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Everything You Always Wanted to Know About Official Support to Non-Federal Entity Fundraisers[1]

Teresa A. Smith
Supervisory Attorney, Administrative Law Division,
Office of the Staff Judge Advocate
U. S. Army Field Artillery Center and Fort Sill

Introduction

Army ethics counselors[2] persistently face the problem of determining the extent to which commanders may officially support fundraising efforts of non-federal entities.[3] Official support to fundraisers can be a particularly challenging area because the provisions of the *Joint Ethics Regulation* (*JER*) appear to conflict, in some instances, with other rules regulating support to fundraisers. Federal statutes and regulations, Executive Orders, Department of Defense (DOD) Directives and Instructions, Department of Army (DA) regulations, and opinions interpreting these rules all impact upon the issue.

This article recommends an analytical method for evaluating requests for official support to non-federal entity fundraisers. It also provides examples to illustrate the mechanics of the analysis and defines non-federal entities. The article then overviews the rules and regulations that ethics counselors should consult when advising commanders. It also discusses opinions issued by the DOD Standards of Conduct Office (DOD SOCO), the DA Standards of Conduct Office (DA SOCO), the Office of Personnel Management (OPM), and the Office of Government Ethics (OGE). These opinions provide the ethics counselor invaluable assistance in interpreting the various rules that concern fundraising. Finally, to eliminate conflicting provisions of the rules, this article suggests changes to DA and DOD regulations. These changes would increase consistency among the opinions of ethics counselors. Political fundraising is outside the scope of this article.

Analytical Method

How should an ethics counselor respond to a commander who seeks legal authority to provide official support to a fundraising event? This article suggests that the ethics counselor follow a five-step analysis:

Step One–Is the event sponsored by a non-federal entity?

Step Two–If the event is sponsored by a non-federal entity, what type of non-federal entity is it?

Step Three–Does the event fit the regulatory definition of a fundraiser? Could the ethics counselor legitimately characterize the event as something other than a fundraiser?

Step Four–Is the non-federal entity requesting actual support, or merely requesting permission to have its fundraiser on the military installation?

Step Five–Does a statute, regulation, or directive either authorize official support or further restrict official support?

Step One: Is the Event Sponsored by a Non-Federal Entity?

Both non-federal and federal entities may raise funds on military installations. When federal entities conduct the fundraisers, commands are subject to significantly fewer restrictions on their ability to support the events. For example, an installation's public affairs office may sponsor an open house.[4] The installation's morale, welfare, and recreation fund (IMWRF) may sell tickets to the event. Even though the ticket sales produce funds for the IMWRF, this event is not considered a non-federal entity fundraiser because the IMWRF is a federal non-appropriated fund entity.[5] Ethics counselors generally distinguish the IMWRF's activities by referring to its ventures as "events" rather than "fundraisers." An ethics counselor can

1. And Then Some . . . .

2. The term "ethics counselor" generally refers to those Department of Defense (DOD) attorneys who are appointed in writing to "assist in implementing and administering the [DOD] Component command's or organization's ethics program and to provide ethics advice to [DOD] employees . . . ." U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 1-214 (30 Aug. 1993) [hereinafter JER].

3. *See infra* note 29 and accompanying text (defining non-federal entities).

4. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION: MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, para. 7-48(2) (25 Oct. 1998) (discussing open houses, primarily a public affairs event, in the context of installation morale activities) [hereinafter AR 215-1].

5. *See id*. para. 3-1a. Every nonappropriated fund activity legally exists as an instrumentality of the United States.

conclude the analysis at this step if he discovers he is dealing with an official event that happens to produce funds. Official support may be provided because there is no non-federal entity involved.

Step Two:
If the Event is Sponsored by a Non-Federal Entity, What Type of Non-Federal Entity Is It?

