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Lore of the Corps

The Governor Versus the Adjutant General: The Case of Major General George O. Pearson, Wyoming National Guard*

Fred L. Borch
Regimental Historian & Archivist

On Tuesday, 1 December 1964, Major General George O. Pearson, Adjutant General of the Wyoming National Guard, angrily denied charges made against him by Wyoming Governor Clifford P. Hansen. In a front-page story in *The Billings (Montana) Gazette*, Pearson insisted that he had never “misappropriated state funds and diverted them to his personal use.”¹ Not only was he completely innocent of any wrongdoing, but the sixty-one-year old Pearson claimed that he would “explicitly refute each and every charge made against [him].”² What follows is the story of the legal fight between the Governor of Wyoming and the highest military official of that state; a conflict that resulted in a Wyoming Supreme Court decision and Pearson’s court-martial, a unique event in the history of the Army National Guard and military criminal law.

Born in Sheridan, Wyoming, on 15 August 1903, George Oliver Pearson had a remarkable career as a Soldier. When he was sixteen years old, he enlisted as a private in the 1st Wyoming Cavalry Regiment. Later, while a student at the University of Minnesota, Pearson also served in the 151st Field Artillery Regiment, Minnesota National Guard. Major General Pearson obtained an officer’s commission in 1928, and when the United States entered World War II, then Major Pearson deployed to the Pacific. He saw heavy combat as the commander of the famous 187th Airborne Infantry Regiment³ in the Philippines and was decorated for gallantry in action with the Silver Star.⁴ After the Japanese surrender in 1945, then Colonel Pearson participated in the initial occupation of Japan. He subsequently served as Commander of the 508th Regimental Combat Team in Berlin, Germany, before retiring from active duty in 1958 and returning to Wyoming. On 1 June 1959, Colonel Pearson joined the staff and administration of the Wyoming National Guard. Two years later, he transferred from the Infantry to the Adjutant General’s Corps and was promoted

to brigadier general. A year later on 23 July 1962, Pearson pinned on a second star after being appointed The Adjutant General by Governor Jack R. Gage. Major General Pearson was still serving as the top military officer in Wyoming when that state’s voters defeated Gage’s bid for re-election and chose Republican Clifford Hansen to be their chief executive in November 1962.⁵

In late November 1964, Governor Hansen confronted Major General Pearson with evidence that Pearson had “turned in false travel vouchers” and “charged personal long distance telephone calls to the state.” Convinced that Pearson was guilty of criminal misconduct, but that the matter should be handled administratively, the governor apparently offered Pearson two choices: submit his resignation or be fired. When Pearson “declined to resign because he was innocent,”⁶ Governor Hansen exercised his authority as “Governor and Commander in Chief” to relieve Pearson as “The Adjutant General, State of Wyoming, effective 25 November 1964.”⁷ In his stead, Governor Hansen appointed Brigadier General Roy E. Cooper as Acting Adjutant General.⁸ As for Pearson, he retained his rank but was in an “inactive and unassigned” status. In a 20 February 1965 letter addressed “To All units of the Wyoming Army and Air National Guard,” Governor Hansen informed all personnel that “under no circumstances” could Major General Pearson “participate in Wyoming National Guard activities or exercise any authority.”⁹

While Hansen insisted that he had the authority to remove Pearson from office and strip him of all military authority, the latter very much disagreed, and filed suit in Wyoming’s highest court to block the governor’s action. Major General Pearson argued that a Wyoming statute, which provided “that no state appointed person serving in a military capacity can be removed without a hearing,”¹⁰ meant that Hansen’s action was a nullity.

* The author thanks Lieutenant Colonel Francisco L. Romero, Staff Judge Advocate, Wyoming National Guard, for his help in preparing this article.

¹ *Can Prove Hansen Charges False*, BILLINGS GAZETTE (Montana), Dec. 1, 1964, at 1.

² *Id.*

³ The 187th Airborne Infantry Regiment is today known by the moniker Rakkasans. In Japanese, Rakkasan means “man falling under umbrella”; the unit received the moniker while in occupation duty in Japan after World War II. See *The Rakkasans, 187th Infantry Regiment*, RAKKASAN ASS’N, <http://www.rakkasan.net/history.html> (last visited Oct. 16, 2013).

⁴ U.S. Dep’t of Army, DA Form 66, Officer Qualification Record, George O. Pearson, block 21 (Awards and Decorations) (17 Aug. 1966).

⁵ *Id.* block 12 (Appointments).

⁶ *Supra* note 1.

⁷ Wyo. Adjutant Gen.’s Office Exec. Order No. 66 (Nov. 26, 1964) (copy on file with author).

⁸ Wyo. Adjutant Gen.’s Office, Special Order No. 222 (Nov. 26, 1964) (copy on file with author).

⁹ Letter from Clifford P. Hansen, to To All units of the Wyoming Army and Air National Guard (20 Feb. 1965).

¹⁰ *Guard Dispute: Attorney General Asks Suit Dismissal*, BILLINGS GAZETTE (Montana), Dec. 25, 1964, at 21.

On 12 May 1965, in *The State of Wyoming ex rel. Pearson v. Hansen et al.*, the Supreme Court of Wyoming agreed with Pearson. While acknowledging that Governor Hansen held “the sole power” to appoint the state’s Adjutant General, the court unanimously concluded that Wyoming Statute 19-56 required “a court-martial or efficiency board” as a prerequisite to removing a military officer from office. Consequently, the Court held that “the Governor exceeded his powers” in removing Pearson from office and granted summary judgment for him on the complaint.¹¹

So what was Governor Hansen to do? Since the highest court of the state had indicated in its opinion that there was no reason that the governor could not convene a court-martial to hear the evidence against Major General Pearson, Hansen took action. Two months later, on 12 July 1965, acting under his authority as “Governor and Commander-in-Chief,” Hansen “relieved” Pearson from “Command and Duties as Adjutant General . . . during the pendency of the court-martial proceedings which have been instituted against him.”¹²

On 12 November 1965, again under his authority as “Commander-in-Chief,” Governor Hansen convened a general court-martial at the New Armory, Cheyenne, Wyoming, “for the trial of Major General George O. Pearson.”¹³

On 6 December 1965, a panel consisting of Colonel Theron F. Stimson as president, eight lieutenant colonels and two majors, convened to hear the evidence against Pearson.¹⁴ He was charged with a number of travel-related offenses under Articles 80, 107, 121, 133, and 134, Uniform Code of Military Justice (UCMJ). Although two charges alleged that he had falsely claimed payments for personal long distance telephone calls, the remaining charges and specifications revolved around falsely claiming reimbursement for airline tickets, limousine, and taxi expenses. The prosecution’s evidence was that General Pearson had travelled on Wyoming National Guard aircraft to various locations, but filed vouchers claiming that he had flown on commercial aircraft, requesting money as reimbursement for these commercial airline tickets and related per diem and travel expenses.

¹¹ State of Wyoming *ex rel. Pearson v. Hansen*, 401 P.2d 954 (1965). Cooper was named as a defendant because Hanson had appointed him as Adjutant General after removing Pearson from the office.

¹² Wyo. Office of the Governor and Commander-in-Chief Exec. Orders No. 34 (12 July 1965).

¹³ Headquarters, Wyo. Nat’l Guard, Office of the Commander-in-Chief, Gen. Court-Martial Appointing Order No. 1 (12 Nov. 1965).

¹⁴ Under Article 25(d)(1), Uniform Code of Military Justice (UCMJ), a member may be junior in rank to the accused when that cannot be “avoided.” Since Pearson was the highest-ranking officer in the Wyoming National Guard, selecting members junior to him could not be avoided. UCMJ art. 25(d)(1) (2012).

Defense counsel first objected to the presence of Mr. George W. Latimer as Assistant Trial Counsel, perhaps because of Latimer’s considerable military legal experience.¹⁵ This objection was overruled by the court.

Defense counsel then argued to the panel that it lacked jurisdiction over General Pearson. The gist of the argument apparently was that as the Wyoming legislature had not formally adopted the UCMJ, there could be no court-martial. After the law officer¹⁶ ruled that there was jurisdiction, Pearson and his counsel filed a writ of prohibition with the Wyoming Supreme Court, seeking to halt the proceedings on this same jurisdictional basis. On 14 January 1966, the court denied the writ.¹⁷

Major General Pearson’s trial resumed on 24 January 1966, and concluded on 3 February. He was convicted of one specification of filing a false claim and one specification of conduct unbecoming an officer and gentlemen. He was sentenced to a reprimand.¹⁸

Perhaps Governor Hansen hoped that the court-martial panel would have sentenced Pearson to a dismissal so that he then would have a clear basis to order his removal as Adjutant General. But this was not to be and, in the absence of a dismissal, it seems that Hansen was stuck with Pearson. This is the best explanation for why Governor Hansen rescinded his earlier order prohibiting Pearson from participating in National Guard matters. A 4 June 1966 letter from Hansen to Major General Pearson restored his authority as Wyoming’s top military officer.¹⁹

¹⁵ A distinguished lawyer with a strong military background (he had enlisted in the Utah National Guard in 1917 and served as a colonel in the 40th Infantry Division in World War II) George W. Latimer was one of the original three judges on the Court of Military Appeals (today’s Court of Appeals for the Armed Forces). Latimer served on that court from 1951 to 1961. *Judges*, U.S. COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/judges.htm> (last visited Oct. 9, 2013). Some years after the Pearson court-martial, Latimer defended Lieutenant William F. “Rusty” Calley in the infamous My Lai massacre court-martial. RICHARD HAMNER, *THE COURT MARTIAL OF LT. CALLEY* 61–62 (1971).

¹⁶ Prior to the Military Justice Act of 1968, when Congress created the position of “military judge,” all general courts-martial had a “law officer” detailed to them by the convening authority. The law officer was a quasi-judicial official, and was certified by The Judge Advocate General as legally qualified to instruct the panel members on the elements of the offense, the presumption of innocence, and the burden of proof. The law officer also ruled on interlocutory questions of law. UCMJ art. 26 (1951).

¹⁷ State *ex rel. Pearson v. Hansen*, 409 P.2d 769 (1966). The court had previously held that the legislature had enacted sufficient legislation to allow for trials of state military personnel under the UCMJ.

¹⁸ Memorandum from Wyo. Nat’l Guard, Office of the Staff Judge Advocate, subject: Opinion, Review, and Recommendations, Trial of Major General George O. Pearson, Adjutant Gen., State of Wyo. 5 (29 Aug. 1966).

¹⁹ Letter from Governor Hansen, to Major General Pearson (4 June 1966).

Almost three months later, on 29 August 1966, Governor Hanson approved the court-martial findings and sentence.²⁰ On 3 October 1966, he took his final action in the case by issuing a written reprimand to Major General Pearson. It read, in part:

You were found guilty by a General Court Martial of conduct unbecoming an officer and gentleman, and of conduct such as to bring discredit upon the Armed Forces of the State of Wyoming, and sentenced to a reprimand. As it is my duty to carry out that sentence, I shall proceed to do so.

The Office of Adjutant General is a high position in the organization of the State of Wyoming. It is so, because it carries with it not only the responsibility for the conduct of State business, but also the leadership of a department steeped in military traditions, based upon honor and moral duty as well as the best of discipline.

...

You have violated the trust which you were given by the people of this great State. Government falls into disrepute when its highest officers depart from honesty and follow an unacceptable path. It is regrettable that by your conduct you have brought upon yourself the humiliation and overwhelming sense of shame you must feel when facing your fellow officers and men, in having failed to set for them the example which they expect and to which they are entitled.²¹

So ended the fight between Governor Hansen and his Adjutant General. The governor had made his point, and General Pearson must have felt uncomfortable in his presence—and that of his fellow Guardsmen. But he remained as the Adjutant General until the following year when, aged sixty-four years, Pearson reached mandatory retirement. Amazingly, Pearson was awarded the Wyoming National Guard Distinguished Service Medal “for long and exceptionally distinguished service to the State of Wyoming and the United States of America” before retiring. The citation lauds his “exceptional foresight and leadership in directing the training and administration” of the Guard and his “steadfast devotion to duty.”²² Since Governor Hansen approved the award to Pearson, one must conclude that Hansen harbored no ill feelings toward his Adjutant General. In any event, the Pearson-Hansen dispute did have a lasting impact: at least in Wyoming until 1977, the Adjutant General could not be removed except by a court-martial.²³

What happened to Major General Pearson after 1967? Instead of going quietly into retirement, Pearson went to Vietnam, where he worked for Pacific Architects and Engineers as a civilian contractor at Cam Ranh Bay. He returned to the United States in 1970 and settled in Sheridan, Wyoming. George Pearson died there in March 1998. As for Governor Hansen? He completed his service as Wyoming’s chief executive and was elected to the U.S. Senate in 1967. He served two terms and retired in 1978 when he declined to run for a third. Clifford P. Hansen died in Wyoming in 2009 at the age of ninety-seven.²⁴

More historical information can be found at

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<https://www.jagcnet.army.mil/History>

²⁰ *Supra* note 17, at 8.

²¹ Letter from Governor Clifford P. Hansen, to Major General George O. Pearson, subj: Reprimand (3 Oct. 1966).

²² Wyo. Adjutant Gen.’s Office, Gen. Orders No. 18 (10 June 1967).

²³ In 1977, almost certainly in response to the Hansen-Pearson controversy, the Wyoming legislature revised state law to provide for the removal of the Adjutant General, as with all other gubernatorial appointees, at the pleasure of the governor. WYO. STAT. ANN. §§ 19-7-103(a), 9-1-202(a) (1977). While this means that the governor may remove the Adjutant General from the state position, this would not constitute a dismissal action with respect to dual status membership in the Reserves or state militia.

²⁴ *Obituary, Clifford P. Hansen, 1912–2009*, WYOMING TRI. EAGLE, http://www.wyomingnews.com/articles/2009/10/24/obituaries/01obit_10-24-09.prt (last visited Aug. 20, 2013).

Protecting the Process: 10 U.S.C. § 1102 and the Army's Clinical Quality Management Program

Major Edward B. McDonald*

I. Introduction

A judge advocate practicing in the field of health law is frequently faced with many overlapping or related legal issues arising from adverse medical events. For example, the Health Law Judge Advocate (HLJA) receives notice from the hospital risk manager (RM) that a potentially compensable event (PCE) occurred last night.¹ All that is known is a baby (Baby Lucy) may have been severely injured after being administered carbon dioxide gas instead of oxygen for approximately forty minutes immediately after delivery.² The extent of the injury is unknown, but is likely severe.³ The RM is gathering information and the event will likely be reviewed at the next risk management committee (RMC).⁴ Soon, the HLJA receives a call from the public affairs officer (PAO) concerning media interest in the event and the military treatment facility (MTF) commander's desire to release a statement in response to inquiries.⁵ Concurrently, the HLJA expects a medical claim will arise from this adverse event.⁶

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¹ U.S. DEP'T OF ARMY, REG. 40-68, CLINICAL QUALITY MANAGEMENT (22 May 2009) [hereinafter AR 40-68]. The Risk Manager (can be civilian or military) is responsible for: "(1) Identify[ing] and quantify[ing] healthcare related risk. (2) Participat[ing] in the risk analysis process. (3) Coordinat[ing] the PCE and malpractice claims management processes. (4) Develop[ing] and revis[ing] risk management policies and procedures. (5) Educat[ing] staff (all levels, all disciplines) concerning risk reduction/mitigation. (6) Provid[ing] data on a periodic basis to MTF senior leadership concerning RM issues and trends." *Id.* para. 13-2c. Potentially compensable event is defined as "[a]n adverse event that occurs in the delivery of health care or services with resulting injury to the patient. It includes any adverse event or outcome, with or without legal fault, in which the patient experiences any unintended or unexpected negative result. It pertains to all patients regardless of beneficiary status." *Id.* sec. II.

² Rob Perez, *Hospital Cases End Tragically*, HONOLULU ADVERTISER, Feb. 5, 2006, available at <http://the.honoluluadvertiser.com/article/2006/Feb/05/ln/FP602050348.html>. Hereinafter, the injured baby used as the introductory example will be referred to as "Baby Lucy."

³ *Id.*

⁴ See *infra* note 12 (providing a description of the responsibilities of the RMC).

⁵ See generally Perez, *supra* note 2.

⁶ See generally U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 2-2 (8 Feb. 2008) [hereinafter AR 27-20]; see also U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION para. 3-9 (19 Sept. 1994) [hereinafter AR 27-40]; see also U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES paras. 2-2, 2-34 (21 Mar. 2008) [hereinafter DA PAM. 27-162]. There are tort firms and attorneys that specialize in military medical malpractice claims. For large or complex claims, a local attorney, who is familiar with the local Army medical center or clinic, quickly learns of the possible claim and begins representing the claimant. The local attorney will then usually bring in a

larger specialty firm to assist in pursuing the claim. This assertion is based on the author's recent professional experiences as the Deputy Command Judge Advocate, Tripler Army Medical Center, from June 2009 to June 2011 [hereinafter Professional Experiences]. Additionally, "[i]n the context of patient safety, incidents involving patients are classified as either adverse events or close calls." AR 40-68, *supra* note 1, para. 12-4a. An adverse event is defined as "[a]n occurrence or condition associated with the provision of care or services that caused harm/injury to the beneficiary. Adverse events may be due to acts of commission or omission." *Id.* glossary, at 154.

Adverse events like the example of Baby Lucy have a tremendous emotional and financial impact upon families, expose the U.S. Army to multimillion dollar claims, adversely affect careers, and impact the trustworthiness of the military medical system.⁷ Not all adverse events can be prevented, but the "occurrence" or "resulting harm" may be minimized with a functioning clinical quality assurance (QA) program (CQAP).⁸

The key mechanism that permits a CQAP to properly function is 10 U.S.C. § 1102.⁹ For a HLJA, understanding how the U.S. Army implements its CQAP and 10 U.S.C. § 1102 will not only assist the HLJA in providing accurate and timely advice concerning adverse medical events, but will also provide the HLJA with a solid foundation for understanding how a MTF operates to minimize or mitigate future adverse events.¹⁰

This article provides a general framework for understanding the Army's CQAP, which is called the Clinical Quality Management (QM) Program (CQMP), and 10 U.S.C. § 1102.¹¹ It also explains the credentialing, privileging, and RMC processes, which are major components of the CQMP.¹² Lastly, it identifies common

⁷ See Perez, *supra* note 2; see also Professional Experiences, *supra* note 6. Beneficiary is defined as "[a]nyone eligible to receive health promotion, illness prevention, inpatient and outpatient health care and services within the military health system." AR 40-68, *supra* note 1, glossary, at 156.

⁸ See S. REP. NO. 99-331, at 245–46 (1986); see also AR 40-68, *supra* note 1.

⁹ S. REP. NO. 99-331, at 245–46; see also 10 U.S.C.A. § 1102 (West 1986) (this is the original version that this article compares to a recent amendment).

¹⁰ S. REP. NO. 99-331, at 245–46; Professional Experiences, *supra* note 6. The term military treatment facility (MTF) will collectively refer to military medical center, hospital, and clinic. AR 40-68, *supra* note 1, glossary, at 164.

¹¹ AR 40-68, *supra* note 1, para. 1-1. See generally 10 U.S.C.A. § 1102 (this is the most current version that will be contrasted against the version cited in note 9).

¹² See generally AR 40-68, *supra* note 1. The risk management committee is responsible for "provid[ing] impartial oversight and review of all PCEs and medical malpractice/disability claims management activities." *Id.* para. 13-3a, a(1).

concurrent roles that a HLJA may perform, the regulations that govern his actions, and reference secondary resources that may assist the HLJA in addressing some of the issues that arise.

II. History of 10 U.S.C. § 1102

A HLJA must understand the rationale for the original 1986 version of 10 U.S.C. § 1102 because it sets forth the basic foundation for protecting the QA process. Understanding it will help the HLJA explain the legal advice that he provides to stakeholders concerning QA matters. It will also assist the HLJA in formulating arguments in defense of record non-disclosure if a question arises concerning protection of a particular record that fails to fall squarely within the enumerated protections of 10 U.S.C. § 1102 or case law. The ability to formulate such arguments may prove very important in light of recent and substantial changes contained in today's 10 U.S.C. § 1102.¹³

Before 1986, no statutory protection existed for the quality assurance process.¹⁴ Instead, protection was based upon federal case law and state statutes.¹⁵ The lack of concrete protections in light of the various mechanisms available for compelling disclosure of information and testimony created a substantial obstacle in determining and preventing the cause and reoccurrence of medical adverse events.¹⁶ Specifically, unrestricted access to Army Medical QA information hinders the primary goal of the medical system: the delivery of quality healthcare because people are unlikely to come forward and provide information.¹⁷

Reflecting these concerns, Senate Report No. 99-331 sets forth that the purpose for creating 10 U.S.C. § 1102 was

to “encourage . . . candid peer review and quality assurance.” The report notes that “[m]edical quality assurance programs are the primary mechanism [for] . . . monitor[ing] and ensur[ing . . .] quality medical care . . .” and “[c]entral to these quality assurance review activities is the peer review process.”¹⁸

In the Baby Lucy case, without protection, the RMC charged with determining the exact cause of the baby's injury and providing recommendations to prevent or mitigate a similar event in the future would have great difficulty eliciting the required information from those who participated in the event.¹⁹ The individuals appearing before the RMC would be very hesitant to speak frankly and provide information knowing that this information could be obtained by the press or virtually anyone under a Freedom of Information Act (FOIA) request; possibly subject them to civil litigation; require deposition or appearance in court; cause workplace disharmony; create stigma; and just about any other concern that people reasonably associate with informing on others and participating in a judicial or administrative process.²⁰ This obstacle, however, was largely eliminated in 1986 with the passage of 10 U.S.C. § 1102.²¹

III. Current State of the Law and Army Regulation 40-68, the Army's Clinical Quality Management Program Implementing Regulation

It is likely that the extent of the protections originally afforded by 10 U.S.C. § 1102 was recently narrowed.²² As a result, the Army's CQMP may have been adversely affected.²³

¹³ 10 U.S.C.A. § 1102 (West 2012); *see also id.* § 1102 (West 1986).

¹⁴ Major William A. Woodruff, *Confidentiality of Medical Quality Assurance Records*, ARMY LAW, May 1987, at 5, 5–6. This article provides a very good explanation of the protections available before 10 U.S.C. § 1102 was enacted and highlights the major facets of 10 U.S.C.A. § 1102 (West 1986). The article was published shortly after enactment. It does not contain court treatment of 10 U.S.C. § 1102, subsequent changes to 10 U.S.C. § 1102, or current information regarding AR 40-68. *Id.*

¹⁵ Woodruff, *supra* note 14, at 6.

