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# ANNUAL REVIEW OF DEVELOPMENTS IN INSTRUCTIONS

Colonel Herbert Green  
Chief Circuit Judge, Third Judicial Circuit

This article reviews some of the more important appellate cases of the last year involving instructional issues.

## Offenses

Two cases involved instructions unique to murder and attempted murder. In *United States v. Valdez*,<sup>1</sup> the accused was charged *inter alia* with unpremeditated murder<sup>2</sup> by acts and omissions, including the refusal to secure proper medical treatment.<sup>3</sup> The military judge gave the following instruction on the second element of murder:

[T]hat [the] death resulted from the act of the accused kicking her in the buttocks and or . . . the accused's intentional failure to take her for medical treatment, knowing that the natural and probable results of his failure to do so would necessarily result in her death or great bodily harm.<sup>4</sup>

The judge also instructed that the members could infer the requisite intent to kill or inflict great bodily harm only if they were convinced that the accused knew the victim was seriously ill and knew that the illness necessarily would lead to death or great bodily harm.<sup>5</sup> The Army Court of Military Review (ACMR) held that the instructions were proper and were appropriate to the unique nature of the offense.

*United States v. DeAlva*<sup>6</sup> highlights the different *mens rea* elements involved in unpremeditated murder<sup>7</sup> and attempted murder.<sup>8</sup> Unpremeditated murder requires as an element that the homicide be committed with the intent to kill or inflict great bodily harm. The crime of attempted murder has a narrower *mens rea* requirement. For conviction, the Government must establish that the accused acted with the intent to kill.<sup>9</sup>

DeAlva was charged with attempted murder and burglary with intent to commit murder.<sup>10</sup> In instructing on attempted murder, the military judge erroneously instructed that the *mens rea* element could be satisfied by either the intent to kill or the intent to inflict great bodily harm.<sup>11</sup> Because the accused was acquitted of attempted murder, the instructional error was harmless as to that offense.<sup>12</sup> When he instructed on burglary, however, the military judge did not define murder, but merely referred the members back to his earlier erroneous instructions on attempted murder.<sup>13</sup> The ACMR accepted the Government's concession of error. It held that burglary with intent to commit murder includes as an element that the accused intended to kill—not merely inflict great bodily harm. Accordingly, the instruction should not have made any reference to the intent to inflict great bodily harm.

In *United States v. Mance*,<sup>14</sup> the Court of Military Appeals (COMA) held that knowledge of the presence of a controlled substance and of its contraband nature were elements of the

<sup>1</sup>35 M.J. 555 (A.C.M.R. 1992).

<sup>2</sup>UCMJ art. 118(2) (1988).

<sup>3</sup>The specification is set out in the opinion. *Valdez*, 35 M.J. at 557-58.

<sup>4</sup>*Id.* at 561.

<sup>5</sup>*Id.*

<sup>6</sup>34 M.J. 1256 (A.C.M.R. 1992).

<sup>7</sup>UCMJ art. 118(2) (1988).

<sup>8</sup>*Id.* art. 80.

<sup>9</sup>See *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982).

<sup>10</sup>UCMJ art. 129 (1988).

<sup>11</sup>The instruction is set out in the opinion. *DeAlva*, 34 M.J. at 1258.

<sup>12</sup>The instructional error would have been avoided had the military judge used the standard instruction for attempted murder. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-2 (1 May 1982) [hereinafter BENCHBOOK].

<sup>13</sup>The instruction is set out in the opinion. *DeAlva*, 34 M.J. at 1257-58.

<sup>14</sup>26 M.J. 244 (C.M.A. 1988).

offenses of possession and use of controlled substances. Moreover, the military judge was required to instruct on these elements.<sup>15</sup> In *United States v. Smith*,<sup>16</sup> the COMA again was called upon to review the adequacy of instructions given in light of *Mance*.<sup>17</sup> Smith was charged with wrongful use of cocaine.<sup>18</sup> The defense was innocent ingestion and passive inhalation.<sup>19</sup> The military judge instructed that the use must be knowing and conscious—that is, the accused must have been aware of the presence of the substance at the time of its use. The military judge further instructed that the Government must establish beyond reasonable doubt that the accused was aware that he was using a controlled substance at the time of its use.<sup>20</sup>

On appeal, the instructions were attacked because, while they clearly set out the requirement of proof beyond reasonable doubt for the knowledge of the contraband nature of the substance, the instructions did not specifically require that the knowledge of the presence of the substance be established beyond reasonable doubt. The COMA acknowledged that the doctrinal sophistication of *Mance* was lacking,<sup>21</sup> but found that taken as a whole, the instructions were legally sufficient. Had the military judge instructed on the knowledge elements *qua* elements, rather than as definitions of knowing and conscious use, the instructional issues would not have arisen.

Instructions in Air Force fraternization cases were, once again, the subject of appellate litigation.<sup>22</sup> Almost a decade ago in an en banc decision, the Air Force Court of Military

Review (AFCMR) held that no Air Force custom prohibited private heterosexual relations between officers and enlisted personnel unless a command or supervisory relationship existed.<sup>23</sup> In the absence of a command or supervisory relationship, private fraternization between officers and enlisted personnel did not constitute criminal conduct.<sup>24</sup> Although the Air Force court made the substantive law clear, instructional issues relating to the substantive law continue to arise.

In *United States v. Wales*,<sup>25</sup> officer-enlisted fraternization specifications originally alleged a supervisory relationship but these allegations were deleted at the trial counsel's request.<sup>26</sup> Subsequently, the military judge instructed that in deciding whether fraternization occurred, the members should consider *inter alia* whether the chain of command was compromised, but made no reference to the supervisory relationship.<sup>27</sup> In the lead opinion, Chief Judge Everett found the instructions deficient because the "appellant was entitled to have the court members specifically advised that unless they found beyond a reasonable doubt that appellant was the supervisor of . . . [the enlisted person] . . . at the time of the alleged fraternization, they could not find him guilty."<sup>28</sup> Judge Sullivan concurred, finding the instructions "too confusing to support a conviction."<sup>29</sup>

Last year in *United States v. Fox*,<sup>30</sup> the COMA revisited the *Wales* instructional issues. An Air Force captain was charged with fraternization by having sexual relations with a master

<sup>15</sup>*Id.* at 256.

<sup>16</sup>34 M.J. 200 (C.M.A. 1992).

<sup>17</sup>*See, e.g.,* *United States v. Crumley*, 31 M.J. 21 (C.M.A. 1990); *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988).

<sup>18</sup>*See* UCMJ art. 112a (1988). The accused tested positive for cocaine on a random urinalysis.

<sup>19</sup>The defense claimed that the accused may have smoked a borrowed cigarette that he did not know was laced with cocaine, that he may have inhaled smoke from a passenger's cocaine-laced cigarette, or that cocaine may have been absorbed by his body when he handled currency that had come in contact with cocaine.

<sup>20</sup>The instructions are set out in the opinion. *Smith*, 34 M.J. at 204.

<sup>21</sup>*Id.* at 205.

<sup>22</sup>*See generally* *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990); *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990); *United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd in part and rev'd in part*, 20 M.J. 155 (C.M.A. 1985); *United States v. Miller*, 34 M.J. 1175, 1176 n.1 (A.F.C.M.R. 1992) ("Fraternization has been a volatile charge in the Air Force, particularly since *United States v. Johanns*"); *United States v. Parillo*, 31 M.J. 886 (A.F.C.M.R. 1990).

<sup>23</sup>*United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983).

<sup>24</sup>No regulation prohibited such conduct. *See United States v. Wales*, 31 M.J. 301, 307 (C.M.A. 1990) (we conclude that if the Air Force elects to prosecute and punish private sexual intercourse between an officer and an enlisted person not under his command or supervision, then . . . it must promulgate specific punitive regulations forbidding the unwanted conduct).

<sup>25</sup>*Id.* at 301.

<sup>26</sup>The specifications are set out in the opinion. *Id.* at 302. They read in pertinent part, ". . . knowingly fraternize with . . . an enlisted person in the United States Air Force who was under his military supervision . . ."

<sup>27</sup>*Id.* at 305.

<sup>28</sup>*Id.* at 308.

<sup>29</sup>*Id.* at 310 (Sullivan, J., concurring).

<sup>30</sup>34 M.J. 99 (C.M.A. 1992).

sergeant.<sup>31</sup> Neither a command nor supervisory relationship was alleged.<sup>32</sup> The military judge gave the same instructions<sup>33</sup> presented in *Wales* and the COMA reached the same result. The COMA held that the members must be instructed that to find the accused guilty of fraternization, they must find beyond reasonable doubt that a command or supervisory relationship existed at the time of the offense. The instruction can be in the form of a separate element or it may be included in the definition of the applicable custom.<sup>34</sup> The failure to give such an instruction "sends the members off willy-nilly like an unguided missile."<sup>35</sup>

Unlike the specifications in *Wales* and *Fox*, the fraternization specification at issue in *United States v. Miller*,<sup>36</sup> clearly alleged an officer's sexual acts with an enlisted person who was in the same unit and flight as the officer, and under the officer's supervision.<sup>37</sup> The instructions made no reference to the need to find a supervisory relationship, nor did they define custom as requiring a supervisory or command relationship.<sup>38</sup> The AFCMR held that this element was critical and in its absence the instructions offered "little more than the generic definition of an Article 133 fraternization offense."<sup>39</sup> Accordingly, the instructions were deficient and amounted to prejudicial error.

The instructions given in *Wales*, *Fox*, and *Miller* were taken almost verbatim from the *Military Judges' Benchbook (Benchbook)*.<sup>40</sup> The standard instruction is valid for fraternization offenses in all military services except the Air Force. Because Air Force fraternization is limited to acts committed within a command or supervisory relationship, the standard instruction must be tailored<sup>41</sup> to account for the Air Force custom.

Tailoring these instructions will not be difficult. In *Miller*, the AFCMR suggested that, had the instructions contained the

language already alleged in the specification, the "conviction might well have been sustainable."<sup>42</sup> Similarly, if the *Benchbook* instruction is amended by adding an element such as "that at the time the accused was the commander or the military supervisor of the subordinate," it likely would be sufficient.

### *Lesser-Included Offenses*

Article 79 of the Uniform Code of Military Justice (UCMJ) provides that "an accused may be found guilty of an offense included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."<sup>43</sup> Although this language is deceptively simple, its interpretation has not been. Until recently, the most authoritative interpretation has been considered the following pronouncement by the COMA in *United States v. Duggan*:<sup>44</sup>

Accordingly, we must look to the allegations of the specifications, and proof in support thereof, in each case to determine whether a lesser offense is placed in issue. While the standards we have adopted in considering whether one offense is included in another may be more generous than those prescribed by other courts, in an unbroken line of decisions we have made the test turn on both the charge and the evidence. When both offenses are substantially the same kind so that accused is fairly apprised of the charges he must meet and the specification alleges fairly, and the proof raises reasonably, all elements of both crimes, we have held they stand in the relationship of greater and lesser offenses.<sup>45</sup>

<sup>31</sup> The allegations involved private heterosexual relations.

<sup>32</sup> The specification is set out in the opinion. *Id.* at 100.

<sup>33</sup> *Id.* at 103.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 34 M.J. 1175 (A.F.C.M.R. 1992).

<sup>37</sup> The specification is set out in the opinion. *Id.* at 1177, n.4. ("... engage in a sexually intimate relationship to include sexual intercourse and oral sodomy with ... an enlisted person assigned to the same unit, same flight, and under the supervision of" the accused).

<sup>38</sup> The instructions are set out in the opinion. *Id.* at 1176.

<sup>39</sup> *Id.* at 1178.

<sup>40</sup> BENCHBOOK, *supra* note 12, para. 3-152.1.

<sup>41</sup> For an excellent discussion of the concept of instruction tailoring, see *United States v. Smith*, 33 C.M.R. 3 (C.M.A. 1963).

<sup>42</sup> *Miller*, 34 M.J. at 1178.

<sup>43</sup> UCMJ art. 79 (1988).

<sup>44</sup> 15 C.M.R. 396 (C.M.A. 1954).

<sup>45</sup> *Id.* at 399-400.

Subsequently, in *United States v. Thacker*,<sup>46</sup> the COMA made the following declaration:

The "basic test" to determine whether the court-martial may properly find the accused guilty of an offense other than that charged is whether the specification of the offense on which the accused was arraigned "alleges fairly, and the proof raises reasonably, all elements of both crimes" so that "they stand in the relationship of greater and lesser offenses. . . . Both aspects of the "basic test" of allegation and proof must be satisfied . . . . Similarly, an appellate authority cannot affirm findings of guilty of a lesser offense which does not satisfy both aspects of the test.<sup>47</sup>

Accordingly, an offense is lesser-included if it contains fewer common elements than the charged offense and includes no additional elements. Similarly, if the allegations in a specification and the proof reasonably raise all elements of an offense similar to the offense charged, this lesser offense also may be considered as included.<sup>48</sup> Consequently, military law determines lesser-included offenses in a manner other than by a mere comparison of elements.

The Supreme Court recently has taken a different view in determining lesser-included offenses. In *Schmuck v. United States*,<sup>49</sup> the defendant was convicted of mail fraud<sup>50</sup> in connection with a scheme to sell used automobiles containing altered odometers. On appeal, he claimed error when the trial judge refused to instruct that the misdemeanor offense of tampering with an odometer<sup>51</sup> was a lesser-included offense.

The Supreme Court recognized that the federal circuits were split concerning the determination of lesser-included

offenses. Some courts used the "inherent relationship" test. Under that test, one offense is included in another when the facts, as alleged in the indictment and proved at trial, support the inference that the defendant committed the less serious offense and an "inherent relationship" exists between the two offenses.<sup>52</sup> Other courts use the "elements" test. This test treats one offense as included within another when the elements of the lesser are a subset of the greater offense.<sup>53</sup>

The Supreme Court rejected the "inherent relationship" test and adopted the "elements" test as the approach to be applied in the federal system. Although the Supreme Court did not state clearly that the Constitution required the "elements" test, it did declare that this approach was compatible with the wording of the Federal Rules of Criminal Procedure,<sup>54</sup> was consistent with the prevailing practice in the United States, was more certain and predictable and gave more notice than the "inherent relationship test."<sup>55</sup> Because the elements of the misdemeanor offense were not a subset of the elements of the offense charged, the refusal to give the requested instruction was not error.

The "elements" approach is more restrictive than the "generous policy"<sup>56</sup> that applies in military law; therefore, whether *Schmuck* applies to the military is not yet settled. In *United States v. Carter*,<sup>57</sup> the COMA opined, without deciding, that in view of *Schmuck*, the appropriateness of the broad military test to determine lesser-included offenses "has become increasingly suspect."<sup>58</sup>

Last year, two courts of military review considered the issue. An Air Force panel<sup>59</sup> used both the "elements" approach and the *Duggan* test to determine whether indecent assault<sup>60</sup> was a lesser-included offense of sodomy.<sup>61</sup> The AFCMR examined the "elements" approach and opined that because an element of indecent assault—requiring the victim

<sup>46</sup>37 C.M.R. 28 (C.M.A. 1966).

<sup>47</sup>*Thacker*, 37 C.M.R. at 30.

<sup>48</sup>The definition is based on *Thacker*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 2 (1984) [hereinafter MCM].

<sup>49</sup>489 U.S. 705 (1989).

<sup>50</sup>18 U.S.C. §§ 1341, 1342 (1982).

<sup>51</sup>15 U.S.C. §§ 1984, 1990 (1982).

<sup>52</sup>*Schmuck*, 489 U.S. at 708-09.

<sup>53</sup>*Id.* at 709-10.

<sup>54</sup>FED. R. CRIM. P. 31(c).

<sup>55</sup>*Id.* at 715-21.

<sup>56</sup>*Duggan*, 15 C.M.R. at 399.

<sup>57</sup>30 M.J. 179 (C.M.A. 1990).

<sup>58</sup>*Id.* at 181.

<sup>59</sup>*United States v. Foster*, 34 M.J. 1264 (A.F.C.M.R. 1992).

<sup>60</sup>UCMJ art. 134 (1988); MCM, *supra* note 48, pt. IV, para. 63.

<sup>61</sup>UCMJ art. 125 (1988); MCM, *supra* note 48, pt. IV, para. 51.

not to be the wife of the accused<sup>62</sup>—was not an element of sodomy, instructing that indecent assault as a lesser-included offense of sodomy was error. Similarly, using the *Duggan* criteria, the court held that the specification did not place the accused on notice of the essential element that the victim was not married to the accused.

In *United States v. Littles*,<sup>63</sup> the accused was charged with selling a stolen military rifle in violation of a federal statute.<sup>64</sup> In a bench trial, however, the accused was found guilty of violating Article 108<sup>65</sup> by selling military property. The Navy-Marine Corps Court of Military Review (NMCMR) examined military precedent, as well as *Schmuck*, and concluded that the “elements” approach adopted in *Schmuck* was the only test to be applied in the military to determine lesser-included offenses. Using the “elements” approach, the NMCMR set aside the conviction because the element of military property was not an element of the federal offense.

Recently, the COMA<sup>66</sup> compared the elements of attempted rape with those of extortion<sup>67</sup> and found that because the elements were different, extortion was not a lesser-included offense.<sup>68</sup> The COMA opined that its holding would not change even if the extortion amounted to the constructive force of rape.<sup>69</sup>

Whether the “elements” approach is or should be the prevailing law in the military is open to question. Despite the ruling in *Schmuck*, two judges on the COMA recently have indicated that the *Duggan* test is still viable.<sup>70</sup> If the “elements” approach were adopted, military law would be affected significantly. At least one consequence involves Article 134. Because all Article 134 (1) and (2) offenses contain the unique element of either prejudice to good order and discipline or service discrediting circumstances,<sup>71</sup> those offenses apparently would not be lesser-included offenses of non-Article 134 crimes.<sup>72</sup> Neither the Government nor the accused

<sup>62</sup>See MCM, *supra* note 48, pt. IV, para. 63.

<sup>63</sup>35 M.J. 644 (N.M.C.M.R. 1992).

<sup>64</sup>18 U.S.C. § 922 (1988).

<sup>65</sup>UCMJ art. 108 (1988).

<sup>66</sup>United States v. Edwards, 35 M.J. 351 (C.M.A. 1992).

<sup>67</sup>*Id.* at 358.

<sup>68</sup>The court was deciding a multiplicity issue.

<sup>69</sup>*Edwards*, 35 M.J. at 358. For a beneficial discussion of constructive force, see *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992); see also *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991).

<sup>70</sup>See *United States v. Strachan*, 35 M.J. 362, 365 (C.M.A. 1992) (Gierke, Wiss, JJ., dissenting).

<sup>71</sup>UCMJ art. 134 (1988); see *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991).

<sup>72</sup>In *Foster*, the additional element of prejudice or service discrediting conduct did not concern the court. It affirmed a conviction for indecent acts, which also is a violation of Article 134. Presumably, the court did not consider the unique Article 134 elements to be significant when applying the “elements” test. At least one court has held that the unique Article 134 elements are so important that a plea of guilty cannot be sustained unless the accused specifically admits these elements. *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990). *But cf.* *United States v. Plante*, 36 M.J. 626, (A.C.M.R. 1992). The importance of this element as an element was emphasized in *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991). The accused was charged with aggravated assault and adultery by having sexual intercourse after he was determined to be HIV positive. The court declared,

In his second assignment of error, the appellate asserts that the evidence is both legally and factually insufficient to support a finding of guilty to the offense of adultery. Adultery is a military criminal offense under Article 134, UCMJ. . . . Among other elements, the government must prove that under the circumstances the adulterous act of sexual intercourse was either prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

We are not prepared to state a *per se* rule that sexual intercourse with a person not his or her spouse by a married soldier under any circumstances constitutes the offense of adultery under Article 134, UCMJ. Article 134 is not “a catchall as to make every irregular, mischievous, or improper act a court-martial offense.” *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964). The government must prove, either by direct evidence or by inference, that the accused’s conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces. The prejudice must be reasonable and directly and palpably prejudicial to good order and discipline . . . . The conduct must bring the service into dispute (sic) or lower it in the public esteem. . . . Civilians must be aware of the behavior and the military status of the offender. . . . Open and notorious conduct may be service discrediting, while wholly private conduct is not generally service discrediting. . . . We do not agree with the government’s position that the appellant’s HIV positive condition is itself sufficient to show prejudice to good order and discipline in the armed forces or of a nature to bring discredit on the armed forces.