Commands may provide different types of support to different kinds of non-federal entities. The second step requires that the ethics counselor determine whether the non-federal entity requesting the support is covered by *JER* paragraph 3-210[6] or *JER* paragraph 3-211.[7] This determination is important because the *JER* authorizes commands to officially endorse the fundraising and membership drives of organizations that fit within *JER* paragraph 3-210. Although the word "support" is not mentioned in *JER* paragraph 3-210, ethics counselors often interpret *JER* paragraph 3-210 to include support. Likewise, DOD SOCO interprets the term "endorse" in this provision to mean "endorse and officially support."[8]

In addition to examining the nature of the fundraising organization, ethics counselors should inquire into the use of the generated funds. An organization not actually listed in *JER* paragraph 3-210 may still qualify for official endorsement under that provision. A DOD employee may officially endorse a fundraising event sponsored by an "unlisted" organization if it will be donating all funds raised to certain listed organizations.[9]

If the organization does not qualify for support under *JER* paragraph 3-210, the ethics counselor must then determine if the fundraiser is "charitable" and, thus, eligible for official logistical support.[10] If the non-federal entity does not fit within

6. JER, *supra* note 2, para. 3-210. Paragraph 3-210 allows endorsement of several specifically mentioned non-federal entities, including the Combined Federal Campaign (CFC) and Army Emergency Relief (AER). The *JER*, subparagraph 3-210a(6), additionally includes:

> [O]ther organizations composed primarily of DOD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents when approved by the head of the DOD Component command or organization after consultation with the [Deputy Agency Ethics Official] or designee.

Id. para. 3-210a(6). *JER* paragraph 3-210 organizations are not subject to the provisions of *JER* paragraph 3-211. *See id*. para. 3-210a.

7. *Id.* para. 3-211. Paragraph 3-211 describes official logistical support to non-federal entities. *JER* subparagraph 3-211a describes a seven-pronged test that allows a commander to determine whether to provide logistical support to non-federal entity events but does not apply to support for non-federal entity fundraising or membership drives. The seven prongs are:

> (1) The support does not interfere with the performance of official duties and would in no way detract from readiness;
> (2) DoD community relations with the immediate community and/or other legitimate DoD public affairs or military training interests are served by the support;
> (3) It is appropriate to associate DoD, including the concerned Military Department, with the event;
> (4) The event is of interest and benefit to the local civilian community, the DoD Component command or organization providing the support, or any other part of DoD;
> (5) The DoD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-Federal entities;
> (6) The use is not restricted by other statutes (see 10 U.S.C. 2012 (reference (f)) which limits support that is not based on customary community relations or public affairs activities) or regulations; and
> (7) No admission fee is charged (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event, no admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the portion of the event supported by DoD, or DoD support to the event is incidental to the entire event in accordance with public affairs guidance.

Id.

JER subparagraph 3-211b allows the commander to provide official support to charitable fundraising events when the first six of the seven prongs in JER subparagraph 3-211a are met and the non-federal entity is not affiliated with CFC or, if affiliated, the Director, OPM, does not object to the event. The OPM has no objection to fundraising events that do not occur in the federal workplace, as determined by the commander.

8. *See* DOD SOCO Advisory, Dep't. of Defense Office of General Counsel, Standards of Conduct Office, No. 97-09, para. 1 (8 July 1997) *available at* <http://www.defenselink.mil/dodgc/defense_ethics/ethics_issues/ADVIS709.HTM> [hereinafter DOD SOCO Advisory No. 97-09]. As a result of receiving and denying many fundraising requests from DOD organizations, OPM asked DOD SOCO to clarify the applicable regulations. DOD SOCO issued this advisory in response to OPM's request. *See id*. The advisory states that "DOD personnel and organizations may officially raise funds for those organizations listed in [para.] 3-210 of the *JER*. These organizations include 'on-base organizations' (organizations composed primarily of DOD employees or their dependents when fundraising among their own members for the benefit of their own members)." *Id*. This language indicates, for example, that an on-post fundraiser sponsored by a Girl Scout troop consisting of soldiers' family members would qualify for official support. An on-post fundraiser sponsored by the Officer Wives' Club would also qualify. Does this mean the commanding general (CG) may now officially encourage federal workers to buy Girl Scout cookies on an installation? A literal reading of the advisory may cause one to conclude that the CG could do so. Because the advisory interprets *JER* paragraph 3-210 very liberally, proceed with caution when relying on it.

9. *See* Memorandum, Dep't of Defense Office of General Counsel, Standards of Conduct Office, subject: Guidance Regarding Military Ball Fundraisers and Similar Events (14 Mar. 1996) (on file with author). When a fundraising event donates all the contributed funds to the organizations listed in *JER* subparagraphs 3-210a(1) through (5), DOD employees "may officially endorse and attend the event in an official capacity." *Id*. para 1.