¹⁶ *See id.*; *see also* S. REP. NO. 99-331, at 245–46 (1986). For example, absent protection, the following is a nonexclusive list of provisions that could possibly be used to obtain quality assurance information: (1) Requests for information under 5 U.S.C.A. § 552 (West 2009) (Freedom of Information Act (FOIA)), 5 U.S.C.A. § 552a (West 2010) (Privacy Act). (2) Applicable provisions of the FED. R. OF CIV. P. 26 (Duty to Disclose; General Provisions Governing Discovery), 30 (Depositions by Oral Examination), 31 (Depositions by Written Questions), 34 (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes), and 45 (Subpoena). (3) Applicable provisions of the FED. R. OF CRIM. P. 16 (Discovery and Inspection) and 17 (Subpoena). Professional Experiences, *supra* note 6.

¹⁷ S. REP. NO. 99-331, at 245–46; *see also* Woodruff, *supra* note 14, at 5.

¹⁸ S. REP. NO. 99-331, at 245.

¹⁹ *See* AR 40-68, *supra* note 1, ch. 13; S. REP. NO. 99-331, at 245; *see generally* Woodruff, *supra* note 14.

²⁰ *See* S. REP. NO. 99-331, at 245–46; *see also* Woodruff, *supra* note 14.

²¹ *See* 10 U.S.C.A. § 1102 (West 1986); *see generally* Woodruff, *supra* note 14.

²² *See* 10 U.S.C.A. § 1102 (West 1986); *see also id.* § 1102 (West 2012).

²³ *See generally* AR 40-68, *supra* note 1; *see generally* U.S. DEP'T OF DEF., INSTR. 6025.13, MEDICAL QUALITY ASSURANCE (MQA) AND CLINICAL QUALITY MANAGEMENT IN THE MILITARY HEALTH SYSTEM (MHS) (17 Feb. 2011) [hereinafter DoDI 6025.13]. The provision establishes the Department of Defense's (DoD) medical and clinical quality assurance program for the DoD. It also sets forth DoD's policies regarding clinical quality management, confidentiality of records and information created as part of the MQA program, etc. The provisions identify and require implementation activities to be carried out by the military services. *See also* U.S. DEP'T OF DEF., REG. 6025.13-R, MILITARY HEALTH SYSTEM (MHS) CLINICAL QUALITY ASSURANCE (CQA) PROGRAM REGULATION (11 June 2004). This provision expounds upon and implements DoDI 6025.13. It specifically cancels and replaces DoD Directive 6025.13, but does not cancel DoDD 6025.13-R. Instead, DoDD 6025.13-R refers to the prior version of DoDD 6025.13. Generally, HLJAs will only have to refer to AR 40-68. Professional Experiences, *supra* note 6. For information concerning

A. Current State of 10 U.S.C. § 1102

1. *The Statute*

Under 10 U.S.C. § 1102(a), “[m]edical quality assurance records created by or for the Department of Defense as part of a *medical quality assurance program* are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).”²⁴ Additionally, unless an exception applies, the statute prohibits in either a judicial or administrative proceeding: (1) testimony concerning the medical quality assurance record; (2) discovery of the quality assurance record; or (3) admitting the record into evidence.²⁵ The statute also creates a specific exemption to FOIA and limits civil liability for those individuals providing information to “a person or body that reviews or creates quality assurance information.”²⁶

Until the most recent amendment, “medical quality assurance program” was defined as

any activity carried out . . . by or for the Department of Defense to assess the quality of medical care, including activities conducted by individuals, military medical or dental treatment facility committees, or other review bodies responsible for quality assurance, credentials, infection control, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review and identification and prevention of medical or dental incidents and risks.²⁷

On 1 January 2012, however, Congress amended the statute by redefining “medical quality assurance program” as “any *peer review activity* carried out.”²⁸ Further, the amendment defined “peer review” as “any *assessment* of the quality of medical care *carried out by a health care professional*, including any such assessment of professional performance, any patient safety program root cause analysis

or report, or any similar activity described in regulations prescribed by the Secretary.”²⁹

When read together and given their common meaning, the new definitions appear to substantially narrow the scope of protection originally provided by limiting the protection to only those records that have occurred under “peer review” by a “healthcare provider.”³⁰ In contrast, the statute previously covered “any activity” and did not limit the protections to “assessment . . . carried out by health care professional.”³¹ The changes may create new challenges and impact how the courts subsequently treat challenges to non-disclosure of records created within the current military quality assurance program.

Specifically, records believed to be protected may now be unprotected due to the unclear and likely narrowed scope of 10 U.S.C. § 1102. For example, while the protections could arguably extend only to those records assessed by a health care professional, the statute, however, does not define health care professional.³² If Congress did not mean to limit the assessment to health care professionals, why did it include and define “peer review” with this limitation?³³ As a result, information such as adverse event data collected by a non-health care professional RM or assistant may not be protected. Further, the definitional change will likely lead to changes in the Department of Defense and Service implementing regulations, cause changes in institutional practices, and require retraining of personnel.³⁴ Lastly, each of these possible outcomes will likely have a substantial financial impact on the military in a time of fiscal uncertainty and dwindling resources.

other service medical quality assurance program implementation, see U.S. DEP’T. OF AIR FORCE, INSTR. 44-119, MEDICAL QUALITY OPERATIONS (16 Aug. 2011) or U.S. DEP’T. OF NAVY, BUREAU OF MEDICINE AND SURGERY (BUMED) INSTR. 6010.13, BUMED-3C4 (19 Aug. 1991).

²⁴ 10 U.S.C.A. § 1102(a) (West 2012) (emphasis added).

²⁵ *Id.* § 1102(b). For exceptions to disclosure and testimony concerning quality assurance records see *id.* § 1102(c).

²⁶ *Id.* § 1102(f); *id.* § 1102(g).

²⁷ *Id.* § 1102(j)(1) (West 1986) (emphasis added).

²⁸ *Id.* § 1102(j)(1) (West 2012) (emphasis added).

²⁹ *Id.* § 1102(j)(4) (emphasis added).

³⁰ *Id.* § 1102(j)(1), (4). Health care provider is defined as “any military or civilian health care professional who, under regulations of a military department, is granted clinical practice privileges to provide health care services in a military medical or dental treatment facility or who is licensed or certified to perform health care services by a governmental board or agency.” *Id.* § 1102(j)(3).

³¹ See *id.* § 1102(j)(1) (West 1986). *Id.* § 1102(j)(4) (West 2012).

³² *Id.* § 1102(j)(4) (West 2012); see also *id.* § 1102(j).

³³ *Id.* § 1102(j)(4).

³⁴ Neither AR 40-68, *supra* note 1, nor the Rosalind Gagliano information papers reflect the definitional changes contained in 10 U.S.C.A. § 1102 (West 2012). U.S. ARMY MEDICAL COMMAND, OFFICE OF THE STAFF JUDGE ADVOCATE INFORMATION PAPERS (11 Apr. 2008) (*Release of Quality Assurance Information (QAI)* and (16 Feb. 2007) (*Identifying Quality Assurance Information under 10 U.S.C. §1102*)) (on file with author). As a result, it would be prudent for HLJAs practicing health care law to note the definitional changes in their legal advice concerning CQMP until reasonable certainty is developed through guidance and case law. Professional Experiences, *supra* note 6.

2. Case Law Before Amendment

Going forward, the recent changes will surely have little impact on the established treatment by the courts of records that are deemed to be a product of the medical quality assurance program. Instead, the legal question will be, as it was when 10 U.S.C. § 1102 was first enacted, whether the record is now covered by the statute.³⁵ As a result, the HLJA should understand the parameters established by the courts under the original 1986 version of 10 U.S.C. § 1102 and analyze current practices in light of the recent amendment.

Before the 1 January 2012 amendment, the courts found that the protections of 10 U.S.C. § 1102 were not waived by the government's failure to do the following: respond or object to a plaintiff's interrogatories, provide quality assurance information in response to discovery requests, or inadvertently disclose medical quality assurance records.³⁶ Further, protections are not waived and extend to military medical QA records that are possessed by a state licensing authority and placed in a public file.³⁷ In contrast, the court has held that a dental employment application held by a U.S. government contractor was not a record protected by 10 U.S.C. § 1102.³⁸

Whether intended or not, uncertainty now exists concerning the scope of protection afforded by the 2012 version of 10 U.S.C. § 1102. The rationale for and the benefits of this change remain unclear.³⁹ The possible detriments, however, are foreseeable: degraded protections, increased litigation, uncertainty, additional and needless financial expense, and "[a]s an indirect result, beneficiaries may receive less than the high quality of care they deserve."⁴⁰ Lastly, amending 10 U.S.C. § 1102 also brings into question the extent to which AR 40-68 remains sound.

B. Department of the Army Regulation 40-68—The U.S. Army Implementing Regulation for Clinical Quality Assurance

The first reference a HLJA must understand is AR 40-68. In most instances, a HLJA assigned to the U.S. Army Medical Command (USAMEDCOM) has not practiced health care law and likely lacks the basic understanding of regularly used terminology and how a MTF operates. Understanding common health care terminology and how the MTF operates is critical to providing timely and accurate medical legal advice. Not only does AR 40-68 explain the Army's CQMP, it also defines common health care terminology and provides a solid foundation for understanding how the MTF operates.

1. Overview of the Army's Clinical Quality Management Program

Army Regulation 40-68 serves as the consolidated regulation for implementing the U.S. Army's Clinical Quality Management Program (CQMP).⁴¹ For discussion purposes, think of CQMP as two functional areas—credentialing/privileging and oversight/continuous clinical improvement.

Credentialing and privileging can be described as concurrent processes to determine whether a provider is qualified and, if so, should he be authorized to provide medical services and to what extent.⁴² These processes occur before, during, and, in some instances, after someone provides medical services to beneficiaries.⁴³ With Baby Lucy, the health care providers involved may have included, along with others, a physician, a certified nurse midwife, a physician's assistant, or a nurse anesthetist.⁴⁴ Each would have undergone the credentialing and privileging process before they provided medical services to Baby Lucy and her mother.⁴⁵

³⁵ See Woodruff, *supra* note 14, at 7.

³⁶ See *In re United States*, 864 F.2d 1153 (5th Cir. 1989); see also *Smith ex. rel. Smith v. United States*, 193 F.R.D. 201 (D. Del. 2000).

³⁷ *Cole v. McNaughton*, 742 F. Supp. 587 (D. Okla. 1990).

³⁸ See *E.E.O.C. v. Med-Nat'l, Inc.*, 186 F.R.D. 609 (D. Haw. 1999).

³⁹ No congressional reasoning for the changes could be found using various legislative databases to include THOMAS, U.S.C.C.A.N., LexisNexis, ProQuest Congressional, and ProQuest Legislative Insight.

⁴⁰ See S. REP. NO. 99-331, at 245 (1986); see also *Professional Experiences*, *supra* note 6.

⁴¹ AR 40-68, *supra* note 1, summary.

⁴² Credentialing is defined as "[t]he process of obtaining, assessing, and verifying the qualifications of a health care provider to render beneficiary care/service in or for a health care organization." *Id.* glossary, at 159. Further, privileging is defined as "[t]he process whereby the privileging authority, upon recommendation from the credentials committee, grants to individuals the authority and responsibility for making independent decisions to diagnosis, initiate, alter, or terminate a regimen of medical or dental care." *Id.* glossary, at 167. Appendix A (Non-Adverse Standard Credentialing and Privileging Flow Chart) contains a flow chart of the standard credentialing and privileging process.

⁴³ See generally AR 40-68, *supra* note 1.

⁴⁴ "Health care practitioners who function independently to initiate, alter, or terminate a regimen of medical care must be privileged." *Id.* para. 9-2a.

⁴⁵ *Id.* paras. 8-3a and 9-2a.

a. Credentialing

Whether a civilian or military health care professional, credentialing begins many years before working for the U.S. Army and involves great personal expense and time (e.g., undergraduate degrees, medical degrees, medical boards, licenses, certifications, masters degrees, internships, post-graduate education, training, etc.).⁴⁶ Upon application to (civilian) or before accession in (military) the U.S. Army, a prospective health care professional must provide documentation that “constitutes evidence of current licensure, certification, registration, or other authorizing document[ation]” to establish his respective qualifications.⁴⁷ The information undergoes primary source verification (PSV).⁴⁸

Whether privileged or non-privileged, the MTF must review qualification information “for all professional health care personnel.”⁴⁹ The process is generally administered by the MTF credentials manager who is responsible for “verif[ying], update[ing], and maintain[ing]” the information while the privileged provider is performing services at the MTF.⁵⁰ The privileged provider’s professional information is generally contained in two files called the provider credentials file (PCF) and the provider activity file (PAF).⁵¹

The PCF is the provider’s permanent file and contains credentialing and performance information.⁵² The “PAF is a working file,” maintained at the credentialing office, which captures data related to a provider’s clinical practice (e.g., deaths, medical record deficiencies, inappropriate clinical drug use, complaints, etc.).⁵³ The PAF is also used to

“[p]eriodically reevaluate performance and privileges.”⁵⁴ Army Regulation 40-68 asserts that documents contained in the PCF and PAF are protected by 10 U.S.C. § 1102.⁵⁵

Some documents obtained or created during the processes, however, may no longer receive protection as the new definition of “peer review” arguably limits the protection to “any *assessment of the quality of medical care carried out* by a health care professional.”⁵⁶ This definition appears to contemplate only retrospective assessment of a provider’s clinical practice.⁵⁷ As a result, it can be argued that until the information contained in a PCF is assessed by a health care professional, the information is not protected.⁵⁸ Nevertheless, the information would still have limited protection under the Privacy Act by requiring a judge’s order before release would occur.⁵⁹

A provider’s credentialing is ongoing and contains “a series of activities designed to collect relevant data that serve as the basis for decisions regarding appointment and reappointment to the medical/dental staff.”⁶⁰ It also serves as the basis for granting privileges and the scope of those privileges.⁶¹ The decision to appoint a health care provider to the medical staff, grant privileges, and determine the scope of those privileges rests with the MTF commander.⁶² The decision typically flows from a department/division chief through the credentials committee and the ECMS to the commander.⁶³

⁴⁶ See generally *id.* ch. 7 (outlining the specific requirements for each type of privileged provider).

⁴⁷ *Id.* paras. 8-1, 8-2, 8-6, and app. F. Additionally, the “professional credentials substantiate relevant education, training, and experience; current competence and judgment; and the ability to carry out the duties and responsibilities of the assigned position or, for the privileged provider, to perform the privileges requested.” *Id.* para. 8-1.

⁴⁸ *Id.* para. 8-2, 8-6. Primary source verification is defined as “the process utilized to authenticate the accuracy of a specific credential or qualification as reported by an individual health care provider or professional. The primary source is the institution, agency, or body that is the original source of the credential or qualification.” *Id.* glossary, at 167.

⁴⁹ *Id.* para. 8-3a, b. The remainder of this article will focus entirely upon privileged providers.

⁵⁰ *Id.* para. 8-3b(2).

⁵¹ *Id.* para. 8-3. The provider activity file is considered an “extension of the PCF.” *Id.* glossary, at 168.

⁵² *Id.* para. 8-3.

⁵³ *Id.* para. 8-3 and glossary, at 168. The definition of providers’ credentials file contains a non-exclusive list of information to be captured by the provider activity file. *Id.* sec. II. The Provider Activity File (PAF) specific content requirements are located in appendix E. *Id.* app. E.

⁵⁴ *Id.* para. 8-3.

⁵⁵ *Id.* para. 8-3(2)(c).

⁵⁶ 10 U.S.C.A. § 1102(j)(4) (West 2012) (emphasis added).

⁵⁷ *Id.*

⁵⁸ *Id.* § 1102(j)(3), (4).

⁵⁹ See AR 27-40, *supra* note 6, para. 7-7b; see also U.S. DEP’T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM para. 3-1k (5 July 1985); 5 U.S.C.A. § 552a(b)(11) (West 2010).

⁶⁰ AR 40-68, *supra* note 1, para. 8-4a.

⁶¹ *Id.*

⁶² *Id.* paras. 8-4b, 8-5a(3). A commander of a MTF can be a non-healthcare provider. The changes to 10 U.S.C. § 1102 make it possible, although unlikely, that a situation could arise where a non-health care provider makes a decision concerning privileging that may not constitute a “peer review.” An example is where a commander who is a non-health care provider is notified by law enforcement concerning an issue that calls into question a provider’s ability to perform medical services. As a result, the commander decides to immediately restrict the provider’s privileges. *Id.* para. 10-2. The recording of this decision would likely be placed into the provider activity file. *Id.* para. 8-3b(2)(c). Arguably, this decision would not fall within the new scope of 10 U.S.C. § 1102 because it was not assessed by a health care provider. See 10 U.S.C.A. § 1102(j)(4) (West 2012); see also Professional Experiences, *supra* note 6.

⁶³ AR 40-68, *supra* note 1, paras. 8-4 to 8-5. The Executive of the Medical Staff is defined as “[a] group, comprised of physicians and other members in leadership positions within the organization, that is responsible for activities related to self-governance of the medical staff and [professional

The credentials committee is composed of a chairperson and other permanent and alternate members.⁶⁴ A majority must “be fully appointed members of the medical/dental staff.”⁶⁵ A non-voting HLJA will likely serve as the legal advisor.⁶⁶ Up to this point, although the credentialing process has been discussed separately from the privileging process, the processes generally occur simultaneously but serve different purposes. Stated simply, the credentials committee will determine whether someone possesses the requisite qualifications. If so, it will make a recommendation to the commander concerning whether someone should practice and the scope of that practice to which he will be privileged.⁶⁷

b. Privileging

Privileging, at its core, is a pure QA process.⁶⁸ The process is not intended to serve as “a disciplinary or personnel management mechanism.”⁶⁹ Nevertheless, an adverse privileging action may result from provider misconduct.⁷⁰ Medical treatment facility commanders have much discretion when it comes to awarding and scoping clinical privileges.⁷¹ In contrast, a commander may not be able to immediately affect the credentials of a provider.⁷²

impairment] of the professional services provided by individuals with clinical privileges” *Id.* glossary, at 160.

⁶⁴ *Id.* para. 8-5b.

⁶⁵ *Id.* para. 8-5b(2). Appointment to the medical staff is a separate but concurrent process to credentialing and privileging. *Id.* para. 9-5. Appointment to the medical staff generally “reflects the provider’s relationship with the medical/dental staff and the degree to which the provider participates in medical/dental staff surveillance and review as well as quality improvement activities related to the governance of the medical/dental staff.” *Id.* As a practice tip, think of appointed members of the medical staff as fully qualified providers that generally work full time at the MTF and who can admit a patient for inpatient services. Professional Experiences, *supra* note 6.

⁶⁶ AR 40-68, *supra* note 1, para. 8-5b(4). Health Law Judge Advocates are usually present only when an adverse credentialing action is conducted. Professional Experiences, *supra* note 6. According to AR 27-20, *supra* note 6, para. 2-3e, the HLJA performing as the claims attorney should not advise on credentialing actions involving the claim due to a potential for conflict of interest. As a practical matter, the availability of personnel and resources may prohibit this prudent measure. Professional Experiences, *supra* note 6.

⁶⁷ See AR 40-68, *supra* note 1, ch. 9 and para. 9-4b(3).

⁶⁸ *Id.* para. 9-1a. There are three types of privileges—regular, temporary, and supervised. *Id.* para. 9-3.

⁶⁹ *Id.* para. 9-1a.

⁷⁰ *Id.* para. 10-4b.

⁷¹ See generally *id.* chs. 9, 10.

⁷² See *id.* para. 14. The credentials (a license, certification, etc.) of a provider may be affected by submitting information concerning a finalized adverse event or activity to a state regulatory agency, one of the national agencies, or clearinghouses. *Id.*

There are three types of privileging actions—routine, adverse, or non-adverse.⁷³ Approval, reappraisal, and renewal are considered routine privileging actions.⁷⁴ If an issue arises regarding a provider or with the provider’s performance, privileges may be “restrict[ed], reduc[ed], suspen[ded], revoke[ed], or deni[ed].”⁷⁵ These actions are considered adverse to the provider, but serve a critical QA function.⁷⁶ Alternatively, the provider’s privileges may be placed in abeyance or summarily suspended.⁷⁷ These actions are considered non-adverse, but have a similar effect with limited duration.⁷⁸

The flow of the privileging action depends upon the type and category of the action.⁷⁹ The process, no matter how it originates, involves substantial documentation and input from the respective provider and the provider’s department/service chief.⁸⁰ Routine actions will typically move from the respective provider or department/service chief through the credentials committee and ECMS to the MTF commander for approval.⁸¹ With adverse privileging actions, however, additional procedures are mandated.⁸²

This additional process is provided through “investigation, professional peer review, hearing, and appeal.”⁸³ In many instances, there will be concurrent non-health care-related administrative or legal actions.⁸⁴ A HLJA serves an important function in adverse privileging actions and any related non-health care legal matters that

⁷³ See *id.* para. 9-1b.

⁷⁴ *Id.*

⁷⁵ *Id.* para. 9-1b and ch. 10.

⁷⁶ *Id.* para. 9-1a, b.

⁷⁷ *Id.* paras. 9-1b, 10-6a, b.

⁷⁸ *Id.* para. 10-6a, b.

⁷⁹ See generally *id.* chs. 9, 10.

⁸⁰ *Id.*

⁸¹ See *id.* para. 9-4.

⁸² *Id.* para. 10-1. A detailed examination of the adverse clinical privileging process is beyond the scope of this article. Those seeking additional information should consult, Lieutenant Colonel Anthony J. Kutsch, *Risk Management: The Role of Peer Review in Potentially Compensable Event and Medical Malpractice Claims Processing in the Army Medical Department*, U.S. ARMY MED. DEP’T. J., Jan.–Mar. 2010, at 20, available at <http://www.cs.amedd.army.mil/AMEDDJournal/2010janmar.pdf>.

⁸³ AR 40-68, *supra* note 1, para. 10-1.