The facts are not in controversy. From November 1989 to January 1990, the appellant was still married but separated from his wife. The appellant engaged in consensual sexual intercourse and Ms. E was aware of the appellant’s marital status. The acts were done in the privacy of Ms. E’s home, off-post, the parties did not have a work relationship, and the government did not prove that the appellant was able to transmit the HIV disease in sexual intercourse. We find no evidence in the record that the appellant’s conduct adversely affected good order and discipline. Accordingly, we hold that the evidence is legally insufficient to prove prejudice to good order and discipline.

Likewise, the sexual intercourse was with a civilian having no military or work relation with the accused, off-post, in the privacy of a bedroom, and the government did not prove that the appellant was able to transmit the HIV disease in sexual intercourse. While the appellant was still technically married to his wife, the separation agreement would appear to permit sexual intercourse with another woman without violating the sanctity of the marriage contract. The government presented no evidence that the conduct offended local law or community standards. On the record before us, we are not convinced beyond a reasonable doubt appellant’s conduct in this case was of a nature to bring discredit on the armed forces.

*Perez*, 33 M.J. at 1054.

would have the benefit of instructions on these offenses as lesser-included. The Government, however, could plead Article 134 offenses as separate offenses with possible severe consequences to the accused. Consequently, the accused might be convicted of more offenses arising out of the same transaction than he or she would be under the present test. This result inevitably would lead to exposing the accused to a greater maximum punishment. The more narrow the definition of what is a lesser-included offense, the more incentive the prosecution would have to plead numerous offenses to ensure that an accused—who the Government believes is guilty of something—did not escape his or her just due. Consequently, charge sheets would be longer and trials may be prolonged by additional instructions on alleged offenses and by extended debate by members on findings. Undoubtedly, the law should not encourage this unfavorable situation.

Some benefits, however, would accrue should the military adopt the “elements” approach. The “elements” approach provides a degree of certainty in identifying lesser-included offenses. Additionally, it provides clear notice to the accused concerning the range of possible offenses that he or she may face.

Military judges now are faced with a dilemma. Whether military judges continue to rule using the *Duggan* or *Thacker* tests or whether they employ the “elements” approach, the vagaries of the appeal process do not reveal for several years what rule they should have applied. At least two panels in two military services have indicated military law has changed and the judges in those services are bound by that case law. No matter what approach the military judge takes, the judge would be wise to obtain the consent of both counsel, especially the defense, when ruling on this issue.

In deciding on which lesser-included offenses to instruct, two determinations must be made. The first involves determining the presence of any lesser-included offenses. This determination is made by employing either the *Duggan-Thacker* test or the “elements” approach of *Schmuck*.<sup>73</sup> The judge then must determine what lesser-included offenses are factually in issue. Lesser-included offenses are not instructed on solely because they legally are lesser-included. These instructions are required only if the evidence reveals a dispute regarding a factual element of the greater offense.<sup>74</sup>

The military judge must instruct members properly on all lesser-included offenses reasonably raised by the evidence. The instructional duty arises whenever “some evidence” is presented to which the fact finders “might attach credit” if they so desire.<sup>75</sup>

At issue in *United States v. Frye*<sup>76</sup> was whether a lesser-included offense was raised by the evidence. The charge was rape.<sup>77</sup> The prosecution’s evidence indicated that the accused offered to sell cocaine to the victim and when she accepted, the accused claimed to be a Criminal Investigation Command agent and threatened to arrest her. Eventually, the accused offered to forego an arrest in return for sex and they went to her barracks. While in the barracks, the accused attempted to massage the victim, at which time she indicated reluctance. The accused again threatened to arrest her if she did not have sex. The victim chose sex and intercourse occurred. The defense claimed that an exchange of drugs for sex occurred and that when the victim did not receive the drugs, she alleged rape.

At trial, over defense objection, the military judge instructed *inter alia*, on indecent assault<sup>78</sup> as a lesser-included offense stating, “I believe the jury could find, if they don’t find sufficient force to overcome the consent, indecent assault.”<sup>79</sup> The accused was convicted of indecent assault by *inter alia* “having sexual intercourse with her.”<sup>80</sup> On appeal, the accused claimed error on the lesser-included offense instruction. The ACMR affirmed. It found that consent and resistance were the key issues and, therefore, the instruction on indecent assault was proper. The ACMR also held that the evidence established indecent assault and that any error in the instructions benefited the accused.

The critical instructional issue in the case was the factual dispute presented by the evidence that raised the lesser-included offense. If the issue was whether sexual intercourse occurred, attempted rape<sup>81</sup> or indecent assault may well have been in issue. All parties, however, agreed that sexual intercourse occurred. Similarly, both rape and indecent assault require force and the lack of consent. Accordingly, disputes over these elements did not raise the lesser-included offense of indecent assault.

<sup>73</sup>The MCM lists some, but not all, lesser-included offenses in its discussion of the punitive articles. MCM, *supra* note 48, pt. IV.

<sup>74</sup>See MCM, *supra* note 48, R.C.M. 920(e) discussion.

<sup>75</sup>*United States v. Jackson*, 12 M.J. 163, 166-67 (C.M.A. 1981). See generally *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).

<sup>76</sup>33 M.J. 1075 (A.C.M.R. 1992).

<sup>77</sup>UCMJ art. 120 (1988); see MCM, *supra* note 48, pt. IV, para. 45.

<sup>78</sup>See MCM, *supra* note 48, pt. IV, para. 63; BENCHBOOK, *supra* note 12, para. 3-128.

<sup>79</sup>*Frye*, 33 M.J. at 1077.

<sup>80</sup>*Id.*

<sup>81</sup>UCMJ art. 80 (1988).

A significant substantive law issue in *Frye* was not whether consent was obtained by fraud—which still would be consent—but whether the consent was obtained by the threat of disciplinary action.<sup>82</sup>

The ACMR believed that the threat of disciplinary action supplied the requisite force for rape and indecent assault and rendered invalid any consent to sexual intercourse.<sup>83</sup> The ACMR first cited *United States v. Hicks*<sup>84</sup> for this position. In *Hicks*, the accused threatened to punish a subordinate unless the latter's girl friend participated in sexual intercourse. In upholding a conviction for rape, the court acknowledged the threat. It noted, however, that the victim was placed in fear of harm to herself by the accused's threat that "it doesn't matter if you cooperate or not, I'm going to give it to you anyway."<sup>85</sup> Accordingly, constructive force and not the threat of disciplinary action, established the force element of rape.

In *United States v. Bradley*<sup>86</sup>—a case remarkably similar to *Hicks*—the accused, a drill sergeant, threatened to punish a trainee unless the trainee's wife agreed to sexual intercourse. The COMA found that the accused created a coercive atmosphere that implied the threat of death or bodily harm to the wife. This implied threat of harm to the wife, and not the threat of disciplinary action to the trainee, supplied the constructive force necessary to commit rape.<sup>87</sup>

Neither *Hicks* nor *Bradley* support the ACMR's contention that the threat of disciplinary action provides the requisite force and negates consent. In *Frye*, a conviction for rape could be upheld only if the threat of disciplinary action supplied the requisite force. No prior military case, however, has held this position. Moreover, *Frye* was not convicted of rape,

but of indecent assault. If the threat of disciplinary action provided the requisite force for rape, no reason existed to instruct on indecent assault because no factual dispute arose over an element of rape that placed the lesser-included offense in issue.

Was the court wrong in affirming a conviction for indecent assault? If neither party was entitled to the lesser-included offense instruction and the case should have been submitted on an all-or-nothing theory, then the accused was prejudiced because he was acquitted of rape. If, however, rape was proven and legally sustainable, then the accused received a windfall about which the *Frye* court has said, the accused will not be heard to complain.<sup>88</sup>

### Defenses

The general rule is that affirmative defenses must be the subject of instructions when the evidence places them in issue.<sup>89</sup> This occurs "when some evidence without regard to its source or credibility has been admitted upon which members might rely if they choose."<sup>90</sup> The issues of when defenses are raised by the evidence and when they must be the subject of instructions recently were litigated.

The outer limits of the rule requiring instructions, regardless of the credibility of the evidence, was tested in *United States v. Barnes*.<sup>91</sup> The accused was charged *inter alia* with failure to go to his appointed place of duty.<sup>92</sup> He gave two versions of why he was absent. In the first, he claimed that he was abducted in his car, taken to a location between forty and sixty miles away, and released, requiring him to walk home. In the other version, he claimed he transported hitchhikers to a

<sup>82</sup>*Frye*, 33 M.J. at 1078.

<sup>83</sup>*Id.*

<sup>84</sup>24 M.J. 3 (C.M.A. 1987).

<sup>85</sup>*Id.* at 5.

<sup>86</sup>28 M.J. 197 (C.M.A. 1989).

<sup>87</sup>*Id.* at 200.

<sup>88</sup>In *United States v. Watson*, 31 M.J. 49 (C.M.A. 1990), the court used similar reasoning to affirm a conviction for indecent assault. In a bench trial, the accused was charged with rape. The military judge erroneously believed that a rape victim must manifest lack of consent in an affirmative manner, but no such duty is incumbent upon a victim of indecent assault. Accordingly, although the evidence was sufficient to convict for rape, the military judge found the accused guilty of the lesser-included offense. Because the maximum punishment for rape includes confinement for life, while that for indecent assault is five years, the accused clearly was not prejudiced. The *Frye* court cited *Watson* in finding no prejudicial error. The cases, however, may be distinguished. *Watson* involved findings, whereas the issue in *Frye* involved instructions. Second, and more importantly, the great disparity in the maximum sentence did not exist. *Frye* was a full rehearing. See UCMJ art. 63 (1988). He was originally sentenced to 18 months confinement and accessory penalties. Therefore, the maximum confinement that could be adjudged at the rehearing was limited to 18 months—well within the maximum punishment for either rape or indecent assault. See *United States v. Lawson*, 34 M.J. 38 (C.M.A. 1992).

<sup>89</sup>See *United States v. Watford*, 32 M.J. 176 (C.M.A. 1991); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); see also MCM, *supra* note 48, R.C.M. 920(e).

<sup>90</sup>MCM, *supra* note 48, R.C.M. 920(e) discussion.

<sup>91</sup>33 M.J. 893 (A.F.C.M.R. 1991).

<sup>92</sup>UCMJ art. 86 (1988).

designated location in return for money. Upon arrival, however, they took his money and automobile and he was forced to walk home. Although the AFCMR found this evidence to be speculative, it determined that it presented the defense of inability<sup>93</sup> to report for duty. This evidence required a sua sponte instruction; however, because none was given—error although nonprejudicial—occurred.<sup>94</sup>

The issue of whether the evidence raised the defense of voluntary intoxication occurred in *United States v. Yandle*.<sup>95</sup> The accused was charged with conspiracy to commit robbery,<sup>96</sup> and robbery.<sup>97</sup> The evidence established that after consuming potent alcoholic beverages for an extended period,<sup>98</sup> the accused and two friends viciously beat and robbed a fellow marine. The accused testified that he had been consuming alcoholic beverages, was “staggering drunk,” and fell down a flight of stairs when he exited the bar just prior to the robbery. The accused’s accomplice, testifying under a grant of immunity, also stated that he was “staggering drunk” after sharing alcoholic beverages with the accused.

No request for the voluntary intoxication instruction<sup>99</sup> was made and none was given. Actually, the military judge instructed “as a matter of law that voluntary intoxication in this case is not a defense to the offenses that have been alleged.”<sup>100</sup> The NMCMR, however, held that the defense of

intoxication was raised by the evidence, the failure to instruct on it was error, and that the instruction as given was also error.

Conspiracy to commit robbery and robbery are specific intent crimes<sup>101</sup> and voluntary intoxication is a defense to both.<sup>102</sup> Mere intoxication is insufficient to raise the defense. Intoxication must be to such a degree that the accused is unable to form the requisite specific intent.<sup>102</sup> The NMCMR held that the accused and his accomplice presented enough evidence<sup>103</sup> to reasonably raise the issue. Once raised, the military judge had a duty to instruct on this issue, regardless of the defense theory of the case.

In its first year of its existence, the COMA held<sup>104</sup> that voluntary intoxication was not a defense to unpremeditated murder,<sup>105</sup> notwithstanding that the intent to kill or inflict great bodily harm is an element of the offense. The COMA’s holding essentially went unchallenged until *United States v. Tilley*.<sup>106</sup> In *Tilley*, the accused was charged with premeditated murder<sup>107</sup> and convicted of the lesser-included offense of unpremeditated murder. The military judge instructed that voluntary intoxication would not, by itself, reduce unpremeditated murder to the lesser crime of unlawful killing. He also instructed that amnesia and intoxication were factors to consider in determining the accused’s mental processes at the

<sup>93</sup> See MCM, *supra* note 48, R.C.M. 916(i); BENCHBOOK, *supra* note 12, para. 5-9.

<sup>94</sup> The court held that the omission of the instruction was waived by the failure to object and that plain error did not result. It opined that plain error did not exist because the defense evidence was presented, counsel argued the issue, and the members were not prohibited from adopting the defense theory and acquitting. In the absence of instructions guiding the members on how to consider the evidence, the members could not be expected to adopt the defense theory without the judge telling them how they properly could do so. In finding waiver, the court cited R.C.M. 920(f) as its authority. That rule states that omissions in instructions are, in the absence of plain error, waived. The COMA, however, has held that R.C.M. 920(f) does not apply to the failure to object to the omission of affirmative defense instructions. *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988). Accordingly, the finding of waiver is questionable.

<sup>95</sup> 34 M.J. 890 (N.M.C.M.R. 1992).

<sup>96</sup> UCMJ art. 81 (1988).

<sup>97</sup> *Id.* art. 122.

<sup>98</sup> “Appellant and his two friends . . . were consuming a substance known as ‘Mojo,’ a concoction containing a mixture of bourbon, scotch, vodka, gin, rum, tequila, and Kool Aid.” *Yandle*, 34 M.J. at 891.

<sup>99</sup> See BENCHBOOK, *supra* note 12, para. 5-12.

<sup>100</sup> *Yandle*, 34 M.J. at 893.

<sup>101</sup> See MCM, *supra* note 48, pt. IV, para. 47.

<sup>102</sup> “There must be some evidence that the intoxication was of a severity to have the effect of rendering the appellant incapable of forming the necessary intent.” *United States v. Box*, 28 M.J. 584 (A.C.M.R. 1989). Both conspiracy to commit robbery and robbery include the essential element of the specific intent to permanently deprive the victim of the use and benefit of his property.

<sup>103</sup> Evidence of a defense requiring an instruction need not come from the defense. It may come from any witness and be in any form. For an interesting commentary on who must raise the issue, see the battle of the footnotes in *United States v. Buckley*, 35 M.J. 262, 264 n.5, 265, n.2 (C.M.A. 1992) (Cox J.) (Wiss, J., dissenting).

<sup>104</sup> *United States v. Roman*, 2 C.M.R. 150 (C.M.A. 1952).

<sup>105</sup> UCMJ art. 118(2) (1988) (“Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . (2) intends to kill or inflict great bodily harm; . . . is guilty of murder . . .”).

<sup>106</sup> 25 M.J. 20 (C.M.A. 1987).

<sup>107</sup> UCMJ art. 118(1) (1988).

time of the offense and the accused's ability to form the requisite intent.<sup>108</sup>

The COMA held the instructions proper and affirmed. It went further, however, and posed the question of "whether evidence of voluntary intoxication should ever be considered on the question of one's capacity to form the intent to kill or inflict great bodily harm."<sup>109</sup> After posing the question and citing several cases that might affect the answer,<sup>110</sup> the COMA opined that resolving the issue was unnecessary.

The question left open in *Tilley* was raised in *United States v. Morgan*.<sup>111</sup> The accused was convicted of unpremeditated murder and appealed, claiming as error the failure of the trial judge to instruct on voluntary intoxication.<sup>112</sup> The ACMR examined military precedent, *Tilley*, and the policy reasons for not permitting voluntary intoxication to be a defense.<sup>113</sup> It then affirmed stating, "We are satisfied that one who intentionally kills another while under the influence of his own voluntary action in becoming intoxicated is not entitled to an instruction that would vitiate or excuse his conduct on grounds he lacked specific intent."<sup>114</sup>

The mistake of fact instruction<sup>115</sup> was at issue in three cases. In *United States v. Buckley*,<sup>116</sup> a rape prosecution,<sup>117</sup> the issue was whether the mistake of fact as to consent instruction was available to the accused.<sup>118</sup> The accused's version described an evening of progressive sexual advances and fondling by the victim, culminating in three acts of consensual sexual intercourse. The victim denied the existence of sexual advances, admitted enjoying a massage administered by the accused, and claimed the sexual intercourse occurred while she was sleeping and without her consent. She acknowledged that when she later confronted the accused, he apologized and stated he thought she was awake.

The NMCMR had held that the mistake of fact instruction was not required. It opined that either the intercourse was consensual or that it was not, and that no mistake was shown.<sup>119</sup> The COMA agreed and affirmed.

Judges Wiss and Gierke dissented.<sup>120</sup> They claimed that although the evidence presented by the participants was at the extremes, the truth may well have been somewhere between those extremes. Therefore, they argued, the members should have been instructed on the defense that lies in the middle ground—mistake of fact as to consent. Their contention reflects a truism about jury trials. The members have the sole prerogative to determine credibility, assess the weight of the evidence, and determine where the truth lies. The dissenters, however, provided no standards to guide the trial judge. Unless the rules require that some evidence be presented to raise the issue, the dissent's position would compel the military judge to instruct on every conceivable defense that might arise from a particular fact situation, regardless of the evidence.

Generally, military law recognizes two types of mistakes that may be defenses.<sup>121</sup> If an essential element of the offense is premeditation, specific intent, willfulness, or specific knowledge, an honest mistake with respect to that element—no matter how unreasonable—is a defense. In other cases involving mistake as a defense, the mistake must be honest and reasonable.

In *United States v. Brown-Austin*,<sup>122</sup> the issue was which type of mistake was applicable and which should be the subject of instructions. The accused was charged *inter alia* with the dishonorable failure to pay just debts<sup>123</sup> arising from the accused's automobile purchases. He believed that uncorrected mechanical defects relieved him of his obligation to pay for

<sup>108</sup>The instructions are set out in the opinion. *Tilley*, 25 M.J. at 21-22.

<sup>109</sup>*Id.* at 22.

<sup>110</sup>*Id.*

<sup>111</sup>33 M.J. 1055 (A.C.M.R. 1991). "Unlike the court in *Tilley*, we are squarely faced with the question alluded to in its opinion." *Id.* at 1058.

<sup>112</sup>The instruction was not requested at trial. If voluntary intoxication was a defense and the evidence reasonably raised it, the military judge would have had a duty to instruct on it *sua sponte*. *Id.* at 1057, n.3. Sufficient evidence was presented to raise the issue. *Id.* at 1061, n.7.

<sup>113</sup>The court also recognized the opposing arguments. *Id.* at 1058-59, n.5.

<sup>114</sup>*Id.* at 1061.

<sup>115</sup>See BENCHBOOK, *supra* note 12, para. 5-11.

<sup>116</sup>*United States v. Buckley*, 35 M.J. 262 (C.M.A. 1992).

<sup>117</sup>UCMJ art. 120 (1988).

<sup>118</sup>Honest and reasonable mistake as to consent is a defense to rape. *United States v. Peel*, 29 M.J. 235 (C.M.A. 1989); *United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

<sup>119</sup>*Buckley*, 35 M.J. at 264; *cf.* *United States v. Sellers*, 33 M.J. 364 (C.M.A. 1991).

<sup>120</sup>*Buckley*, 35 M.J. at 265 (Wiss, J., dissenting). Judge Gierke also wrote a separate dissent. *Id.* at 264-65 (Gierke, J., dissenting).

<sup>121</sup>See MCM, *supra* note 48, R.C.M. 916(j).

<sup>122</sup>34 M.J. 578 (A.C.M.R. 1992).

<sup>123</sup>UCMJ art. 134 (1988); MCM, *supra* note 48, pt. IV, para. 71.

one automobile and, based on the advice of a German lawyer, failed to pay for another vehicle, which was involved in a collision. The military judge instructed that to be a defense, the accused's mistake must have been both honest and reasonable.<sup>124</sup> The accused was convicted and appealed, claiming as error the instruction on honest and reasonable mistake. He argued that requiring the mistake to be reasonable was erroneous.

The ACMR analyzed the case in an essentially elemental way. It first sought to determine whether the offense was a general or specific intent crime. It reviewed the precedents and determined that the state of mind required was "dishonorableness"—a concept which was close to, but not quite, specific intent.<sup>125</sup> Consequently, it held that the offense was a general, not a specific, intent crime. Because only an honest and reasonable mistake—not merely an honest one—was a defense to a general intent crime, the ACMR held the instruction to be proper, and affirmed.