JER paragraph 3-210, and is not engaged in charitable fundraising pursuant to *JER* subparagraph 3-211b, the ethics counselor may conclude that the command cannot provide official support to the fundraiser. Nevertheless, the ethics counselor should still consider the impact of the remaining steps in the five-step analysis, explained below, before opining that official support is not authorized.

Step Three: Does the Event Fit the Regulatory Definition of a Fundraiser?[11] *Could the Ethics counselor Legitimately Characterize the Event as Something Other Than a Fundraiser?*

Merely because people are charged an admission fee to attend an event does not necessarily mean that the event is a fundraiser under the *JER*.[12] As discussed in the first step of this analytical model, when the government, as opposed to a non-federal entity, charges persons to attend a function, the function is referred to as an "event" rather than a "fundraiser." Similarly, when government employees set up a collection box for canned goods or clothing in a public area, the *JER* fundraising restrictions are inapplicable.[13] Employees would not be deemed to be "fundraising" under the *JER* if they organized an Angel Tree[14] charitable gift program during the holiday season.[15]

Furthermore, charging individuals an admission fee to attend an event does not automatically make the event a fundraiser. If the admission charge is solely for the purpose of covering the reasonable costs of holding the event, the event is not a fundraiser under *JER* subparagraph 3-211b; rather, it is an "event" under *JER* subparagraph 3-211a.[16] In this situation, an ethics counselor can advise based on the analysis in *JER* subparagraph 3-211a, without regard to the more limiting fundraising restrictions found in *JER* subparagraph 3-211b.

Step Four: Is the Non-Federal Entity Requesting Actual Support, or Merely Requesting Permission to Have Its Fundraiser on the Military Installation?

Non-federal entities may use an installation's "category C" morale, welfare, and recreation (MWR) facilities[17] for fundraising events.[18] Arguably, the government's participation by providing the opportunity to fundraise may not be characterized as "official support" of the event.[19] Appropriately, the government can be viewed as simply engaging in a business transaction. Conversely, if the non-federal entity requests use, free of charge, of the installation golf courses, bowling lanes, or clubs, the request is a request for "official support." In that instance, the installation is foregoing funds for the benefit of the benevolent purposes of the non-federal entity.

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10. *See* JER, *supra* note 2, para. 3-211b. This provision allows commanders to provide official logistical support to charitable fundraisers that meet certain criteria. For a discussion of "charitable" activities, *see infra* notes 107-08 and accompanying text.

11. For purposes of the *JER*, fundraising means:

> [T]he raising of funds for a nonprofit organization, other than a political organization as defined in 25 U.S.C. § 527(e), through: (i) Solicitation of funds or sale of items; or (ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

5 C.F.R. § 2635.808(a)(1) (1999).

12. For example, a non-federal entity can charge an admission fee designed to cover the reasonable costs of the event and still fit within the parameters of the less-restrictive provisions of *JER* subparagraph 3-211a, which is inapplicable to fundraisers. *See* JER, *supra* note 2, para. 3-211a(7).

13. *See* 5 C.F.R. § 950.102(b). Combined Federal Campaign regulations do not apply to "the collection of gifts-in-kind, such as food, clothing and toys, or to the solicitation of Federal employees outside of the Federal workplace as defined by the applicable Agency Head consistent with General Services Administration regulations and any other applicable laws or regulations." *Id*.

14. An "Angel Tree" is a holiday tree containing cards with details as to the specific needs of underprivileged persons in the community. Donors can select an individual and provide items, such as books, shoes, clothes, and toys, responsive to the needs of that particular person.

15. The *JER* definition of fundraising differs significantly from the Army's regulatory definition. *See* U.S. DEP'T OF ARMY, REG. 600-29, PERSONNEL–GENERAL: FUNDRAISING WITHIN THE DEPARTMENT OF THE ARMY, para. 1-5c(3) (20 Mar. 1992) [hereinafter AR 600-29]. The Army's current definition of fundraising is "any activity conducted for the purpose of collecting money, goods or other support for the benefit of others." *Id*. glossary, sec. II. Therefore, *AR 600-29* would apply to the Angel Tree program.