⁸⁴ See *id.* paras. 10-3, 10-4. Some of the types of other legal actions that may occur include: officer separation proceedings; command-directed mental health examinations; involuntary mental health referral and commitment proceedings; actions taken in accordance with the Uniform Code of Military Justice; federal lawsuits (due process proceedings); concurrent criminal and administrative investigations of all types; and Equal Opportunity complaints, etc. Professional Experiences, *supra* note 6.

may arise.⁸⁵ Specifically, the HLJA helps to ensure that “due process and legal rights are [properly] afforded” and ensures that information protected by 10 U.S.C. § 1102 is not included in any collateral matter.⁸⁶

In adverse privileging actions, a highly competent disinterested third party should conduct an investigation.⁸⁷ The investigator investigates the facts and circumstances and makes a report to the credentials committee.⁸⁸ The credentials committee reviews and considers the investigation. The chairperson of the credentials committee recommends to the MTF commander that either “no further action be taken” or the “summary suspen[sion of privileges] pending a formal peer review.”⁸⁹ If a peer review panel is required, it will “evaluate the available information and to determine if the [standard of care] was met” and “evaluate the provider’s performance, conduct, or condition to determine the extent of the problem(s).”⁹⁰ The subject provider’s participation and rights are limited during this stage of the adverse privileging process.⁹¹

The peer review panel may include one of the following recommendations concerning the subject provider’s privileges—reinstatement, suspension, restriction, reduction, or denial.⁹² The peer review panel’s recommendations and associated information is returned to the credentials committee.⁹³ The credentials committee will likely review the matter, include recommendation(s), and forward the matter to the MTF commander for a decision on the matter.⁹⁴ If the MTF commander “intends to deny, suspend, restrict, reduce, or revoke the provider’s privileges” then the commander must notify the subject provider and provide information concerning “hearing and appeal rights.”⁹⁵

The hearing is an administrative process that provides substantial due process rights.⁹⁶ Additionally, specific time requirements are mandated.⁹⁷ The hearing board determines findings and recommendations.⁹⁸ The findings and recommendations are likely detailed and each finding “must be supported by a preponderance of the evidence.”⁹⁹ The entire record is submitted through the ECMS to the MTF commander.¹⁰⁰ The matter is reviewed for legal sufficiency before the MTF commander makes a decision.¹⁰¹ Ideally, a HLJA who did not advise the peer review panel will conduct the review.¹⁰² Once a decision is made, it is communicated, along with notice of appeal rights, to the subject provider, a copy is placed in the PCF, and “the appropriate department, service, or clinic chiefs” are informed.¹⁰³ The subject provider may elect to appeal the decision.¹⁰⁴

The appeal process has strict time requirements and should be rigidly followed.¹⁰⁵ The appeal process constitutes two appeals.¹⁰⁶ The first appeal is to the MTF commander that rendered the decision.¹⁰⁷ If denied, the matter is forwarded through the Regional Medical Commander to the USAMEDCOM Quality Management Division (QMD).¹⁰⁸ The USAMEDCOM QMD establishes another appeals board, which reviews the entire matter and provides findings and recommendations to the Surgeon General.¹⁰⁹ The Surgeon General renders a decision and notifies the subject provider.¹¹⁰

⁸⁵ Professional Experiences, *supra* note 6.

⁸⁶ See AR 40-68, *supra* note 1, para. 10-3a; Professional Experiences, *supra* note 6. Defects in due process will delay the adverse privileging process and lead to due process challenges in the federal courts. There are legal firms and attorneys experienced in challenging military privileging actions. A due process violation can be a sound basis for challenge. *Id.*

⁸⁷ AR 40-68, *supra* note 1, para. 10-6d (directing use of Clinical Quality Management Quality Assurance Investigation); Professional Experiences, *supra* note 6.

⁸⁸ AR 40-68, *supra* note 1, para. 10-6d, e(1).

⁸⁹ *Id.* para. 10-6e.

⁹⁰ *Id.* para. 10-6e(c), f(1).

⁹¹ *Id.* para. 10-6f(1)(c), (d).

⁹² *Id.* para.10-6f(5).

⁹³ *Id.* para.10-6f(6).

⁹⁴ *Id.* para. 10-6f(6), (7).

⁹⁵ *Id.* para. 10-6f(7)(c).

⁹⁶ *Id.* paras. 10-7–10-8.

⁹⁷ *Id.* The stated time limitations, prohibition of attorney participation, and the overall hearing process may be used as a basis for challenging the proceeding in federal court. The HLJA should research and determine whether the MTF is strictly adhering to the published rules and, if not, assist in correcting deficiencies. Professional Experiences, *supra* note 6.

⁹⁸ AR 40-68, *supra* note 1, para. 10-8f.

⁹⁹ *Id.*

¹⁰⁰ *Id.* para. 10-9a.

¹⁰¹ *Id.* para. 10-9b.

¹⁰² Professional Experiences, *supra* note 6.

¹⁰³ *Id.* para. 10-9c(2)—10-9c(3).

¹⁰⁴ *Id.* para. 10-10a.

¹⁰⁵ See *id.* para. 10-10. Practice Tip: Any deviation from mandated rules or procedures may be used as a basis for making a due process challenge in federal court even if the deviation was made to accommodate the subject bringing the claim. Professional Experiences, *supra* note 6.

¹⁰⁶ AR 40-68, *supra* note 1, para. 10-10a to 10-10d.

¹⁰⁷ *Id.* para. 10-10 to 10-10b.

¹⁰⁸ *Id.* para. 10-10c, 10-10d to 10-10f.

¹⁰⁹ *Id.* para. 10-10d to 10-10f.

¹¹⁰ *Id.* para.10-10f to 10-10g.

Many options, such as increased supervision, additional or re-training, mentoring, counseling, substance abuse intervention, etc., exist to address issues that affect the ability of a provider to render proper and safe medical care.¹¹¹ Terminating the provider's ability to practice will likely be the final option. Ultimately, the option selected will likely reflect that which is necessary to ensure quality and safe health care.¹¹²

2. The Risk Management Process

Another QA mechanism is the risk management (RMGT) process.¹¹³ This process can lead to an adverse privileging action.¹¹⁴ It may also lead to changes in a particular clinical or administrative practice, modification or termination of a specific clinical procedure, increased training or retraining of personnel involved in providing health care, or anything else related to the delivery of care.¹¹⁵ In short, the RMGT process is one of the most important aspects of quality assurance because it seeks to "prevent the loss of human, material, or financial resources and to limit the negative consequences of adverse or unanticipated events that occur in a healthcare setting."¹¹⁶

The goals of RMGT are achieved through an overall systematic plan that incorporates identification of possible clinical issues and practices, multi-disciplinary review and evaluation, data gathering, analysis, and reporting, along with risk reduction and mitigation training.¹¹⁷

Identification of possible clinical issues occurs at all levels of healthcare practice.¹¹⁸ In some instances, the incident itself indicates that a clinical issue may exist.¹¹⁹ In Baby Lucy, the unanticipated injury post-delivery indicates that an issue exists.¹²⁰ Another example would be the sudden and unforeseen death of a patient. The event, however, does not have to be catastrophic in nature (e.g., the chipping of a patient's teeth during intubation, a patient falling off an exam table during a procedure, or a mild,

unanticipated adverse reaction to medicine).¹²¹ Identification of a clinical risk also occurs as a result of the medical claims process.¹²² The identification occurs when an individual who believes he or she has been harmed files a claim with the servicing claims office.¹²³ Notice of the claim should be quickly reported to the RM.¹²⁴ No matter the method of notification, the identification of any potential risk is important to mitigating or preventing such risks in the future.¹²⁵ Once identified, the clinical risk is evaluated.¹²⁶

Evaluation of the clinical risk begins with the RM.¹²⁷ The RM gathers initial information or investigates the event and, along with RMGT's Clinical Advisor (RMCA) and the medical claims attorney/HLJA, makes an initial determination as to whether the event constitutes a PCE.¹²⁸ Soon thereafter, a non-involved peer conducts an impartial department or service level review of the event.¹²⁹ The peer review determines whether the standard of care (SOC) was "met, not met, or indeterminate" for the overall event and individually by those significantly involved.¹³⁰ The peer review also "include review of care findings, [a]ssignment of responsibility and the rationale supporting the decision, and any input from each provider involved unless he/she has elected to waive this opportunity."¹³¹

¹²¹ AR 40-68, *supra* note 1, para. 13-5b(8).

¹²² *Id.* para. 13-6a; *see also* AR 27-20, *supra* note 6, para. 2-9e to 2-9f; DA PAM. 27-162, *supra* note 6, para. 2-2b.

¹²³ The servicing medical claims office will usually be a function of the MTF Command JA (CJA) or at the servicing Office of the Staff Judge Advocate (OSJA) that administers the U.S. Army's Claims Service (USARCS) function for that geographic area. The MTF CJA and medical claims attorney is generally delegated authority to dispose of claims from USARCS or the servicing SJA based upon a dollar threshold. *See* AR 27-20, *supra* note 6, paras. 1-12b(3), 8-8; *see also* DA PAM. 27-162, *supra* note 6, para. 2-3b, 2-3e. Close coordination among the MTF CJA, servicing OSJA, and USARCS should be maintained. *See generally* AR 27-20, *supra* note 6, paras. 1-12, 1-14; DA PAM. 27-162, *supra* note 6, paras. 2-1b, 2-3e; Professional Experiences, *supra* note 6. Appendix C (General Medical Tort Claims Process Flow Chart) contains a flow chart of the medical claims process.

¹²⁴ Professional Experiences, *supra* note 6.

¹²⁵ AR 40-68, *supra* note 1, paras. 13-1, 13-4.

¹²⁶ *Id.* para. 13-2c(1), 13-2d(1).

¹²⁷ *Id.* para. 13-2c(1).

¹²⁸ *Id.* para. 13-4.

¹²⁹ *Id.* para. 13-5a to 13-5b. Generally, only extremely competent and experienced peers are selected for this review. Professional Experiences, *supra* note 6.

¹³⁰ AR 40-68, *supra* note 1, para. 13-5a, 13-5b(5), 13-5(6)(a). Standard of care is defined as "health care diagnostic or treatment judgments and actions of a provider/professional generally accepted in the health care discipline or specialty involved as reasonable, prudent, and appropriate." *Id.* glossary, at 170.

¹³¹ *Id.* para. 13-5b(5).

¹¹¹ *See id.* chs. 9, 10.

¹¹² *Id.* para. 9-1a.

¹¹³ *See id.* para. 13-1. Appendix B (Standard Risk Management Flow Chart with Collateral Matters) is a flow chart of the risk management process.

¹¹⁴ *Id.* para. 13-3c(2).

¹¹⁵ *See id.* para. 13-4.

¹¹⁶ *Id.* para. 13-1.

¹¹⁷ *See id.* ch. 13 and para. 13-2.

¹¹⁸ *See generally id.* chs. 12, 13.

¹¹⁹ *See id.* para. 13-4.

¹²⁰ *Id.*; *see also* Perez, *supra* note 2.

Once the peer review is complete, it is delivered to the RM for the RMC.¹³² The RM tracks, prioritizes, and schedules RMC meetings for all PCEs.¹³³ The RMC is an impartial multidisciplinary group that includes a “represent[ative] from each clinical department/service, the RM, the HLJA, and other designated (ad hoc) participants, as needed.”¹³⁴ The RMC “review[s] the facts of the case, consider[s] [the] peer review findings and recommendations,” and makes the same determinations as those required for the peer review.¹³⁵ Additionally, those significantly involved may provide in-person information to the RMC.¹³⁶ Each member of the committee, except for the RM, HLJA, and the chairperson (who only votes when there is a tie), casts a vote for each determination.¹³⁷ Although applicable medical records and notice of the peer review is provided to those significantly involved, due process is considered inapplicable to the process.¹³⁸

Once the RM committee makes its determinations and recommendations, the information is delivered through QA channels to the MTF commander for consideration.¹³⁹ Additionally, where a provider does not meet SOC, the review is also delivered to the credentials committee for adverse privileging action.¹⁴⁰ All of the information concerning a PCE is captured and maintained in an electronic system called “Centralized Credentials and Quality Assurance System (CCQAS).”¹⁴¹ Trends are reported to the ECMS and MEDCOM QM.¹⁴² If necessary, the information will be used to take action to prevent or mitigate future harm.¹⁴³ The RM process and the information gathered likely remains protected with the changes to 10 U.S.C. § 1102.

In the Baby Lucy case, the event would likely undergo a peer review and RMC review soon after the event. Depending upon cause of injury, the RMC would likely recommend immediate actions to prevent the reoccurrence,

¹³² See *id.* paras. 13-2, 13-3b.

¹³³ *Id.* paras. 13-2c(3), 13-4, 13-4b.

¹³⁴ *Id.* para. 13-3a, 13-3a(1).

¹³⁵ *Id.* para. 13-3b.

¹³⁶ *Id.* para. 13-5b(3).

¹³⁷ *Id.* para. 13-3a(1) to 13-3a(3).

¹³⁸ *Id.* para. 13-5b(3), 13-5(3)(d).

¹³⁹ *Id.* para. 13-3c(1).

¹⁴⁰ *Id.* para. 13-3c(2).

¹⁴¹ *Id.* paras. 1-4j(7)(k), 13-4d.

¹⁴² *Id.* paras. 13-2c(6), 13-2e.

¹⁴³ *Id.* para. 13-4.

to include changes in procedures, policies, and referral of providers to the credentials committee.

C. Concurrent Health Law Judge Advocate Roles and Responsibilities

Concurrent with the RMGT process and any resulting adverse privileging action, HLJAs must not lose sight of their additional roles and responsibilities that will likely arise with an adverse medical event. The eventual medical claim must be documented, reported, investigated, accurately maintained, and submitted to the U.S. Army Claims Service (USARCS) at various stages throughout the adjudication process.¹⁴⁴

Any USARCS Claims Attorney (CA) and Claims Investigator assigned will need support in adjudicating the claim.¹⁴⁵ This support is not limited to providing advice, context, command and stakeholder desires and concerns, medical records, witness statements, and ensuring that no QA information or documentation is included in the material provided.¹⁴⁶ It also includes any aspect of local support that enables the CA to efficiently and effectively perform his job (e.g., work space at the medical facility, computer automation support, network access, coordination for local witness interviews, security badges, escorting around the facility, introductions to stakeholders, etc.).¹⁴⁷

If the claim enters into litigation, the HLJA will also provide similar support activities as those noted for the CA to the assigned Litigation Judge Advocate and Assistant United States Attorney.¹⁴⁸ Additionally, assistance with coordination for the appearance of witnesses from the MTF at depositions, hearings, or trials may be necessary.¹⁴⁹

Further, the HLJA will be responsible for providing legal advice and oversight concerning any criminal prosecution or administrative action, to include separation, which may result from an adverse medical event.¹⁵⁰ Lastly,

¹⁴⁴ Professional Experiences, *supra* note 6; see AR 27-20, *supra* note 6, paras. 2-2, 2-3, 2-9 to 2-12, 2-22; see also DA PAM. 27-162, *supra* note 6, paras. 2-12, 2-19, 2-34b, 2-60.

¹⁴⁵ See generally Professional Experiences, *supra* note 6; AR 27-20, *supra* note 6, paras. 2-1, 2-3c, 2-22a.

¹⁴⁶ Professional Experiences, *supra* note 6; see generally DA PAM. 27-162, *supra* note 6, paras. 1-18b, 2-7c, 2-12, 2-19 to 2-24, 2-34.

¹⁴⁷ Professional Experiences, *supra* note 6.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; see generally AR 27-40, *supra* note 6, paras. 7-1 to 7-7, 7-12 to 7-13, 7-15; see also DA PAM. 27-162, *supra* note 6, para. 2-34.

¹⁵⁰ Professional Experiences, *supra* note 6; see AR 40-68, *supra* note 1, paras. 2(d)(b), 10-3a, 10-4, 10-12 to 10-13, 11-2 to 11-5, 12-4c(3), (4), app. I-1.

requests for information and records from media and others will likely arise with an adverse medical event. Information released in response to requests requires careful review and analysis because it may include QA information, impact any claim or tort case that arises, and violate the Privacy Act or Health Insurance Portability and Accountability Act.¹⁵¹

IV. Conclusion

Baby Lucy illustrates many of the common issues and concerns that arise with adverse medical events. One of the best tools available to minimize the frequency of an adverse medical event or to reduce the harm suffered during an adverse event is a properly functioning medical QA program.¹⁵² Without robust protections and confidentiality of the medical QA process, the medical QA program will not properly function for the same reasons that lead to adverse medical events—humans are imperfect. This imperfection understandably manifests as a desire to avoid exposing oneself to potential civil liability, public or private condemnation, ridicule, invasion of privacy, additional work, etc.¹⁵³

When 10 U.S.C. § 1102 was enacted, it mitigated these human imperfections by allowing frank and thorough assessment of the entire health care process. In turn, information collected could be used to improve the medical system.¹⁵⁴ Unfortunately, the amendment likely narrows the protection afforded.

Additionally, the Baby Lucy case illustrates several roles and responsibilities that are present but separate from the QA process. Health Law Judge Advocates will have to assist in managing and counseling stakeholders with the issues that arise and in ensuring compliance with applicable laws and regulations. The best means for preparing for such events is to understand the underlying reasons for creating 10 U.S.C. § 1102, the recent changes, and AR 40-68.

¹⁵¹ See DA PAM. 27-162, *supra* note 6, paras. 1-18, 2-7h, 2-34i; *see also* AR 27-40, *supra* note 6, paras. 7-7, 7-14; 42 U.S.C. §§ 1320d-6 (2010).

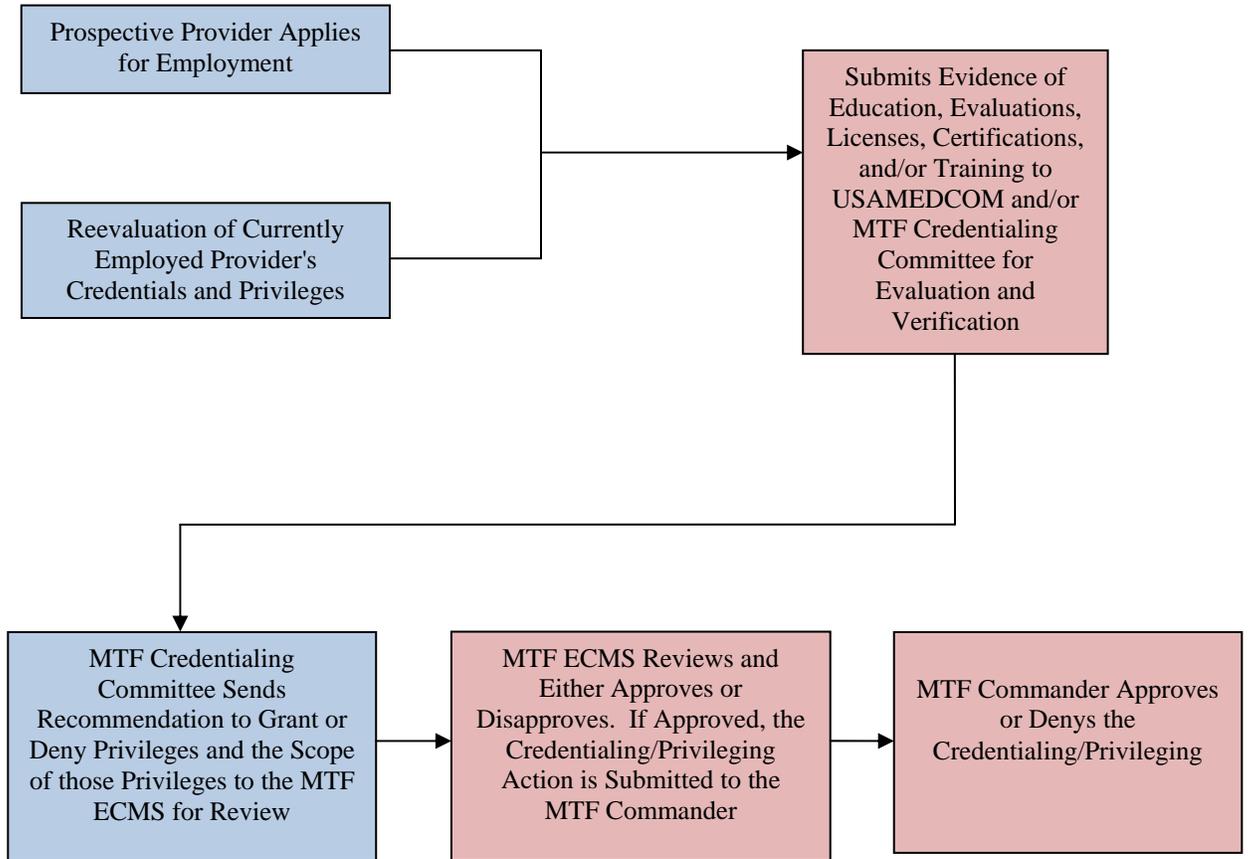
¹⁵² *See* S. REP. NO. 99-331, at 245–46 (1986).

¹⁵³ *See id.*

¹⁵⁴ AR 40-68, *supra* note 1, para. 13-4.