The court's opinion and analysis are unsatisfactory. Although acknowledging that the offense does not neatly fit into either crime category of general or specific intent,<sup>126</sup> the ACMR made a conclusory decision that it fit into the former. Second, although mentioning it, the opinion did not actually address the state of mind required for the offense. A dishonorable failure to pay debts requires a state of mind characterized by deceit, evasion, or other distinctly culpable circumstances indicating deliberate nonpayment or a grossly indifferent attitude toward one's just obligations.<sup>127</sup> If an individual honestly believes—no matter how unreasonable the belief is—that he or she need not pay a debt, is that honest belief consistent with a dishonorable state of mind? The court apparently did not want to address this question.

In *United States v. McMonagle*,<sup>128</sup> the issue was whether the mistake of fact defense was available to an individual

charged with murder while engaging in an act inherently dangerous to others.<sup>129</sup> The accused shot and killed a civilian during Operation Just Cause in Panama and was convicted of murder. On appeal, he claimed that he was entitled to the mistake of fact instruction. The ACMR disagreed. It opined that the mistake of fact defense could apply to only two elements of the crime. The first was whether the conduct was inherently dangerous and wanton. It held that this element is not synonymous with willfulness and does not involve *mens rea*; the focus is on the accused's conduct, not his state of mind. The other potentially applicable element was unlawfulness. Here too, the ACMR held the accused's state of mind irrelevant; the fact finder need not make a *mens rea* assessment. Accordingly, mistake of fact does not apply and the omission of the instruction was not error.

Unlike the *sua sponte* instructional requirement for many defenses,<sup>130</sup> the accused must request the character defense instruction,<sup>131</sup> or it is waived. Last year, a unanimous COMA reaffirmed this rule.<sup>132</sup>

In *United States v. Rankins*,<sup>133</sup> a sharply divided COMA clashed<sup>134</sup> over the applicability of the duress instruction.<sup>135</sup> The accused refused to go to the field with her unit, claiming she was afraid her husband would suffer a heart attack while she was gone. Her husband had been hospitalized for a heart-related medical condition but had been cleared for regular physical training and for deployment to Saudi Arabia. The military judge refused to give a requested duress instruction, finding that the accused had no cause to believe that her husband would suffer any immediate harm.

The COMA analyzed the issues in terms of whether the applicable defense was duress or necessity.<sup>136</sup> The plurality opinion indicated that the duress defense should apply only when coercion comes from third persons—which did not

<sup>124</sup> See BENCHBOOK, *supra* note 12, para. 5-11 I.

<sup>125</sup> *Brown-Austin*, 34 M.J. at 580.

<sup>126</sup> *Id.*

<sup>127</sup> MCM, *supra* note 48, pt. IV, para. 71; see *United States v. Moseley*, 35 M.J. 481 (C.M.A. 1992).

<sup>128</sup> 34 M.J. 852 (A.C.M.R. 1992).

<sup>129</sup> UCMJ art. 118(3) (1988) ("Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life . . . is guilty of murder . . ."). See MCM, *supra* note 48, pt. IV, para. 43.

<sup>130</sup> See MCM, *supra* note 48, R.C.M. 910(e), 916.

<sup>131</sup> See BENCHBOOK, *supra* note 12, para. 7-8.

<sup>132</sup> *United States v. Smith*, 34 M.J. 341 (C.M.A. 1992).

<sup>133</sup> 34 M.J. 326 (C.M.A. 1992).

<sup>134</sup> Judge Crawford wrote the plurality opinion, in which Judge Cox concurred. Judge Gierke concurred in the result and opined that duress was not raised by the evidence. Chief Judge Sullivan dissented, arguing that the failure to give the duress instruction was error. Judge Wiss also dissented, claiming sufficient evidence was present to require a duress instruction.

<sup>135</sup> See BENCHBOOK, *supra* note 12, para. 5-5.

<sup>136</sup> See generally Eugene Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95. (1988).

occur in *Rankins*. It also indicated that the defense of necessity should not be adopted by the judiciary.<sup>137</sup> A majority agreed that the evidence did not present a reasonable fear of harm to the husband. Accordingly, the instruction on duress was not required.

### Evidence

Accomplice testimony instruction<sup>138</sup> was again<sup>139</sup> the subject of litigation. In *United States v. Gillette*,<sup>140</sup> the military judge gave the standard accomplice testimony instruction and instructed that one prosecution witness was an accomplice as a matter of law.<sup>141</sup> The judge refused to declare two other prosecution witnesses accomplices and instructed that the members should determine their statuses. On appeal, the accused claimed as error the denial of an instruction that the other two witnesses were accomplices as a matter of law.

The COMA affirmed, establishing several precepts as "black letter" law. First, the court acknowledged the "concern and suspicion accomplice testimony carries with it."<sup>142</sup> Second, it held that the accomplice testimony instruction must be given upon the request of either the prosecution or the defense.<sup>143</sup> Third, the instruction must inform the members how to determine whether a witness is an accomplice and must contain the standard language "regarding the suspect credibility of accomplice testimony."<sup>144</sup> Fourth, the judge should not instruct that a witness is an accomplice as a matter of law; rather, the members should make that determination based on the guidance provided in the instructions.

Because the *Gillette* court identified one prosecution witness as an accomplice, while allowing the members to decide

the status of the others, the instructions actually gave the defense more than they were entitled to. Accordingly, the court denied relief to the accused.

"The usual test applied in determining whether a witness is an accomplice is whether the witness . . . could have been convicted of the same crime for which the defendant is being prosecuted."<sup>145</sup> When a witness did not know of the crimes until after they were committed, did not believe the accused committed them, and was not implicated by the evidence, the witness was not an accomplice.<sup>146</sup> Under these circumstances, the accomplice testimony instruction is not required.

The accomplice testimony rule also has included the principle that an accused may not be convicted based on the uncorroborated testimony of an accomplice if the testimony is self-contradictory, uncertain, or improbable.<sup>147</sup> In *United States v. Sanders*,<sup>148</sup> the AFCMR determined that this corroboration rule is still the law.<sup>149</sup> When accomplice testimony is not corroborated and a sufficient question as to its uncertainty and self-contradiction exists, an instruction on corroboration is required upon request. "If corroboration is lacking, the better practice is to give the instruction and allow the court members to decide the state of the evidence . . . ." <sup>150</sup> When accomplice testimony is not self-contradictory, uncertain, or improbable, the corroboration rule need not be the subject of an instruction.

Two cases considered instructions on expert witnesses in child sex abuse cases. In *United States v. Suarez*,<sup>151</sup> one expert witness testified on posttraumatic stress disorder and how it applied to one of the witnesses. Another testified on

<sup>137</sup> *Rankins*, 34 M.J. at 330, n.2.

<sup>138</sup> See BENCHBOOK, *supra* note 12, para. 7-10.

<sup>139</sup> See, e.g., *United States v. Davis*, 32 M.J. 166 (C.M.A. 1991); *United States v. McKinnie*, 32 M.J. 141 (C.M.A. 1991).

<sup>140</sup> 35 M.J. 468 (C.M.A. 1992).

<sup>141</sup> The complete accomplice testimony instruction is set out in the appendix to the opinion. *Id.* at 471-72.

<sup>142</sup> *Id.* at 470.

<sup>143</sup> The court previously has held that when the testimony of an accomplice comprises virtually the entire case or is of vital or pivotal importance to the prosecution, the accomplice testimony instruction must be given *sua sponte*. See *United States v. Garcia*, 46 C.M.R. 8 (C.M.A. 1972); *United States v. Lell*, 36 C.M.R. 317 (C.M.A. 1966); *United States v. Stephen*, 35 C.M.R. 286 (C.M.A. 1965); *United States v. Schreiber*, 18 C.M.R. 226 (C.M.A. 1955). Nothing in *Gillette* indicates that the court intended to change this *sua sponte* instructional requirement.

<sup>144</sup> *Gillette*, 35 M.J. at 470. "The testimony of an accomplice, even though it may be (apparently)(corroborated), is of questionable integrity and should be considered by you with great caution." See BENCHBOOK, *supra* note 12, para. 7-10; see MCM, *supra* note 48, R.C.M. 918(c) discussion ("Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution").

<sup>145</sup> *United States v. McKinnie*, 32 M.J. 141, 143 (C.M.A. 1991).

<sup>146</sup> *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992).

<sup>147</sup> See MANUAL FOR COURTS-MARTIAL, *United States*, 74a(2) (rev. ed. 1969) [hereinafter 1969 MANUAL].

<sup>148</sup> 34 M.J. 1086 (A.F.C.M.R. 1992).

<sup>149</sup> The court determined that the corroboration rule was based on case law that predated even the 1951 *Manual for Courts-Martial* and the references to it in subsequent *Manuals* were restatements of existing law. *Id.* at 1090-92. It held that the lack of specific reference to the rule in the present *Manual* was not an indication that the rule had been changed. The absence is merely a manifestation of a desire to not "clutter the Rules for Courts-Martial with elaborate explanations of the basis for findings or specific required instructions on findings." *Id.* at 1092.

<sup>150</sup> *Id.* at 1093.

<sup>151</sup> 35 M.J. 374 (C.M.A. 92).

child sexual abuse accommodation syndrome.<sup>152</sup> Immediately after each expert testified, the military judge instructed that the testimony could not be considered as expressing an opinion that sexual abuse occurred. Nor that could the members consider the testimony as supporting the truthfulness of the victims. The members were the sole judges of credibility, and any expression of opinion by the experts was permitted only to explain why the experts treated the witnesses as they did.<sup>153</sup> The general findings instructions included the standard expert witness instruction.<sup>154</sup> The COMA held that the expert testimony was properly before the members and that the instructions were proper.

In *United States v. Johnson*,<sup>155</sup> the military judge ruled that an expert could testify only about the characteristics of post-traumatic stress disorder and specifically prohibited the witness from expressing an opinion as to whether the victim was believable or that sex abuse had occurred.<sup>156</sup> The direct examination went beyond the limits set by the judge and

<sup>152</sup>The testimony is set out in Appendix A to the opinion. *Id.* at 377-78.

<sup>153</sup> Gentlemen, I'd like to mention a couple of things to you. First of all, there—we have no expert witnesses who can come in and tell us what occurred and what didn't occur. The experts on credibility and in determining facts are, in this case, you eight gentlemen and only you eight gentlemen. So, we can't, even though we'd like it, we can't have anybody come in and tell us what occurred. That's for you to decide based on all the evidence.

Now, to the extent that you believe that Miss Mordkin testified that she believes the accused [sic] was sexually abused, that's brought to you only for the—only to establish why Miss Mordkin has treated her in the way she has. You may not consider, if in fact she said it, if she said or if she indicated to you that she believes that [S] was sexually abused, you cannot consider that as evidence that [S] was sexually abused. Her opinion as to that is only limited to why she has acted the way she has.

You have—now, you can consider, among other things, her testimony that it is consistent with various diagnoses, but nevertheless, you have to determine for yourself, without benefit of anybody's opinion what occurred.

Gentlemen, once again, I want to caution you about the Doctor's testimony. Once again, you cannot glean from it that he believes that [S] or [A] are telling the truth about what they testified, and if he does then you may only accept that for the limited purpose of showing why the Doctor acted the way he did.

*Id.* at 378.

<sup>154</sup> Now, you've heard, yesterday, the testimony of Ms. Mordkin and Dr. Burns in the area of child sex abuse and—child physiology. They're known as expert witnesses because their knowledge, skill, training, and education may assist you in understanding the evidence or in determining a fact in issue. You're not required to accept the testimony of an expert or give it any more weight than the testimony of an ordinary witness; however, you should consider their qualifications as expert witnesses.

*Id.* at 378; see BENCHBOOK, *supra* note 12, para. 7-9.

<sup>155</sup>35 M.J. 17 (C.M.A. 1992).

<sup>156</sup>*Id.* at 19.

<sup>157</sup>*Id.* at 20.

<sup>158</sup> Mr. President and members of the court, before we proceed further, I wanted to advise you that the testimony you just heard from Mrs. Ruth Unger must be considered by you for limited purposes only. You are not to infer that because . . . [the victim] displays some symptoms of post-traumatic stress disorder—or stress syndrome—that sexual abuse against her must have occurred.

Mrs. Unger's testimony, including the basis and background of her testimony brought out in court, was offered by the government for the following limited purposes: To explain delays in reporting the offense, to explain the apparent absence of strong overt resistance during the alleged offenses in determining the issue of whether sexual intercourse was done without . . . [the victim's] consent and whether parental duress existed, to explain the repeated return of . . . [the victim] to the accused's residence where the alleged offenses occurred.

Once again, you must not conclude that because . . . [the victim] apparently possesses symptoms of post-traumatic stress disorder, that sexual abuse of her has occurred.

The expert testimony of Mrs. Ruth Unger only serves to explain the testimony of . . . [the victim] concerning the specific issues that I've described to you. It's your job as members of this court to make the ultimate determination as to where the truth lies in this area.

*Id.* at 20.

<sup>159</sup>MCM, *supra* note 48, MIL. R. EVID. 404(b).

included "the general area of sexually abused children and family patterns."<sup>157</sup> Immediately after the witness testified, the military judge gave a limiting instruction in accordance with his previous ruling.<sup>158</sup> The COMA held that the prompt and effective limiting instruction helped to render harmless the inadmissible evidence.

Rule 404(b) of the Military Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>159</sup>

Rule 105 provides that when evidence is presented for a limited purpose, as when admitted under Rule 404(b), "the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly."<sup>160</sup>

In *United States v. Leavitt*,<sup>161</sup> the COMA established criteria that govern Rule 404(b) and 105 instructions:

- (1) The military judge can and should employ effective limiting instructions;
- (2) The instruction must specifically identify the purpose or purposes for which the evidence is legitimately admitted;
- (3) Merely reciting the purposes allowed by Rule 404(b) without identifying the precise purpose for which the evidence may be used in a particular case will not suffice;
- (4) The instruction must expressly bar use of evidence for improper purposes, including proof of bad character or propensity for crime;
- (5) To be most effective, the instruction should be given immediately after the evidence is presented;
- (6) The instruction should be repeated prior to the commencement of deliberations; and

- (7) The instruction should be phrased to remove any suggestion that the military judge believes the uncharged misconduct occurred or that any inference must be drawn from its occurrence.<sup>162</sup>

In this larceny<sup>163</sup> prosecution, evidence was admitted that the military police interrogated the accused regarding an unrelated larceny. The military judge instructed *inter alia* that this evidence could be considered only for its tendency, if any, to prove the accused intended permanently to deprive the owner of the property alleged to have been stolen.<sup>164</sup> The COMA held that the instruction met the criteria set forth in the opinion and affirmed.

Private Clyde Leavitt possesses a distinction. On the same day the above-mentioned larceny conviction was affirmed, his earlier larceny conviction also was affirmed by the COMA.<sup>165</sup> In this latter case, the defense presented evidence that, on two occasions, the accused took the property of others and then returned it—ostensibly to teach the owners a lesson. The evidence was presented for its tendency to prove that the accused did not intend permanently to deprive the owner of the property taken in the charged larceny.<sup>166</sup> The Government then presented evidence of a fourth taking of property by the accused. This property was returned by the accused only after the commencement of the investigation of the offense charged. Consequently, the evidence showed the accused took and returned a diamond ring that was the subject of the charged offense, took two chains and a diamond ring from two marines and returned them (defense evidence), and took another diamond ring and returned it (prosecution rebuttal evidence).

<sup>160</sup>*Id.* MIL. R. EVID. 105.

<sup>161</sup>35 M.J. 114 (C.M.A. 1992).

<sup>162</sup>*Leavitt*, 35 M.J. at 119-20.

<sup>163</sup>UCMJ art. 121 (1988).

<sup>164</sup>Immediately after the uncharged misconduct was admitted, the military judge instructed as follows:

Before I allow you [members] to ask some questions, if you want to, let me give you an instruction on this evidence. You now have evidence that Gunny Burns interrogated the accused regarding an unrelated matter to this court of missing or stolen jewelry. This information may be considered by you for the limited purpose of its tendency, if any, to prove that the accused intended to keep the jewelry, in other words, his intent to permanently deprive the owner of this jewelry, in the charges before the court. You can also consider this to show the accused's awareness of his guilt of the offenses charged. You can also use this information—I believe that's the only two ways you can consider this information: one, to prove that he intended to permanently deprive the owners of this jewelry, or, two, to show awareness of his guilt of the offenses charged.

You may not consider this evidence for any other reason and you may not conclude from the evidence that the accused is a bad person or has a criminal tendency, or that he, therefore, committed the offense charged because of some criminal tendency or that he's a bad person.

*Id.* at 117-18. During the closing instructions, he instructed:

Now, evidence that Gunnery Sergeant Burns interrogated the accused may be considered by you for the limited purpose of its tendency, if any, to prove that the accused intended to permanently deprive the alleged victims of the jewelry and to show the accused's awareness of his guilt of the offense charged. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he, therefore, committed the offenses charged.

*Id.* at 118.

<sup>165</sup>*United States v. Leavitt*, 35 M.J. 108 (C.M.A. 1992).

<sup>166</sup>The taking of property to teach the owner a lesson is a defense to larceny, but not to wrongful appropriation. *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983); *accord United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984).

The military judge instructed that the defense evidence was presented for the limited purpose of its tendency to show the accused did not intend permanently to deprive the owner of the property alleged to have been stolen. He further instructed that the Government's evidence was presented to rebut the issue of innocent taking<sup>167</sup> raised by the defense.<sup>168</sup> The COMA held that the instruction was proper.

In *United States v. Hebert*,<sup>169</sup> the accused was charged with committing sodomy<sup>170</sup> with a young boy. Evidence was admitted showing that, on other occasions, the accused committed sodomy with another boy. The military judge instructed that the evidence of the uncharged sodomy was admissible to show the accused's state of mind and his desire to satisfy his sexual desires with young boys.<sup>171</sup> The COMA was not convinced totally that the presentation of the uncharged misconduct was proper,<sup>172</sup> but was satisfied that any error in its admission was harmless. Contributing to its conclusion was the uncharged misconduct instruction, which "significantly reduced the possibility that appellatant was convicted simply because he was a bad person."<sup>173</sup>

The foregoing cases demonstrate that the COMA has approved of two uses for properly framed uncharged misconduct instructions. The first occurs when the military judge

places the uncharged misconduct in proper perspective for the members. The other is for use by an appellate court to determine whether the incorrect admission of uncharged misconduct was harmless.

An improperly tailored instruction on inadmissible uncharged misconduct, however, will not help cure every error. In *United States v. Cousins*,<sup>174</sup> the accused was charged with the wrongful use of cocaine.<sup>175</sup> Evidence was admitted that, on numerous prior occasions, the accused used methamphetamines. The military judge instructed that the prior drug use could be considered only as background information.<sup>176</sup> The COMA found that the prior drug use was not relevant and if it was, its prejudicial effect substantially outweighed its probative value,<sup>177</sup> thereby making it inadmissible. In response to the Government's argument that the instruction cured the error, the COMA found that the words "background information" were not defined and the members were not told how they legitimately could use the evidence. "This lack of guidance left the evidence in the posture of a 'wild card,' to be considered and used by the court members for undefined purposes."<sup>178</sup> Accordingly, the instruction did not cure the error.

The Supreme Court considered an uncharged misconduct instruction in *Estelle v. McGuire*,<sup>179</sup> a *habeas* appeal from a

<sup>167</sup>"The doctrine of 'innocent purpose' is a misnomer when applied in such a situation." *United States v. Kastner*, 17 M.J. 11, 13 (C.M.A. 1983).

<sup>168</sup>The complete instruction is as follows:

Now, the defense offered evidence in the form of testimony by Lance Corporal James and Sergeant Jones that the accused may have taken property of other Marines. This evidence may be considered by you for the limited purpose of its tendency, if any, to establish the accused's intent not to permanently deprive or to temporarily appropriate Lance Corporal Martin's ring in this question, or, the ring in question.

The government introduced Lance Corporal Jackson's testimony to rebut this issue of innocent taking raised by the defense. You may not consider this evidence for any purpose other than that, and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies, or that he, therefore, committed the offense charged, so, you can use that evidence presented by Lance Corporal James, Sergeant Jones, and Lance Corporal Jackson only with regard to the intent issue and that's all. You can't infer from that evidence that Staff Sergeant Leavitt took the ring in question in this case.

*Leavitt*, 35 M.J. at 110-11.

<sup>169</sup>35 M.J. 266 (C.M.A. 1992).

<sup>170</sup>UCMJ art. 125 (1988).