16. *See supra* note 12 and accompanying text. The DOD may provide logistical support to events other than fundraisers and membership drives when:

> No admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event, no admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the portion of the event supported by DOD, or DOD support to the event is incidental to the entire event in accordance with public affairs guidance.

JER, *supra* note 2, para. 3-211a(7). Commanders must also find that the events meet the remaining six prongs of *JER* subparagraph 3-211a.

17. *See* AR 215-1, *supra* note 4, para. 6-2i. Category C MWR activities include golf courses, bowling centers, clubs, skating rinks, and similar social and recreational activities. *See id.* para. 4-1c, fig. 4-1.

Step Five:
Does a Statute, Regulation, or Directive Either Authorize Official Support or Further Restrict Official Support?

The last step in the analysis is the most challenging. Having passed all the other hurdles, the ethics counselor has concluded that the situation presented is one where a non-federal entity is engaging in fundraising as defined in the *JER*. At this point, to opine that the command may provide official support, the ethics counselor must find a statute, regulation, or directive that authorizes the official support. The command cannot provide official support in the absence of such authority.[20]

Applying the Analysis

Example–The Field Artillery Association (FAA), a non-profit organization, sponsors an annual Saint Barbara's Holiday Ball, in honor of the patron saint of the field artillery. For purposes of this example, assume that the FAA does not qualify for official support under *JER* subparagraph 3-210a(6). Assume also that the FAA charges fifteen dollars per ticket, which will cover only the estimated costs of the event. These costs include a meal prepared by the officers' club, a category C MWR facility. The FAA requests the use of the officers' club for the event and also requests the official assistance of a few Redlegs[21] to pull the lanyard (that is, fire the cannon) signaling the start of the event. May the command provide the support? The ethics counselor should apply the five-step analysis.

Step One–The FAA, a non-federal entity, is sponsoring the event.

Step Two–The FAA is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

Step Three–JER subparagraph 3-211a applies because the ball is an event, not a charitable fundraiser.

Step Four–The request to use the officers' club for the function is not a request for official support. The FAA will pay the officers' club, a category C MWR activity, for the meals provided.[22] However, the FAA request for Redleg assistance is a request for official support. Therefore, that portion of the request requires analysis under *JER* subparagraph 3-211a.

Step Five–The *JER*, at subparagraph 3-211a, provides authorization for support to the Redleg event. To utilize this authority, the command must determine that the seven factors listed in 3-211a are met. This subparagraph authorizes support. Likewise, no other statutes or regulations restrict the support.

Example–The Association of the United States Army (AUSA) requests to have a golf tournament on the installation golf course. Funds raised will benefit AUSA programs. They also request that soldiers distribute AUSA flyers and install AUSA banners at the golf course before the event. What support may the installation commander legally provide?

Step One–The event is sponsored by AUSA, a non-federal entity.

Step Two–AUSA is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

Step Three–This event would not qualify as a "charitable" fundraiser since the funds raised are to benefit AUSA rather than a charity. Therefore, to qualify for support, the event must meet the seven-prong test of *JER* subparagraph 3-211a.[23] It does not meet the seventh prong because the purpose of the event is to make money above and beyond the costs of the event

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18. *Army Regulation 215-1* does not differentiate between private organizations operating on an installation and non-federal entities. *See id.* "Private organizations authorized to operate on an installation may participate in that installation's special events and activities, subject to the provisions of this regulation and *AR 210-1*." *Id.* para. 6-2j. The old regulation went on to state that "non-DOD organizations are authorized to use Category C MWR facilities for fund-raising purposes as long as they follow the regulatory guidelines contained in *AR 210-1* and *AR 600-29*." *Id.* para. 6-2k. The drafters of subparagraph 6-2k apparently did not notice that *AR 210-1* (now also rescinded) applied only to on-post private organizations, and not to "[private organizations] operating outside of DA installations that request use of Army space or facilities." U.S. DEP'T OF ARMY, REG. 210-1, INSTALLATIONS: PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS, para. 1-1b(1) (14 Sept. 1990) [hereinafter AR 210-1]. *Army Regulation 210-1* was rescinded by Memorandum, Assistant Chief of Staff for Installation Management, CFSC-SP, subject: Policy Governing Private Organizations on Army Installations (20 Apr. 1998) (on file with author) [hereinafter ACSIM memo].