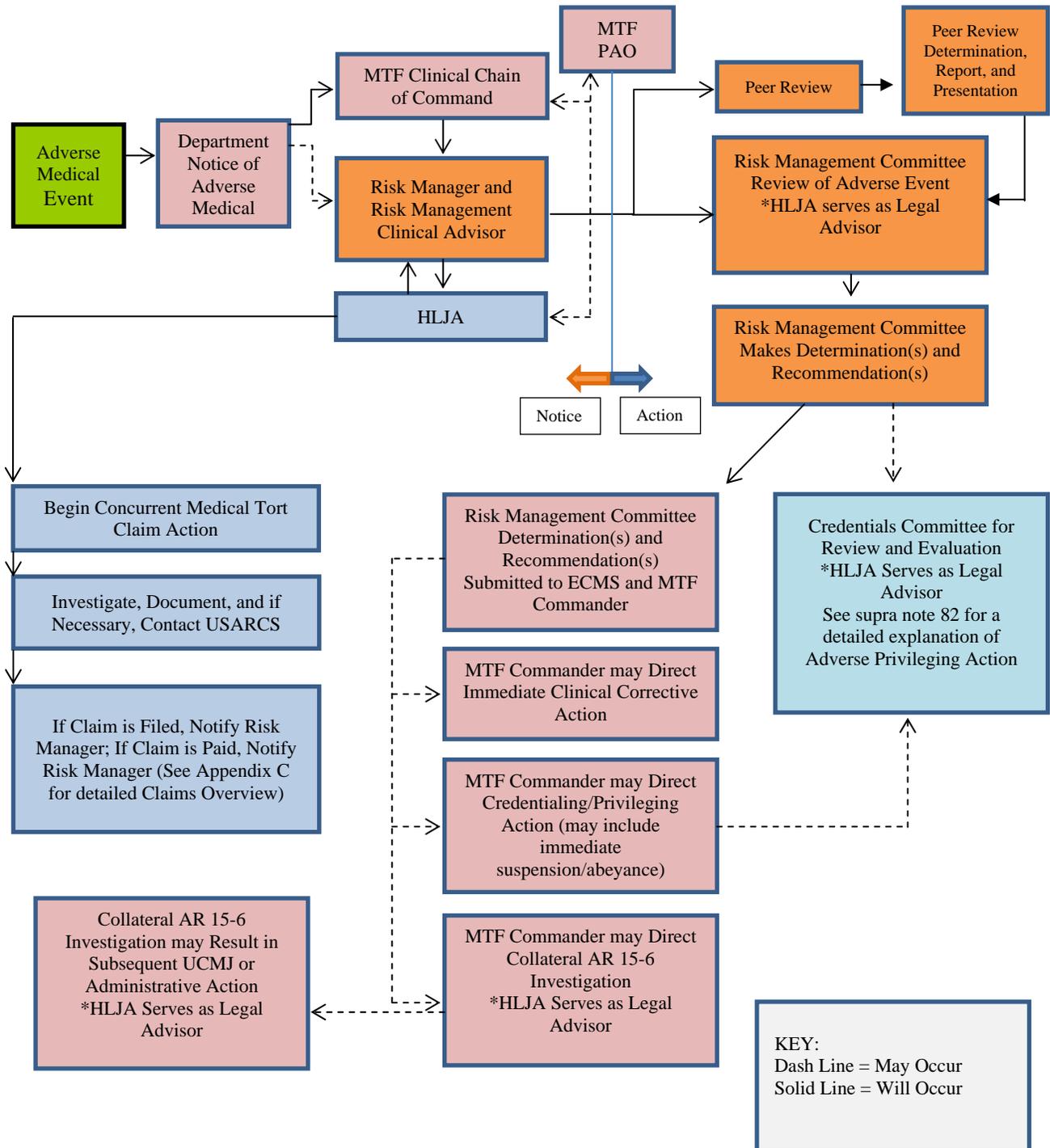
Appendix A

Non-Adverse Standard Credentialing and Privileging Flow Chart



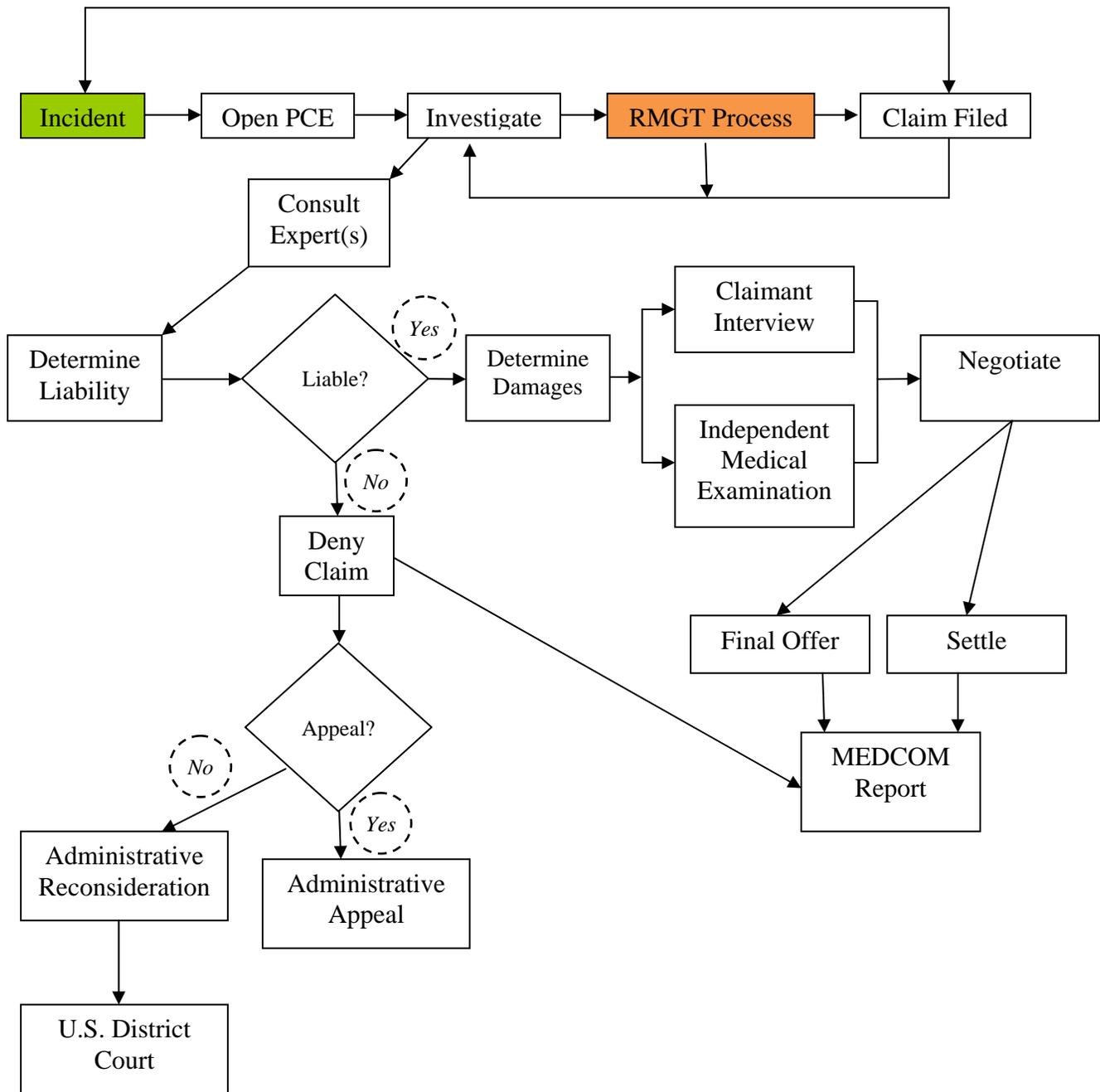
Appendix B

Standard Risk Management Flow Chart with Collateral Matters



Appendix C

General Medical Tort Claims Process Flow Chart*



*Information provided by Mr. Douglas Dribben, Attorney Advisor, Foreign Torts Branch, U.S. Army Claims Service.

Staying Abreast of Separation Benefits

Major Joshua J. Smith*

Time is a sort of river of passing events, and strong is its current; no sooner is a thing brought to sight than it is swept by and another takes its place, and this too will be swept away.

—Marcus Aurelius

I. Introduction

Every trial counsel has faced the daunting task of explaining to commanders, chiefs of justice, and staff judge advocates exactly what differentials exist among a separation under honorable, general under honorable, or under other than honorable conditions. Every defense counsel has faced a client who, in preparing for a pending separation action, asks what benefits they will retain upon separation from the Armed Forces.

The great salvation to those in such a predicament rested with the well-valued and long used “Benefits at Separation” document.¹ This document saved hours, days, or weeks of researching and muddling through code, regulations, and instructions so that you could tell your respective client, commander, or Soldier that the Soldier would still be entitled to preference on a farm loan by the Department of Agriculture, even with an under other than honorable conditions characterization of service.

The “Benefits at Separation” document is relied upon by more than young judge advocates seeking a reliable reference document to the myriad of benefits for transitioning Soldiers. Veteran outreach organizations and offender transitioning services, such as Transitioning Offenders Program (TOP), rely on this document to advise their clients of potential services and benefits which may be available during their re-entry into civilian life.²

Unfortunately, as time elapsed, either few thought of the need to update the “Benefits at Separation” document, or as they prodded the surface they quickly became aware of the monstrous web of statutes and regulations that continued to sweep forward like a strong river, growing and morphing. This is not a criticism of those who originally pulled together the information, but a warning to current judge advocates of the consequences of not staying abreast of these changes.

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¹ Benefits at Separation, http://www.knox.army.mil/Garrison/supportof-fices/tds/docs/VA_Benefits_Chart.pdf (last visited Sept. 20, 2013).

² Transition Offender Program based out of Washington recently published in June 2012 an information paper for incarcerated Veterans. Central to this information is the “Benefits at Separation” document. See <http://www.topwa.org/veteransjune2012.pdf> (last visited Sept. 20, 2013).

Fortunately, a massive undertaking in updating our understanding in this area of the law occurred with the publication of *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces* (hereinafter known as *Beyond “T.B.D.”*).³ As noted in this article, the “Benefits at Separation” document provides a valuable starting point, though it is long overdue a makeover. This article attempts to place the readers on a path to understanding the current state of transitional benefits, outside the scope of the VA benefits already covered by “*Beyond T.B.D.*”, as it applies to the varied characterizations of service a Soldier may receive.

II. A Review of Sample Separation Benefits⁴

A. Statutory Review

Since benefits inherently involve monetary expenditures, the first step is locating the statutory authorization for the benefit. The statutes provide the benefit’s scope and the class of individuals who qualify for receipt. The importance of consulting the statutes, and then later the regulations, lies with the fact that many of the benefits do not rest solely upon the characterization of service the servicemember receives. While characterization of service certainly plays a significant litmus test and may automatically exclude certain categories of individuals, other criteria may further exclude individuals who, if relying solely upon characterization, may mistakenly believe they qualify for the benefit.

The additional statutory criteria are most often apparent in benefits administered by agencies other than the Department of Defense. Criteria for benefits under other government agencies are generally more involved beyond a simple characterization of service analysis. For example, the Department of Labor administers unemployment compensation. Soldiers separating from the service must meet two criteria to receive unemployment compensation. First, the characterization of service must be honorable or

³ Major John W. Brooker, Major Evan R. Seamone & Ms. Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012).

⁴ A listing of several separation benefits is found in the Appendix to this article.

general under honorable conditions.⁵ Second, the Soldier must have served the entire first full term initially agreed to, or the Soldier must have been discharged under certain limited circumstances. Those circumstances are limited to: (a) discharge under an early release program for the convenience of the Government; (b) discharge due to pregnancy or parenthood; (c) discharge for medical disqualification or service incurred injury or disability; (d) discharge due to personality disorders or inaptitude, and only if service was continuous for 365 days or more; or (e) discharge because of a hardship, such as sole survivorship.⁶ For enlisted Soldiers separating before their enlistment period concludes, only separations pursuant to Army Regulation 635-200, *Active Duty Enlisted Administrative Separations*, Chapters 5, 6, and 8 would qualify the Soldier for unemployment compensation.⁷

In addition to adding criteria within the statutory language itself, agencies providing benefits, such as veteran preferences, tend to selectively cite definitions from Title 10 or Title 38. It is critical to conduct a thorough reading of those definitions to understand the scope of the agency's benefits and any applicable limitations.⁸ For example, the Department of Agriculture administers government farm loans. The statute grants war veterans a preference to those

farm loans.⁹ The authorizing statute, 7 U.S.C. § 1983(5) (2012), cites 38 U.S.C. § 101(12) (2012) to define "a person who is a veteran of any war."¹⁰ The definition is common-sensible including "any veteran who served in the active military, naval, or air service during a period of war."¹¹ However, the term "veteran" is further defined under 38 U.S.C. §§ 101(2) and (18) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."¹² Therefore, a first glance reading of the farm loan preference may include all war veterans; however, a complete and thorough reading excludes those with a dishonorable discharge.¹³

Finally, outside agencies may redefine honorable service for the purpose of applying their mandates. For example, the U.S. Citizenship and Immigration Service (USCIS) processes alien Soldiers' requests to naturalize. Alien Soldiers must serve honorably or under honorable conditions to qualify for naturalization based upon military service.¹⁴ Within the definition of honorable conditions are the following caveats:

⁵ 5 U.S.C.A. § 8521(a)(1)(A) (2012).

(1) "Federal service" means active service (not including active duty in a reserve status unless for a continuous period of 90 days or more) in the armed forces or the Commissioned Corps of the National Oceanic and Atmospheric Administration if with respect to that service— (A) the individual was discharged or released under honorable conditions (and, if an officer, did not resign for the good of the service); . . .

Id. § 8521(a)(1)(A). However, note that while the Department of Labor utilizes Title 5's base definition of federal service requiring honorable or general under honorable conditions, other departments or agencies may define federal service more broadly. For example, *Beyond T.B.D.*" found that the Department of Veterans Affairs, in some contexts, may consider other than honorable discharges sufficient for certain VA administered benefits.

⁶ *Id.* § 8521(a)(1)(B).

⁷ For purposes of unemployment compensation, AR 635-200, Chapter 5 covers separations for Secretarial Plenary Authority actions, Surviving Sons and Daughters, Parenthood, Medical Disqualification, Personality Disorders, Early Release for Education, and other physical or medical conditions warranting separation. AR 635-200, Chapter 6 covers hardship separations. AR 635-200, Chapter 8 covers pregnancy separations. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR, 6 Sept. 2011).

⁸ As noted above, the Department of Labor and Department of Veterans' Affairs may use differing definitions of what constitutes federal service, which consequently affects whether an honorable or other than honorable characterization of service will even qualify the separated Soldier from any benefits whatsoever. Defining the fundamental terms enables the advocate to properly advise and navigate the veteran through the maze of transitional and VA benefits.

⁹ 7 U.S.C.A. § 1983(5) (2012) ("(5) the application of a person who is a veteran of any war, as defined in section 101(12) of title 38, for a loan under subchapter I or II of this chapter to be given preference over a similar application from a person who is not a veteran of any war, if the applications are on file in a county or area office at the same time.").

¹⁰ *Id.*

¹¹ 38 U.S.C.A. § 101(12) (2012).

¹² *Id.* §§ 101(2), (18).

¹³ See Brooker, Seamone & Rogall, *supra* note 3 (providing a thorough analysis and the statutory effects).

¹⁴

(a) Requirements. A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating one year, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's application, in the United States for at least five years, and in the State or district of the Service in the United States in which the application for naturalization is filed for at least three months, and without having been physically present in the United States for any specified period, if such application is filed while the applicant is still in the service or within six months after the termination of such service.

8 U.S.C. § 1439(a) (2012).

(a) Requirements. Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950,

That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section.¹⁵

Additionally, and unlike the G.I. Bill's consideration of prior honorable enlistment periods, naturalization requires all discharges be under honorable conditions to qualify the applicant for citizenship.¹⁶ It is noteworthy to mention that Soldiers who obtain citizenship based upon military service and who are subsequently discharged with an other than honorable conditions characterization of service face the prospect of losing their citizenship.¹⁷

B. Regulatory and Administrative Review

The second step is locating the regulatory instruction on implementing the benefit. These instructions are especially important where the statute leaves discretion to the administering agency concerning entitlements. For example, a Soldier who is discharged with anything greater than a dishonorable discharge may be entitled to a death gratuity.¹⁸

and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if

(2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: No period of service in the Armed Forces shall be made the basis of an application for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

8 U.S.C.A. § 1440(a)(2) (2012).

¹⁵ 8 U.S.C.A. § 1440(a)(2).

¹⁶ *Id.* § 1439(b)(3).

¹⁷ *Id.* §§ 1439(f), § 1440(c). *See also* AR 635-200, *supra* note 6, paras. 1-37 through 1-39.

¹⁸

(b) A payment may not be made under section 1476 unless the Secretary of Veterans Affairs determines

This includes those who die within 120 days of discharge from the service and where the death is linked to a service-related injury.¹⁹ However, the Department of Defense Financial Management Regulation 7000.14-R adds that the discharge must be under honorable conditions, which effectively removes other than honorable and bad conduct discharge characterizations of service.²⁰ Again, keep in mind that the definition of the administering agency controls whether one, the veteran's service will be viewed as federal service; and two, if constituting federal service, the characterization of service is sufficient to warrant the receipt of benefits.²¹

that the decedent was discharged or released, as the case may be, under conditions other than dishonorable from the last period of the duty or training that he performed.

10 U.S.C.A. § 1480(b) (2012).

¹⁹

(1) Except as provided in section 1480 of this title, the Secretary concerned shall pay a death gratuity to or for the survivors prescribed in section 1477 of this title of each person who dies within 120 days after discharge or release from—

(A) active duty; . . .

(2) A death gratuity may be paid under paragraph (1) only if the Secretary of Veterans Affairs determines that the death resulted from an injury or disease incurred or aggravated during—

(A) the active duty or inactive-duty training described in paragraph (1); or

(B) travel directly to or from such duty.

Id. § 1476(a).

²⁰

Death gratuity will be paid regardless of whether death occurred in the line of duty or as the result of a member's misconduct to eligible beneficiaries of the following (except a temporary member of the Coast Guard Reserve):

B. A former member who dies during the 120-day period beginning on the day following date of discharge or release, under honorable conditions, from active duty (including retirement for either disability or length of service). In this case, the Secretary of Veterans Affairs must determine that death resulted from disease or injury incurred or aggravated while the member was on active duty or while in authorized travel status to or from such duty.

U.S. DEP'T OF DEF. 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 36, para. 360101 (Jan. 2012).

²¹ Again, as noted above, some administering departments, such as the Department of Labor, will only view honorable or general under honorable conditions as valid federal service. Other agencies, such as the VA as discussed in *Beyond "T.B.D."*, maintain a more open definition of federal service, enabling it to expand or contrast its definitions on the characterization of service, resulting in more particular calculations as to whether a veteran is entitled to a specific benefit or not.

Another example includes travel and transportation allowances after separation from the service. Generally, Soldiers are entitled to travel and transportation allowances without regard to comparative costs when separating from the service.²² However, and except for a few medical or hardship exceptions, Soldiers separated who have failed to complete at least ninety percent of their initial enlistment or are separated with an other than honorable conditions discharge, may only be covered for the least expensive mode of transportation available.²³

22

Except as provided in subsection (f) and under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders, without regard to the comparative costs of the various modes of transportation—

(3) upon separation from the service, placement on the temporary disability retired list, release from active duty, or retirement, from his last duty station to his home or the place from which he was called or ordered to active duty, whether or not he is or will be a member of a uniformed service at the time the travel is or will be performed; . . .

37 U.S.C.A. § 474(a)(3) (2012).

23

(f) (1) The travel and transportation allowances authorized under this section for a member who is separated from the service or released from active duty may be paid or provided only for travel actually performed.

(2)

(A) Except as provided in subparagraph (B), a member who is separated from the service or released from active duty and who—

(i) on the date of his separation from the service or release from active duty, has not served on active duty for a period of time equal to at least 90 percent of the period of time for which he initially enlisted or otherwise initially agreed to serve; or

(ii) is separated from the service or released from active duty under other than honorable conditions, as determined by the Secretary concerned;

may be provided travel and transportation under this section only by transportation in kind by the least expensive mode of transportation available or by a monetary allowance that does not exceed the cost to the Government of such transportation in kind.

(B) Subparagraph (A) does not apply to a member—

(i) who is retired, or is placed on the temporary disability retired list, under chapter 61 of title 10;

(ii) who is separated from the service or released from active duty for a medical condition affecting the member, as determined by the Secretary concerned;

(iii) who is separated from the service or released from active duty because the period of time for which the member initially enlisted or otherwise initially agreed to serve has been reduced by the Secretary concerned and is separated or released under honorable conditions;

(iv) who is discharged under section 1173 of title 10; or

(v) who is involuntarily separated from active duty during the period beginning on October 1, 1990, and ending on December 31, 2001.

In addition to conducting statutory and regulatory research, the administering agency may also produce valuable information guides. These guides or pamphlets provide the agencies' interpretation in layman terms, which may provide insight on how to interpret the statutes and regulations. For example, G. I. Bill educational benefits appear strictly limited to those who only receive a fully honorable characterization of service when discharged.²⁴ However, the Veteran Affairs suggests that Soldiers discharged with a general under honorable or even an other than honorable conditions characterization of service may still be entitled to educational benefits so long as they have had a prior honorable discharge, even if it was for the purpose of reenlisting.²⁵ As noted in *Beyond "T.B.D."*, there is the requirement of thirty-six months of honorable service to qualify for this benefit.²⁶

C. Other Considerations

Some categories of beneficiaries either no longer exist or will soon expire. A few examples bear notation. First are commissary and exchange privileges. Normally Soldiers involuntarily separated are no longer entitled to commissary and exchange privileges. However, Soldiers involuntarily separated between 1 October 2007 and 31 December 2012 are entitled to commissary and exchange privileges for up to two years from the date of discharge.²⁷ Unless the statute is

Id. § 474(f).

²⁴ *Id.* § 3011(a)(3)(B) (“(3) who, after completion of the service described in clause (1) of this subsection—

(B) is discharged from active duty with an honorable discharge; . . .”).

²⁵

However, if you have more than one period of service, and receive an other than honorable discharge from one period, you may be able to qualify if you receive an honorable discharge from another period of service. (A period from which you were discharged in order to reenlist may meet the eligibility requirements).

U.S. DEP'T OF VETERANS AFFAIRS, PAM. 22-90-2, THE MONTGOMERY GI BILL—ACTIVE DUTY, SUMMARY OF EDUCATIONAL BENEFITS UNDER THE MONTGOMERY GI BILL—ACTIVE DUTY EDUCATIONAL ASSISTANCE PROGRAM CHAPTER 30 OF TITLE 38, U. S. CODE (rev. Feb. 2011).

²⁶ Brooker, Seamone, & Rogall, *supra* note 3, at 48–49.

²⁷

(a) Members Involuntarily Separated From Active Duty.—The Secretary of Defense shall prescribe regulations to allow a member of the armed forces who is involuntarily separated from active duty during the period beginning on October 1, 2007, and ending on December 31, 2012, to continue to use commissary and exchange stores during the two-year period beginning on the date of the involuntary separation of the member in the same manner as a member on active duty. The Secretary of Transportation shall implement this provision for Coast Guard members involuntarily separated during the same period.

updated, Soldiers involuntarily separated after 31 December 2012 are no longer entitled to commissary and exchange privileges. The entitlement to commissary and exchange privileges does not discriminate on the basis of discharge. However, since most Soldiers separated with an other than honorable conditions characterization generally receive a bar to the installation at the same time, they are effectively barred from the commissary and exchange as well.

The second are military housing entitlements. Under 10 U.S.C. §1147, Soldiers involuntarily separated are authorized to remain in military housing for up to 180 days after the date of separation.²⁸ Those individuals are charged a reasonable rental fee.²⁹ However, the entitlement only applies to Soldiers separated between 1 October 1990 and 31 December 2001.³⁰ Since 180 days has clearly expired since the last possible applicable separation occurred, this statutory authorization bears no applicability to Soldiers today. Furthermore, Army Regulation 210-50, which provided secretarial guidance on the implementation of this entitlement, including possible discrimination based upon characterization of service criteria, has since expired and is no longer a published regulation.³¹

Finally, a third expired category involves preference in applying for National Guard and Reserve vacancies. However, like military housing, the preference only applies to Soldiers involuntarily separated between 1 October 1990 and 31 December 2001.³²

III. Conclusion

Government benefits of any type are subject to changing political conditions and considerations. Servicemembers facing separation, voluntary or involuntary, should understand the scope and nature of their benefits. Our mission as legal advisors to commanders or Soldiers is to provide the most updated and relevant information. This will require more than a generational review of our “Benefits at Separation” document; we must consider a more systematic approach to staying abreast of changing entitlements.

10 U.S.C.A. § 1146(a) (2012). *See also* U.S. DEP’T OF DEF., INSTR. (DODI) 1330.17, ARMED SERVICES COMMISSARY OPERATIONS enclosure 4, para. 1i (8 Oct. 2008).

²⁸

(a) Transition for Involuntarily Separated Members.
(1) The Secretary of a military department may, pursuant to regulations prescribed by the Secretary of Defense, permit individuals who are involuntarily separated during the period beginning on October 1, 1990, and ending on December 31, 2001, to continue for not more than 180 days after the date of such separation to reside (along with other members of the individual’s household) in military family housing provided or leased by the Department of Defense to such individual as a member of the armed forces.

10 U.S.C.A. 1147(a) (2012).

²⁹ *Id.* 1147(b).

³⁰ *Id.* 1147(a).