<sup>171</sup>"Evidence has been admitted that the accused may have committed sodomy with Bradley. This evidence was admitted and may be considered by you for its limited purpose of its tendency, if any, to show the accused's state of mind and his desire to satisfy his sexual desires with young boys." *Hebert*, 35 M.J. at 267.

<sup>172</sup>*Id.* at 268.

<sup>173</sup>*Id.* at 269. In *United States v. Franklin*, 35 M.J. 311 (C.M.A. 1992), the court used similar reasoning to find harmless error. The unrelated mistreatment of one female by the accused was admitted in evidence in a case involving the murder of another female. The court held that the uncharged misconduct was inadmissible but harmless. Contributing to this conclusion was the immediate instruction that "thereby further mitigat[ed] the possibility of prejudice." *Franklin*, 35 M.J. at 318. The instruction is set out in the opinion. *Id.* at 315.

<sup>174</sup>35 M.J. 70 (C.M.A. 1992).

<sup>175</sup>UCMJ art. 112(a) (1988).

<sup>176</sup> Evidence that the accused may have used methamphetamine before 29 July 1989 was presented to you as background information. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he, therefore, committed the offense charged.

*Cousins*, 35 M.J. at 73.

<sup>177</sup>See MCM, *supra* note 48, MIL R. EVID. 403.

<sup>178</sup>*Cousins*, 35 M.J. at 74.

<sup>179</sup>60 U.S.L.W. 4015 (U.S. Dec. 4, 1991).

conviction for the murder of the defendant's infant daughter. The prosecution presented evidence of prior injuries to prove battered child syndrome, which "exists when a child has sustained repeated and/or serious injuries by non-accidental means."<sup>180</sup> The Court held that the instructions, while not as clear as they could have been,<sup>181</sup> let the jury determine if the accused had committed the prior acts and informed the jury that they could use the prior act evidence only if they so found. The instruction required the jury to find a clear connection between the prior acts and the charged acts and only if they found the defendant was the perpetrator of the prior acts could the evidence be used. Accordingly, the instruction did not violate due process.<sup>182</sup>

Curative instructions, when inadmissible matters are presented, continue to find favor with appellate courts.<sup>183</sup> When a military judge chastised a defense counsel in a less than civil

and temperate manner,<sup>184</sup> the court held that an inquiry by the judge if any member perceived the judge to be biased against the defense had the effect of a curative instruction and alleviated any prejudice.

In *United States v. Earnesty*,<sup>185</sup> the prosecution improperly presented evidence that the accused had requested a lawyer and invoked the right to silence.<sup>186</sup> The court found that "the error is exacerbated by the fact that the military judge failed to provide any curative instructions to the court members."<sup>187</sup>

Judges gave erroneous limiting instructions on evidentiary rules in several cases. *United States v. Shepard*<sup>188</sup> involved the state of mind exception to the hearsay rule.<sup>189</sup> The prosecution presented statements made by a murder victim prior to the offense. The military judge instructed that the statements could be considered for their tendencies to prove that the

<sup>180</sup>*Id.* at 4016.

<sup>181</sup>The court instructed the jury as follows:

Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you[,] to prove that he is a person of bad character and that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
2. To establish the battered child syndrome, and
3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose.

*Id.* at 4017 n.1.

<sup>182</sup>The defendant also alleged that the prosecution should not have been permitted to present the battered child syndrome evidence because the issue of the defendant's intent had not been raised. The court rejected the contention, declaring "the evidence of the battered child syndrome was relevant to show intent, and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the accused chooses not to contest the point." *Id.*

The COMA has taken a different approach. In *United States v. Franklin*, 35 M.J. 311 (C.M.A. 1992), it opined that uncharged misconduct evidence of intent should not be permitted unless the intent element is placed in issue. "It is recommended that a judge wait until both parties present evidence on the merits before determining whether intent is at issue." *Id.* at 317.

<sup>183</sup>"Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when court members have heard inadmissible evidence, as long as the curative instruction avoids prejudice to the accused." *United States v. Rushatz*, 31 M.J. 450, 465 (C.M.A. 1990).

<sup>184</sup>*United States v. Wamock*, 34 M.J. 567 (A.C.M.R. 1991). Part of the colloquy is set out in the opinion, *Id.* at 570-72.

<sup>185</sup>*United States v. Earnesty*, 34 M.J. 1179 (A.C.M.R. 1992).

<sup>186</sup>See MCM, *supra* note 48, MIL. R. EVID. 301(f).

<sup>187</sup>*Earnesty*, 34 M.J. at 1182. The failure to object does not relieve the military judge of his instructional responsibility. *Id.* at 1181.

<sup>188</sup>34 M.J. 583 (A.C.M.R. 1992).

<sup>189</sup>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of a declarant's will.

MCM, *supra* note 48, MIL. R. EVID. 803(3).

accused intended to kill the victim.<sup>190</sup> The instruction was erroneous because the state of mind exception applies to the declarant's state of mind.<sup>191</sup> The evidence, therefore, could not be used to determine the accused's state of mind.<sup>192</sup>

In *United States v. Armstrong*,<sup>193</sup> the military judge instructed that a prior inconsistent statement—made by a prosecution witness favorable to the defense—could be used only in evaluating her credibility.<sup>194</sup> The statement, however, was given under oath at a prior trial. Consequently, the statement was substantive evidence and could be used for all purposes.<sup>195</sup> Accordingly, the limiting instruction was erroneous.

### Procedure

The military judge's duty to supervise counsel's argument was considered in three cases.

In *United States v. Mobley*,<sup>196</sup> the trial counsel, during argument on findings, asked rhetorical questions that constituted

an improper comment on the accused's right to remain silent.<sup>197</sup> The military judge did not view the argument as improper and did not interrupt. The defense did not object during the argument, but belatedly asked for a mistrial. The motion for a mistrial was denied, but the military judge gave a tailored<sup>198</sup> failure-to-testify instruction<sup>199</sup> that made reference to the rhetorical questions and emphasized the right of the accused to remain silent.

The AFCMR held that the argument was improper and opined that, had the military judge recognized the impropriety, he had a duty to interrupt the argument and give appropriate instructions. His instruction, however, cured the improper argument.

Not every improper argument will be considered prejudicial error in the absence of a curative instruction. Accordingly, when a trial counsel erroneously argued that the results of one urinalysis test confirmed the results of another, the absence of a curative instruction was not plain error.<sup>200</sup> Similarly, a ref-

<sup>190</sup>The instruction is set out in the opinion *Shepard*, 34 M.J. at 587-88.

<sup>191</sup>The court criticized the instruction for neither providing clear guidance nor a meaningful basis or rationale for the members' considering the evidence. The court declared that the instruction was nothing more than a tailored uncharged misconduct instruction that, "while proper for uncharged misconduct, had the opposite and wrong effect in the context of state of mind evidence." *Id.* at 591. For a better, although not perfect, state of mind instruction, see *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991).

<sup>192</sup>The court found that the state of mind statements were inadmissible because "the probative value did not substantially outweigh the danger of unfair prejudice, confusion of the issues, or misleading the members." *Shepard*, 34 M.J. at 591. The court's recitation of this Military Rule of Evidence is backwards. For admissibility, the probative value need not exceed the prejudicial effect; rather, evidence is admissible unless the prejudicial effect substantially outweighs its probative value. MCM, *supra* note 48, MIL. R. EVID. 403.

<sup>193</sup>33 M.J. 1011 (A.C.M.R. 1991).

<sup>194</sup>*Id.* at 1015.

<sup>195</sup> Rule 801. Definitions The following definitions apply under this section:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

MCM, *supra* note 48, MIL. R. EVID. 801.

<sup>196</sup>34 M.J. 527 (A.F.C.M.R. 1991).

<sup>197</sup>The offending portions of the argument appear in the opinion of the COMA. *United States v. Mobley*, 31 M.J. 273, 280-82 (C.M.A. 1990).

<sup>198</sup>The military judge instructed as follows:

[Y]ou heard the trial counsel, during the course of his argument of the evidence, ask certain rhetorical questions which appeared to be directed toward the accused . . . I think it was obvious to you that these were [a] rhetorical form of questions and a rhetorical form of argument, but I do caution you again that the accused has an absolute right to remain silent, and you will not draw any inference adverse to the accused from the fact that he did not testify as a witness.

*Id.* at 531.

<sup>199</sup>See BENCHBOOK, *supra* note 12, para. 7-12.

<sup>200</sup>*United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). The military judge did instruct that counsel's argument was not evidence and that only evidence properly before the court could be considered. *Id.* at 1250.

erence in the trial counsel's argument to "your Air Force base" was not so improper that a sua sponte curative instruction was required.<sup>201</sup>

Military law prefers that all known charges be disposed of in one trial.<sup>202</sup> The law also recognizes that when similar, but unrelated, offenses are tried together, the danger arises that the evidence pertaining to one offense may spill over and be improperly used to convict for another offense.<sup>203</sup> In rare cases, to prevent manifest injustice, the offenses may be severed and tried separately.<sup>204</sup> In most cases, however, the danger of a spillover effect may be ameliorated by proper instructions.<sup>205</sup> In *United States v. Kirks*,<sup>206</sup> Kirks was charged with the unrelated molestations of two children. The offenses were tried together and the military judge, at the beginning of the trial<sup>207</sup> and prior to findings,<sup>208</sup> instructed that the evidence related to one offense and one child could not be used in any way in considering the offense relating to the other child.<sup>209</sup> The ACMR approved the instructions and affirmed.<sup>210</sup>

*United States v. Mansfield*,<sup>211</sup> was a full rehearing.<sup>212</sup> The military judge instructed that the accused had been tried

before but that the verdict must be based solely on the evidence presented in the present trial.<sup>213</sup> The AFCMR recognized that in retrials, prior proceedings often were referred to. The AFCMR upheld the instruction, reasoning that it was merely a recognition of what was likely to occur and an attempt "to meet the problem head-on."<sup>214</sup>

### Sentencing

Sentencing instructional issues were addressed in a number of cases.

In *United States v. Whitcomb*,<sup>215</sup> the accused was convicted of two specifications of indecent acts with a child under the age of sixteen. A defense sentencing witness testified that, based on his knowledge of the accused and the facts of the case, he would have no problem leaving the accused alone with his children. On cross-examination, the witness was asked if he had heard that the accused previously had received deferred adjudication for indecency with a child.<sup>216</sup> The military judge instructed that the question was permitted to test the credibility of the witness and that no evidence of any pre-

<sup>201</sup> *United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991).

<sup>202</sup> MCM, *supra* note 48, R.C.M. 601(e)(2). Ordinarily, all known charges should be referred to a single court-martial. *Id.* R.C.M. 601(e)(2) discussion.

<sup>203</sup> See *United States v. Haye*, 29 M.J. 213 (C.M.A. 1989); *United States v. Hogan*, 20 M.J. 71 (C.M.A. 1985).

<sup>204</sup> MCM, *supra* note 48, R.C.M. 906(b)(10); see *United States v. Curry*, 31 M.J. 359 (C.M.A. 1990).

<sup>205</sup> See *United States v. Hogan*, 20 M.J. 71, 73 (C.M.A. 1985) (if military judge had instructed the court members to keep evidence of the two offenses separate during their deliberations, this would have reduced substantially the members' chances of cumulating evidence and a different result may have been reached). In *United States v. Haye*, 29 M.J. 213 (C.M.A. 1989), the military judge instructed in accordance with the guidance of *Hogan*. The result, however, was the same as that in *Hogan*.

<sup>206</sup> 34 M.J. 646 (A.C.M.R. 1992).

<sup>207</sup> You'll see testimony in court about both of these victims; however, the evidence about one victim cannot be used to prove up the crimes against the other victim. They're two separate things. Again, you won't use the testimony or the evidence about one witness that testifies about one victim against the accused for the other offense—they're two separate matters—unless I give you instructions otherwise about how that might apply to each offense.

*Id.* at 652.

<sup>208</sup> Remember, also, what I told you up at the front of the trial: That is, in assessing the evidence, you may not use the evidence pertaining to Adam in your determination of the allegations pertaining to Kerstun, and you may not use the evidence pertaining to Kerstun in your determination of the allegations pertaining to Adam.

*Id.* at 652.

<sup>209</sup> The military judge essentially conducted a bifurcated trial. The evidence was presented separately, separate findings worksheets were used, and separate arguments were made. Whether all these precautions were necessary is doubtful.

<sup>210</sup> In another spillover case, *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992), the court held that evidence of one offense could be considered with respect to another offense under Military Rule of Evidence 404(b). The court also held that a proper limiting instruction was given.

<sup>211</sup> 33 M.J. 972 (A.F.C.M.R. 1991).

<sup>212</sup> UCMJ art. 63 (1988).

<sup>213</sup> "The accused has been tried before. You should not concern yourself with this fact. Your verdict must be based solely on the evidence in the present trial, in accordance with the court's instructions." *Mansfield*, 33 M.J. at 987.

<sup>214</sup> *Id.* at 987.

<sup>215</sup> 34 M.J. 984 (A.C.M.R. 1992).

<sup>216</sup> A partial transcript appears in the opinion. *Id.* at 989.

vious incident existed.<sup>217</sup> The ACMR found the question and the instruction to be proper.<sup>218</sup> When inadmissible evidence is presented, however, the absence of a curative instruction is error.<sup>219</sup>

As a general rule, the administrative and collateral consequences of a sentence should not be the concern of a court-martial.<sup>220</sup> Occasionally, these matters do arise and were considered in two cases during the past year.

In *United States v. McLaren*,<sup>221</sup> the court members asked how the subject of parole should be considered. The military judge instructed *inter alia* that both parole and good-time credit existed, but that the members should not consider them in determining a sentence.<sup>222</sup> The AFCMR declared that administrative procedures which permit penal authorities to adjust sentences are collateral to the sentencing function and the members should not speculate on this administrative relief. It cautioned that "military judges must tread carefully when responding to a court member's question on . . ." <sup>223</sup> administrative matters, and recommended that judges should simply "affirm that collateral consequences are not germane to the sentencing process."<sup>224</sup> Here, the military judge acknowledged the existence of administrative programs, but instructed

that they should not be considered. Accordingly, the instruction was adequate to preclude improper consideration by the members.<sup>225</sup>

In *United States v. Pollard*,<sup>226</sup> the ACMR reviewed an instruction that acknowledged the existence of, and the accused's eligibility for admission to, sex offender treatment programs. The trial counsel requested that the military judge take judicial notice of sex offender treatment programs available at Army correctional facilities. The military judge did so and instructed that confinement for six months and one day was necessary for admission. The ACMR found two errors. First, the existence of sex offender treatment programs may be acknowledged only in rebuttal.<sup>227</sup> In *Pollard*, notice was taken as a matter in aggravation. Second, the announcement of the "six months plus one day" criterion was improper and the time constraint was inaccurate.<sup>228</sup>

The military judge's duty to police improper sentencing arguments was addressed in several cases.

In *United States v. Flynn*,<sup>229</sup> the trial counsel argued that he represented the United States Government, that the "United States Government really wants this person to go to jail," and

<sup>217</sup>The instruction reads as follows:

In this regard, the government counsel posed a question to Sergeant First Class Smith, and he did that to test Sergeant First Class Smith's bases for his opinion. Sergeant First Class Smith gave the opinion that he would have no problem with his daughter being around [the appellant]. And that question posed involved an alleged incident in Texas involving a minor. Now, in this regard, members of the court, that question was proper to test the credibility of that witness. That is all it was proper for. There is no evidence of any incident in Texas, and you're not to consider it for any other purpose than to test the credibility of this witness as to his opinion as to whether he would like to have his daughter around the accused again.

*Id.* at 989-90. The instruction indicates that no evidence of the prior incident existed. When asked, however, if he knew about it, the witness indicated that he did. Accordingly, evidence of the prior incident existed.

<sup>218</sup>"Have you heard?" and "did you know?" questions are the classic method of cross-examining character witnesses. See *Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Donnelly*, 13 M.J. 79 (C.M.A. 1982). The military judge previously had held that the evidence of the prior incident would not be permitted. Because the defense opened the door, however, the Government properly could refer to evidence of the prior incident.

<sup>219</sup>*United States v. Plott*, 35 M.J. 512 (A.F.C.M.R. 1992) (extensive evidence of pedophilia inadmissible when evidence established accused was not a pedophile).

<sup>220</sup>See *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989) (effect of punitive discharge on retirement pay and benefits); *United States v. Flynn*, 28 M.J. 218 (C.M.A. 1989) (existence of and eligibility for sex offender treatment programs at confinement facilities); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (Air Force regulation governing eligibility for correction and rehabilitation squadron); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988) (effect of sentence with and without punitive discharge on retirement benefits); *United States v. Brown*, 1 M.J. 465 (C.M.A. 1976) (tax consequences of a sentence); *United States v. Quesinberry*, 31 C.M.R. 195 (C.M.A. 1962) (specific consequences of a bad conduct discharge).

<sup>221</sup>34 M.J. 926 (A.F.C.M.R. 1992).

<sup>222</sup>The instruction appears in the opinion. *Id.* at 933-34.

<sup>223</sup>*Id.*

<sup>224</sup>*Id.*

<sup>225</sup>Acknowledging that good-time credit and parole existed is unnecessary. The instruction to disregard these programs, however, was sufficient.

<sup>226</sup>34 M.J. 1008 (A.C.M.R. 1992).

<sup>227</sup>See *United States v. Flynn*, 28 M.J. 218 (C.M.A. 1989); *United States v. LaPeer*, 28 M.J. 189 (C.M.A. 1989).

<sup>228</sup>In *Flynn*, 28 M.J. at 218, the military judge took judicial notice of sex offender treatment programs at the United States Disciplinary Barracks, Fort Leavenworth, and at the United States Army Correctional Brigade, Fort Riley, Kansas. The judge also informed the members of the minimum sentences to confinement necessary to transfer prisoners to these institutions. The court approved the trial judge's decision to take judicial notice of the programs, but did not comment on the propriety of mentioning the minimum confinement requirements.

<sup>229</sup>34 M.J. 1183 (A.F.C.M.R. 1992).

that opposing counsel merely represented the accused.<sup>230</sup> The military judge instructed that the trial counsel's argument did not necessarily reflect the official position of the Air Force.<sup>231</sup> The COMA held that the instructions adequately cured any impropriety.

In *United States v. Motsinger*,<sup>232</sup> the trial counsel's argument improperly blurred the distinction between the administrative concept of retention and a punitive discharge.<sup>233</sup> The military judge interrupted the argument and properly corrected the counsel.<sup>234</sup>

The propriety of adjudicating a fine when a fine was not mentioned during the instructions was examined.<sup>235</sup> Reference was made to the sentence worksheet, which provided for a fine and stated that ordinarily a fine should be adjudged only in cases of unjust enrichment.<sup>236</sup> The COMA opined that instructions on punishment should not be presented solely through the worksheet, but found no prejudicial error.<sup>237</sup>

Improper voting procedure instructions were given in *United States v. Wallace*.<sup>238</sup> The military judge instructed that the members should consider the vote as similar to an election, that various proposals should be considered as a block, that the votes for various proposals should be compared to each other, and that the vote for a particular proposal could be split

three ways.<sup>239</sup> Essentially, the judge created confusion by not clearly instructing that the sentence proposals were to be voted on one at a time and that—if none were adopted—discussion, proposal of sentences, and voting should begin again.<sup>240</sup>

In *United States v. Lawson*,<sup>241</sup> the COMA resolved, at least temporarily, the maximum punishment on which to instruct in a sentence rehearing. It held that the maximum sentence at the rehearing is the sentence that originally was adjudged. The COMA rejected the argument that the maximum sentence on which to instruct at a rehearing was limited to the sentence that was approved by the convening authority at the original trial.<sup>242</sup> Judge Cox, concurring, argued that the better way to secure justice was to instruct that the maximum punishment was the one provided in the *Manual for Courts-Martial (MCM)*.<sup>243</sup> Subsequently, Congress agreed with Judge Cox and amended the UCMJ.<sup>244</sup> For offenses occurring after 23 October 1992, the maximum punishment on which to instruct at a sentence rehearing is limited only by the UCMJ and the *MCM*.<sup>245</sup> If the original sentence included a punitive discharge, but not confinement, the failure to instruct at a sentence rehearing that confinement is an available punishment is error.<sup>246</sup> Such an instruction is required even if the defense strategy is to avoid confinement.

<sup>230</sup>*Id.* at 1189.

<sup>231</sup> Now, the court is advised that the arguments of trial counsel represent only the prosecution's suggestions as to what might be an appropriate sentence and they do not necessarily reflect the opinion of the United States Air Force or anyone occupying an official position with respect to these proceedings. The court is also advised that it is inappropriate for a lawyer, for either side, to express a personal opinion.

*Id.*

<sup>232</sup>34 M.J. 255 (C.M.A. 1992).