19. For example, a command and an on-post, private organization may co-host an art exhibition in the officers' club and split the gate receipts. "MOAs/MOUs with military units or on-post private organizations . . . are authorized for the operation of MWR resale booths at MWR events." The old regulation stated that before October 1998, AR 215-1 distinguished between private organizations and non-federal entities. *See* UNITED STATES DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 Sept. 1995) (now rescinded) [hereinafter Rescinded 215-1]. AR 215-1, *supra* note 4, para. 7-48a(4).

20. *See* 5 C.F.R. § 2635.808(b) (1999). "An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation, or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." *Id.*

21. Field Artillerymen. During the Mexican War, artillery uniforms had a two-inch stripe on the trousers and horse artillerymen wore red canvas leggings. The nickname of Field Artillery soldiers, Redlegs, came from this clothing. *See* Field Artillery Proponency Office, *United States Army Field Artillery* (visited 31 Mar. 1998) <http://sill-www.army.mil/tngcmd/ldr/tcl_fa1.htm#MEXICAN>.

22. *See* AR 215-1, *supra* note 4, para. 8-16b(7)(a)(g). Individuals who are nonmembers of military clubs are nevertheless authorized to attend functions in those clubs hosted by on-post, private organizations. The regulation does not reference the *JER* as applying to this determination. *See id.*

and the soldiers would provide more than just incidental support. Therefore, the commander may not approve the request for soldier support. Remember, however, the analysis does not end here.

Step Four–If AUSA compensates the installation for the use of the golf course, that portion of the request may be granted without consideration of *JER* subparagraph 3-211a. It is not a request for official support.[24] If AUSA was requesting use of the golf course at no cost, the request would be for official support.

Step Five–No other statute, directive, or regulation exists that allows the requested soldier support.

Example–The local chapter of the American Red Cross, an organization affiliated with the Combined Federal Campaign (CFC), requests to have a fundraising bowl-a-thon at the installation bowling lanes. The local chapter requests that the installation commander waive any fees for the day of the tournament so that they may reap the maximum benefit of the fundraiser. The bowl-a-thon will be open to the public, including DOD personnel, but does not specifically target DOD personnel. May the installation commander provide official support to the fundraiser by waiving the fees?

Step One–The local chapter of the American Red Cross, a non-federal entity, is sponsoring the event.

Step Two–The American Red Cross is not one of the organizations listed in *JER* paragraph 3-210; therefore, *JER* paragraph 3-211 applies.

Step Three–The event fits within the regulatory definition of a charitable fundraiser; consequently, *JER* subparagraph 3-211b applies. Therefore, to qualify for support, the event must meet the first six prongs of *JER* subparagraph 3-211a. It clearly does. Additionally, *JER* subparagraph 3-211b requires OPM permission to provide official support to charitable fundraising events when the sponsoring organization is affiliated with CFC and the fundraising occurs in the federal workplace. The federal workplace includes the entire military installation; however, the installation commander may designate certain areas on the installation (like the bowling alley) to be outside of the federal workplace for fundraising purposes.[25] Additionally, the Army's position is that OPM approval is not necessary when the fundraiser does not target federal employees.[26] Therefore, OPM approval is unnecessary.

Step Four–This is a request for official support. Only if the local chapter were paying for the use of the bowling lanes would the request fall outside the ambit of "official support."

Step Five–Since there are no other applicable restrictions, the commander may authorize official support.

Example–The Better Opportunities for Single Soldiers Program (BOSS) plans to have a chili cook-off on the installation to raise funds for a youth Easter egg hunt. What support can the command provide?

Step One–BOSS is not a non-federal entity; it is a category B MWR activity.[27] Because it is a federal entity, the *JER* restrictions on support to non-federal entities are inapplicable. Official support can be provided. After ensuring that this activity is appropriate under applicable regulations,[28] the ethics counselor need proceed no further in the analysis.

Non-Federal Entities Defined

Definition

The *JER* provides a specific definition of a non-federal entity:

> A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the federal government. A non-Federal entity may operate on DOD installations if approved by the installation commander or higher authority under applicable regulations.[29]

23. *See supra* note 7.

24. *See supra* note 19 and accompanying text.

25. *See* JER, *supra* note 2, para. 3-211b.