³¹ Army Regulation 210-50, *Housing Management*, did not make any provisions for Soldiers involuntarily separated from the service. Paragraph 3-19 directed housing terminated upon separation from the service. U.S. DEP’T OF ARMY, REG., 210-50, HOUSING MANAGEMENT para. 3-19 (26 Feb. 1999).

³²

(a) Preference for Certain Persons.—A person who is separated from the armed forces during the period beginning on October 1, 1990, and ending on December 31, 2001, and who applies to become a member of a National Guard or Reserve unit within one year after the date of such separation shall be given preference over other equally qualified applicants for existing or projected vacancies within the unit to which the member applies.

10 U.S.C.A. 1150(a) (2012).

Appendix

Army Transitional Benefits

Benefits	H	G	OTH	BCD	DD	Authorities
Separation Pay	E ¹	E ¹	NE	NE	NE	10 USC § 1174; DoDI 1332.29
Payment of Accrued Leave	E	E	NE	NE	NE	37 USC §§ 501-503; DoD FMR 7000.14-R, Vol. 7A, Ch. 35, para. 350101, A
Death Gratuity (within 120 days of discharge and service related cause)	E	E	NE	NE	NE	10 USC § 1476, 1480; DoD 7000.14-R, Vol. 7A, Ch. 36, para. 360101
Wearing of Military Uniform	E ²	E ²	NE	NE	NE	10 USC § 771a, 772; AR 670-1, para. 30-4
Admission to Retirement Home	E ³	E ³	NE	NE	NE	24 USC § 412
Burial in Army Cemeteries	E ⁴	E ⁴	NE ⁴	NE ⁴	NE	38 USC § 2402; AR 290-5; AR 210-190
Army Board for Correction of Military Records (ABCMR)	E	E	E	E	E	10 USC § 1552; DoDD 1332.41, AR 15-185
Army Discharge Review Board (DRB)	E	E	E	NE ⁵	NE	10 USC § 1553; DoDI 1332.28, AR 15-180
Transportation to Home	E ⁶	E ⁶	E ⁶	E ⁶	E ⁶	37 USC § 474(a)(3); JFTR, Ch. 7, Part T, para. U7465-U7490
Travel/Transportation Allowance for Dependents to Home	E	E	E ⁷	E ⁷	E ⁷	37 USC §§ 453(c)(1), 476; JFTR, Ch. 5, Part C, para. U5225-F, U5240-F
Transportation of HHGs to Home	E	E	E ⁷	E ⁷	E ⁷	JFTR, Ch. 5, Part D, U5370-H
Pre-separation Counseling	E	E	E	E	E	10 USC § 1142
Employment Assistance	E	E	E	E	E	10 USC §§ 1143, 1144
Health Benefits (180 days of Tricare Prime)	E	E	E	E	E	10 USC § 1145(a)(4)
Commissary / Exchange	E ⁸	E ⁸	E ⁸	E ⁸	E ⁸	10 USC § 1146; DoDI 1330.17
Overseas Relocation Assistance	E	E	E	E	E	10 USC § 1148; AR 608-1, Ch. 4, Sect. III
Excess Leave / Permissive TDY	E	E	NE	NE	NE	10 USC § 1149; AR 600-8-10, para. 5-35
G.I. Bill	E	NE ⁹	NE ⁹	NE	NE	38 USC § 3011; VA Pamphlet 22-90-2 (Feb. 2011)

¹ Additional limitations listed out in DoDI 1332.29, paragraph 3.4, and includes, but not limited to, separation at own request, separation during initial term of enlistment (including erroneous enlistments for mental competence or minimum age requirements), retained or retired pay eligible, and unsatisfactory performance or misconduct under DoDI 1332.14 or DoDI 1332.30. *See also* 10 USC §§ 504, 505, 1145, 1170, 12303, and 12686.

² Unless service during a time of war (declared or undeclared), discharged persons may only wear a military uniform while going from place of discharge to home within three months after discharge. 10 USC § 772(c)-(e). Service in a time of war authorizes discharged persons the right to wear the uniform only for ceremonial occasions. AR 670-1, para. 30-4b.

³ Additional limitations include attaining the age of sixty and having twenty or more years of service **or** the inability of earning a livelihood because of a service-connected disability. 24 USC § 412(a). Post-military activity may further limit eligibility, such as felony convictions or drug or alcohol dependency. 24 USC § 412(b).

⁴ Post cemeteries limit burial to retired members or honorably discharged members who have an immediate family member buried there. AR 210-190, paragraph 2-5a.(1), (8). Arlington limits burials to retired members or honorably discharged members who either were awarded certain decorations or have an immediate family member buried there. AR 290-5, para. 2-4b, d, j. At all other Army national cemeteries, honorable or general under honorable discharged members are eligible for burial. AR 290-5, para. 2-9b. Other VA-administered cemeteries may accept servicemembers discharged with an other-than-honorable or bad-conduct discharge. *See* VA-NCA-IS-1, Section III, paragraph 1a(2), Section IV, paragraph 1c. (Jan. 2011). Finally, convictions of certain offenses, including mutiny, aiding the enemy, or spying, prohibits burial at Army cemeteries, regardless of discharge. *See* 38 USC § 6105.

⁵ DRB will accept applications from former servicemembers discharged administratively or by sentence of a court-martial (other than a general court-martial). DoDI 1332.28 (Apr. 4, 2007), enclosure 2, para E2.1.1.

⁶ Limitations of allowances are based upon shortened service or characterization of service. 37 USC § 474(f)(2)(A)(ii); JFTR Ch. 7, Part T, para. U7465.

⁷ Authorized by a Service-designated authority who determines that a reasonable relationship exists between the conditions/circumstances in the specific case and the authorized destination. JFTR, Ch. 5, Part C, para. U5240-F.2, para. U5370-H.2. Limitations of allowances based upon shortened service. 37 USC § 476(a)(2)(A)(ii).

⁸ A Soldier involuntarily separated is not entitled to commissary or exchange privileges unless they were involuntarily separated between 1 October 2007 and 31 December 2012. These particular involuntarily separated Soldiers have commissary and exchange privileges for two (2) years from the date of separation. DoDI 1330.17 (Oct. 8, 2008), enclosure 4, para. 1(i).

⁹ A Soldier with more than one enlistment or period of service may still receive the GI Bill (Montgomery and Post-9/11) if the Soldier was previously separated honorably, even if the current separation is for less than honorable. VA Pamphlet 22-90-2 (Feb. 2011), Part I, page 2.

Other Agency Administered Benefits

Benefits	H	G	OTH	BCD	DD	Authorities
Civil Service Retirement Credit	E	NE	NE	NE	NE	5 USC §§ 8331(13), 8332(c),(d),(j)
Civil Service Preference	E	E	NE	NE	NE	5 USC §§ 2108(a)(1), 3309-3316, 3502, 3504
Unemployment Compensation	E ¹	E ¹	NE	NE	NE	5 USC §§ 8521-8525
Job Preference, Public Works ²	E	E	E	E	NE	42 USC § 6706
Farm Loan Preference	E	E	E	E	NE	7 USC § 1983(5); 38 USC §§ 101(2), (12), (18)
Rural Housing Loan Preference	E	E	E	E	NE	42 USC § 1477
Naturalization Benefits	E ³	E ³	NE	NE	NE	8 USC §§ 1439(a), 1440(a)(2); AR 635-200, para. 1-38
Social Security	E	E	E	E	E	42 USC § 417

¹ In addition to the characterization of service, the Soldier must either have completed the first full term of their initial enlistment or be separated under an early release program, medical issue, hardship, or personality disorder. 5 USC § 8521(a)(1). The State law under which the file is claimed determines the exact amount of benefits, duration, and other eligibility conditions. *Unemployment Compensation for Ex-servicemembers*, UNITED STATES DEPARTMENT OF LABOR (Nov. 19, 2009), <http://workforcesecurity.doleta.gov/unemploy/ucx.asp>.

² Limited to disabled and Vietnam era veterans. 42 USC § 6706(3).

³ Exceptions apply for those separated on account of alienage and those who were conscientious objectors and performed no military duty or refused to wear the uniform. 8 USC § 1440 (a)(2).

Strategies for Presenting Unavailable Witness Testimony in Courts-Martial

Lieutenant Steven M. Shepard*

I. Introduction

What should government counsel do when it appears likely that a government witness cannot (or will not) appear in person at the time and place set for a court-martial because of one of the reasons listed in Article 49, Uniform Code of Military Justice (UCMJ): poor health, military necessity, nonamenability to process, or other reasonable cause? This is a common, difficult problem. It has proven particularly common, and particularly difficult, in courts-martial involving offenses committed during the recent conflicts in Iraq and Afghanistan.¹ The problem was on display in the Staff Sergeant Robert Bales prosecution, in which Afghan witnesses were flown to Joint Base Lewis-McChord in preparation for trial.²

A solution to the problem of missing witnesses is to obtain and record the necessary testimony at a pre-trial Article 32 hearing or deposition and then play back the recording at trial, defeating any potential hearsay and Confrontation Clause defense objections by proving that the witness is unavailable for in-person testimony for one of the reasons listed in Article 49. The burden is on the government to prove that its witness is unavailable.³ But just what is the legal standard? What evidence, exactly,

must the government offer to prove that its witness is unavailable?⁴

II. Three Authorities on Unavailability: The Confrontation Clause, Article 49, and MRE 804

The standard for witness unavailability in courts-martial is found in three separate sources: the Sixth Amendment's Confrontation Clause; Article 49, UCMJ; and Military Rule of Evidence (MRE) 804(a).

A. Unavailability Under the Confrontation Clause: *Ohio v. Roberts*

The Sixth Amendment's Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The CAAF has held that this Clause, and the Supreme Court decisions interpreting it, apply in full to courts-martial.⁵ (Although the CAAF's reasoning on this point is hardly free from doubt,⁶ the doctrine appears settled.)

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¹ Compare Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12-34 (arguing that witness production difficulties contributed to making courts-martial "non-deployable"), with Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6-34 (rebutting Rosenblatt's conclusion but agreeing that witness production was difficult). See also Major John M. Hackel, *Planning for the "Strategic Case": A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239 (2009); Captain A. Jason Nef, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50; and Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, ARMY LAW., Nov. 2009, at 36.

² Adam Ashton, *Afghan Witnesses Visit Base to Prepare for Staff Sgt. Bales' Court-martial*, TACOMA NEWS TRIB., Mar. 13, 2013, <http://www.mcclatchydc.com/2013/03/13/185690/afghan-witnesses-visit-base-to.html#storylink=cpy> (last visited Sept. 26, 2013).

³ *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987). The government must carry this burden by a "preponderance of the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 104(a) (2012) [hereinafter MCM] (military judge's responsibility to determine "admissibility of evidence"); *id.* R.C.M. 801(e)(4) (rulings by military judge on interlocutory matters are based on preponderance of the evidence unless a specific provision of the Manual for Courts-Martial (MCM) provides otherwise).

⁴ There are two important limitations to note at the outset. First, this article does not include the issue of child victim-witnesses, who are in limited fact-specific instances permitted to testify by one-way closed-circuit television because of the traumatic effect that the accused's presence would have on them. That particular problem has already received extensive attention; the solution to it is (at least in theory) straightforward and well-established in the Rules for Courts-Martial (RCM). The procedures are found in Military Rules of Evidence (MRE) 611(d) and RCM 914A; the Court of Appeals for the Armed Forces (CAAF) has held that they comply with the Confrontation Clause. *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007). See also Major Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, ARMY LAW., Feb. 2013, at 4. This article instead focuses on adult witnesses who are capable of testifying but who are unavailable for other reasons. The second limitation is that this article's strategies should not be used in a capital case because depositions are not admissible in such cases. UCMJ art. 49 (2012).

⁵ See, e.g., *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010); *United States v. Magyar*, 63 M.J. 123 (C.A.A.F. 2006).

⁶ The CAAF's logic is far from self-evident because the Uniform Code of Military Justice (UCMJ) is an "[e]xercis[e]" of Congress's constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, sec. 8, cl. 14; *Solorio v. United States*, 483 U.S. 435, 438 (1987). The UCMJ trumps at least some other guarantees of the Sixth Amendment, including the right to trial by a civilian petit jury. *Reid v. Covert*, 354 U.S. 1, 37 (1957); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Ex parte Milligan*, 71 U.S. 2, 78 (1886). It is therefore at least arguable that, if the UCMJ were to conflict with the Supreme Court's interpretation of the Confrontation Clause, the UCMJ should control. Fortunately, as this article outlines, the Supreme Court's interpretation of the Confrontation Clause, set forth in *Ohio v. Roberts*, is not in direct conflict with the military's unavailability standard, but can instead be read in harmony with it.

The Supreme Court has held that this Clause bars the government from presenting any testimonial statement by an out-of-court witness, unless that witness is “unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination.”⁷ In *Ohio v. Roberts*, the Court defined unavailable in terms of the prosecution’s good faith: “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.”⁸ *Roberts* held that this standard was met (i.e., the prosecution proved that the witness was unavailable) because the prosecutor in that case sent five subpoenas to the witness’s last known address—her parents’ home—and the witness’s parents testified that they had not heard from her in over a year. *Roberts* remains the leading case on the meaning of unavailability for purposes of the Confrontation Clause.⁹

B. Unavailability Under Article 49, UCMJ

The military’s unavailability standard is found in Article 49, UCMJ, which is located in Part VII of the code. Despite Part VII’s name—Trial Procedure—Congress has not, in fact, created very many trial procedures, choosing instead to leave that task to the President.¹⁰ Article 49 (entitled Depositions) is a rare exception to that general rule. The fact that Congress wrote a specific Article on the issue of unavailability is rather remarkable,¹¹ and indicates how important Congress considered the issue of unavailable witnesses in courts-martial.

Article 49’s definition of unavailable is more specific than the Supreme Court’s general test of prosecutorial good faith. Paragraph (d) of Article 49 states:

A duly authenticated deposition . . . so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence . . . if it appears

(1) that the witness resides or is beyond the State, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, *military necessity*, *nonamenability to process*, or *other reasonable cause*, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.¹²

This article does not address the third subparagraph because missing witnesses are relatively uncommon in the military justice system. More common are courts-martial in which a witness is unavailable for a reason given in subparagraph (d)(1) or (d)(2).¹³

1. Subparagraph (d)(1)—Physical Distance from the Site of Trial

The plain meaning of subparagraph (d)(1) is that courts-martial should admit pre-trial depositions into evidence whenever the witness is physically located in another state or more than 100 miles from the site of trial. The subparagraph does not require the government to subpoena or even to invite the witness to participate. Distance alone decides the matter, according to the text of the statute. This plain

⁷ *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

⁸ *Ohio v. Roberts*, 448 U.S. 56, 74–75 (1980) (citing and quoting *Barber v. Page*, 390 U.S. 719 (1968)) (quotations and some punctuation omitted).

⁹ At issue in *Roberts* were two questions: (1) did the witness’s pretrial statement bear sufficient “indicia of reliability” that it could be admitted? and (2) was the witness really unavailable for trial? *Roberts*’s answer to the first question was later overruled by *Crawford v. Washington*, 541 U.S. 36, 54 (2004). But *Roberts* remains the controlling authority on the legal standard by which to judge whether a witness is truly unavailable. On this issue, *Crawford* had nothing to say and thus did not disturb the reasoning or the result in *Roberts*. See *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam) (quoting, analyzing, and applying *Roberts* to hold that the Illinois appellate court was not unreasonable in determining that the prosecution’s witness was unavailable); see also *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007) (applying *Roberts* to hold that the witness’s pre-trial hearsay statements were inadmissible because “the government’s decision to deport [the witness] . . . was not reasonable”).

¹⁰ UCMJ art. 36 (President may prescribe rules).

¹¹ Congress has not made any similar rule for the federal civilian courts, but has instead relied on the Supreme Court, and the Judicial Conference of the United States, to “prescribe” the rules, which then take effect automatically, seven months later, unless Congress acts to prevent any particular rule from taking effect. 28 U.S.C. §§ 2071–2077 (2013) (Rules Enabling Act).

¹² UCMJ art. 49 (emphasis added).

¹³ The leading case on missing witnesses and the unavailability exception is *United States v. Burns*, 27 M.J. 92 (C.M.A. 1988). *Burns* has been cited twenty-two times by later military courts, and just one of those citations came from a case with a witness who could not be located: *United States v. Hubbard*, 28 M.J. 27, 31 (C.M.A. 1989) (witness, an active-duty Soldier, went AWOL two weeks before trial and could not be found despite widespread search). A search of the Westlaw database confirms the lack of appellate cases on this issue. The Boolean search string “unavail! /s miss!” turns up zero hits in the sixty years since *United States v. Woodworth*, 7 C.M.R. 582 (A.F.B.R. 1952). In *Woodworth*, the defense conceded that the witnesses were unavailable because they were listed as missing in action.

meaning has been ruled a violation of “military due process.”¹⁴ “[T]he appellate courts do not give this provision the credence it appears to demand,” writes Colonel Mark Allred, USAF.¹⁵ “Indeed, they have ganged up on the verbiage and beaten it pretty well into oblivion.”¹⁶

Just as the courts eliminated subparagraph (d)(1), so, too, did the President’s rules of evidence. The subparagraph survived in the Manuals for Courts-Martial promulgated by Presidents Truman (1951) and Nixon (1969),¹⁷ but then disappeared in President Carter’s rewrite of the Military Rules of Evidence (1980).¹⁸ This disappearance may have been a response to the military appellate courts’ treatment of the subparagraph,¹⁹ or it may have been an oversight due to the drafters’ heavy reliance on the Federal Rules of Evidence (which contain no such 100-mile rule for witness availability).²⁰ Whatever the reason for the initial decision

to eliminate subparagraph (d)(1) from the military rules of evidence, this elimination has persisted in every subsequent revision of the rules.

Despite this negative treatment of Congress’s plain meaning in subparagraph (d)(1), trial counsel may wish to raise and preserve the argument for appeal. Doing so should be easy and risk-free in many cases in which trial counsel is also seeking to have a witness declared unavailable for one of the reasons listed in subparagraph (d)(2), such as military necessity or nonamenability to process.²¹

2. Subparagraph (d)(2)—Other Reasons for Unavailability, Including Military Necessity and Nonamenability to Process

Subparagraph (d)(2) instructs a court-martial to admit a pre-trial deposition into evidence if two conditions are met: (1) the witness “is unable or refuses to appear”; and (2) the reason for the witness’s inability or refusal is poor health, “imprisonment, military necessity, nonamenability to process, or other reasonable cause.”²²

Unlike subparagraph (d)(1), which has been ignored by the military rules of evidence, subparagraph (d)(2) is implemented by Military Rule of Evidence 804(a).

C. Unavailability Under MRE 804

Rule 804(a) permits pre-trial testimony to be admitted if any of Article 49(d)(2)’s reasons for unavailability are met—that is, pre-trial testimony may be admitted under Rule 804(a) if the witness:

- (1) has a “physical or mental illness or infirmity,”
- (2) if “process” has not sufficed to “procure” the witness’s “attendance,” or
- (3) if the witness is otherwise “unavailable within the meaning of Article 49(d)(2).”

He instructed the Working Group that it was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure, unless a substantial articulated military necessity for its revision existed, or, put differently, unless the civilian rule would be unworkable within the armed forces without change.

Id. at 13. See also Colonel George R. Smawley, *A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley*, 208 MIL. L. REV. 213, 277–78 (2011).

²¹ Those witnesses who are unavailable by reason of military necessity are also likely to be located over 100 miles from the site of trial.

²² UCMJ art. 49(d)(2) (2012).

¹⁴ In 1970, the Court of Military Appeals ruled that subparagraph (d)(1) violates “the right of confrontation as embodied in military due process,” and that in addition to physical distance from trial, the government must also prove “actual unavailability.” *United States v. Davis*, 19 C.M.A. 217, 224 (C.M.A. 1970); see also *United States v. Dieter*, 42 M.J. 697, 700 (A. Ct. Crim. App. 1995) (“[T]he ‘hundred-mile’ rule of Article 49(d)(1), UCMJ, is not an acceptable excuse when it comes to military witnesses.”). These rulings are ripe for reconsideration now that the military due process doctrine has been discredited, most recently by *United States v. Vazquez*, in which the CAAF described the doctrine as “an amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM. They do not.” 72 M.J. 13, 19 (C.A.A.F. 2013).

¹⁵ Colonel Mark L. Allred, *Depositions and a Case Called Savard*, 63 A.F. L. REV. 1, 12–13 (2009).

¹⁶ *Id.* See *Davis*, 19 C.M.A. at 224; *Dieter*, 42 M.J. at 700.

¹⁷ Both manuals were promulgated by executive order, and both contained a Chapter XXVII, entitled “Rules of Evidence”; this chapter, in turn, contained a Paragraph 145 entitled “DEPOSITIONS; FORMER TESTIMONY.” The first sentence of that paragraph read, in full: “See Article 49.” Nothing in the pages following that sentence suggested subparagraph (d)(1) was not to be seen along with the rest of the Article.

¹⁸ Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). This executive order was drafted by military lawyers from each armed force, working together as the Evidence Working Group of the Joint Service Committee on Military Justice. Their work was then reviewed and approved by others, including the General Counsel of the Department of Defense, prior to the President’s signature. MCM, *supra* note 3, Analysis of the Military Rules of Evidence, at A22-1. The 1980 executive order effected what the leading treatise on military evidence law describes as “a dramatic change.” I STEPHEN A. SALTZBURG, LEE D. SHINASI & DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL*, at xv (Matthew Bender & Co. 2006). A detailed description of the Evidence Working Group’s efforts may be found in an article written ten years later by a prominent member of that Group. Frederic L. Lederer, *The Military Rules of Evidence: Origin and Judicial Implementation*, 130 MIL. L. REV. 5 (1990).

¹⁹ See *supra* note 14 and cases cited therein.

²⁰ Lederer’s description of the Evidence Working Group does not mention Article 49 or depositions. See Lederer, *supra* note 18. But Lederer does describe the “marching orders” given to the group by its leader, Colonel Wayne Alley, U.S. Army.

Rule 804(a) also includes some additional reasons for unavailability, not expressly mentioned in Article 49(d):

- (1) if the witness is privileged from testifying;
- (2) if the witness is unable to remember the events in question; or
- (3) if the witness simply refuses the court's order to testify.

Just as Rule 804(a) adds to Article 49's list of reasons why a witness may be unavailable, so too does the Rule's next paragraph, 804(b), add to Article 49's list of what kinds of pre-trial testimony may be admitted. Although Article 49 mentions only pre-trial depositions, Rule 804(b) also includes in the list of acceptable substitutes for in-person testimony at trial, any pre-trial testimony at "the same or different proceeding," including the Article 32 hearing.²³ Because an Article 32 hearing must be conducted before any general court-martial, this hearing is the ideal time to capture testimony from witnesses who will be unavailable at trial for the reasons stated in Article 49(d) and Rule 804(a). The only question is—how can trial counsel prove that the witness is, in fact, unavailable at trial, even though the witness was available at a pre-trial deposition or an Article 32 hearing? That is the question addressed in the next Part of this article.