<sup>233</sup>*See* *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989).

<sup>234</sup> Captain Greenfield, I am going to stop you here. We are not talking about retention or a discharge. It is a punitive discharge, and if the court members do not vote for a punitive discharge, that is certainly not a vote for retention as it is in a discharge board. I just want the members to be aware of that.

*Motsinger*, 34 M.J. at 257.

<sup>235</sup>*Id.* at 255; *United States v. Gonzalez*, 33 M.J. 875 (A.F.C.M.R. 1991).

<sup>236</sup>*Motsinger*, 34 M.J. at 257; *Gonzalez*, 33 M.J. at 877 n.3.

<sup>237</sup>The *Gonzalez* court did not discourage the procedure. Because *Gonzalez* was decided before *Motsinger*, however, courts should disregard any intimation that the procedure actually is to be encouraged.

<sup>238</sup>35 M.J. 897 (A.C.M.R. 1992).

<sup>239</sup>The instruction appears in the opinion. *Id.* at 898.

<sup>240</sup>The errors could have been avoided had the military judge repeated the standard instructions, rather than extemporaneously answering a member's question.

<sup>241</sup>34 M.J. 38 (C.M.A. 1992).

<sup>242</sup>*See* *MCM*, *supra* note 48, R.C.M. 810(d)(1); *United States v. Frye*, 33 M.J. 1075, 1079 (A.C.M.R. 1992).

<sup>243</sup>*Lawson*, 34 M.J. at 42-43, (Cox, J., concurring). Except when the minimum sentence is prescribed by statute, the President has the authority to limit the maximum punishment that may be adjudged. UCMJ art. 56 (1988). The President has exercised this authority in the *Manual*. *See* *MCM*, *supra* note 48, pt. IV, paras. 3-113.

<sup>244</sup>Department of Defense Authorization Act for Fiscal Year 1993.

<sup>245</sup>UCMJ art. 63 (West Supp. 1992).

<sup>246</sup>*United States v. Turner*, 34 M.J. 1123 (A.C.M.R. 1992). The accused originally was sentenced at a special court-martial to a bad conduct discharge, partial forfeitures for six months, and reduction to the grade of E-1.

# USALSA Report

United States Army Legal Services Agency

## The Advocate for Military Defense Counsel

### DAD Notes

#### Pretrial Confinement Review: RCM 305i Is Now a Forty-Eight Hour Review

For years, the United States Supreme Court's concern over police misconduct in the execution of the official law enforcement role has centered around Fourth Amendment search and seizure scenarios.<sup>1</sup> The basis of the exclusionary rule is anchored in the Court's preoccupation with assuring the "clean hands" of the government.<sup>2</sup>

The Supreme Court expanded this preoccupation to include pretrial confinement in *Gerstein v. Pugh*.<sup>3</sup> The *Gerstein* Court insisted that a "prompt" judicial determination of probable cause occur before any prolonged pretrial confinement.<sup>4</sup> The Court viewed this review as an essential check on potential police misconduct that would deprive an individual of his or her liberty. *Gerstein* further mandated that a "neutral and detached magistrate whenever possible"<sup>5</sup> must perform this review.

The latest Supreme Court case interpreting pretrial confinement review is *County of Riverside v. McLaughlin*.<sup>6</sup> In

*McLaughlin*, the Court further defined *Gerstein's* "prompt" standard by stating, "We believe that a jurisdiction that provides judicial determinations of probable cause within forty-eight hours of arrest, will, as a general matter, comply with the promptness requirement of *Gerstein*."<sup>7</sup> The Court held that beyond forty-eight hours, the burden shifts to the Government to prove "the existence of a bona fide emergency or other extraordinary circumstance"<sup>8</sup> justifying the delay.

In *United States v. Rexroat*,<sup>9</sup> the Army Court of Military Review (ACMR) noted that Rule for Courts-Martial (R.C.M.) 305(i)<sup>10</sup> was based largely on *Courtney v. Williams*,<sup>11</sup> which applied *Gerstein* to the military.<sup>12</sup> The ACMR held that R.C.M. 305(i) was implemented through *Army Regulation 27-10*<sup>13</sup> (AR 27-10), mandating that military magistrates or military judges were the *only* authorized pretrial confinement reviewers.<sup>14</sup> The ACMR held that *McLaughlin* also must apply to the military because it modifies *Gerstein*. Consequently, R.C.M. 305(i) had to be modified to comply with the new forty-eight hour rule. Accordingly, the ACMR struck down the seven- and ten-day rules of R.C.M. 305(i) as unconstitutional, replacing them with forty-eight hours<sup>15</sup> as the time required in which to perform the pretrial confinement review.

In dicta, the ACMR also suggested that even if AR 27-10—which mandated reviews by military magistrates—were to be

<sup>1</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961); cf. *United States v. Leon*, 468 U.S. 897 (1984).

<sup>2</sup> See generally *Leon*, 468 U.S. at 897.

<sup>3</sup> 420 U.S. 103 (1975).

<sup>4</sup> *Id.* at 114.

<sup>5</sup> *Id.* at 112; accord *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>6</sup> 111 S. Ct. 1661 (1991).

<sup>7</sup> *Id.* at 1670.

<sup>8</sup> *Id.*

<sup>9</sup> No. 9102033, (A.C.M.R. 8 Dec. 1992) (reconsideration en banc), order for review granted, (The Judge Advocate General, U.S. Army \_\_\_).

<sup>10</sup> MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 305(i) (1984) [hereinafter MCM].

<sup>11</sup> 1 M.J. 267 (C.M.A. 1976).

<sup>12</sup> *Rexroat*, No. 9102033, slip op. at 3-4.

<sup>13</sup> DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (16 Jan. 1989).

<sup>14</sup> *Rexroat*, No. 9102033, slip op. at 4-5, 9.

<sup>15</sup> *Id.* at 5-7.

changed to reflect nonattorneys, such as commanders,<sup>16</sup> as reviewers, the ACMR may rely upon *Coolidge v. New Hampshire*<sup>17</sup> in challenging the ability of nonattorneys "to render reasoned legal magisterial decisions."<sup>18</sup> Although the ACMR discussed whether commanders could be designated as neutral and detached for purposes of constitutionally mandated reviews,<sup>19</sup> it deferred discussing the competing philosophies of *Lopez* and *United States v. Stuckey*.<sup>20</sup>

In *United States v. McLeod*—decided just nine days later—the ACMR restricted *Rexroat*'s scope, finding a de minimis effect on the sentencing. Although the accused was due three days' credit for a delayed magistrate's review pursuant to *Rexroat*, no remedy existed because, by the time his case finally was decided on appeal, the accused already had served his sentence.<sup>21</sup> On 8 January 1993, the ACMR again restricted the scope of *Rexroat* in *United States v. Nobles*,<sup>22</sup> this time applying waiver to the issue.

Defense counsel should note that all pretrial confinement reviews under R.C.M. 305(i) are to take place no more than forty-eight hours after apprehension and placement into pretrial confinement. This review must be performed by a military magistrate or military judge. This issue *must* be raised at trial and fully litigated because recent cases show that the ACMR's decision in *Rexroat* is tempered either by the lack, or irrelevance, of the remedies accorded to an accused on appeal. Captain Thomas.

### Soldiers Beware: You're Now Fiduciaries!

The ACMR recently released an opinion that delineates that court's interpretation of *United States v. Antonelli*.<sup>23</sup>

In *United States v. Thomas*,<sup>24</sup> an accused was assigned to Korea on an unaccompanied tour. He requested and received permission to live off post. A lease was signed and the appro-

priate paperwork was done at the finance office to secure the needed basic allowance for quarters (BAQ) and overseas housing allowance (OHA) funds. Approximately half way through the term of his lease, the accused decided to move back into the barracks and terminate his lease. Although the accused told both his company commander and his first sergeant of his actions, he failed to inform the finance office of his change in status. Consequently, he continued to receive his OHA funds and failed to return his security deposit to the finance office. The accused eventually extended his tour and, to avoid repaying the security deposit, secured a second lease. This maneuver allowed him to continue to receive his OHA and to retain the use of the security deposit. The accused never moved into his new apartment, which the landlord subsequently rented to someone else. A few months later, the company commander realized that the finance office had not been notified of the accused's status change, and informed those officials of the change.

The question for the ACMR was two-fold. First, did the accused have a fiduciary duty to report the change in his status to finance when he initially broke his lease and moved into the barracks? Second, if such a fiduciary duty existed, did he fulfill that duty by giving the Army finance office constructive knowledge or notice via the company commander and first sergeant. Although the facts of *Thomas* are egregious—especially in light of his actions in obtaining the second lease—the argument is a technical one and the ACMR took an expansive view of it.

In overruling both *United States v. McFarland*<sup>25</sup> and *United States v. Watkins*,<sup>26</sup> the ACMR held that the COMA's decision in *Antonelli* was controlling. When soldiers receive allowances, "there is a bailment and the monies remain the property of the United States. As such, the soldier has a duty to account for the property."<sup>27</sup> In other words, soldiers are fiduciaries and if, as Judge Crawford points out in her *Antonelli* concurrence, a soldier mistakenly receives an allowance and realizes the mistake but does nothing to correct

<sup>16</sup>See *United States v. Lynch*, 13 M.J. 394 (C.M.A. 1982); *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992).

<sup>17</sup>403 U.S. 443 (1971).

<sup>18</sup>*Rexroat*, No. 9102033, slip op. at \_\_ n.9.

<sup>19</sup>*Rexroat*, No. 9102033 slip op. at \_\_ n.7.

<sup>20</sup>10 M.J. 347 (C.M.A. 1981).

<sup>21</sup>No. 9102729, slip op. at 3 (A.C.M.R. 17 Dec. 1992).

<sup>22</sup>No. 9201891 (8 Jan. 1993) (memorandum opinion).

<sup>23</sup>35 M.J. 122 (C.M.A. 1992).

<sup>24</sup>No. 9002824 (A.C.M.R. 20 Nov. 1992).

<sup>25</sup>23 C.M.R. 266 (C.M.A. 1957).

<sup>26</sup>32 M.J. 527 (A.C.M.R. 1990).

<sup>27</sup>*Thomas*, slip op. at 6.

it, he or she is guilty of larceny or wrongful appropriation.<sup>28</sup> According to the ACMR, it does not matter that the soldier's chain of command was notified, nor does it matter that, unlike *Thomas*, a soldier may have done nothing illegal or immoral to come into possession of the funds. The only issue is whether the soldier failed in his or her fiduciary role to return the monies to the United States Government.

Accordingly, the lessons for defense counsel are first, to make sure that soldiers understand their fiduciary roles, and second, to be prepared to litigate this issue by attacking the intent to steal element of the larceny offense. This burden will be difficult to overcome when the soldier makes no attempt to return the mistaken delivery of monies to the United States Government. Captain Thomas.

### The ACMR Seeks to Abate Years of COMA Precedent

On 1 and 2 May 1991, Sergeant (SGT) Jerry Berry was tried in Garlstadt, Germany, for writing bad checks and being absent without leave. On appeal, no errors were found and the case was submitted to the ACMR on its merits. On 31 December 1991, the ACMR affirmed the findings and sentence in a short-form opinion.<sup>29</sup> On 20 March 1992, SGT Berry was served a copy of the court's decision pursuant to R.C.M. 1203(d).<sup>30</sup> Service of the ACMR decision started SGT Berry's sixty-day clock for filing a petition for grant of review at the COMA.<sup>31</sup> On 13 May 1992, seven days before the expiration of his COMA filing deadline, SGT Berry died.<sup>32</sup>

Immediately upon learning of SGT Berry's death, appellate defense counsel filed a motion to abate the proceedings. The Government filed an opposition to the motion, arguing that

once the ACMR affirmed the findings and sentence and the time for reconsideration had passed, SGT Berry's conviction was final because no proceedings to abate existed. The Government tried to distinguish the leading COMA cases in this area—which hold that abatement is appropriate—and instead relied on the Supreme Court case of *Dove v. United States*.<sup>33</sup> *Dove* held that if an appellant dies while a discretionary appeal is pending, only the discretionary appeal is abated; the conviction stands. In *United States v. Kuskie*,<sup>34</sup> however, the COMA specifically declined to follow *Dove* and instead reaffirmed the line of military cases that have expanded the rule of abatement in the military. Accordingly, The ACMR denied SGT Berry's motion to abate without explanation.

Appellate counsel for SGT Berry filed a motion for reconsideration, which also was denied without explanation by the ACMR on 10 August 1992. Appellate counsel then filed a motion for reconsideration and suggestion for en banc reconsideration, which was denied by the ACMR without explanation. Appellate counsel then petitioned the COMA for extraordinary relief in the nature of a writ of mandamus. On 14 October 1992, the COMA issued the Government a show-cause order to explain why the requested relief should not be granted. In its response, the Government—although conceding that military case law clearly mandates that the proceedings be abated *ab initio*—asked the COMA to reconsider its decision in *Kuskie*.<sup>35</sup>

In a line of cases beginning with *United States v. Crawford*,<sup>36</sup> the military courts have held if a service member dies while his or her appeal is pending—regardless of whether an appellant is before a court of military review or the COMA—the proceedings are abated *ab initio*. Consequently, the charges are dismissed and all rights and privileges are restored. Prior to *Dove*, this approach also was the rule in the federal court system.<sup>37</sup> After *Dove*, however, the federal

<sup>28</sup>*Id.* at 6-7 (citing *Antonelli*, 35 M.J. at 131).

<sup>29</sup>*United States v. Berry*, ACMR 9101233 (A.C.M.R. 31 Dec. 91) (unpub.).

<sup>30</sup>MCM, *supra* note 10, R.C.M. 1203(d)(1984). The record is unclear as to why serving SGT Berry with a copy of his decision took so long.

<sup>31</sup>UCMJ art. 67(b) (1988).

<sup>32</sup>The coroner's death investigation report stated that SGT Berry was found along a highway in Georgia with massive head injuries from being struck by a car. SGT Berry had been paroled from the United States Disciplinary Barracks in April 1992.

<sup>33</sup>423 U.S. 325 (1976).

<sup>34</sup>11 M.J. 253 (C.M.A. 1981).

<sup>35</sup>COMA heard oral argument on SGT Berry's writ on 6 January 1993. No. 92-43/AR (C.M.A. 6 Jan. 1993).

<sup>36</sup>36 C.M.R. 697 (A.C.M.R. 1966); *see also* *United States v. Brown*, 34 M.J. 22 (C.M.A. 1991); *United States v. Jarvis*, 23 M.J. 359 (C.M.A. 1987); *United States v. McLane*, 20 M.J. 369 (C.M.A. 1985); *United States v. Anderson*, 19 M.J. 295 (C.M.A. 1985); *United States v. Jackson*, 19 M.J. 276 (C.M.A. 1985); *United States v. Flannigan*, 6 M.J. 157 (C.M.A. 1978); *United States v. Johnson*, 3 M.J. 391 (C.M.A. 1977); *United States v. Day*, 5 M.J. 998 (C.M.A. 1976).

<sup>37</sup>*Durham v. United States*, 401 U.S. 481 (1971).

courts have distinguished between direct appeals as a matter of right and discretionary appeals,<sup>38</sup> holding that if an accused was pending a discretionary appeal, only that portion of his or her case would be abated. In other words, an appellate petition would be dismissed, but a conviction would stand if it had been affirmed at the first level of the appellate process.<sup>39</sup>

In *Kuskie*,<sup>40</sup> the COMA specifically declined to follow *Dove*, distinguishing the COMA from the Supreme Court by pointing to the "critical role this Court plays in the direct review of courts-martial as the court of last resort in the military justice system."<sup>41</sup> The Government in *Kuskie* argued that the appellant was not prejudiced in the exercise of his appellate rights as a result of his death.<sup>42</sup> Although recognizing merit in the Government's argument, the COMA observed that "the Government ignores larger considerations of criminal law at stake in this case, i.e., that the goals of criminal law—incapacitation, rehabilitation, retribution and deterrence—would not be furthered by upholding the deceased's conviction."<sup>43</sup>

The COMA did not address abatement until *United States v. Roettger*.<sup>44</sup> In *Roettger*, an equally divided ACMR sitting en banc denied a motion to abate, following the federal practice and the "general abatement rule."<sup>45</sup> The COMA overruled the ACMR, stating that *Dove* "is not applicable to a mandatory appeal before a Court of Military Review or during that period when a petition for reconsideration could be filed concerning such an appeal."<sup>46</sup> After *Roettger*, the issue appeared to be settled.<sup>47</sup>

Apparently, the ACMR felt that a newly expanded COMA should re-examine its decision in *Kuskie*. Several factors should prevent the COMA from reversing its position. First, the military environment is unique. As Judge Coker eloquently stated in his separate dissent in *Roettger*, "To apply civilian concepts of pendency of appeal within the statutorily constructed scheme of the UCMJ is to graft the elephant's nose to the camel's hump."<sup>48</sup> A second reason that the COMA should decline to reverse itself is stare decisis. The law of abatement as developed in the military is wholly based on case law; no rule or statute governs its application. Because Congress has not addressed the issue, and the facts of SGT Berry's situation present no substantial distinguishing factors from prior case law, the COMA should not disturb its long line of precedent.<sup>49</sup> Finally, if the Government does not approve of existing law, it always can attempt to legislate new law. As Judge Crawford recently stated in *United States v. Weiss*,<sup>50</sup>

If there is dissatisfaction with the military justice system as it exists today, it can be changed or modified by the majoritarian process. That is, the elected representatives of the Congress, in consultation with the executive branch, have the power to make any necessary changes. But this court must not, by judicial fiat, impose the procedures intended for a federal civilian judiciary upon the military under the guise of the Constitution.

<sup>38</sup>Even among the federal and state courts, a split remains over whether or not to abate ab initio. Annotation, *Effect, on proceedings below, of death of defendant pending appeal from criminal conviction*, 83 A.L.R.2d 864 (1962).

<sup>39</sup>*United States v. Pauline*, 625 F.2d 684 (5th Cir. 1980); *United States v. Bechtel*, 547 F.2d 1379 (9th Cir. 1977); *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977).

<sup>40</sup>*Kuskie*, 11 M.J. at 255.

<sup>41</sup>*Id.* at 255 (citations omitted).

<sup>42</sup>The Government's rationale was that the appellant pleaded guilty while appellate counsel assigned a single error concerning severity of the sentence (which was rejected by the ACMR). The appellant in *Kuskie* died while his petition to the COMA was pending, but his appellate counsel did not discover his death until after the COMA denied his petition. *Id.*

<sup>43</sup>*Id.*

<sup>44</sup>17 M.J. 453 (C.M.A. 1984).

<sup>45</sup>16 M.J. 536, 541 (A.C.M.R. 1983).

<sup>46</sup>*Roettger*, 17 M.J. at 457.

<sup>47</sup>The Court of Military Appeals failed to write any further opinions on the issue, but did decide several cases by summary disposition, citing *Kuskie*. See generally cases cited *supra* note 8.

<sup>48</sup>*Roettger*, 16 M.J. at 545.

<sup>49</sup>See generally *United States v. Sloan*, 35 M.J. 4, 12 (C.M.A. 1992); *United States v. Berg*, 30 M.J. 195, 200 (C.M.A. 1990); *United States v. Kelly*, 25 C.M.R. 288, 289 (C.M.A. 1958).

<sup>50</sup>No. 67,869/NMCM, slip op. at 12 (C.M.A. 21 Dec. 92) (unpub.).

The military justice system has chosen to expand the rule of abatement beyond that of the federal courts. Over time, several judges from both the ACMR and the COMA have articulated valid reasons for treating service members differently than defendants charged in federal court. The Government likely was concerned that SGT Berry's service records accurately reflect the character of his service and also that his surviving family members will not be enriched unjustly by any financial benefits that may flow to them if SGT Berry's rights and privileges were restored. Judge Fletcher, however, emphatically stated in *Kuskie*,

It is well established that . . . courts-martial are not convened for administrative purposes but rather "to adjudicate charges of criminal violations of military law." Accordingly, we are not disposed to decide this question on the basis of the collateral administrative ramifications of our decision or perceived inequities stemming therefrom which are conjured up by the Government. Moreover, it is a fundamental principle of criminal law that its object is to punish the criminal and not his family.<sup>51</sup>

Captain Smith.

### *Clerk of Court Note*

#### **A Closer Look at Army Court-Martial Conviction Rates**

Avid readers of the Clerk of Court's annual military justice statistics are accustomed to seeing court-martial conviction rates ranging from about eighty percent in ordinary special courts-martial (SPCM) to about ninety-five percent in general courts-martial (GCM). Critics of the military justice system tend to cite the higher rates as evidence that the system is institutionally unfair, notwithstanding our rates are not materially different from conviction rates in many civilian jurisdictions when guilty-plea cases are included.