26. *See* Memorandum, Dep't. of the Army Standards of Conduct Office, to Staff Judge Advocate, U.S. Forces Command, Fort McPherson, Georgia, subject: Support of Local Non-Federal Entity Fundraising Events, para. 3 (3 Feb. 1994) (on file with author).

27. *See* AR 215-1, *supra* note 4, para. 8-20c.

28. The Army specifically permits BOSS to charge fees for events. *See id.* para. 8-20c(2). The funds raised may be used to support community service projects, such as an Easter egg hunt. *See* U.S. DEP'T OF ARMY, CIR. 608-97-1, PERSONAL AFFAIRS: BETTER OPPORTUNITIES FOR SINGLE SOLDIERS PROGRAM, para. C-2b (29 Aug. 1997).

29. JER, *supra* note 2, para. 1-221.

The term "non-federal entity" was not one commonly used by Army ethics counselors before the *JER* was implemented. Army attorneys used *AR 210-1* (now rescinded)[30] and *AR 600-50*[31] as their primary authorities when advising commanders regarding support of fundraisers sponsored by "private organizations." The term "private organization" is not used in the *JER*.[32] Often, the terms "private organization" and "non-federal entity" are used interchangeably, which may cause confusion to the uninitiated.[33] Recently, however, DOD reissued the instruction that had served as the basis for the Army's former regulation on private organizations, *AR 210-1*.[34] The superseded instruction conflicted with the *JER*.[35] The revised instruction further clarifies the definition of "private organization."[36] It also restates the long-standing prohibition against private organization competition with nonappropriated fund instrumentalities.[37]

Types of Non-Federal Entities

When analyzing questions concerning official support to non-federal entities, the ethics counselor must first decide what type of non-federal entity is in issue. Following the rescission of *AR 210-1*, the most logical way to categorize the non-federal entity is to decide whether it fits into *JER* paragraph 3-210 or *JER* paragraph 3-211.

JER Paragraph 3-210 Non-Federal Entities[38]

Many organizations that the Army has traditionally supported fit into this category. It may include private organizations such as officer wives' clubs, thrift shops, and museum associations; informal funds;[39] family support groups (FSGs);[40] and other similar groups organized to support the morale of soldiers, employees, and family members.

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30. AR 210-1, *supra* note 18.

31. U.S. DEP'T OF ARMY, REG. 600-50, PERSONNEL–GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL (28 Jan. 1988). This regulation has been superseded by the *JER*.

32. The *JER* may be accessed through the World Wide Web and digitally searched at <http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/jerch1/>. A search on the phrase "private organization" resulted in no hits.

33. The confusion exists because Army attorneys frequently misused the general term "private organization" to refer to a specific sub-element of private organizations: those that had received permission from the installation commander to operate on the military installation. The terms "non-federal entity" and "private organization" actually had the same meaning. The Army's policies apply to "the authorization and operation of private organizations (POs) operating on Army installations, and official participation by DA agencies, commands, and personnel in the activities of POs and associations, regardless of whether they operate on or off DA installations." AR 210-1, *supra* note 18, para. 1-1a. This paragraph clarifies that organizations operating off the military installation are POs; however, only on-post POs are subject to the organizational rules in *AR 210-1*. *See supra* note 18.

34. *See* U.S. DEP'T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DOD INSTALLATIONS (23 Oct. 1997) [hereinafter DODI 1000.15].

35. *See* Memorandum, Dep't. of Defense Office of General Counsel, Standards of Conduct Office, to Designated Agency Ethics Officials and Deputy Designated Agency Ethics Officials, subject: Red Cross Fundraising Raffle (3 Mar. 1995) (on file with author). This memorandum stated that a Red Cross raffle had been approved in accordance with DODI 1000.15, *supra* note 34. It noted that the fundraiser should not have been approved because DODI 1000.15 conflicted with the *JER*.

36. The revised DODI 1000.15, *supra* note 34, defines private organizations as "[s]elf-sustaining and non-federal entities, incorporated or unincorporated, which are operated on DOD installations with the written consent of the installation commander or higher authority, by individuals acting exclusively outside the scope of any official capacity as officers, employees, or agents of the federal government." *Id.* para. 3.2. Under this revised definition, private organizations are now a subset of non-federal entities. Non-federal entities may exist both on and off the military installation; those that operate on-post are "private organizations." Compare this definition to the definition formerly used by the Army. *See supra* note 33.