III. Three Dimensions of Unavailability in Courts-Martial: Good Faith, Timing, and Location

There are three dimensions of unavailability that trial counsel must prove. The first dimension is the government's good faith. Military courts have insisted that military prosecutors make good faith efforts to locate, invite, cajole, and (if necessary and possible) compel their witnesses to appear at the trial to testify in person—the same standard that the Supreme Court announced in *Ohio v. Roberts*.²⁴ But the precise requirements of good faith vary considerably depending on the reason for the witness's unavailability, as is described below in Part III.A.

The second dimension is the timing of trial. Military courts have examined the timing of trial and have asked why the trial must take place at the time set for it, rather than later, when the reason for unavailability has passed and the witness is again available. Delaying trial is a realistic option if the reason for unavailability is the witness's poor health or military necessity. The amount of delay required, and its costs and benefits, are estimated and weighed by the courts.

²³ If Article 32 testimony is read into evidence from a transcript, the transcript must be verbatim. MCM, *supra* note 3, MIL. R. EVID. 804(b)(1). As discussed further in Part IV, below, the better course is to obtain a high-quality video and audio recording.

²⁴ 448 U.S. 56, 74–75 (1980).

The third dimension of unavailability is the location of trial. Military courts have indicated that, in some cases, prosecutors must also show why the trial should occur in the place set for it, rather than in some other place, where the witness may be available. Moving a court-martial overseas, for example, could improve the availability of deployed and foreign witnesses.

A. The First Dimension of Witness Unavailability: The Government's Good Faith

The first dimension of unavailability in courts-martial is the government's good faith. This is the principle that *Ohio v. Roberts* announced,²⁵ but its application differs greatly depending on the reason for the witness's unavailability. This Section will consider this principle as applied to two of Article 49(d)(2)'s most common reasons for unavailability: military necessity and nonamenability to process.

1. Military Necessity: The Witness's Duties Must Be Important and Separate from Trial Considerations

When the reason for unavailability is military necessity, the first dimension the government must prove is the content and importance of the witness's military duty. Unfortunately, there is no opinion on this dimension from the highest military court, and the few opinions from the intermediate service courts of appeal do not give any explicit guidance as to what will and what will not be considered sufficient evidence.²⁶ The leading treatise is unhelpful.²⁷

Although the courts have not clearly explained their *theory*, it appears that in *practice* they have measured the government's actions by the standard of good faith. Specifically, the courts appear to have asked whether there is a legitimate and important military reason why the witness cannot be present—a reason that is separate from the

²⁵ *Id.*

²⁶ See *infra* notes 27–31 and cases cited therein.

²⁷ 2 SALTZBURG, SCHINASI & SCHLUETER, *supra* note 18, § 804.02[2][f]. This treatise cites, first, *United States v. Obligacion*, 37 C.M.R. 861 (A.F.C.M.R. 1967). But *Obligacion* concerned not the military necessity reason for unavailability, but rather the 100-mile physical distance reason, and even then, the court decided the case on an separate ground (namely, the court reversed because the defense did not, at the time of the pre-trial Article 32 testimony, have clear notice that the testimony was intended for use at trial). Second, this treatise cites *United States v. Chavez-Rey*, 49 C.M.R. 517 (A.F.C.M.R. 1974), *rev'd on other grounds* by 1 M.J. 34 (C.M.A. 1975). But *Chavez-Rey* concerns witnesses' absence from an Article 32 hearing, not from the trial itself. *Id.* at 519 (finding no error, in part, because the absent witnesses later "appeared at trial and were subjected to searching cross-examination"). Third, the treatise cites *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). But *Ledbetter*, like *Chavez-Rey*, concerns the absence of a witness from an Article 32 hearing, not the absence from *trial itself*, and, as in *Chavez-Reyes*, there was no assertion of military necessity. *Id.* at 43–44.

prosecution's desires to achieve a conviction, to reduce travel costs, and to avoid personal inconvenience to witnesses.

The government has prevailed under this standard in every published opinion, of which there are three.²⁸ In 1993, the Army Court of Criminal Review upheld the military judge's ruling that "two policemen were unavailable" because they were "in a distant theater of operations [Saudi Arabia] with hostilities imminent."²⁹ In 1992, the Air Force Court of Criminal Review found that a witness "was unavailable due to military necessity in that he was performing an essential military mission as an aircraft flight engineer in support of Operation Desert Shield."³⁰ And in 1979, the Coast Guard Court of Criminal Review agreed that the Commanding Officer of an icebreaker was unavailable as a witness because of an unexpected "order for his vessel to [conduct] emergency ice-breaking operations."³¹

Contrary to those three published decisions, an unpublished (and therefore non-precedential) 2005 decision of the Army Court of Criminal Appeals, *United States v. Campbell*, found that the government had not demonstrated a military necessity for its witness to be absent from trial, even though, at the time of trial (in North Carolina), the witness was on overseas deployment (in Colombia).³² But *Campbell* is different from the three published cases discussed above because in *Campbell*, the military necessity had a firm, imminent end-date: the witness was due to return from deployment just six weeks after the trial occurred. Thus, *Campbell* is best read as a case about the second dimension of unavailability—the timing of trial.

The UCMJ's legislative history supports the courts' practice of requiring a good faith military reason for the witness's absence. The issue was mentioned just once in the volumes of committee reports and hearings that preceded the UCMJ.³³ The mention occurred at the end of Felix Larkin's

testimony before Subcommittee No. 1 of the House Armed Services Committee, on the afternoon of Saturday, 26 March 1949. The very last question about Article 49 came from Representative Overton Brooks, the Chairman of the Subcommittee:

MR. BROOKS: May I ask you this question, Mr. Larkin: Under small 2 subsection (d) [of Article 49] what is meant by "military necessity?"

MR. LARKIN: I take it that covers the situation where there is a witness subject to the code, or military personnel who are on such an important military mission, or by virtue of military operations, that it is impossible in performing their duty to also be at the place of the trial. In that case it is permitted that their deposition be read at the trial.

MR. BROOKS: Of course, that could be badly abused if they wanted to.

MR. LARKIN: I suppose it is a question of the good faith in operating or administering it.

In sum, then, the three military appellate courts to issue published opinions on this point have applied a good-faith standard to witness absence due to military necessity, and have asked whether the absence is due to a legitimate, important military duty that is separate from the particular interests of the prosecutors. This standard comports with the available legislative history on this point. Under this standard, the government has usually prevailed.

2. *Nonamenability to Process: The Government Must Make a Good-Faith Effort to Invite and, If Necessary, to Compel the Witness to Attend*

This section describes what trial counsel must do to establish that a civilian witness is unavailable by reason of nonamenability to process. The general legal standard is, once again, good faith. But in this context, good faith requires more effort from trial counsel than previously seen in the military-necessity cases discussed above. The meaning of good faith is set forth in the leading case of *United States v. Burns*, which held that trial counsel must "exhaust[] every reasonable means to secure" a civilian

²⁸ A search of the Westlaw military-justice database for all decisions in which the terms "military necessity" and "witness" appeared returned 155 decisions (both published and unpublished), of which only five addressed the question. The three published opinions, and the unpublished *United States v. Campbell*, are discussed above in the text. The fifth opinion is very old, brief, and based on numerous errors, not just the lack of proven military necessity to justify the witnesses' absence: *United States v. Mulvey*, 27 C.M.R. 316, 318 (C.M.A. 1956).

²⁹ *United States v. Boswell*, 36 M.J. 807, 811 (A.C.M.R. 1993).

³⁰ *United States v. Marsh*, 35 M.J. 505, 509 (A.F.C.M.R. 1992).

³¹ *United States v. Kincheloe*, 7 M.J. 873, 877–78 (C.G.C.M.R. 1979).

³² *United States v. Campbell*, 2005 WL 6520466 (A. Ct. Crim. App. June 28, 2005).

³³ See generally INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 1950 (William K. Suter, ed., 1999). The House and Senate Committee Reports on the UCMJ described what Article 49 would accomplish, but did not specifically address the military necessity reason for unavailability. Instead, those reports simply stated that "[t]he admissibility

of a deposition is made dependent upon the need for its use at the time of trial." S. REP. NO. 486, at 22 (1949); H.R. REP. 491, at 25 (1949). Because a full discussion of the proper use of legislative history is beyond the scope of this article, this history is simply noted; left unaddressed is the question of precisely how binding or persuasive it is.

witness's "live testimony."³⁴ When the trial and the witness are both located in the United States, the *Burns* standard is relatively easy to understand because it is clear what means exist for trial counsel to exhaust. But when a trial or a witness is located overseas, the *Burns* standard becomes more difficult to understand because it is less clear what reasonable means are available to compel an unwilling witness.³⁵

Before claiming that a witness is unavailable by reason of nonamenability to process, trial counsel must first invite the witness to attend and offer to pay her expenses to do so.³⁶ If the witness is employed by the Department of Defense,³⁷ or even by another federal agency,³⁸ trial counsel should also ask the employer to compel the witness's attendance and should enlist the convening authority's personal assistance in this effort.³⁹

If the witness agrees to attend, then trial counsel must arrange travel. This can be difficult, especially if the witness is located abroad, is not a U.S. citizen, and the trial is set to occur in the United States. In that case, trial counsel must ensure that the witness is able to pass through customs or otherwise travel into the United States. These efforts may require high-level coordination between the Department of Defense and the Department of Homeland Security.⁴⁰

The sooner trial counsel makes these efforts to persuade and enable a witness to attend voluntarily, and the sooner trial counsel obtains the witness's refusal, the sooner trial counsel may turn to reasonable efforts to compel the witness.

³⁴ 27 M.J. 92, 97 (C.M.A. 1988).

³⁵ *Id.*

³⁶ *United States v. Crockett*, 21 M.J. 423, 427 (C.M.A. 1986) (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968)). "Often witnesses who cannot be compelled to appear can nonetheless be persuaded to do so." *Id.* at 427.

³⁷ MCM, *supra* note 3, R.C.M. 703(e)(2) (discussion) (civilian employees of the DoD "may be" directed by "appropriate authorities" to attend court-martial).

³⁸ In a recent case, the Food and Drug Administration (FDA) refused to compel one of its employees to travel from the United States to testify at a trial in Germany. The Army Court of Criminal Appeals held that the prosecutors' good-faith efforts to request agency cooperation were sufficient to render the witness unavailable. *United States v. Kitmanyen*, 2011 WL 5557420 (A. Ct. Crim. App. Oct. 31, 2011).

³⁹ *See id.* In *Kitmanyen*, the convening authority wrote a letter to the Commissioner of the FDA personally requesting assistance in compelling the witness's attendance. This level of effort likely played a role in the court's conclusion that trial counsel had satisfied the *Burns* standard of exhausting all reasonable means.

⁴⁰ In the *Bales* prosecution, the Army managed to fly six Afghan nationals directly to its base in Washington, not for the trial itself, but merely to prepare the witnesses for trial. *See Ashton, supra* note 2.

Here is the sequence of events if both the witness and the court-martial are located in the United States: If the witness refuses an invitation to attend the court-martial, then trial counsel must issue a subpoena and mail it to the witness. (This is as far as trial counsel got in *Burns*.) If mailing the subpoena fails, trial counsel must then cause the subpoena to be personally served on the witness.⁴¹ If the witness still refuses to comply with the personally served subpoena, trial counsel should bring the matter to the military judge's attention. The judge should then issue a warrant of attachment that authorizes law enforcement to seize, arrest, and transport the witness to the site of trial.⁴² With that warrant in hand, trial counsel may obtain the assistance of a law enforcement officer to execute the warrant, which means, in practical terms, to arrest the witness and bring him to the site of trial. Trial counsel may seek assistance from the U.S. Marshals Service,⁴³ the civilian agents of the Military Criminal Investigative Organizations, such as the Navy's Naval Criminal Investigative Service or the Army's Criminal Investigation Division,⁴⁴ agents of the service Inspector General,⁴⁵ or the local sheriff's office. If the witness still refuses to testify—even after he is arrested, brought to court, and placed on the witness stand—the military judge may then declare him unavailable.⁴⁶ All witnesses located in the United States are amenable to this process if the court-martial is also located in the United States.

⁴¹ MCM, *supra* note 3, R.C.M. 703(e)(2); *United States v. Burns*, 27 M.J. 92, 96–97 (C.M.A. 1988). The trial counsel in *Burns* failed to take this next step of causing the subpoena to be personally served on the witness.

⁴² MCM, *supra* note 3, R.C.M. 703(e)(2)(G)(i) (discussion). A warrant of attachment is the equivalent of an arrest warrant and must be issued by the military judge. Although the rule states that a warrant of attachment may be executed by any person who is at least 18 years old, by far the best practice is for trial counsel to arrange for someone with civilian arrest powers to execute the warrant.

⁴³ *See* 28 U.S.C. § 566 (2013) (U.S. Marshals "shall execute all lawful writs, process, and orders issued under the authority of the United States"). A 1981 letter from the Deputy U.S. Attorney General to the Director of the Marshal's Service stated that the U.S. Marshals are "authorized and obliged" to execute military warrants of attachment. Letter from Edward C. Schmults, Deputy U.S. Attorney General, to William E. Hall, Director, U.S. Marshals Service (Mar. 5, 1981) (on file with author).

⁴⁴ Congress has empowered the Service Secretaries to authorize the civilian agents of each service's investigative organization to "execute and serve warrants and other processes issued under the authority of the United States." 10 U.S.C. § 4027 (2013) (Army); *id.* § 7480 (Navy); *id.* § 9027 (Air Force). The Secretary of the Navy exercised this authority by issuing SECNAVINST 5430.107, which states: "[C]ivilian Special Agents are authorized to execute and serve any warrant or other process issued under the authority of the United States." U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6f (28 Dec. 2005), available at http://www.fas.org/irp/doddir/navy/secnavinst/5430_107.pdf.

⁴⁵ *United States v. Harding*, 63 M.J. 65, 66 (C.A.A.F. 2006) (stating the Inspector General of the Air Force could seize psychotherapy documents held by a civilian social worker pursuant to a warrant of attachment).

⁴⁶ MCM, *supra* note 3, MIL. R. EVID. 804(a)(2).

If either the witness or the trial is located abroad, however, then process is much more difficult. A casual glance at the Manual for Courts-Martial suggests that process to compel witnesses exists only if both the witness and the trial are located in the United States.⁴⁷ There is one exception to this general rule: U.S. citizens located overseas may be compelled by a subpoena issued by a federal district court under Section 1783 of Title 28.⁴⁸ The Supreme Court upheld this process in *United States v. Blackmer*, a unanimous decision that required a U.S. citizen living in Paris to provide evidence in a civilian criminal prosecution in the District of Columbia.⁴⁹ The Court reasoned:

By virtue of the obligations of citizenship, the United States retained its authority over [the witness], and he was bound by its laws made applicable to him in a foreign country. . . . [T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.⁵⁰

Although the Analysis section of the Manual claims that Section 1783 cannot be used in courts-martial, its reasoning is not persuasive.⁵¹

Trial counsel should—in keeping with *Burns*'s admonition to exhaust all reasonable means to secure the

witness's presence—apply to a U.S. district court to issue a subpoena to any uncooperative U.S. citizen witness located abroad. If the witness continues to resist, then trial counsel should attempt to effect lawful service of the subpoena,⁵² and once service is accomplished, should enforce the subpoena by moving the district court that issued the subpoena to seize the witness's assets in the United States.

To sum up, then, the first dimension of unavailability, good faith, requires trial counsel to make reasonable efforts to secure the witness's presence. If the reason for unavailability is military necessity, then the prosecution must establish that the witness's military duties are important and separate from trial considerations. If the reason for unavailability is nonamenability to process, then the prosecution must demonstrate, first, its efforts to invite and persuade the witness and then, second, its efforts to use all available process to compel the witness to attend.

B. The Second Dimension of Witness Unavailability: The Timing of Trial

The second dimension of unavailability is the date of trial. Even if a witness is unavailable on that date, a delay is always possible. Trial counsel must first estimate the length of the delay that would be necessary to produce the witness, and must then convince the court that the costs of that delay outweigh the benefits of the witness's in-court presence. Trial counsel must take these steps even if the defense has not requested a continuance for the purpose of obtaining the witness's in-court testimony.⁵³

The leading case on the timing dimension of unavailability is *United States v. Cokeley*, in which the civilian witness—the alleged victim of a rape—was unavailable for medical reasons: she was recovering from an emergency Caesarean section. The Court of Military Appeals reversed the conviction, holding that the military judge abused his discretion by admitting the civilian witness's pre-trial deposition into evidence. The military judge should have delayed the trial, the court held, until the witness's health improved so that she could travel to the

⁴⁷ Article 46 states, "Process issued in court-martial cases . . . shall run to any part of the United States, or the Territories, Commonwealths, and possessions." UCMJ art. 46 (2012) (emphasis added). The emphasized language suggests that a court-martial's "process" does not extend to any foreign country. See also MCM, *supra* note 3, R.C.M. 703(e)(2) (discussion); *id.* app. 21-38 ("[p]rocess in courts-martial does not extend abroad").

⁴⁸ The court may "order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783 (2013) (emphasis added). The emphasized portion of Section 1783 gives a U.S. district court the authority to issue a subpoena requiring a U.S. citizen, located abroad, to appear before a court-martial that is "designated" by the court. If the foreign-located witness ignores the district court's subpoena, then the district court may use the enforcement mechanism set forth in Section 1784, which permits it to confiscate any U.S.-based assets of the recalcitrant witness in order to exact a criminal fine of up to \$100,000. *Id.* § 1784.

⁴⁹ 284 U.S. 421 (1932).

⁵⁰ *Id.* at 436–38.

⁵¹ MCM, *supra* note 3, app. 21-38 (2012). The Analysis's sole authority for the proposition that Section 1783 does not apply is *United States v. Daniels*, 48 C.M.R. 655 (C.M.A. 1974). But *Daniels* is no authority at all because in *Daniels*, neither the prosecution nor the defense attempted to use Section 1783. *Id.* at 656–57. The only invocation of Section 1783 came in Judge Quinn's concurring opinion, in which he argued that Section 1783 does authorize federal district courts to compel U.S. citizens abroad to testify in courts-martial. *Id.* at 658.

⁵² See generally, *Service of Legal Documents Abroad*, TRAVEL.STATE.GOV, http://travel.state.gov/law/judicial/judicial_680.html (last visited Sept. 30, 2013) (describing various methods of serving U.S. legal documents on persons located in foreign countries). The U.S. rules do not require any particular method of service, but rather cite each other in an unhelpfully recursive loop. Compare 28 U.S.C. § 1783(b) (rules of service are to be found in the "Federal Rules of Civil Procedure"), with FED. R. CIV. P. 45(b)(3) ("28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.").

⁵³ Although defense did request a continuance in *United States v. Cokeley*, 22 M.J. 225 (C.M.A. 1986), there is no indication that the defense did so in the leading military necessity case, *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

court-martial to testify in person.⁵⁴ The most important fact to keep in mind about *Cokeley* is that the delay required was quite short: the victim's doctors estimated that she would be well enough to travel in just two or three weeks.⁵⁵ The *Cokeley* court stated a "preference for live testimony" and then gave a list of six factors that a military judge should consider in determining whether to delay the trial until a temporarily unavailable witness may testify in person:

The military judge must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony. Factors to be considered include [1] the importance of the testimony, [2] the amount of delay necessary to obtain the in-court testimony, [3] the trustworthiness of the alternative to live testimony, [4] the nature and extent of earlier cross-examination, [5] the prompt administration of justice, and [6] any special circumstances militating for or against delay.⁵⁶

One year after *Cokeley*, in *United States v. Vanderwier*, the Court of Military Appeals extended *Cokeley*'s six-factor test to the situation where a witness is unavailable because of military necessity.⁵⁷ In *Vanderwier*, the delay required was even shorter than the two or three weeks required in *Cokeley*; it appeared that a delay of just two days would have brought the witness back from training to testify in person; therefore, it was error for the military judge to find the witness unavailable and admit the witness's pre-trial deposition.⁵⁸

⁵⁴ 22 M.J. 225 (C.M.A. 1986). After giving a pre-trial deposition, the witness left South Carolina (where the alleged assault occurred and the court-martial was held) for Oregon, where she gave birth, by emergency Cesarean, on 1 November. Trial occurred on 12 December, after the military judge denied a defense request for continuance until the witness could travel.

⁵⁵ *Id.* at 227.

⁵⁶ *Id.* at 229.

⁵⁷ 25 M.J. 263 (C.M.A. 1987). In *Vanderwier*, the accused was the Commanding Officer of a frigate. He was convicted by a military judge, sitting as a general court-martial, of consensual sodomy with a Hospital Corpsman under his command.

⁵⁸ *Id.* The military witness at issue was the ship's Executive Officer, who was unavailable during three weeks in November while the ship was undergoing refresher training. The trial date was at first set for 14 November, during this training. But the trial was later continued at the defense's request until 28 November, and the deposition was admitted into evidence (over a defense hearsay objection) on 29 November. Although trial counsel represented to the military judge that the witness was still unavailable on 29 November (because the ship's training had taken longer than expected), the Court of Military Appeals found that the military judge abused his discretion by admitting the deposition into evidence. After reciting the *Cokeley* factors, the court noted: "Certainly, the record provides no explanation why trial could not have commenced earlier or concluded later so the temporary unavailability of the witness would not have necessitated resort to 'a weaker substitute for live testimony.'" *Id.* at

The appellate courts continue to cite the *Vanderwier/Cokeley* six-factor list, not only in medical-unavailability cases like *Cokeley*,⁵⁹ but also in military necessity cases. For example, in *United States v. Campbell*, the Army Court of Criminal Appeals found that the witness was not unavailable, even though the witness was on an overseas deployment in Colombia at the time of trial.⁶⁰ Here again, the delay required was relatively short: the witness was scheduled to return from deployment just six weeks after the trial took place.⁶¹

The *Cokeley/Vanderwier* standard can be met, especially if the delay is measured in months rather than in weeks. To meet this standard, trial counsel must do three things: (1) obtain and record high quality testimony; (2) develop evidence of the length of delay required to produce the witness for trial; and (3) develop evidence of the costs of that delay. Those three tasks will satisfy all six *Cokeley/Vanderwier* factors.

1. The Government Must Obtain High Quality Pre-Trial Testimony at the Article 32 Hearing or Deposition

High quality pre-trial testimony will satisfy three of the six *Cokeley/Vanderwier* factors: factor (1) "the importance of the testimony [at trial]"; factor (3), "the trustworthiness of the alternative to live testimony"; and factor (4), "the nature and extent of earlier cross-examination."⁶²

The term "high quality" refers not just to the quality of the audio and video recording (though that quality is important), but also to the quality of the defense's opportunity to cross-examine the witness. Counter-intuitively, a trial counsel is most effective in this regard when he is most solicitous of the defense. The defense should be given notice of who will testify; all relevant discovery needed to cross-examine these witnesses; and

267. The Court of Appeals affirmed the conviction despite the error, finding that the error caused no prejudice in the outcome of the judge-alone trial.

