibility every three years in addition to the annual MCLE requirement. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 15 January.	*Washington	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 Sixth Ave. Seattle, WA 98121-2599 (206) 448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; \$50 1st year; \$150 2d year; \$250 3d year, etc.).
*Tennessee	Executive Director Commission on CLE 214 Second Ave. Suite 104 Nashville, TN 37201 (615) 242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.	*West Virginia	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 (304) 348-2456	-Twenty-four hours every two years; at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
			*Wisconsin	Director Board of Attorneys' Professional Competence	-Thirty hours during two-year period. -Reporting date: 20 January every other year.

State	Local Official	CLE Requirements
*Wisconsin (con't)	119 Martin Luther King, Jr. Blvd. Room 405 Madison, WI 53703-3355 (608) 266-9760	

State	Local Official	CLE Requirements
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061	-Fifteen hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, Defense Switched Network (DSN) 284-7633.

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

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of

TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A239203 Government Contract Law Deskbook, vol. 1/JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, vol. 2/JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A245381 Tax Information Series/JA 269/92 (264 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92)

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290

AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A255064 Government Information Practices/JA-235(92) (326 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A256772 Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, & Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers' Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel & Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Guard & Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam. 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

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

*Indicates new publication or revised edition.

2. Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

a. The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

b. Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(I) Active Army.

(a) Units organized under a PAC. A PAC that supports battalion-size units will request a consolidated publications account

for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the

Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

c. Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

d. Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

e. Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

f. Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity:none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS. Questions concerning the LAAWS BBS should be directed to the OTJAG LAAWS Office at (703) 805-2922.

b. Instructions for Downloading Files From the LAAWS Bulletin Board Service.

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the "ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

c. TJAGSA Publications Available Through the LAAWS BBS.

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.	FISCALBK.ZIP	November 1990	Fiscal Law Deskbook (Nov. 1990)
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review	FSO_201.ZIP	October 1992	Update of FSO Automation Program. Download to hard disk, unzip to floppy disk, then enter A:\INSTALLA or B:\INSTALLB.
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992	JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992	JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991	JA210.ZIP	October 1992	Law of Federal Employment
93CLASS.ASC	July 1992	FY 1993 TJAGSA class schedule (ASCII).	JA211.ZIP	August 1992	Law of Federal Labor-Management Relations
93CLASS.EN	July 1992	FY 1993 TJAGSA class schedule (ENABLE 2.15).	JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
93CRS.ASC	July 1992	FY 1993 TJAGSA course schedule (ASCII).	JA23592.ZIP	August 1992	Government Information Practices (July 1992). Updates JA235.ZIP.
93CRS.EN	July 1992	FY 1993 TJAGSA course schedule (ENABLE 2.15).	JA235.ZIP	March 1992	Government Information Practices
ALAW.ZIP	June 1990	<i>The Army Lawyer and Military Law Review</i> Database (ENABLE 2.15). Updated through 1989 <i>The Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.	JA241.ZIP	March 1992	Federal Tort Claims Act
BBS-POL.ZIP	December 1992	Draft letters of LAAWS BBS operating procedures	JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet
CCLR.ZIP	September 1990	Contract Claims, Litigation & Remedies	JA261.ZIP	March 1992	Legal Assistance Real Property Guide
DEPLOY.EXE	December 1992	Exerpts from the Legal Assistance Deployment Guide (JA 274)—These documents were created in WordPerfect 4.0 and zipped into an executable file. Once downloaded, copy them to hard drive and type "deploy."	JA262.ZIP	March 1992	Legal Assistance Wills Guide
			JA267.ZIP	March 1992	Legal Assistance Office Directory
			JA268.ZIP	March 1992	Legal Assistance Notarial Guide
			JA269.ZIP	March 1992	Federal Tax Information Series
			JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
			JA272.ZIP	March 1992	Legal Assistance Deployment Guide

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA281.ZIP	November 1992	AR 15-6 Investigations
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook
JA301.ZIP	July 1992	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	July 1992	Crimes and Defenses Handbook
JA4221.ZIP	May 1992	Operational Law Handbook, vol. 1
JA4222.ZIP	May 1992	Operational Law Handbook, vol. 2
JA509.ZIP	October 1992	Contract Claims Litigation, and Remedies Deskbook (Sept. 1992).

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
V1YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 1 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
V2YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 2 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
V3YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 3 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
YIR89.ZIP	January 1990	1989 Contract Law Year in Review

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the

point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 934-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

Handwritten notes and stamps, including a date stamp "JAN 1993" and various illegible markings.

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By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

Milton H. Hamilton
MILTON H. HAMILTON
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Secretary of the Army
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