37. The revised DODI states: "A private organization covered by this instruction that offers programs or services similar to either appropriated or nonappropriated fund activities on a DOD installation shall not compete with, but may, when specifically authorized in the approval document, supplement those activities." DODI 1000.15, *supra* note 34, para. 6.4.

38. JER, *supra* note 2, para. 3-210. *See supra* note 6.

39. Informal funds are funds such as office coffee funds and cup and flower funds. These funds may operate on a military installation without formal authorization because of their limited scope. *See* DODI 1000.15, *supra* note 34, para. 6.15. The Army's guidance for informal funds is contained in the memorandum rescinding *AR 210-1*. *See* ACSIM memo, *supra* note 18, enclosure 4. The Army issued further guidance clarifying that local installation commanders have discretion to place dollar limits on the net worth of informal funds. *See* Memorandum, Assistant Chief of Staff for Installation Management, CFSC-SP, subject: GC Notes No. 30 (22 Jan. 1999) (February 1999 notes to Army garrison commanders) (on file with author) [hereinafter GC Notes]. The DOD does not put a dollar limit on the amount of net worth informal funds may accumulate. *See* DODI 1000.15, *supra* note 34, para. 6.15.

40. *See* U.S. DEP'T OF ARMY, PAM 608-47, PERSONAL AFFAIRS: A GUIDE TO ESTABLISHING FAMILY SUPPORT GROUPS (16 Aug. 1993) [hereinafter DA PAM 608-47]. The pamphlet defines a family support group (FSG) as a "command sponsored vehicle for people within the unit to help each other." *Id.* para. 1-7.

As mentioned previously,[41] DOD SOCO has indicated that these organizations may qualify for official support for their fundraising activities. Further, provided the listed organizations are fundraising on a military installation, DA SOCO has indicated that they qualify for official support even when raising funds outside of their specific membership.[42]

JER Paragraph 3-211 Non-Federal Entities[43]

If a non-federal entity fundraiser does not qualify for official support under *JER* paragraph 3-210, the ethics counselor may still be able to advise the commander that official support is appropriate under *JER* subparagraph 3-211b. Generally, organizations ineligible for support under *JER* paragraph 3-210 may qualify for support under *JER* paragraph 3-211. For example, a fundraiser sponsored by a charitable veterans' organization could qualify for official support under *JER* paragraph 3-211. Other charitable organizations in the local community may also be entitled to support.[44]

Rules and Regulations

Decide What Rules Apply

After an ethics counselor characterizes the type of organization and event in question, he must examine the applicable rules. In this area, the *JER* has not lived up to its promise of being a "one-stop shop" for ethics counselors.[45] The *JER*, although helpful, provides just enough guidance in paragraphs 3-210 and 3-211 to send an ethics counselor in the right direction.

Rules to Consult for JER Paragraph 3-210 Organizations

A good place to start is *JER* subparagraph 3-210(b), which lists a number of rules that apply to fundraising.

Federal Rules

Several rules on fundraising apply throughout the Executive Branch:

5 C.F.R. § 2635.808[46]–This regulatory provision is the basic, fundamental restriction on official support to fundraising. It applies to federal employees in the Executive Branch. It defines fundraising[47] and sets parameters on the fundraising activities of employees. Soliciting funds for a nonprofit organization, selling items, and participating in a charitable event are all covered by this provision.[48] It allows employees to participate in fundraising in their official capacities if they are authorized to engage in fundraising as part of their official duties.[49] In August 1997, DOD SOCO issued guidance interpreting 5 C.F.R. § 2635.808.[50]

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41. *See supra* note 7 and accompanying text.

42. *See* Information Paper, Dep't. of the Army Standards of Conduct Office, subject: Family Support Group (FSG) Fundraising, para. 2d (8 Aug. 1995) (on file with author) [hereinafter DA FSG Information Paper]. The author, Mr. Al Novotne, agrees with DOD SOCO's interpretation that *JER* paragraph 3-210 authorizes both official support and official endorsement. He provides the example of a family support group having an on-post bake sale. When the FSG is fundraising, it is considered a non-federal entity. Mr. Novotne states that the post commander could authorize official support, such as the use of Army equipment or the release of soldiers from duty to attend the event. *See id*. He interprets the phrase "fundraising among their own members" in *JER* subparagraph 3-210a(6) to mean fundraising on the installation, among members of the military community. *See id*. Therefore, an officer wives' club bake sale on the installation fits within *JER* subparagraph 3-210a(6) even though sales are being made to persons not members of the club.