⁵⁹ See, e.g., *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007). In *Cabrera-Frattini*, the court held that "the military judge did not abuse his discretion by concluding that the Government made good faith efforts to procure the [juvenile] witness's presence for trial, concluding that [the witness] was unavailable [for reasons of mental health], and admitting [the witness's] videotaped deposition testimony." See also *United States v. Dieter*, 42 M.J. 697 (A. Ct. Crim. App. 1995) (finding an abuse of discretion to admit military witness's deposition where the witness was prevented from being present at trial only because of the birth of his child; there was no good reason why the trial could not have been continued until the witness was available to testify in person).

⁶⁰ *United States v. Campbell*, 2005 WL 6520466 (A. Ct. Crim. App. June 28, 2005). See discussion *supra* note 32.

⁶¹ See *Campbell*, 2005 WL 6520466, at *6.

⁶² *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986).

notice that the government intends to play back their testimony at trial.

Trial counsel should also consider whether to increase the quality of the testimony by administering a different oath. For non-U.S. citizens, trial counsel should not only administer both the standard Manual oath, but should also research and consider administering the standard oath typically used in the witness's country of residence.⁶³

By showing early solicitude toward the defense, and by administering an effective oath, trial counsel will convince the military judge that the pre-recorded testimony satisfies the relevant *Cokeley/Vanderwier* factors: factor (1) is met because high-quality recorded testimony means that in-court testimony is not as important; factor (3) is met because high-quality recorded testimony is trustworthy; and factor (4) is met because the defense was given the time and notice required to prepare for cross-examination.

2. *The Government Must Prove That a Lengthy Delay Would Be Required Before the Witness Is Available*

In addition to obtaining high quality testimony, trial counsel should also develop evidence for *Cokeley/Vanderwier* factor (2)—the length of delay required. This factor weighed heavily in *Cokeley* (a delay of just two to three weeks would have sufficed to permit the witness to be present in person), *Vanderwier* (a delay of just a few days), and *Campbell* (only a six week delay).

3. *The Government Must Prove the Costs of the Required Delay*

Finally, and perhaps most importantly, trial counsel should develop evidence of the costs of delay. The fifth *Cokeley/Vanderwier* factor—the need for prompt administration of justice—is a fact that can be proved through evidence and is not just a point to be argued at a motions hearing. This proof can take various forms. Is the unit about to deploy? If so, then a delay would require witnesses to travel back to the site of trial, increasing costs. Is the pending court-martial affecting the unit's morale or performance? If so, then delay will continue those strains. Has the crime affected the military's standing at home or, even more important, in a COIN environment? If so, then delay may carry costs to the military's reputation—a concern that is especially important in strategic cases conducted during COIN efforts.⁶⁴

⁶³ Federal courts have relied on the use of an effective oath when admitting into evidence pre-trial depositions of foreign nationals. Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1607 & n.159 (2007) (listing cases).

⁶⁴ Hackel, *supra* note 1.

In sum, the second dimension of unavailability—the timing of trial—is satisfied if the government obtains high-quality pre-trial testimony, demonstrates the significant delay required for the witness to become available, and proves the detrimental costs (in terms of money, effort, or reputation) that delay would cause.

C. The Third Dimension of Witness Unavailability: The Location of Trial

The location of trial is the third dimension of unavailability. Even if a witness is unavailable at the place set for trial, that place could change because courts-martial, unlike civilian trials, are mobile. This third dimension of unavailability was illustrated in the recent, high-profile court-martial of Navy Special Warfare Operator 2 (SO2) Matthew McCabe, USN.⁶⁵ Navy SEAL McCabe was court-martialed (and acquitted) in Norfolk, Virginia, on the charge of maltreating an Iraqi detainee. The detainee was the key government witness, but the Iraqi government would not permit him to leave that country to testify in the United States. For that reason, the trials of SO2 McCabe's two co-accused took place in Fallujah, Iraq, so that the detainee could testify in person. McCabe's court-martial occurred in Norfolk, Virginia, after he waived his right to confront the detainee in person. Trial counsel left the location of the court-martial up to the defense: if the defense had wanted the detainee to testify in person, then the court-martial would have been held in Iraq; because the defense waived that right, the trial was instead held in Norfolk, Virginia.⁶⁶

The Rules for Courts-Martial contemplate that a trial may relocate. Although one provision of the rules authorizes the Convening Authority to “designate,” in his Convening Order, “where the court-martial will meet,”⁶⁷ another provision permits the military judge to change that location “to prevent prejudice to the rights of the accused.”⁶⁸

The typical defense request to relocate is not based on witness availability. Instead, the typical request is based on an accused's fear that pretrial publicity has created “so great a prejudice against [him] that [he] cannot obtain a fair and

⁶⁵ See, e.g., Steve Centanni, *Prosecution Rests in Navy SEAL Matthew McCabe's Court Martial*, LIVESHOTS, FOXNEWS.COM (May 5, 2010), <http://liveshots.blogs.foxnews.com/2010/05/05/prosecution-rests-in-navy-seal-matthew-mccabes-court-martial>.

⁶⁶ *Id.*

⁶⁷ MCM, *supra* note 3, R.C.M. 504(d). “A convening order for a general or special court-martial shall designate the type of court-martial and detail the members and may designate where the court-martial will meet.” *Id.* (emphasis added).

⁶⁸ *Id.* R.C.M. 906(b)(11). “The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are prejudiced thereby.” *Id.*

impartial trial.”⁶⁹ But although this is the typical reason for requesting a change of venue, it is not the only reason for doing so. The CAAF has indicated that the venue-change provision is also available to an accused who seeks to bring the court-martial nearer to a witness to make that witness available to testify.⁷⁰

Because the location of trial appears to be the least litigated of the three dimensions, the legal standard—including the burden of proof—is not completely clear. On the one hand, as described above, the appellate courts have stated that the government bears the burden to prove the unavailability of its witnesses.⁷¹ On the other hand, the courts have also held that the defense bears the burden to show the need for relocation, at least in those cases where the reason for the move is pre-trial publicity.⁷² While the government has the burden to show that its witness is unavailable, this burden is relatively easy to meet when it comes to the third dimension of witness unavailability—the location of trial. The government may meet its burden simply by showing the high costs of relocation.

That standard is consistent with the leading case of *United States v. Crockett*, in which the Court of Military Appeals approved the military judge’s decision to admit pre-trial videotaped depositions of two government witnesses. The court-martial was convened in Germany, and these two witnesses were U.S. citizens living in Florida.⁷³ No subpoena power exists to compel U.S. citizens to travel from the United States to a court-martial overseas.⁷⁴ *Crockett* based its holding on the high costs of relocating the court-martial from Germany to Florida.⁷⁵

⁶⁹ *United States v. Loving*, 41 M.J. 213, 254 (C.A.A.F. 1994) (quoting discussion to RCM 906(b)(11)).

⁷⁰ *United States v. Sutton*, 42 M.J. 355, 356 (C.A.A.F. 1995). In *Sutton*, the court-martial was convened in Nevada and one government witness was located in Honduras. That witness refused to travel to the court-martial, and no process was available to compel him to attend. The military judge ruled him unavailable for the purpose of admitting his pre-trial statements against penal interest. The accused objected to admitting these pre-trial statements, but did not then specifically request that the trial be moved to Honduras. Rather than resolve the question of whether the witness’s pre-trial statement was inadmissible because the witness could have become available if the court-martial had moved, CAAF instead moved straight to a prejudice analysis, holding that any error was harmless. *Id.*

⁷¹ *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

⁷² *E.g.*, *United States v. Cook*, 1996 WL 927694, at *2 (N-M. Ct. Crim. App. July 31, 1996). “The appellant had the burden of establishing by a preponderance of evidence that, without the change of venue, he could not get a fair trial.” *Id.*

⁷³ *United States v. Crockett*, 21 M.J. 423, 427–30 (C.M.A. 1986).

⁷⁴ *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982).

⁷⁵ *Id.*

[M]oving the court-martial to Florida would have required the expense, effort, inconvenience, and delay of transporting from Europe to the United

Crockett demonstrates that the third dimension of military necessity—the place of trial—should be relatively easy for the government to establish, at least when the necessary relocation is across national borders. Nevertheless, government counsel should still take at least two precautions. First, the Staff Judge Advocate should ensure that the Convening Authority exercises his authority to designate the place of trial (either in the referral block of the charge sheet or in the convening order).⁷⁶ Second, trial counsel should gather evidence of the costs of relocating the trial to be near the unavailable witnesses. Such evidence may vary considerably. In a strategic case, trial counsel may present testimony about how the court-martial’s designated location in theater would benefit counter-insurgency efforts. In other cases, as in *Crockett*, the evidence may simply be a calculation of the costs of moving other witnesses and trial personnel.

IV. Steps to Prepare for a Court-Martial in Which Government Witnesses Will Be Unavailable

This next part of the article distills the legal analysis above into a specific list of action items for the three officers who are likely to be involved in a prosecution involving witnesses who are unavailable because of military necessity: the Staff Judge Advocate (SJA); the Article 32 Investigating Officer (IO);⁷⁷ and the trial counsel (TC).

These officers should use the Article 32 investigation to (1) record high-quality testimony for use at trial, and (2) gather the evidence needed to prove the three dimensions of unavailability by reason of military necessity. These two purposes are appropriate under Article 32 and RCM 405.⁷⁸

States the court members, judge, counsel and supporting court personnel. Moreover, unless these same persons were transported back to Europe for the remainder of the trial, it also would have been necessary to take the other witnesses—eight civilian and three military—from Germany to Florida. The Government would have been obligated to feed and house everyone while they were enroute and in Florida. Because any military personnel transported to Florida would have been away from their regular duties for several additional days and would not have been available in Germany for any emergencies, even the mission of their military units might have been adversely affected.

Id.

⁷⁶ MCM, *supra* note 3, R.C.M. 504(d).

⁷⁷ Beginning 1 December 2013, the Secretary of Defense has ordered that all Article 32 investigating officers in cases of sexual offenses be judge advocates. Memorandum from Sec’y of Def. Chuck Hagel (Aug. 14, 2013), available at <http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf>.

⁷⁸ Rule 405 empowers the convening authority to “give procedural instructions” to the investigating officer, and also authorizes the investigating officer to “inquire into such other matters as may be necessary

The Article 32 investigation is a cheap, flexible, powerful tool to obtain evidence. The IO may obtain sworn testimony over as many days as he wishes, and in whatever location he wishes.

One important caution at the outset: although the IO and the SJA can and should play a leading role in obtaining the resources needed (including, most importantly, the space, personnel, and equipment needed to obtain a high-quality recording), these two officers should take care to remain impartial and independent on the issues of the accused's guilt and the unavailability of any witnesses. Failure to appear impartial on these issues could allow the accused to re-open the Article 32 investigation,⁷⁹ or could disqualify the SJA from later providing post-trial advice to the Convening Authority.⁸⁰

This article now turns to the specific actions that are required to put the Article 32 solution into practice. The basic "how to" of taking depositions is provided in RCM 702; that rule should be followed to the letter when obtaining any Article 32 testimony that is intended for later use at trial.⁸¹ Counsel should also read Colonel Allred's account of the *Savard* trial, in which he presided as military

to make a recommendation as to the disposition of the charges." MCM, *supra* note 3, R.C.M. 405(c). Article 32 itself provides, in paragraph (a), that the investigating officer may "include" a "recommendation as to the disposition which should be made of the case in the interest of justice and discipline." The phrase "recommendation as to the disposition," as used both in the statute and the rule, may be read to encompass not only the charges referred and the forum, but also the place and time that the court-martial should take place, and the witnesses available to take part in that place and time. All these concerns are central to "disposition" of the case in a particular court-martial. *Id.* R.C.M. 405(e).

⁷⁹ See, e.g., *United States v. Foley*, 37 M.J. 822, 831 n.9 (A.F.C.M.R. 1993) (collecting cases on the impartiality required of an Article 32 Investigating Officer).

⁸⁰ Article 6(c), UCMJ, forbids anyone who has acted as a trial counsel or investigating officer in any case from later serving as the SJA to any "reviewing authority" in that case. This provision has been interpreted to guarantee the accused the right to "a fair and impartial post-trial recommendation by one 'free from any connection with the controversy.'" *United States v. McCormick*, 34 M.J. 752, 755 (N.M.C.M.R. 1992) (quoting *United States v. Metz*, 36 C.M.R. 296, 297 (1966)). When giving pre-trial advice, the SJA has greater latitude to appear biased in favor of the prosecution, because pre-trial advice is given in a "prosecutorial context," subject only to Article 35(a)'s requirement that the advice be legally competent and accurate. *United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979); see also *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (re-affirming *Hardin*'s limitation of Article 6(c) to post-trial advice). However, the prudent course for the SJA is to avoid any action, pre-trial, that would create even the "perception of partiality." FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, *COURT-MARTIAL PROCEDURE* § 10-23.00 (2006). By following that course, the SJA will avoid any action that may create an appearance of prosecutorial bias that would disqualify him from later giving post-trial advice when the convening authority reviews the case to take action.

⁸¹ MCM, *supra* note 3, MIL. R. EVID. 804(b)(2) permits depositions to be admitted into evidence at trial if they have been "taken in compliance with the law." The only relevant law appears to be RCM 702. See Allred, *supra* note 15.

judge, and in which the government obtained numerous video depositions, most of which later proved unusable because of poor recording technology.⁸² In addition to RCM 702's basics, here is a list of other tasks that the government should accomplish to obtain evidence that will be admissible at trial.

1. *Anticipate when and where the court-martial is likely to be held.* All three dimensions of unavailability depend on the date and location of trial, especially if there is any chance that the court-martial will be held overseas. A witness may be unavailable if the trial is held in California, but available if held in Naples, Italy, for example. Therefore, the SJA should, in consultation with the Convening Authority, decide on a tentative date and place. These decisions should be subject to reconsideration later, upon receipt of the IO's report. But it is essential to make a good first guess at the answer in order for TC to develop the necessary evidence of unavailability.

2. *In writing, request defense counsel be detailed as soon as possible; specifically request defense counsel with a schedule (and a security clearance) that can support the Article 32 solution.* Defense counsel may object to the Article 32 solution by claiming that they lacked sufficient time to prepare a cross-examination. The sooner the convening authority requests defense counsel, the less force this argument will have. Because some defense offices will not detail counsel until charges are preferred, prefer the charges as soon as possible, even if the charges may need to be amended later.⁸³

The request for defense counsel should go beyond the typical, bare-bones format of such requests, and should also describe the convening authority's intent to use the Article 32 hearing to obtain testimony for use at trial. The request should specifically ask for defense counsel whose schedule will permit the necessary preparation prior to the Article 32 hearing. If operational security concerns are one potential factor in military necessity arguments, be sure to request a defense counsel with the appropriate security clearance.

3. *Give the defense clear, early notice that the Article 32 testimony may be used at trial.* The case law on the unavailability exception makes clear that defense counsel must be given the same motive to cross-examine the witnesses at the Article 32 hearing as the defense counsel

⁸² Allred, *supra* note 15.

⁸³ The first charge sheet preferred need not charge every conceivable offense. If additional offenses are uncovered during the course of the Article 32 investigation, they may be added later, without the need for an additional Article 32 investigation, as long as they were investigated during that Article 32 hearing. UCMJ art. 32(d) (2012); see *United States v. Diaz*, 54 M.J. 880, 883 (N-M. Ct. Crim. App. 2000) (stating that even though charges were unsworn at the time of the Article 32 investigation, that error did not require a new investigation).

would have at trial.⁸⁴ Giving written notice to defense counsel well in advance of the Article 32 hearing will satisfy this requirement, despite the outdated and erroneous commentary to the contrary in the Manual for Courts-Martial's Analysis of the Military Rules of Evidence.⁸⁵ One logical place to give this notice to the defense is in the Article 32 Appointing Order. In the interests of basic fairness, the government should also provide the defense with an equivalent opportunity to use the Article 32 process to obtain and record trial-ready testimony from any defense witness who may be unavailable at trial.⁸⁶

4. *Provide defense discovery.* As soon as possible, trial counsel should provide the defense with (1) a list of all witnesses the government intends to call, and those witnesses' contact information,⁸⁷ and (2) all discovery that may be relevant to cross-examining the witnesses, especially any previous statements made by them.⁸⁸

5. *Plan for the accused to be present at all Article 32 hearings.* Unless he proves disruptive, the accused has a right to be physically present at any deposition or Article 32 hearing.⁸⁹ If the accused is in pre-trial confinement, plan to move him to the location(s) of the Article 32 hearing(s).

6. *Appoint a competent reporter with access to high-quality recording equipment.* The Convening Authority may appoint anyone as reporter of an Article 32 hearing,⁹⁰ so

long as the person is properly sworn and is not disqualified by prior involvement in the case.⁹¹ This appointment may be the single most important factor to the success of the Article 32 solution, because without high-quality video and audio footage, the exercise will be much less useful at trial. The SJA should take the lead in finding and appointing a member of Combat Camera or a similar organization with experience in obtaining professional video footage in unusual places. Previous experience as a court reporter is far less important than is familiarity with and access to the right equipment (including cameras, multiple microphones, and lighting). The IO should swear in the reporter at the beginning of the hearing.⁹²

7. *Appoint a flexible IO who can travel as needed.* The SJA should have many candidates to choose from: any officer with legal training, or any line officer in the grade of O-4 or higher, may serve as IO,⁹³ he may be appointed by any Convening Authority (even a Convening Authority who is only empowered to convene summary courts-martial).⁹⁴ There is nothing to prevent the SJA from selecting an IO on the basis of his or her availability to gather evidence for use at trial.

8. *Inform the witnesses of the plan as soon as possible and persuade civilians to participate.* The IO should immediately take ownership of the process of obtaining witnesses and scheduling the hearings. Witnesses may need time to prepare themselves and their schedules for travel.

Voluntary participation is much quicker and easier than compelling an unwilling witness, so the IO should use all powers of persuasion to convince civilians to participate

⁸⁴ MCM, *supra* note 3, MIL. R. EVID. 804(b)(1); United States v. Taplin, 954 F.2d 1256, 1259 (6th Cir. 1992) (testimony by witness at pre-trial hearing on motion to suppress not admissible at later trial because defendant did not have same motive to cross-examine at the pre-trial hearing as he would have had at trial).

⁸⁵ MCM, *supra* note 3, App. 22, at A22-58. The MCM's non-binding Analysis claims that if defense counsel, at the Article 32 hearing, announces that she is "limiting cross-examination" for some reason, then that announcement will cause the testimony to be inadmissible at a later trial under MRE 804(b)(1). It is this author's opinion that the MCM's Analysis is wrong. United States v. Connor, 27 M.J. 378, 388 (C.M.A. 1989) ("[A]s we interpret the requirement of 'similar motive,' if the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of Mil. R. Evid. 804(b)(1) and of the Sixth Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."). For an account of how the Analysis came to be drafted, see Lederer, *supra* note 18, at 24-26.

⁸⁶ Giving the defense an opportunity to use the Article 32 process to obtain and record the testimony of its witnesses will demonstrate fairness and good faith on the part of the government. *Cf.* United States v. Crockett, 21 M.J. 423, 430 (C.M.A. 1986) (finding no Sixth Amendment violation, in part, because the prosecutor's use of videotape showed good faith).

⁸⁷ MCM, *supra* note 3, R.C.M. 702(e).

⁸⁸ *Id.* R.C.M. 702(g)(1)(B).

⁸⁹ *Id.* R.C.M. 702(g); United States v. Jacoby, 11 C.M.A. 428, 433 (C.M.A. 1960) (holding that the accused has the right to be physically present at the taking of deposition).

⁹⁰ Rule for Court-Martial 502(e)(1) states that the qualifications for "reporter" may be prescribed by the Secretary. MCM, *supra* note 3, R.C.M.

502(e)(1). The Secretaries have done so for "court reporters." *E.g.*, U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5700.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL para.0130(d) (26 June 2012) [hereinafter JAGMAN]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 25 (3 Oct. 2011). But the Secretaries have not done so for reporters of Article 32 hearings. *See* JAGMAN, *supra*, para. 0130 (describing qualifications for court reporter but not Article 32 reporter); U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32B INVESTIGATING OFFICER (16 Sept. 1990) (not prescribing qualifications for Article 32 reporter). In the absence of secretarial action, the Convening Authority may exercise his own judgment on this matter. MCM, *supra* note 3, R.C.M. 501(c) (reporters "may be detailed or employed as appropriate").

⁹¹ *See* MCM, *supra* note 3, R.C.M. 702(f)(4) (oath required); *id.* R.C.M. 807 (content of oath); *id.* R.C.M. 502(e)(2) (listing grounds for disqualification as reporter).

⁹² *Id.* R.C.M. 702(f)(4) (oath required); *id.* R.C.M. 807 (content of oath); *cf.* DD Form 456 (reporter's oath).

⁹³ Beginning 1 December 2013, the Secretary of Defense has ordered that all Article 32 investigating officers in cases of sexual offenses be judge advocates. Memorandum from Sec'y of Def. Chuck Hagel (Aug. 14, 2013), available at <http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf>.

⁹⁴ MCM, *supra* note 3, R.C.M. 405(c); JAGMAN, *supra* note 90, para.120(c).

voluntarily. The SJA should work with the IO to compensate these witnesses for their time and any travel costs, and, if necessary and possible, the IO should offer to relocate the hearing to minimize the need for reluctant witnesses to travel.

9. *Use process to compel unwilling witnesses to attend a pre-trial deposition.* If the unwilling witness is located in the United States, or is a U.S. citizen located abroad, then see the discussion above on the process to compel attendance at trial. That process is the same for a pre-trial deposition, with the important exception that the Convening Authority plays the part of the military judge and issues the subpoena and warrant of attachment, if those are necessary.⁹⁵

If the witness is a non-U.S. citizen located abroad, then the IO may use host-country process to compel attendance, if any such process is available. If the host country has signed a Mutual Legal Assistance in Criminal Matters Treaty (MLAT) with the United States, then the IO should consider sending a formal request for assistance to the host country. The request should be sent, via the Convening Authority, to the U.S. Central Authority for such matters.⁹⁶ U.S. civilian courts will admit into evidence the pre-trial depositions of foreign nationals, obtained using foreign court procedures and personnel, so long as those foreign procedures are similar to U.S. practice.⁹⁷

10. *Administer culturally specific oaths.* Trial counsel should always administer the standard oath provided in the Manual. But for foreign witnesses, trial counsel should research and administer a second, culturally specific oath that is tailored to the host country. Trial counsel should discuss the oath's significance with the witness on the record to provide further evidence of the testimony's reliability.⁹⁸

11. *Prove all three dimensions of unavailability.* With an eye on the case law analyzed above, TC should obtain evidence, from the witnesses and from their chains of command, of all three dimensions of unavailability.