Our response to those critics emphasizes the large number of guilty pleas—typically sixty percent or more—found in

GCM and in special courts-martial empowered to impose a bad-conduct discharge (BCDSPCM). For example, in fiscal year (FY) 1992, of the 1168 GCM trials, 1097 resulted in convictions (a conviction rate of 93.9%). Of these 1097 GCM convictions, however, 701—or sixty-four percent—were guilty pleas.

Other factors also should be considered. The convictions counted as guilty-plea cases are only those in which the accused pleaded guilty to all specifications and charges. Another category of cases exists—usually amounting to about ten percent—in which an accused pleads guilty to some specifications and not guilty to others. If the Government attempts to prove guilt of any specification or element to which the accused pleaded not guilty, the trial judge reports this as a separate category of case—a combination of guilty plea and contested. Notwithstanding the result of the contested matter, those cases almost always result in a statistical conviction because of the guilty plea.

Therefore, for a more accurate view of the military justice system in terms of case outcomes, one must look to the contested cases not involving any plea of guilty. A recent research request received by the Clerk of Court's office, for information from the Army Court-Martial Management Information System, enabled it to do just that. In the five fiscal years from FY 1988 to FY 1992, the Army had 3231 fully contested trials by GCM, BCDSPCM, and SPCM. Convictions resulted in 2576 cases, or eighty percent. Annual contested convictions ranged from a high of eighty-two percent in FY 1988 to a low of seventy-six percent in FY 1992.

Although the Clerk of Court's office did not look at differences between the three levels of courts-martial involved, it did examine the composition of the court. Almost two-thirds of the not-guilty pleas were entered before courts-martial with members. In the trials that were by judge alone, the conviction rate was eighty-seven percent. In cases tried before court members, the conviction rate was seventy-six percent. Overall, as previously indicated, the conviction rate in contested cases was eighty percent—far different from the ninety-five percent that critics of the military justice system prefer to rely on.

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<sup>51</sup>*Kuskie*, 11 M.J. at 255 (citations omitted).

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Criminal Law Note

### What is "Probable Cause"?—Does the "Good Faith Exception" Apply Only to Probable Cause Determinations?—COMA Offers Guidance in *United States v. Mix*

Criminal law practitioners know that "probable cause" determinations under the Fourth Amendment rest on Military Rule of Evidence 315(f)(2)<sup>1</sup> and the "totality of the circumstances" test announced in *Illinois v. Gates*.<sup>2</sup> Rule 315(f)(2) states:

Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched.<sup>3</sup>

The conclusory character of this definition, however, is of little value to a practitioner. After all, what is a "reasonable belief?" What facts or circumstances constitute it? *Illinois v. Gates* provides little guidance. In *Gates*, the Supreme Court held that probable cause is a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."<sup>4</sup> Instead, probable cause depends on the "totality of the circumstances."<sup>5</sup> But when does a totality of the circumstances add up to probable cause? Again, like Military Rule of Evidence 315, *Gates* does little to point the way to finding probable cause in a specific case. Consequently, judge advocates advising commanders, like trial lawyers and judges litigating Fourth Amendment questions, must look to the appellate courts for guidance on determining probable cause.

Those seeking answers to the question, "What is probable cause?" should turn to *United States v. Mix*<sup>6</sup> for valuable insight. First, the facts in *Mix* were held to constitute probable cause. Consequently, counsel can compare and argue by analogy that, just as the circumstances in *Mix* supported a finding of probable cause, they also do in like cases. Second, and more importantly, *Mix* signals that the good-faith exception to the exclusionary rule now makes a determination of probable cause less important. *Mix* reflects the emerging trend that a finding of probable cause no longer determines the legality of many warranted searches or seizures. In sum, knowing *how* to find probable cause, or even to *trying* to find it, is becoming increasingly unimportant.

In *United States v. Mix*, the accused's battalion commander, Lieutenant Colonel (LTC) Haluski, authorized a search of the accused's car. His authorization was based on a finding that probable cause existed to believe that *Mix*'s car contained weapons. On appeal, the accused claimed that LTC Haluski did not have enough facts to find probable cause. He also argued that even if probable cause existed, LTC Haluski was not "competent" to authorize the search because the car was not located in an area under his control.<sup>7</sup>

Judge Crawford, in an opinion by the Court of Military Appeals (COMA), wrote that the facts relayed to LTC Haluski "provided reasonable grounds to believe the items to be seized were located in [*Mix*'s] car [and] satisfied the probable-cause requirement for [the] search."<sup>8</sup> These factors were important. First, the accused's company commander told LTC Haluski that an informant knew about the weapons and that they had been in the barracks the previous day. In addition, the informant had said that if the weapons were not in the barracks, they were in the accused's car. The company commander also noted that the informant was "a good soldier" with a "good reputation." Finally, the accused was restricted to the compa-

<sup>1</sup>MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 315 (1984) [hereinafter MCM].

<sup>2</sup>462 U.S. 213 (1983).

<sup>3</sup>MCM, *supra* note 1, MIL. R. EVID. 315(f)(2). An identical determination is made when doing a probable cause seizure of an item or a person. See generally *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *California v. Hodari D.*, 111 S. Ct. 1547 (1991); *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

<sup>4</sup>*Gates*, 462 U.S. at 232.

<sup>5</sup>*Id.* at 238.

<sup>6</sup>35 M.J. 283 (C.M.A. 1992).

<sup>7</sup>MCM, *supra* note 1, MIL. R. EVID. 315(d)(1), (requiring a commander authorizing a search to have "control over the place where the property . . . to be searched is found or situated"). See *Mix*, 35 M.J. at 287-8.

<sup>8</sup>*Mix*, 35 M.J. at 287.

ny area, "had been seen driving a car along the edge of the battalion area" the day before, and this car "was last seen" parked next to the dining facility used by the battalion.<sup>9</sup>

In sum, LTC Haluski had wholly hearsay evidence from an unidentified soldier that the accused's weapons were in the barracks the day before. If the weapons could not be found there, he was reasonable in thinking they were in the car, particularly because the accused was restricted to the unit area. Because a barracks search had not located the weapons, LTC Haluski authorized a search of the accused's car.<sup>10</sup>

Although Judge Crawford initially cites Military Rule of Evidence 315(f)(2) and *Gates*, her opinion discusses at length the usefulness of the "rejected"—but still "highly relevant"—*Aguilar-Spinelli*<sup>11</sup> test for determining probable cause. While satisfying *Aguilar-Spinelli*'s basis-of-knowledge and reliability test no longer is required, if this "more rigid" test is met, then *Gates*'s totality of the circumstances test is satisfied. In *Mix*, the informant's personal observation satisfied the basis-of-knowledge prong of *Aguilar-Spinelli* while the company commander's knowledge of the informant's character satisfied the reliability prong. Interestingly, the reliability prong is buttressed in the military because "a false report by a military member to a commander may be an offense."<sup>12</sup> Accordingly, the informant's talk with *Mix*'s company commander, and the latter's coordination with LTC Haluski, were inherently more reliable because of the sanctions for providing false official statements under military law.

The COMA also rejected the accused's argument that LTC Haluski lacked authority over the area to be searched. Instead, the court concluded that he was a competent authority who could authorize the search. This particular conclusion, however, would not have determined the outcome of the case because the COMA made the alternative finding that "the good faith exception applies [because] the battalion commander acted as a rational, reasonable commander having probable cause to believe he could authorize a search of appellant's car."<sup>13</sup>

*Mix* is interesting for several reasons. First, the COMA could have used the good-faith exception announced in *United States v. Lopez*<sup>14</sup> to avoid finding probable cause. That it did not, but rather went beyond *Gates* to measure probable cause under the *Aguilar-Spinelli* test, is significant. After *Lopez*, a commander must show only that a "substantial basis" existed for finding probable cause before authorizing a search or seizure. Stated differently, the authorizing commander still must find probable cause; however, neither an *actual* finding of probable cause by a trial judge, nor an appellate court's deciding the legality of a warranted search or seizure is necessary. The lesson for the practitioner is that the COMA looks favorably on using *Aguilar-Spinelli* principles in probable cause determinations. Second, in *Mix*, the COMA signals that its application of *Lopez* and the good-faith exception goes beyond traditional probable cause determinations. After *Mix*, the good-faith exception also extends to a command-authorized search in which the commander might not be competent to grant the authorization. This is a significant extension of the good faith-exception. It means that any search authorized by a commander of an area not under his or her control is saved if the commander had a "rational" basis for thinking he or she had authority over the area. Again, what is interesting about *Mix* is that the COMA could have avoided discussing this authorization issue altogether. After *California v. Acevedo*,<sup>15</sup> a warrant or authorization is no longer needed to search a vehicle. Only probable cause to believe evidence of a crime or contraband is in the vehicle is required. The COMA therefore, could have cited to *Acevedo*, making any further discussion of LTC Haluski's authorization unnecessary. That it did not shows practitioners that *Lopez* applies not only to probable cause determinations, but also to command authorizations generally. In sum, *Mix* represents an expansion of good faith principles announced in *Lopez*.

In *United States v. Mix*, the COMA could have avoided finding probable cause by relying on *Lopez*. It could have avoided the competent authority issue by relying on *Acevedo*.<sup>16</sup> The court's decision instead to wrestle with both questions provides valuable insight and guidance. Major Borch.

<sup>9</sup>*Id.*

<sup>10</sup>A pistol-grip shotgun, and semiautomatic rifle were discovered and seized. Possession of these illegal weapons formed a part of the charges against the accused.

<sup>11</sup>*Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

<sup>12</sup>*Mix*, 35 M.J. at 287 (citing *United States v. Lane*, 29 M.J. 48 (C.M.A. 1989); *United States v. Wood*, 25 M.J. 46, 48 (C.M.A. 1987)).

<sup>13</sup>*Id.* at 288 (citing *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992) (good-faith exception to exclusionary rule applies to command authorized searches and seizures); *People v. Ruiz*, 217 Cal. App. 3d 574, 265 Cal. Rptr. 886 (3d Dist. 1990) (good-faith exception to exclusionary rule saved warrant when police officer failed to tell judge issuing out-of-county warrant that crimes under investigation occurred in issuing county)).

<sup>14</sup>*Id.*

<sup>15</sup>111 S. Ct. 1982 (1991). See generally TJAGSA Practice Note, *United States Supreme Court Creates New "Bright-Line" Rule for Searches of Containers in Vehicles*, ARMY LAW., Oct. 1991, at 39.

<sup>16</sup>Note that in *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992), decided the same day as *Mix*, the COMA did avoid this very issue. *Evans* concerned the legality of a warranted automobile search. The COMA declined to address the correctness of the authorization because after *Acevedo*, probable cause is all that is needed to search an automobile.

## 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.

### Survivor Benefit Plan

Soldiers who are facing retirement must decide whether to participate in the Survivor Benefit Plan<sup>17</sup> (SBP) and, if so, at what level of participation. The SBP is subsidized by the government<sup>18</sup> and, for the vast majority of retirees, it is superior to any alternative that a private insurance company can offer. Unfortunately, some private insurance companies use "omissions and half-truths"<sup>19</sup> to sell alternatives to the SBP. In the next few years, this questionable practice likely will increase as private insurance companies that focus on the military market lose business from active duty soldiers.<sup>20</sup>

Whether or not a retiree needs something like the SBP, and whether private insurance can replace all or part of the SBP function, are issues entirely dependent on the retiree's personal and family situation. Although every situation will be different, a tool exists that can help the individual retiree make the right choice. The Department of Defense Office of the Actuary has assembled a series of computer programs<sup>21</sup> that

provide the real value of the SBP and run a comparison of the SBP with commercial life insurance alternatives. These programs allow the retiree to input essential information, to include the ages of the retiree and his or her spouse, health information that might affect their expected life-spans, future inflation and interest rate assumptions, and the dollar amounts of any proposed commercial insurance replacement products. Most importantly, the programs are "user friendly."<sup>22</sup>

A legal assistance attorney advising a client who is about to retire should determine whether the client has seen a retirement counselor having access to these programs. If not, the legal assistance attorney can download these programs from the LAAWS Bulletin Board, Legal Assistance Conference. Purchasing a commercial insurance alternative to the SBP without first running these programs ultimately could result in severe financial difficulty for the surviving spouse. Major Peterson.

### Tax Note

#### *When Is Alimony Not Alimony But Child Support?*

Confused? Most legal assistance practitioners and many tax assistors recognize that support paid by one spouse to a former spouse ordinarily will be called alimony or spousal support. Nevertheless, that does not necessarily determine whether or not the payment qualifies for the alimony adjustment for federal income tax purposes. The legal assistance provider or tax assistor must determine if the payment meets the tax code definition of alimony.<sup>23</sup> If it does, the party making the payment may reduce his or her gross income by claim-

<sup>17</sup> An excellent reference that describes the Survivor Benefit Plan and how it works is *SBP Made Easy*. This booklet, written by the Retired Officers Association, recently was adopted as *Department of the Army Pamphlet 360F-539*.

<sup>18</sup> The subsidy averages around 44%, but varies significantly with the class of SBP participants being considered—officer versus enlisted, disabled versus nondisabled, retirement eligible versus retired. This information was provided by Mr. Doyle, Deputy Chief Actuary, Office of the Department of the Defense Actuary.

<sup>19</sup> Memorandum, Chief Actuary, Department of the Defense Office of the Actuary (1 Sept. 1988).

<sup>20</sup> The reduction in the size of the military will decrease the size of the active duty market. For those active duty soldiers who do need life insurance, the increase in Servicemen's Group Life Insurance coverage to \$200,000 also may reduce the perceived need for additional private life insurance.

<sup>21</sup> "SBP1993.EXE" is an SBP valuation program. It examines a particular retiree's situation and, using current mortality tables, tells the retiree whether the retiree and the retiree's spouse can expect to get more out of their retired pay without SBP, with reduced SBP, or with maximum SBP. This program also runs a cost-benefit comparison of SBP with an average term insurance alternative. "SBPLIFE.EXE" predicts how long insurance proceeds will last if the surviving spouse invests the proceeds and withdraws monthly payments at the SBP annuity rate. This program is useful for comparing the SBP to commercial insurance when the retiree has specific insurance alternatives in mind that are composed of term insurance, whole life, or a combination of the two. "SUPSBP93.EXE" examines the value of supplemental SBP.

<sup>22</sup> Questions about the programs can be referred to the Deputy Chief Actuary, Mr. Chris Doyle, at (703) 696-5869.

<sup>23</sup> Internal Revenue Code § 71(b) defines alimony as any cash payment if

- (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
- (B) the divorce or separation instrument does not designate such payment as payment which is not included in gross income under this section and not allowable under this section and not allowable as a deduction under section 215,
- (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
- (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

IRC § 71(b) (Maxwell Macmillan 1992).

ing an adjustment for the amount of alimony paid, while the recipient must include that same amount in income. Both do so on Form 1040.<sup>24</sup>

Assume a separation agreement provides the following:

Mary Taxpayer, a soldier, agrees to pay John Taxpayer, her nonmilitary ex-spouse, as alimony, \$175 per week until John is employed (either part- or full-time) or in any event, until December 31, 1994, and then said alimony shall be reduced to \$100 per week and shall continue until John's death, remarriage, or until the youngest child reaches age eighteen, whichever first occurs, in which case said alimony shall stop and John shall have no further right to alimony.

Presuming Mary makes the required payments, has she made an alimony payment for federal income tax purposes?

Based on Internal Revenue Code (IRC) § 71(b), Mary's payment to John initially appears to be alimony for tax purposes. If it is, Mary can decrease her gross income by the total of all alimony payments she made during the tax year. John, on the other hand, must increase his gross income by the amount he received during the tax year.<sup>25</sup>

The tax code,<sup>26</sup> however, distinguishes alimony from payments to support children. These payments are neither includible in the gross income of the recipient nor excludible as an adjustment by the payor. Although Mary and John's agreement literally does not require Mary to pay child support, is the payment child support for purposes of the tax code?

Many legal assistance providers and tax assistants might be surprised to learn that it is child support. Careful reading of

IRC § 71(c)(2)<sup>27</sup> resolves the issue against Mary. Generally, if any payment amount will be reduced based on a contingency relating to a child, then the amount of the reduction will be treated as child support, and not alimony, for federal income tax purposes.<sup>28</sup>

When assisting taxpayers, legal assistance providers or tax assistants should ask taxpayers more than whether the taxpayer is paying or receiving alimony. Legal assistance providers and tax assistants should inquire whether the alimony amount will change, and if so, when and why. If possible, a copy of the agreement or divorce decree detailing the "alimony" payment likewise should be examined. Through these actions, the legal assistance provider can determine whether the payments constitute alimony for federal income tax purposes.

When drafting separation agreements for taxpayers like Mary, legal assistance providers also should be aware of the tax code distinction between alimony and child support.<sup>29</sup> Ordinarily, tax issues do not (and should not) dominate divorce or separation counseling. In many cases, the client may not even be interested in the tax consequences of the pending divorce or separation. Legal assistance providers, however, are encouraged to highlight and distribute *Internal Revenue Service Publication 504, Divorced or Separated Individuals* to clients contemplating divorce. This publication serves to remind clients of the important tax consequences attached to changes in marital status. Major Hancock.

#### Landlord-Tenant Note

##### *Release From Military Service Justifies Early Lease Termination in Maryland*

The federal Soldiers' and Sailors' Civil Relief Act (SSCRA) allows a person coming onto active duty to terminate a residential lease to which he or she became a party prior to com-

<sup>24</sup>Internal Revenue Serv., Form 1040, U.S. Individual Income Tax Form (1992). The recipient reports alimony as gross income on line 11, while the payor takes an adjustment on line 29 of the Form 1040. Neither taxpayer may use Form 1040A or Form 1040EZ to account for alimony. Internal Revenue Serv., Form 1040A, U.S. Individual Income Tax Form (1992); Internal Revenue Serv., Form 1040EZ, U.S. Individual Income Tax Return for Single Filers with No Dependents (1992).

<sup>25</sup>IRC § 71(a) (Maxwell Macmillan 1992).

<sup>26</sup>*Id.* § 71(c).

<sup>27</sup>*Id.* § 71(c)(2). For purposes of determining child support,

[I]f any amount specified in the instrument will be reduced—(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

<sup>28</sup>This is based on a rebuttable presumption. If the taxpayer could show that the duration of alimony payments is customary in the local jurisdiction—for instance, a period equal to one-half of the duration of the marriage—and that the duration of alimony payments just happened to coincide with what appeared to be a contingency related to a child, the payment should qualify as alimony. See Treas. Reg. § 1.71-1T(c) A-18 (Maxwell Macmillan 1992).

<sup>29</sup>See *supra* notes 22 and 26.

ing onto active duty.<sup>30</sup> Providing evidence of entry onto active duty to the landlord will terminate the lease, normally within thirty days. What about a soldier who signs the lease after entering active duty and who, because of military orders, must vacate the premises before his or her lease terminates? The SSCRA provides no remedy in this situation.

Recognizing this shortcoming, several states have enacted statutes allowing early lease termination for military members, under certain circumstances—typically permanent change of station orders.<sup>31</sup> Some states specify that a military member also may terminate a lease prematurely if released from active service.<sup>32</sup>

The Maryland early lease termination statute failed to address this point<sup>33</sup> and until recently, whether a service member leaving active duty would be allowed early cancellation or not, was unclear. On September 15, 1992, however, the Maryland Attorney General issued an opinion that allows military personnel who are released from service and ordered to their permanent homes of record the right to terminate their residential leases.<sup>34</sup> Major Hostetter.

## Family Law Note

### *Support of Stepchildren*

Nearly half of all American marriages end in divorce. In a substantial number of these divorces, minor children are placed in the physical custody of one of their biological parents. If the custodial parent remarries, the minor children will

find themselves living with an adult to whom they are not related biologically. Although potentially stressful, this arrangement may entitle the child to receive financial support from his or her stepparent in addition to that provided by a biological parent.

The Army's rules and state law on support of stepchildren can result in a substantial financial obligation for the uninitiated. This is a matter of substantial concern to soldiers because many soldiers are stepparents. Determining whether a stepparent is obligated to pay for support depends on (1) whether the stepparent adopts the child, (2) the stepparent's and stepchild's domicile,<sup>35</sup> and (3) the stepparent's conduct towards the child.