⁹⁵ Article 49 authorizes the CA to issue a subpoena to compel the witness's attendance at a pre-referral deposition. UCMJ art. 49(a); MCM, *supra* note 3, R.C.M. 702(b). The Investigating Officer then takes the steps required to serve the subpoena on the witness. *Id.* R.C.M. 702(f)(2). If the witness still refuses, the Convening Authority may issue a warrant of attachment. *Id.* R.C.M. 703(e)(2)(G).

⁹⁶ The U.S. Central Authority is currently the U.S. Department of Justice, Criminal Division, Office of International Affairs. See 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 962.1 (2012), available at <http://www.state.gov/documents/organization/86744.pdf>.

⁹⁷ "If the defendant had a previous opportunity to question the witness . . . through the assistance of foreign courts with similar procedures, no violation of the Confrontation Clause results when that hearsay testimony is admitted at the defendant's trial." *Sixth Amendment at Trial*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 663, 684, n.2032 (2011) (collecting cases).

⁹⁸ See Tokson, *supra* note 63, at 1607.

If the reason for unavailability is military necessity, then TC should obtain evidence of: (1) the content and importance of the witness's military duties at the anticipated time of trial; (2) the length of delay until those duties cease; (3) the costs of delaying trial for that amount of time; and (4) the costs of relocating the trial to be closer to the witness.

If the reason for unavailability is the witness's nonamenability to process, then trial counsel should elicit the witness's testimony regarding trial counsel's efforts to persuade the witness to attend the court-martial voluntarily, and the witness's refusal to do so. Separately, trial counsel should also present evidence of the costs of re-locating the court-martial to a place where the witness would be willing to attend or be subjected to compulsory process.

In obtaining this evidence of unavailability, the military rules of evidence need not be followed.⁹⁹ Evidence relating to unavailability will be used by the military judge and appellate courts.

12. *Plan for evidentiary rulings that the Military Judge will later have to make.* Most of the rules of evidence do not apply during the Article 32 hearing. The IO should not exclude evidence based on these inapplicable rules, but he and the trial counsel should prepare for the military judge to do so later, before the testimony is admitted at trial. In particular, counsel should anticipate a pre-trial Article 39(a) hearing, in which the military judge will rule on which parts of the Article 32 recording are admissible and which are not. After that ruling, counsel will have to edit the recording to remove the inadmissible parts, a task which can quickly become a "nightmare."¹⁰⁰

To avoid the nightmare, counsel should plan, at the Article 32 stage, for the likely areas to which one party may later object. These areas of testimony should be obtained in separate, stand-alone segments that may be cut out of the videotape without making the rest of the testimony impossible to follow.

For example, suppose a witness heard the victim talking excitedly about the assault he had just suffered. Trial counsel will want to obtain the witness's testimony as to what the victim said, and introduce it at trial using the excited utterance exception to the hearsay rule.¹⁰¹ But it is possible that the military judge will rule that the victim's statement was not, in fact, an excited utterance. Trial counsel should prepare for this possibility at the Article 32

⁹⁹ MCM, *supra* note 3, MIL. R. EVID. 104(a) (military judge's responsibility to determine admissibility of evidence); *id.* R.C.M. 801(e)(4) (rulings by military judge on interlocutory matters are based on preponderance of the evidence unless a specific provision of the MCM provides otherwise).

¹⁰⁰ Allred, *supra* note 15, at 16 (quoting *United States v. Vanderwier*, 25 M.J. 263, 264 (C.M.A. 1987)).

¹⁰¹ MCM, *supra* note 3, MIL. R. EVID. 803(2).

stage by planning the witness's direct examination in such a way that, if the judge later rules this part of the testimony inadmissible, it can be easily edited out, and what remains will still make sense to the court-martial panel who hears it at trial.

13. *Prepare a verbatim transcript.* A transcript will enable the military judge to rule clearly on any objections to portions of the Article 32 testimony, and will allow TC to edit the recordings in keeping with the judge's ruling.¹⁰² If any portions of the audio are hard for the court-martial members to understand, then a verbatim transcript may be read into evidence.¹⁰³

14. *Authenticate the recording and the transcript.* The investigating officer and the reporter should review the video and audio recordings, the transcript, and should authenticate them using the language provided in DD Form 456.

15. *Include the Investigating Officer's conclusions in the Article 32 report.* The Investigating Officer should describe the evidence presented regarding the three dimensions of unavailability for each witness.¹⁰⁴

16. *Give the IO clear instructions in the Appointing Order.* The Appointing Order is an ideal place to summarize the foregoing objectives, and to give all parties (including, if necessary, any reluctant witnesses and host-country authorities) clear notice of what is happening and why. Include language in the Appointing Order along the following lines:

It is anticipated that trial in this case will occur on [date], at [location]. Your investigation should evaluate whether any relevant witnesses, for the prosecution or the defense, will be unavailable for in-person testimony at that time and place. In making this evaluation, you should gather evidence related to the reasons for unavailability. If the reason for unavailability is military necessity, then you may gather evidence of the witness's military duties, and the timing of those duties, from both the witness and from relevant members of the witness's chain of command. (If operational security concerns are present, this portion of your

¹⁰² Allred, *supra* note 15.

¹⁰³ MCM, *supra* note 3, R.C.M. 804(b)(1) (hearsay exceptions, former testimony); UCMJ art. 49 (2012) ("A duly authenticated deposition . . . may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence. . ."). See also MCM, *supra* note 3, R.C.M. 901–903 (authentication and identification).

¹⁰⁴ See MCM, *supra* note 3, R.C.M. 405(j) (report of investigation).

report may be classified at the appropriate level, in coordination with the Staff Judge Advocate, ____.)

If it appears that any witness will be unavailable at the date and location specified, then you should also gather evidence of the benefits (in terms of good order and discipline, the credit of good service, and the fairness of the court-martial process) that would accrue as a result of conducting a trial at the anticipated date and location, and evidence of the costs of any delay or relocation of the trial that would be required to render the witness available for in-person testimony.

Finally, if it appears that any relevant witness (whether for the prosecution or the defense) will be unavailable at trial, you should obtain a high-quality video and audio recording of that witness's testimony for use at trial, in which both parties are afforded a full and fair opportunity to examine the witness.

If witnesses decline to participate in your investigation voluntarily, and if their testimony appears relevant, you are authorized to use any lawful process to compel these witnesses' participation. If a declining witness is a U.S. citizen, you may apply to me for a subpoena, pursuant to my authority under Article 49 and RCM 702(b). If a declining witness is a foreign national, you are authorized to seek the cooperation of host-country authorities, and to work as closely as possible within host-country procedures, to obtain the witness's testimony. Should you need to request assistance through a Mutual Legal Assistance in Criminal Matters Treaty (MLAT), your request to the U.S. Central Authority shall be sent via the SJA's and my office.

In addition to the standard oath prescribed in the Manual for Courts-Martial, you are also authorized to administer to foreign nationals any other oath appropriate to their nationality, culture, or religion.

You may take testimony in as many hearings, and in as many different locations, as you determine to be necessary. You must give the accused and his counsel reasonable written notice of the time and place of each hearing.

The hearings should be completed no later than ____, and your report provided to me no later than _____. Authority to extend those dates is not delegated. If an extension is necessary, a request should be submitted to me in writing at the earliest possible time.

17. *Have the Convening Authority direct the time and place of the court-martial.* Once informed by the Investigating Officer's report, the Convening Authority should consider giving specific instructions to the court-martial in his convening order and the referral block of the charge sheet.¹⁰⁵

Specifically, the Convening Authority should consider: (1) directing that the trial be held within a particular time-frame, and giving his reasons why; (2) directing that the trial be held in a particular place, giving his reasons why; and (3) determining that certain government witnesses will be unavailable at that place and time, giving his reasons why.

V. Conclusion

When it appears that a government witness cannot (or will not) appear in person at the time and place set for a court-martial, then the SJA, IO, and TC should use the Article 32 hearing or deposition to obtain the witness's testimony and to gather evidence to prove the three dimensions of the witness's later unavailability at the time and place of trial. This strategy is constitutional, practical, and in keeping with the flexible nature of the military justice system.

¹⁰⁵ Rule for Courts-Martial 504(d) authorizes the convening authority to "designate" in his convening order "where the court-martial will meet." Rule for Courts-Martial 601(e) permits the convening authority, in his order referring charges, to include "proper instructions in the order." *Id.* R.C.M. 504, 601.

The Execution of Private Slovik¹

Reviewed by Major Michael A. Rizzotti*

*The one man in such a situation always deserves to be known. Someday I must dig him up. I must also examine the significance of the fact that in its struggle to inspire its youth, to discipline them, to make them stand and fight, the United States resorted, as late as 1945, to one full-dress execution.*²

I. Introduction

In January of 1945, U.S. Army Private Edward D. Slovik, hands bound and affixed to a wooden post, in a snow-filled courtyard in the French countryside, was executed by a twelve-man firing squad for crimes committed against the United States during World War II.³ In death, Private Slovik became the only American post-Civil War, whether civilian or Soldier, to be executed for a “crime of omission”—desertion in the face of the enemy.⁴

In *The Execution of Private Slovik*, author William Bradford Huie masterfully examines, through both document review and meticulous interviews of those who best knew Private Slovik, the events surrounding his formative years, his court-martial, and his ultimate execution by firing squad. In these details, Huie seeks to resolve why, of the more than 40,000 deserters in the European Theater of Operations (ETO) during World War II, 2,864 of whom were convicted at general courts-martial, forty-nine of whom were sentenced to death, Private Slovik was the only Soldier to elude clemency and actually be put to death.⁵

In researching and presenting the facts surrounding Private Slovik’s execution, the author asks the reader to pontificate three overarching questions: one, whether it is dangerous to allow an able-bodied American citizen to

desert military service of the United States with relative impunity; two, whether the United States was at fault for failing to quash the prevailing notion (at the time) that a Soldier could willfully “avoid hazardous duty” at relatively little danger to himself; and three, whether the United States is willing to accept, modify, or discard the idea that an able-bodied American who will not fight for his country has no right to live.⁶ Huie does not affirmatively answer these questions and instead allows the individual reader to form their own conclusions. He does, however, posit that the timing and egregiousness of Private Slovik’s military criminal offenses, in concert with his civilian criminal record, ultimately led to the denial of his request for clemency and his execution.

Huie does not seek to absolve the accused of his military crimes, but rather gives credence to Private Slovik’s assertion, “They’re not shooting me for deserting the U.S. Army. Thousands of guys have done that. They need to make an example out of somebody and I’m it because I’m an ex-con,”⁷—a voice in death. Moreover, Huie seeks to remove Private Slovik from an obscure filing cabinet in the Pentagon and ensure his proper place in the annals of military justice in the post-Civil War era. Military officers and judge advocates today would be well-served to read Huie’s work, not only from an historical perspective, but as a means of professional development to fully experience the interplay between morality, discipline, and leadership in extremely trying times.

II. Background—Who Was Private Eddie Slovik?

Edward D. Slovik was raised in Michigan during the Great Depression and found himself in trouble with the law as an adolescent, culminating in a conviction for embezzlement in 1937.⁸ Ostensibly straightened out over the next five years at a Michigan reformatory,⁹ Slovik was paroled in 1942—in the throes of World War II—with a 4F draft status: an ex-convict unfit for military service.¹⁰ One

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¹ WILLIAM BRADFORD HUIE, *THE EXECUTION OF PRIVATE SLOVIK* (Westholme Publishing ed., 2004) (1954).

² *Id.* at 14. See also Fred Borch, *Lore of the Corps, Shot by Firing Squad: The Execution of Pvt. Eddie Slovik*, *ARMY LAWYER*, May 2010, at 3; U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 192–94 (1975).

³ HUIE, *supra* note 1, at 227–34.

⁴ *Id.* at 8.

⁵ *Id.* at 11–12. Huie’s book was adapted as a screenplay (Richard Levinson, William Link, William Bradford Huie, Lamont Johnson) in the made-for-television movie of the same name, airing in 1974 and starring Martin Sheen (Eddie Slovik), Ned Beatty, and Gary Busy. The tagline questioned, “Was it an Act of Cowardice . . . or an Act of Conscience?” *THE EXECUTION OF PRIVATE SLOVIK* (NBC television broadcast Mar. 13, 1974). One reviewer of the movie notes, “This is a film that will leave you crying, angry and filled with righteous indignation, as it should.” *Reviews and Ratings for “The Execution of Private Slovik,”* IMDB (Aug. 16, 2001) <http://www.imdb.com/title/tt0071477/reviews>.

⁶ HUIE, *supra* note 1, at 189–90.

⁷ *Id.* at 228. Private Slovik uttered these words to Sergeant Frank McKendrick while being escorted to his position in front of the firing-squad. *Id.*

⁸ *Id.* at 25.

⁹ *Id.* at 32.

¹⁰ *Id.* at 32, 40.

year later, on 7 November 1943, Slovik's draft eligibility changed to 1A: fit for duty. Leaving his pregnant wife in Michigan, Slovik left for basic training in Texas in January 1944,¹¹ setting sail for the ETO nine months later in August 1944. Private Slovik was destined to be a replacement Soldier for the 28th Infantry Division, a Pennsylvania National Guard unit which endured thousands of casualties while in persistent armed conflict with the Germans.¹²

Arriving in France on 25 August 1944, Private Slovik failed to rendezvous with his assigned unit until 8 October 1944.¹³ Ordered to take his position on the front line with G Company, 109th Infantry, Private Slovik refused, reducing his defiance to writing: "I told my commanding officer my story. I said that if I have to go out there again, I'd run away. He said there was nothing he could do for me so I ran away again AND I'LL RUN AWAY AGAIN IF I HAVE TO GO OUT THERE."¹⁴ When Private Slovik could not be persuaded to do his duty as ordered, charges were brought against him in late October 1944, and on 11 November 1944, he was tried and convicted at a general court-martial for desertion; his sentence was death.¹⁵

On 27 November 1944, the General Court-Martial Convening Authority, Major General Norman "Dutch" Cota, Commander of the 28th Division, approved the sentence in consultation with his Division Staff Judge Advocate, Lieutenant Colonel Henry Sommer.¹⁶ Thereafter, the case was forwarded to the ETO Commander, General Dwight Eisenhower, for the final decision regarding clemency and punishment. On 23 December 1944, General Eisenhower approved the sentence. With the record of trial found legally sufficient, and on advice from the Office of the Judge Advocate General of the Army, General Eisenhower denied Private Slovik's request for clemency and ordered his execution on 23 January 1945.¹⁷ Thereafter, Private Slovik was executed by a twelve-man firing squad on 31 January 1945, with more than fifty enlisted Soldiers and commissioned officers watching.¹⁸

¹¹ *Id.* at 45, 53, 63.

¹² *Id.* at 102–03.

¹³ *Id.* at 119–20. Whether Private Slovik purposefully failed to rendezvous with his unit on 25 August 1944, or the fog of war caused his missed connection remains unknown as Private Tankey and Private Slovik's accounting for this time period contradict one another. Regardless, Private Slovik did not refute evidence presented at trial that secured his conviction for desertion during this time period. *Id.*

¹⁴ *Id.* at 131–32.

¹⁵ *Id.* at 120–21, 169–70 (noting that Private Slovik's court-martial panel took three separate ballots, all of which resulted in a unanimous vote for imposition of the death penalty).

¹⁶ *Id.* at 121.

¹⁷ *Id.*

¹⁸ *Id.* at 225–27, 234.

III. The Judicial Process

In researching and detailing the military judicial process Private Slovik underwent in 1944 and 1945, and in asking whether or not death was the appropriate punishment for a crime of omission, the author forces the reader to think critically and analytically about the military justice system as a whole, and more specifically, about the actions of the commanders and judge advocates making decisions and offering advice with regard to Private Slovik's case.¹⁹

A. *United States v. Private Eddie Slovik*

Huie concludes that Private Slovik's court-martial in the fall of 1944 afforded him the appropriate amount of due process, and that it was his ill-advised written confession,²⁰ one which an infantry lieutenant colonel advised him to retract,²¹ which ultimately sealed his fate on both the merits and in the sentencing phases of his court-martial.²² Colonel Guy Williams, the court-martial panel president, verified that the panel was unaware of Private Slovik's civilian crimes at the time they sentenced him to death.²³ Colonel Williams noted they "were convinced that, for the good of the division, he ought to be shot,"²⁴ but that no member of the court-martial panel believed he would ever be shot based on common practice at the time.²⁵ Colonel Williams and his fellow panel members' assumption regarding Private Slovik's punishment lends credence to the prevailing notion in the military in 1944 that desertion, or failure to execute your duties before the enemy as ordered, would not be met with capital punishment, regardless of the egregiousness of the facts, a notion that Private Slovik appears to have relied on to his detriment.²⁶

¹⁹ See generally *id.* at 188–92.

²⁰ *Id.* at 131.

²¹ *Id.* at 143.

²² But see Benedict B. Kimmelman, *The Example of Private Slovik*, AM. HERITAGE, vol. 38, no. 6 (Sept./Oct. 1988), <http://www.americanheritage.com/con-tent/example-private-slovik?page=show> (last visited Sept. 19, 2013, 10:09 AM). Benedict Kimmelman served as an officer on the panel that adjudged Private Slovik's death sentence. Kimmelman became a prisoner of war shortly after the trial concluded during the Battle of the Bulge, and, in hindsight, argues that Private Slovik did not receive a fair trial because he was tried by support officers and not line officers, and because he did not have a lawyer serving as his defense counsel. *Id.*

²³ HUIE, *supra* at note 1, at 169–70.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 170–71.

B. The General Court-Martial Convening Authority

In addition to Private Slovik's written confession from trial, Lieutenant Colonel (LTC) Sommer knew of Private Slovik's civilian criminal record through the Federal Bureau of Investigation and incorporated it into his legal review for Major General Cota.²⁷ Major General Cota reflected on his decision years later and surmised, "Given the situation as I knew it in November, 1944 . . . it was my duty to this country to approve that sentence. If I hadn't approved it—if I had let Slovik accomplish his goal—then I don't know how I could have looked a good Soldier in the face."²⁸ Moreover, Major General Cota noted that "after I approved the sentence, I assumed that the accused would ultimately be shot."²⁹

Much like the members of the court-martial panel, LTC Sommer, as the primary legal advisor to Major General Cota, believed that Private Slovik would not be shot because "[g]iven the common practice up to that time, there was no reason . . . to think that the Theater Commander would ever actually execute a deserter."³⁰ While the panel believed execution appropriate but unlikely to be carried out, LTC Sommer, with the added benefit of having reviewed Private Slovik's record of trial along with his criminal record, also believed execution appropriate but unlikely, opining, "[i]f ever they wanted a horrible example, this was one. From Slovik's record, the world wasn't going to be losing much."³¹ Thus, Huie's assertion that Private Slovik's civilian criminal record (in addition to the gravity of his offenses) distinguished him from the thousands of other deserters begins to take shape in determining his suitability, or lack thereof, for clemency.

C. Final Approval—Commander, European Theater of Operations

Though General Eisenhower does not appear to have provided the author an interview, those who advised him on Private Slovik's case did. Brigadier General E.C. McNeil, the Assistant Judge Advocate General and senior Army lawyer in the ETO, provided the following endorsement to the legal review certifying that Private Slovik's record of trial was legally sufficient and supported the sentence:

This is the first death sentence for desertion which has reached me. It is probably the first of the kind in the

American Army for over eighty years—there were none in World War I. In this case the extreme penalty of death appears warranted. This soldier has performed no front line duty. He did not intend to. He deserted from his group of fifteen when about to join the infantry company to which he had been assigned. His subsequent conduct shows a deliberate plan to secure trial and incarceration in a safe place. *The sentence adjudged was more severe than he anticipated*, but the imposition of a less severe sentence would have only accomplished the accused's purpose of securing his incarceration and consequent freedom from the dangers which so many of our armed forces are required to face daily. *His unfavorable civilian record indicates that he is not a worthy subject for clemency.*³²

With the Battle of the Bulge and the German counter-offensive underway in January 1945,³³ General Eisenhower signed Private Slovik's execution order, concurring with Brigadier General Field's assessment that Private Slovik was not worthy of clemency—his civilian record serving as the determining factor in Brigadier General Fields's endorsement of the legal review recommending the denial of clemency.

The author asserts that General Eisenhower, by ordering Private Slovik shot, helped serve a threefold purpose: (1) to correct the dangerous assumption regarding punishment for desertion, (2) to serve as a deterrent, and (3) and because he deserved punishment for his confessed crime.³⁴ The author goes on to thoroughly detail the name, rank, and unit of assignment for each of the Soldiers who bore witness to Private Slovik's execution,³⁵ also providing the contents of a letter disseminated by LTC Rudder, Commander of the 109th Infantry Regiment, to his men describing the Slovik execution.³⁶

Reason would dictate that with so many eyewitnesses, the desired effect of executing Private Slovik was crystal-clear for those contemplating shirking their duty; however, the effects of the execution remain a mystery. Huie hints that there was no consequential deterrent effect, but never outright says so. Notably, the war in the ETO ended on 8 May 1945, approximately ninety days after the execution

²⁷ *Id.* at 174.

²⁸ *Id.* at 177.

²⁹ *Id.* at 178.

³⁰ *Id.* at 174.

³¹ *Id.*

³² *Id.* at 197 (emphasis in original).

³³ *Id.* at 149.

³⁴ *Id.* at 191–92.

³⁵ *Id.* at 225–27.

³⁶ *Id.* at 117.

was carried out, leaving the desired effect of Private Slovik's execution more a matter of academic debate than empirical data.

IV. Conclusion

Huie provides a thought-provoking read, one that unearths a significant event in American history allowing for policy makers, military leaders, and American citizens to debate the merit, morality, and necessity of capital punishment. Judge advocates and students of military history would be well served in undertaking a reading of this book, as it provides a detailed accounting of an obscure, yet important, event in the history of the U.S. military and the practice of criminal law within the military system.

While *The Execution of Private Slovik* would have benefitted from an interview of General Eisenhower (similar to the interview of General Cota) and could have benefitted from a more comprehensive accounting of how the details of Private Slovik's execution were disseminated to U.S. forces in both theaters, these omissions do not detract from Huie's desired and achieved end-state—the unearthing of Private Eddie Slovik's story from anonymity in an unmarked grave in France to assume his place in American history.³⁷

³⁷ *Id.* at 249. In 1987, the United States permitted Private Slovik's remains to be disinterred from France and returned to the United States for burial beside his wife, Antoinette Slovik.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

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

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

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail Thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

a. The Judge Advocate General’s School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please

contact Information Technology Division Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

d. Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the ITD office at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

a. Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

b. Point of contact is Mr. Daniel C. Lavinger, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavinger.civ@mail.mil.