When stepparents adopt stepchildren, these adopted children, as a matter of law, generally are treated for all purposes as the biological children of the adoptive parent.<sup>36</sup> Under Army regulations, a child adopted by a soldier is a "family member."<sup>37</sup> As a "family member," the adopted child is entitled to regular and adequate financial support from the soldier unless relieved of that responsibility by court order or agreement with the child's custodial parent.<sup>38</sup>

If the soldier does not adopt the stepchild, the child is not a "family member" unless the law of the soldier's or stepchild's domicile requires stepparents to provide financial support to stepchildren.<sup>39</sup> Consequently, the obligation to support a stepchild may come into existence or be extinguished because of a change of domicile by either the soldier or stepchild. Courts in at least eight jurisdictions have held that stepparents

<sup>30</sup>50 U.S.C. App. § 534 (1992).

<sup>31</sup>DEL. CODE ANN. TIT. 25 § 5509 (1991); GA. CODE ANN. § 44-7-37 (1990); IDAHO CODE § 55-2010 (1989); KAN. STAT. ANN. § 58-2504, 2570 (1990); MD. REAL PROP. CODE ANN. § 8-212.1 (1991); N.C. GEN. STAT. § 42-45 (1991); VA. CODE ANN. § 55-248.21:1 (1991).

<sup>32</sup>VA. CODE ANN. § 55-248.21:1 (1991) provides that military members may terminate rental agreements if (1) the member receives permanent change of station orders to depart 35 miles or more (radius) from the location of the dwelling; (2) has received temporary duty orders in excess of three months' duration to depart 35 miles or more (radius) from the location of the dwelling; (3) is discharged or released from active duty with the military; or (4) is ordered to report to government quarters resulting in forfeiture of BAQ.

<sup>33</sup>MD. REAL PROPERTY CODE ANN. § 8-212.1 (1991), provides that if a person who is on active military duty enters a residential lease and subsequently receives permanent change of station orders or temporary duty orders for a period in excess of three months, he or she may cancel the lease.

<sup>34</sup>Opinion no. 92-031, 77 Op. Att'y Gen. (Sept. 15, 1992). Relying on the definition of "permanent change of station" found in the *Joint Federal Travel Regulations*, the Attorney General concluded that orders effecting discharge, resignation, or separation from military service under honorable conditions are sufficient upon which to base early lease termination.

<sup>35</sup>Every person has a domicile. By general acceptance, however, domicile is not the same as residence. The critical factor is whether or not the subject intended to make a particular place "his [or her] home for the time at least." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971). A common misconception is that a soldier's domicile is the same as his or her home of record. Intent to establish domicile usually is expressed through a subject's (1) paying local and state income taxes; (2) paying local or state property taxes; (3) registering to vote in the state; (4) obtaining state driver and vehicle licenses; and (5) committing any other act that signifies an intention to make a particular state a permanent home.

<sup>36</sup>H. CLARK, 2 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.12 (1987).

<sup>37</sup>DEPT OF ARMY REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, glossary (22 May 1987).

<sup>38</sup>See generally *id.* ch. 2.

<sup>39</sup>*Id.* glossary.

are liable for the support of stepchildren.<sup>40</sup> Several other jurisdictions impose the obligation by statute.<sup>41</sup>

Finally, a stepparent's conduct relative to the stepchild can result in the stepparent being held liable for the child's support by applying the doctrine of equitable estoppel. Equitable estoppel is not triggered merely by a stepparent's promise to love the stepchild.<sup>42</sup> Instead, courts typically require that (1) the stepparent express an unequivocal intent to support the child and (2) the child or the child's natural parent rely on that representation to their detriment.<sup>43</sup>

Unequivocal intent to support the stepchild can be derived from the stepparent's long-term support of the child and allowing the child to use the stepparent's name.<sup>44</sup> Showing detrimental reliance on the part of the biological parent or stepchild is more difficult.<sup>45</sup> One court, however, held that the requirement was satisfied when the stepparent paid for the termination of his stepchild's biological father's parental rights.<sup>46</sup> Major Connor.

<sup>40</sup> See *Johnson v. Johnson*, 152 Cal. Rptr. 121 (Ct. App. 1979); *Wade v. Wade*, 536 So. 2d 1158 (Fla. Dist. Ct. App. 1988); *Nygaard v. Nygaard*, 401 N.W.2d 323 (Mich. Ct. App. 1986); *M.H.B. v. H.T.B.*, 498 A.2d 775 (N.J. Sup. Ct. 1985); *Wener v. Wener*, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970); *Manze v. Manze*, 523 A.2d 821 (Pa. 1987); *T. v. T.*, 224 S.E.2d 148 (Va. 1976); *K.T. v. L.T.*, 387 S.E.2d 866 (W. Va. 1989).

<sup>41</sup> See, e.g., S.D. CODIFIED LAWS ANN. § 25-7-9 (1990); WASH. REV. CODE ANN. § 26.16.205 (West Supp. 1989).

<sup>42</sup> See, e.g., *A.M.N. v. A.J.N.*, 414 N.W.2d 68 (Wis. Ct. App. 1987).

<sup>43</sup> *Id.* at 71; see also *Knill v. Knill*, 510 A.2d 546 (Ct. App. 1986); *Mace v. Webb*, 614 P.2d 647 (Utah 1980).

<sup>44</sup> *Ulrich v. Cornell*, 17 Fam. L. Rep. (BNA) 1371 (Wis. Ct. App. May 28, 1991).

<sup>45</sup> See, e.g., *Wiese v. Wiese*, 699 P.2d 700 (Utah 1985).

<sup>46</sup> *Ulrich*, 17 Fam. L. Rep. at 1371.

## Claims Report

United States Army Claims Service

### Affirmative Claims Note

#### Cost of Hospital and Medical Care and Treatment Furnished by the United States

The Department of Defense historically has used a single reimbursement rate for various health care services. The rate has taken the form of a single per diem charge for inpatient services and a per-visit charge for outpatient services.

Effective 1 October 1992, the Department of Defense and the Office of Management and Budget (OMB) made the transition to a multiple rate structure for inpatient care. The multiple rates result in charges that more closely approximate the actual costs of delivering specific categories of medical services. This movement to multiple rates is an interim step toward patient level rates based on a classification system such as Diagnosis Related Groups.

#### Inpatient Rates

As authorized by 10 U.S.C. § 1095, the OMB has changed its computation of reasonable costs of inpatient medical care from a unified per diem rate to a per diem rate based on the following "clinical groups":

**General Medical Care Services.** This includes internal medicine, cardiology, dermatology, endocrinology, gastroenterology, hematology, nephrology, neurology, oncology, pulmonary and upper respiratory disease, rheumatology, physical medicine, clinical immunology, HIV III—AIDS, infectious disease, allergy, and medical care not elsewhere classified.

**Surgical Care Services.** This includes general surgery, cardiovascular and thoracic surgery, neurosurgery, ophthalmology, oral surgery, otolaryngology, pediatric surgery, plastic surgery, proctology, urology, peripheral vascular, trauma service, head and neck service, and surgical care not elsewhere classified.

*Obstetric and Gynecological Care.*

*Pediatric Care.* This includes pediatrics, nursery, adolescent pediatrics, and pediatric care not elsewhere classified.

*Orthopedic Care.* This includes orthopedics, podiatry, and hand surgery.

*Psychiatric Care and Substance Abuse Rehabilitation.*

*Family Practice Care.*

*Burn Unit Care.* Furnished at the Burn Center, United States Army Institute of Surgical Research, Brooke Army Medical Center, Fort Sam Houston, Texas.

*Medical Intensive Care/Coronary Care.*

*Surgical Intensive Care.*

*Neonatal Intensive Care.*

*Organ and Bone Marrow Transplants.*

*Same Day/Ambulatory Surgery.*

Patients treated in an intensive care unit any time during the twenty-four hour nursing period shall be charged the intensive care per diem charge in lieu of a charge against the clinical group to which the patient is currently assigned.

**Outpatient Rate**

The OMB's computation of reasonable costs for most outpatient services still is based upon an all-inclusive per-visit rate (the 1993 fiscal year rate is \$100). This per-visit charge includes all ancillary services. A special rule, however, applies to ancillary services purchased from a source other than a military treatment facility. *See infra* "Ancillary Services."

Because the outpatient rate is a per-visit rate and not per diem, the cost of outpatient care may exceed \$100 per day. For example, if a soldier injured in an automobile accident receives follow-up outpatient care in the orthopedic and plastic surgery clinics on the same day, the cost of his medical care would be \$200—based on \$100 per outpatient visit. Any X-rays or pharmaceuticals received would be included in the per-visit rates.

**Ancillary Services or Procedures**

When a medical treatment facility (MTF) purchases an ancillary service or other procedure from a non-MTF source the cost of the purchased service will be added to the inpatient per diem or the outpatient per-visit rate. Examples of ancil-

lary services and other procedures covered by this special rule include, but are not limited to, the following: laboratory, radiology, pharmacy, pulmonary function, cardiac catheterization, hemodialysis, hyperbaric medicine, electrocardiography, electroencephalography, electroneuromyography, pulmonary function, inhalation and respiratory therapy, and physical therapy services. 57 Fed. Reg. 41096 (1992) (amending Department of Defense Regulation that implements 10 U.S.C. § 1095 (1988)).

**Fiscal Year 1993 Rates**

The OMB has established the following rates in computing medical care costs for treatment provided in fiscal year 1993. *See* 57 Fed. Reg. 48642 (1992).

**Inpatient Care (per diem):**

General medical care.....	\$ 777
Surgical care.....	1,022
Obstetrical/gynecological care .....	993
Pediatric care .....	802
Orthopedic care .....	881
Psychiatric care/substance abuse .....	508
Family practice .....	716
Burn center .....	2,761
Medical intensive/coronary care.....	1,749
Surgical intensive care .....	1,767
Neonatal intensive care .....	1,104
Organ & bone marrow transplants .....	1,814
Same day surgery .....	447

**Outpatient Care (per visit) .....** \$ 100

For care and treatment furnished at the expense of the United States in a facility not operated by the United States, the rates shall be the amounts expended for that care and treatment. Captain Krivda & Ms. Jedlinski.

**Management Note**

**Claims Administration**

The following administrative recommendations are made on virtually every claims assistance visit. Implementation of these recommendations can significantly improve personnel claims administration.

1. Cross-train personnel so individual absences do not impede office operations. Cross-training also can provide job enrichment and improve service to claimants.

2. Create or update current standard operating procedures (SOP) and follow them. A typical claims office should have SOPs in each functional claims area to explain what happens at each stage of claims processing. SOPs help with consistency, ease training of new personnel, and will assist in properly processing documents having legal effect (such as DD Form 1840R).

3. Develop, maintain, and use simple suspense systems for each claims area. Offices should have easy to use *individual* suspense systems for personnel, recovery, tort and affirmative claims. Supervisors should ensure that the suspense systems are being used and are working.

4. Once Direct Procurement Method recovery actions have been identified and prepared properly (the United States Army Claims Service has published helpful guides on how to prepare these actions) make sure the staff judge advocate coordinates with the directorate of contracting to assign sufficient priority to these recoveries. Remember, service is just as

important as the amount of money involved. If contractors are allowed to ignore demands, they will have little incentive to improve the quality of their service.

5. Regularly visit the outbound branch of your local transportation office to review the quality of the counseling and briefings that soldiers are getting as they depart the installation. Pay particular attention to information about insurance, maximum payments, category limitations and claimant responsibilities for timely notice of loss and damage. Ms. Zink.

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## Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office*

### *Civilian Personnel Law Note*

#### **Perceived Handicapped Protected from Demotion**

In *Sargent v. Department of the Air Force*,<sup>1</sup> the agency, following a fitness for duty examination, placed a GS-5 firefighter on enforced leave and proposed his removal. The agency had concluded that the employee's medical condition—organic heart disease—presented a risk of serious injury to him or others. Prior to the proposed removal, however, the employee's work performance never had been questioned. Nineteen days after the proposal and in conjunction with the firefighter's request for a downgrade, the agency demoted the employee to a GS-4 supply clerk position.

At the Merit Systems Protection Board (MSPB or Board) hearing, the administrative judge found, based upon credible testimony from a board-certified cardiologist, that the appellant did not have "organic heart disease," but only a common, minor heart rhythm abnormality that would not cause a high probability of harm to himself or to others. Although overturning the agency action on the merits, the administrative judge held that there was no discrimination. The administrative judge found that the agency reasonably had accommodated its perception of the appellant's handicapping condition by placing him in a different position for which the agency believed he was physically qualified.

In a two-to-one decision, the Board affirmed the administrative judge's decision on the merits, but found that the agency had discriminated against the appellant based upon a handicapping condition. The Board reasoned that the agency's demotion of the appellant based upon an erroneous perception of his medical condition—when actually he could perform the essential functions of his position with or without reasonable accommodation—constituted prohibited handicap discrimination.

In his dissent, Chairman Levinson argued that the appeal should have been dismissed for lack of jurisdiction because the appellant's downgrade was voluntary. The administrative judge characterized the firefighter's request to be placed in the GS-4 supply clerk position as a request for mitigation in response to the proposed removal. Chairman Levinson noted that the request was not a generalized plea for leniency but a request for a voluntary downgrade into the specific position to which he was demoted. Although the agency had provided a decision letter to the employee, it maintained that the purpose of the inartfully drafted letter was to inform the employee of appeal rights if he believed that the demotion was involuntary. Chairman Levinson found this agency position credible because the downgrade was expedited at the employee's request. Additionally, the "decision letter" was effective nineteen days after the proposal even though an employee is statutorily entitled to thirty days advance notice of an involuntary adverse action.<sup>2</sup>

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<sup>1</sup>No. SL07528910392 (M.S.P.B. Oct. 28, 1992).

<sup>2</sup>5 U.S.C. 7513(b)(1) (1988).

This case contains several practice points. First, when preparing actions, civilian personnel officers must be specific as to the nature of proposal and decision letters. If the agency's decision letter had been drafted to show clearly that it only was accommodating the firefighter's request for a voluntary downgrade, the outcome might have been as suggested by Chairman Levinson. Second, as a matter of trial advocacy, labor counselors always should anticipate the appellant's witness testimony and be prepared to rebut this testimony, especially expert testimony. A board-certified cardiologist with twenty years' experience on organic heart disease will be more persuasive than an agency general practitioner. Third, the Civil Rights Act of 1991 and the availability of compensatory damages of up to \$300,000,<sup>3</sup> permit measures that go beyond merely reversing the appellate action on the merits. Without a finding of discrimination, a successful appellant is entitled to backpay, attorney's fees and costs, but not compensatory damages. This dichotomy obviously will encourage even successful appellants to file a petition for review with the full Board. As a corollary, labor counselors always should be prepared to address discrimination as a separate issue.

### *Labor Relation Notes*

#### **Federal Labor Relations Authority Orders Status Quo Ante Soda**

While anyone in the desert of Barstow, California, may appreciate a cold soda, Marine Corps employees will be doing so at a cheaper price, courtesy of the Federal Labor Relations Authority (FLRA or Authority).<sup>4</sup>

Since 1986, the Marine Corps Logistics Base had charged fifty cents for soda at its approximately fifty-five vending machines. The fifty cent price was generally cheaper than that charged elsewhere in surrounding areas. In the spring of 1991, because of diminishing morale, welfare and recreation (MWR) revenues, the base increased the price to fifty-five cents without completing negotiations with the union. The Authority found that management had committed an unfair labor practice (ULP) noting that "matters pertaining to food

services and related prices for bargaining unit employees are within the mandatory scope of bargaining."

While a unilateral change of a negotiable term and condition of employment clearly requires a status quo remedy if the purposes and policies of the Federal Service Labor-Management Relations Statute<sup>5</sup> are not to be rendered meaningless,<sup>6</sup> the remedy ordered in this instance appears to be unique. The Authority, adopting the administrative law judge's recommendation, ordered the base not only to cancel the increase, but also to *lower* the price from fifty cents to forty-five cents per can for the same number of days that the price increase was in effect. The adverse implications for the base's MWR fund in this case are obvious. Labor counselors would be well advised to avoid similar occurrences at their installations. Mr. Meisel.

#### **Fourth Circuit Rejects the FLRA's "Clear and Unmistakable Waiver" Doctrine**

As previously noted in the Labor and Employment Law Notes,<sup>7</sup> the Court of Appeals for the District of Columbia rejected the Authority's contention that unless the union clearly and unmistakably waives a statutory right to designate its own representative in a negotiated agreement, an agency that refuses to recognize a designated representative commits an unfair labor practice (ULP).<sup>8</sup> The Fourth Circuit has addressed the issue and joins the District of Columbia Circuit in blasting the "clear and unmistakable waiver" doctrine.

In *Department of Health and Human Services, Social Security Administration v. Federal Labor Relations Authority*,<sup>9</sup> the agency gave an oral warning to a union representative for distributing union literature on employees' desks during work hours in violation of the collective bargaining agreement.<sup>10</sup> A grievance was filed on July 14, 1989, and on November 28, 1989, the union charged a ULP. The FLRA administration law judge dismissed the ULP complaint, holding that the matter was one of contract interpretation properly the subject of the grievance and arbitration procedures. When the FLRA considered the case, the Authority ruled that even though the grievance concerned an interpretation of the labor agreement,

<sup>3</sup>Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>4</sup>Marine Corps Logistics Base, Barstow, Calif. and AFGE Local 1482, 46 F.L.R.A. No. 68 (1992).

<sup>5</sup>5 U.S.C. ch. 71.

<sup>6</sup>Veterans' Administration West Los Angeles Medical Ctr. and AFGE Local 1061, 23 F.L.R.A. 278 (1986).

<sup>7</sup>Labor and Employment Law Note, *ARMY LAW.*, Oct. 1992, at 48.

<sup>8</sup>National Treasury Employees Union, 39 F.L.R.A. 1568 (1991), *vacated and remanded sub nom.* Internal Revenue Serv. v. Federal Labor Relations Auth., 963 F.2d 429 (D.C. Cir. 1992).

<sup>9</sup>Department of Health and Human Servs., Social Security Admin., Md. v. Federal Labor Relations Auth., 976 F.2d 229 (1992).

<sup>10</sup>Article 12, section 2A, of the agreement provided, in part: "Official publications of the Union may be distributed on SSA property by union representatives during the non-duty time of the union representatives who are distributing and the employees receiving the materials. Distribution shall not disrupt operations."

the Authority would not defer to the grievance procedure. The Authority would consider whether the union "clearly and unmistakably" had waived any more extensive distribution rights that may be available due to the employer's favorable treatment of non-union sources.<sup>11</sup>

The case reached the Fourth Circuit, which overturned the FLRA and noted that the Authority's decision "undermines the integrity of the collective bargaining process." Agreeing with the District of Columbia Circuit, the Fourth Circuit stated that the "mere assertion of a colorable argument by the Union regarding the meaning of a provision of the collective bargaining agreement cannot, by itself, be sufficient to allow the Union to prevail in an unfair labor practice dispute." The court held that the Authority is obligated to use standard methods of contract interpretation to decide if an actual waiver of a statutory right appeared in a collective bargaining agreement has occurred. The Fourth Circuit also noted that the Authority may refer such matters, as it has in the past, to grievance arbitration. Nevertheless, the court suggested that the FLRA also is free to attempt to resolve the dispute as a ULP under its own jurisdiction in accordance with 5 U.S.C. 7116(d), and actually interpret the contract, but without using the "clear and unmistakable waiver" analysis. Mr. Meisel.

## Practice Pointer

### Cash Settlements

A majority of a labor counselor's litigation duties centers on settlement negotiations. In every forum, third-party adjudicators actively "encourage" settlement. Public policy clearly favors the amicable settlement of disputes. In addition to the advisability of a settlement, however, the question concerning the legality of any particular settlement exists. Labor counselors should review Comptroller General decisions concerning settlements. Two decisions that should be in every labor counselor's personal library<sup>12</sup> are *Matter of: Equal Employment Opportunity Commission—Informal Settlements of Discrimination Complaints—Monetary Awards*,<sup>13</sup> and *Mat-*

*ter of: Robert D. Ross—Payment Pursuant to MSPB Decision—Not Reviewable by GAO*.<sup>14</sup>

*Informal Settlements of Discrimination Complaints* recognizes that federal agencies have the authority to settle informally discrimination complaints filed under Title VII of the Civil Rights Act of 1964 for monies—including backpay, attorneys' fees and costs—without a corresponding personnel action and without a finding of discrimination, provided that the amount of the settlement may not exceed the amount recoverable under Title VII if a finding of discrimination were made. Prior to the enactment of the Civil Rights Act of 1991,<sup>15</sup> such settlements could not include either compensatory or punitive damages. With the recent Equal Employment Opportunity Commission decision *Jackson v. United States Postal Service*,<sup>16</sup> such settlements also may include compensatory damages.<sup>17</sup>

*Payment Pursuant to MSPB Decision* should be contrasted with the "informal" settlement of the EEO process. This case notes that a decision of the Board, and the resulting order, constitute the legal basis upon which any payment of monies is made and is unreviewable by the Comptroller General.<sup>18</sup> Consequently, when a settlement is entered into the record of an MSPB appeal and thereby becomes an enforceable Board order, a cash settlement need not strictly be related to, or be limited by, backpay or even compensatory damages. While this ability may encourage "buying-off" an appellant, the labor counselor, as agency representative, in conjunction with the civilian personnel officer and the equal employment opportunity officer, should ensure that the settlement they reach fulfills the needs and desires of the command—not just in one particular case, but as part of an overall management strategy. 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 EEO officer.

<sup>11</sup> See generally, 5 U.S.C. 7131(b); Department of Defense Dependent Schs., Mediterranean Region, Naples American High Sch. (Naples, Italy) and Will Schussel, 21 F.L.R.A. 849 (1986).

<sup>12</sup> Labor Counselors who cannot access this information from on-line research services, should check with their major command labor counselors for copies. If unsuccessful, they then should contact the Labor and Employment Law Division, Office of The Judge Advocate General.

<sup>13</sup> B-206014, Mar. 7, 1983, 62 Comp. Gen. 239.

<sup>14</sup> B-206014, Mar. 25 1988 (unpub.).

<sup>15</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>16</sup> EEOC No. 01923399 (1992). The Postal Service filed a request for reconsideration with the Equal Employment Opportunity Commission in December 1992. At press time, no decision had been made by the Commission. Labor counselors strongly are encouraged to check the Labor and Employment Law Conference on the LAAWS Bulletin Board Service (BBS) for recent developments in this area. The LAAWS BBS also should be consulted to see if Headquarters, Department of the Army, has limited local authority's ability to agree to settlements that include compensatory damages.

<sup>17</sup> "EEOC Rules that Compensatory Damages Are Available in the Administrative Process," Labor and Employment Law Notes, ARMY LAW., Jan. 1993, at 55.

<sup>18</sup> Section 205 of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1143 (1978) (codified at 5 U.S.C. 7701-7701), gave the MSPB the exclusive authority to decide administratively all matters involving an employee's appeal of an agency's adverse action.

# Professional Responsibility Notes

## OTJAG Standards of Conduct Office

### Threatening Criminal Sanctions to Gain an Advantage in a Civil Matter

#### Ethical Awareness

Inappropriate nonsupport letters sent by legal assistance attorneys resulted in a previously unpublished Professional Responsibility Committee (PRC) Opinion, No. 89-1. With the republication of the *Army Rules of Professional Conduct for Lawyers (Army Rules)*<sup>1</sup> in 1992, the comment to rule 4.4 of the *Army Rules*<sup>2</sup> was expanded to encompass PRC Opinion 89-1's holding.<sup>3</sup> The following is the language that was added:

[A]n Army Lawyer may communicate a correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled. However, in such a communication, the lawyer may not use intemperate and inappropriate language to embarrass, delay, or burden the recipient of the communication.<sup>4</sup>

These situations are sufficiently common to warrant a reminder to Army lawyers of their obligations to treat all persons involved in the legal process with consideration. Mr. Eveland.

#### Professional Responsibility Opinion 89-1

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

The Judge Advocate General referred the following question to the Professional Responsibility Committee for an advisory opinion:

Is it unethical for an attorney to threaten criminal prosecution to gain an advantage in a civil matter?

The committee provides this answer to the posed question: A correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled, even if such statement may be construed as a threat, by itself is not a violation of the Army Rules of Professional Conduct for Lawyers. However, as set forth in Rule 4.4, the motivation and intent of the attorney involved will be a factor in determining whether his or her actions were ethically improper. The means employed by the attorney may not have a substantial purpose to embarrass, delay, or burden the recipient of the communication.

#### Discussion

The Army Rules of Professional Conduct for Lawyers do not contain the prohibition formerly contained in DR 7-105(A)[5] of the ABA Code of Professional Responsibility.<sup>[6]</sup> The Army Rules include the following Rule 4.4:

#### Rule 4.4 Respect for the Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

This rule is identical to the ABA Model Rule. In the accompanying comments, however, the Army Rule adds the former wording of Ethical Consideration 7-10, which states,<sup>[7]</sup> "The duty of a lawyer to represent the client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

Rule 4.4 and its comment support the prior opinions of the Professional Responsibility Committee that a statement of

<sup>1</sup> See DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

<sup>2</sup> *Id.* rule 4.4 (requiring respect for the rights of third persons).

<sup>3</sup> See DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICE: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA PAM. 27-26]. When PRC Opinion 89-1 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, AR 27-26, *supra* note 1, superseded DA Pam. 27-26.

<sup>4</sup> AR 27-26, *supra* note 1, rule 4.4 comment.

<sup>5</sup> Threatening Criminal Prosecution.

A) A lawyer shall not present, participate in presenting, or threaten to present, criminal charges solely to obtain an advantage in a civil matter.

<sup>6</sup> Laverdure, "Threat of Criminal Sanctions in Civil Matters: An Ethical Morass," ARMY LAW., Jan. 1989, at 16.

<sup>7</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980).

fact, even if it involves a threat of possible criminal sanctions if a civil obligation is not honored, does not violate ethical standards. But intemperate language or personal involvement of the judge advocate is improper conduct and must be avoided.

Judge advocates most often face the situation presented in the posed question when writing letters on behalf of clients who are trying to collect child support from a recalcitrant soldier. May the communication from the legal assistance attorney state that the soldier could be court-martialed for failure to support his family? The question addresses the continued validity of former opinions of The Judge Advocate General. These opinions, using the ABA Code of Professional Responsibility as the applicable standard, found the letters written by judge advocates on behalf of legal assistance clients to be a violation of ethical standards. See Professional Responsibility, Army Law., May 1977, at 11; Professional Responsibility, Army Law., Sept. 1978, at 31.

Examining the letters sent by the judge advocates in the two opinions cited above under the ethical standards of the Army Rules of Professional Conduct, the opinions remain valid. The attorneys in those situations acted inappropriately, not by correctly informing the soldier that failure to support his family or failure to pay a debt could subject him to court-martial, but rather by becoming involved and by including intemperate comments in the letters.

In the first letter, after properly stating that "you may be court-martialed under the Uniform Code of Military Justice for the wrongful failure to support your dependents," the legal assistance attorney went beyond this factual statement by personally interjecting himself in the criminal matter. The letter continued, "I intend to write the strongest letters possible to your entire chain of command, your career branch, and anyone else who conceivably could assert sufficient pressure on you." The Professional Responsibility Committee recommended to The Judge Advocate General that the attorney be issued a letter of reprimand.

In the second letter, the legal assistance officer was attempting to collect a debt for his client. He correctly and factually informed the alleged debtor, "I must inform you of your responsibilities under AR 635-200, Chapter 13, and the fact that you could be eliminated from the service for indebtedness." The letter inappropriately continued, "[You] have shown yourself to be nothing more than a lowly dishonest welsher. . . . I will do everything in my power to insure that your actions will have an adverse effect on your military career." The attorney was misinformed; the recipient of the letter had paid the debt. The attorney was given a letter of reprimand.

The recipient of this second letter sought the aid of a legal assistance officer who compounded the situation by an intemperate return letter. This attorney was counseled by his staff judge advocate.

Both of these cases illustrate the importance of avoiding unprofessional and intemperate language and the pitfalls of basing action on unverified information supplied by a client. A statement of an unemotional, correct fact, in a letter to an unrepresented person, is not an ethical violation. The language in AR 608-99, Family Support, Child Custody, and Paternity, 22 May 1987, is proper. The purpose of such a letter is to have the recipient fulfill a moral and legal obligation and not to gain an advantage over disputed facts. The lawyer must not become personally involved. Inappropriate and intemperate language violates Army Rule 4.4.

When communicating with a soldier, as well as with others, an attorney must follow the guidance of Rules 4.3 and 4.4. Usually the soldier to whom the letter is addressed will not be represented by counsel. The legal assistance attorney should not give advice to the unrepresented soldier other than advice to obtain counsel.

Staff Judge Advocates should monitor the letters of legal assistance officers on behalf of their clients. They, and other supervisors, have an ethical obligation to see that the ethical rules are obeyed. Rule 5.1.[8]

## Obligations of Government Attorneys

### *Ethical Awareness*

The following case summary describes one civilian court's decision concerning a matter addressed in the Army Rules of Professional Conduct for Lawyers.<sup>9</sup> Army lawyers should consider this case as they ponder difficult issues of professional discretion. Lieutenant Colonel Fegley.

### *Case Summary*

Army Rule 3  
(Meritorious Claims and Contentions)

Army Rule 3.8  
(Special Responsibilities of a Trial Counsel)

Army Rule 4.4  
(Respect for the Rights of Third Parties)

Government lawyers, both prosecutors and civil lawyers, have obligations beyond those of private lawyers.

<sup>8</sup>Rule 5.1 Responsibilities of The Judge Advocate General and Supervisory Lawyers.

a. The Judge Advocate General and supervisory lawyers shall make reasonable efforts to ensure that all lawyers conform to these Rules of Professional Conduct.

b. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to these Rules of Professional Conduct.

<sup>9</sup>See AR 27-26, *supra* note 1.

The United States Court of Appeals, District of Columbia Circuit, recently opined that government lawyers, both prosecutors and civil lawyers, have obligations beyond those of private lawyers. In *Freeport—McMoRan Oil & Gas Co. v. F.E.R.C.*,<sup>10</sup> petitioners challenged certain orders of the Federal Energy Regulatory Commission (FERC). After the suit was initiated, but before trial, the challenged orders were superseded by a subsequent FERC order. Nevertheless, despite issuance of the superseding order, petitioners pressed their challenge to the superseded order because leaving the old orders on the books might affect ongoing litigation between the petitioner and another party. Petitioners wanted to render the challenged orders legally irrelevant—either by having the court reject them on the merits, or by having them vacated. The court noted that to the FERC, after issuance of the superseding orders, the challenged orders were meaningless and could have been “painlessly” vacated, a fact that was acknowledged by the FERC’s counsel at oral argument. At trial, the FERC’s counsel had no objection to petitioner’s request that the court vacate the challenged orders.

The court noted that it should have been apparent to the FERC’s counsel prior to trial that vacating the orders would likely settle the litigation, saving time, energy, and money. The ease of settlement should have been apparent when the petitioners, in their reply brief, asked the court to vacate the orders because of their concern that the unreviewed orders might prejudice their position in other litigation. Not only did the FERC’s counsel not explore the possibility of settlement,

counsel did not even disclose in the brief he filed with the court the Commission’s position on vacating the challenged orders, leaving the impression that the Commission might oppose vacating them.

At oral argument, the FERC’s counsel insisted that he had no obligation to try to settle the matter and attempted to place the burden on petitioner’s counsel. He rejected the notion that counsel for a public agency has special obligations, claiming the court was holding government counsel to a higher standard.

That government lawyers have obligations beyond those of private lawyers is a long-standing notion, according to the court. The proposition that a government lawyer is not the representative of an ordinary party to a controversy, but that of a sovereignty whose obligation is not to win a case, but to do justice, applies with equal force to prosecutors and the government’s civil attorneys. Government lawyers should refrain from continuing litigation that is obviously pointless, that could be easily resolved, and that wastes court time and taxpayer money.

The court stressed the point that it was not so much concerned with the failings of the FERC’s counsel in the case at hand, but with counsel’s “unblushing” denial “that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.”<sup>11</sup>

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<sup>10</sup>962 F.2d 45 (D.C. Cir. 1992).

<sup>11</sup>*Id.* at 48.

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## Guard and Reserve Affairs Item

*Judge Advocate Guard and Reserve Affairs  
Department, TJAGSA*

### Quotas for JATT and JAOAC for AY 93

Quotas for Judge Advocate Triennial Training (JATT) and the Judge Advocate Officer Advanced Course (JAOAC) are available on Army Training Requirements and Resource System (ATRRS). To attend JATT, you must be a United States Army Reserve (USAR) judge advocate assigned to a Judge Advocate General Service Organization (JAGSO) unit such as a military law center or functional team. The prerequisite for the JAOAC is that you must be a Reserve Component judge advocate who *has completed* Phase I (the nonresident phase). Quotas are available *only* through ATRRS, the Army’s automation system which allocates training spaces. If you are

either an Army reservist in a troop unit or a National Guardsman, you should contact your training noncommissioned officer (NCO). If you are an individual mobilization augmentee (IMA) or an individual ready reservist (IRR), you should contact Army Reserve Personnel Center (ARPERCEN), Judge Advocate General Personnel Management Office, at 1-800-325-4916 or (314) 538-3762. All quotas for courses at TJAGSA are now available only through ATRRS. Please do not call TJAGSA to obtain a quota for any course, including JATT and the JAOAC, because TJAGSA will not be able to enter you into ATRRS. You will be able to obtain a quota only by contacting either your training NCO or ARPERCEN. The school code for TJAGSA on ATRRS is 181.

## 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 Army-wide 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

19-23 April: TJAG's Reserve Component 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: 93 USAREUR Operational Law CLE (5F-F47E).

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

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

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

14-25 June: JA Officer Advanced Course, Phase II (5F-F58).

14-25 June: JA Triennial Training (5F-F57).

12-16 July: 4th Legal Administrators Course (7A-550A1).

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

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

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

2 August 93-13 May 94: 42nd 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 Officer Legal Orientation Course (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

June 1993

3-4: ESI, Export Controls and Licensing, Washington, D.C.

3-4: ESI, Improving Customer Service, Washington, D.C.

7-8: ESI, Changes, Seattle, WA.

7-11: ESI, Defense Program Management, Washington, D.C.

8-11: ESI, Competitive Proposals Contracting, San Diego, CA.

8-11: ESI, Contracting for Services, Washington, D.C.

9: ESI, Protests, Seattle, WA.

10-11: ESI, Claims and Disputes, Seattle, WA.

10-25: NCDA, Career Prosecutor Course, Houston, TX.

14-15: ESI, Terminations, Seattle, WA.

14-18: ESI, Operating Practices in Contract Administration, Washington, D.C.

14-18: ESI, Accounting for Costs on Government Contracts, Washington, D.C.

- 14-18: ESI, Federal Contracting Basics, San Diego, CA.
- 19-20: ABA, Life Insurer Insolvency, Chicago, IL.
- 21-25: ESI, Managing Projects in Organizations, Washington, D.C.
- 28: GWU, Contract Award Protests: GAO, Washington, D.C.
- 29: GWU, Contract Award Protests: GSBGA, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

- AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.
- AAJE: American Academy of Judicial Education, 1613 15th Street - Suite C, Tuscaloosa, AL 35404. (205) 391-9055.
- AALL: American Association of Law Libraries, 53 West Jackson Blvd., Suite 940, Chicago, IL 60604. (312) 939-4764.
- ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.
- ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.
- AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.
- AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.
- ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104-3099. (800) CLE-NEWS; (215) 243-1600.
- ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.
- CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.
- CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.
- EEI: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.
- ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.
- FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.
- FBA: Federal Bar Association, 1815 H Street, NW., Suite 408, Washington, D.C. 20006-3697. (202) 638-0252.
- GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885., Athens, GA 30603. (404) 542-2522.
- GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.
- GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.
- ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.
- IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.
- KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.
- LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.
- LRP: LRP Publications, 1555 King Street, Suite 200, Alexandria, VA 22314. (703) 684-0510, (800) 727-1227.
- LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.
- MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.
- MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.
- MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.
- MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.
- NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.
- NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.
- NCJFC: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.
- NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

- NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.
- NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).
- NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.
- NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.
- NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Heights, KY 41076. (606) 572-5380.
- NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.
- NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.
- NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 503-8932.
- NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.
- PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.
- PHLB: Prentice-Hall Law and Business, 270 Sylvan Avenue, Englewood Cliffs, NJ 07632. (800) 223-0231, (201) 894-8260.
- PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.
- SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.
- SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.
- SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.
- SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.
- TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.
- TLS: Tulane Law School, Tulane University CLE, 8200 Hampson Avenue, Suite 300, New Orleans, LA 70118. (504) 865-5900.
- UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.
- UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260 Law Building, Lexington, KY 40506-0048. (606) 257-2922.
- UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.
- USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.
- VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.
- WFU: Wake Forest University, School of Law—CLE, Box 7206 Reynolds Station, Winston-Salem, NC 27109-7206. (919) 761-5560.
- WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
New Mexico	30 days after program
North Carolina**	28 February of succeeding year
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth— new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1993 issue of *The Army Lawyer*.

\*Military exempt

\*\*Military must declare exemption

## 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, AUTOVON 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).
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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 A259022 Tax Information Series/JA 269(93) (117 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 A258582 Environmental Law Deskbook, JA-234-1 (92) (517 pgs).

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 A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

#### Labor Law

AD A256772 The 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 and 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 and 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 and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

#### 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 USC 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. Regulations and Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) 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

(2) 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.

(1) *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.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) 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.

(5) 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.

(6) 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.

b. *Listed below are new publications and changes to existing publications.*

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 15-1	Committee Management	27 Nov 92
AR 25-51	Official Mail and Distribution Management	30 Nov 92

Number	Title	Date
AR 60-20	Army and Air Force Exchange Service Operating Policies	15 Dec 92
CIR 11-93-1	Internal Control Review Checklist	4 Jan 93
CIR 11-93-2	Internal Control Review Checklist	4 Jan 93

### 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) 805-3988, or DSN 655-3988, 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.

b. Questions concerning the LAAWS Bulletin Board Service should be directed to the OTJAG LAAWS Office at (703) 805-2922.

c. 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.

d. 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>
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.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
93CLASS.ASC	July 1992	FY 1993 TJAGSA class schedule (ASCII).
93CLASS.EN	July 1992	FY 1993 TJAGSA class schedule (ENABLE 2.15).
93CRS.ASC	July 1992	FY 1993 TJAGSA course schedule (ASCII).
93CRS.EN	July 1992	FY 1993 TJAGSA course schedule (ENABLE 2.15).
ALAW.ZIP	June 1990	<i>The Army Lawyer and Military Law Review Database (ENABLE 2.15). Updated through 1989 The Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.</i>
BBS-POL.ZIP	December 1992	Draft letters of LAAWS BBS operating procedures
CCLR.ZIP	September 1990	Contract Claims, Litigation & Remedies
DEPLOY.EXE	December 1992	Excerpts 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."
FISCALBK.ZIP	November 1990	Fiscal Law Deskbook (Nov. 1990)
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.
JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	October 1992	Law of Federal Employment
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235-92.ZIP	August 1992	Government Information Practices (July 1992). Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA241.ZIP	March 1992	Federal Tort Claims Act	JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet	JA337.ZIP	July 1992	Crimes and Defenses Handbook
JA261.ZIP	March 1992	Legal Assistance Real Property Guide	JA4221.ZIP	May 1992	Operational Law Handbook, vol. 1
JA262.ZIP	March 1992	Legal Assistance Wills Guide	JA4222.ZIP	May 1992	Operational Law Handbook, vol. 2
JA267.ZIP	March 1992	Legal Assistance Office Directory	JA509.ZIP	October 1992	Contract Claims Litigation, and Remedies Deskbook (Sept. 1992).
JA268.ZIP	March 1992	Legal Assistance Notarial Guide	V1YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 1 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA269.ZIP	March 1992	Federal Tax Information Series	V2YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 2 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide	V3YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 3 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA272.ZIP	March 1992	Legal Assistance Deployment Guide	YIR89.ZIP	January 1990	1989 Contract Law Year in Review
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			

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. All other inquiries should be directed to the OTJAG LAAWS Office at (703) 805-2922.

#### 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

a. 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. Tele-

phone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the libraries directly at the addresses provided below.

Staff Judge Advocate, HQ USA Support Command, Hawaii,  
Attn: Carolyn Parmley, Dunning Hall, Fort Shafter, Hawaii  
96858-500; telephone (808) 438-6723.

Federal Supplement, vols. 225-279

Federal Reporter, vols. 390-444

Staff Judge Advocate, HQ 7th Inf. Div. (Light) & Fort Ord,  
Attn: CW3 Perdue, Fort Ord, CA 93941; telephone (408)  
242-2422 or DSN 929-2422.

Federal Reporter, vols. 188-239; 241; 244-305; 307-354;  
356-684; 687-846

Federal Supplement, vols. 1-35; 123-204; 221-356; 368-  
466; 471-491

California Reporter, vols. 148-163; 172-173; 175-179; 181-  
198; 200-215

Supreme Court Reporter, vols. 1-11; 13-65; 69-72; 74-  
100A; 102-107A

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