43. JER, *supra* note 2, para. 3-211. *See supra* note 7.

44. *See* U.S. Dep't of Army, Reg. 360-61, Army Public Affairs: Community Relations, para. 12-2b (15 Jan. 1987) [hereinafter AR 360-61]. The installation commander can provide Army support to local fundraising events if he decides that providing the support is part of the responsible role of the post in the local community. The regulation provides three examples of non-federal entities which could be eligible for such support: a volunteer fire department, a rescue squad, and a youth organization fund drive. These fundraisers could qualify for official support because they benefit the entire community. *See id*. This regulation also gives installation commanders the discretion to authorize Army speaker participation in local fundraising events. *See id*. para. 4-1c. The regulation specifically limits fundraising concerts by military bands. The Department of the Army may grant exceptions upon determining that a concert benefits an entire community. *See id*. para. 12-2d.

45. *See* JER, *supra* note 2, para. 1-100 (stating that the *JER* provides a single source of standards of ethical conduct and ethics guidance).

46. 5 C.F.R. § 2635.808 (1999). *See also* Memorandum from Mr. Stephen D. Potts, Director, U.S. Office of Government Ethics, to Designated Agency Ethics Officials, subject: Fundraising Activities (Aug. 25, 1993) (discussing recurring issues associated with fundraising) (on file with author).

47. *See supra* note 11.

48. *See* 5 C.F.R. § 2635.808(a)(1). Participating in the event is specifically defined to mean "active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line." *Id.* § 2635.808a(2). An employee who merely attends a charitable function is not considered to be fundraising unless the employee knows his or her attendance is being used to promote the event. *See id.* An employee making a speech at a fundraising event is considered to be fundraising, unless delivering an "official speech" about agency policies. *See id.*

Executive Order 12,353[51]–This Executive Order sets out the foundational rules for the CFC, which involves on-the-job solicitation of federal employees and soldiers.[52]

5 C.F.R. § 950[53]–The language in Executive Order 12,353 comports with 5 C.F.R. § 950, the CFC regulations. The CFC is the "only authorized solicitation of employees in the Federal workplace on behalf of charitable organizations."[54] The CFC rules allow agencies to establish procedures for "solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members."[55] The CFC rules are inapplicable to the collection of gifts-in-kind[56] and to the solicitation of federal employees outside the federal workplace.[57] The rules also allow for solicitation of federal employees, outside the CFC, for emergency and disaster appeals. Agencies must get the OPM director's permission before allowing these solicitations.[58]

DOD Rules

In addition to *DODI 1000.15*, the ethics counselor can consult a number of other DOD references:

DOD Directive 5035.1[59]–This directive quotes the language in the Executive Order indicating the CFC rules do not apply to internal fundraising. The directive differs significantly from

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49. *See id*. § 2635.808(b). The authorization must emanate from a statute, executive order, regulation or other agency determination. *See supra* note 20. When authorized to participate in an official capacity, an employee may use his or her official title, position, and authority. *See id*. § 2635.808(b).

50. *See* Memorandum, Dep't of Defense Office of General Counsel, Standards of Conduct Office, to General Counsels of the Military Departments et al., subject: Guidance on Analyzing Invitations to DOD Officials to Participate in Fundraising Activities and to Accept Gifts Related to Events (18 Aug. 1997) (on file with author). The author concludes:

> [A] DOD official should decline an invitation to serve, in his official capacity, as the chairperson or honorary chairperson of a fundraising event for an organization that is not authorized under Section 3-210 of the *JER*. Serving in such a position clearly constitutes fundraising, which is not allowed under the regulations. These invitations seek the visibility of the DOD official and his name to help solicit attendance and money for the event. Participating under these circumstances would also constitute an unauthorized endorsement of the organization's fundraising.
>
> There are only two exceptions under which a DOD employee could be associated with a fundraising event in her official capacity. First, under 5 C.F.R. § 2635.808(a)(2), an employee may merely attend a fundraising event as long as the organization does not use the fact of her attendance to promote the event.
>
> Second, under 5 C.F.R. § 2635.808(a)(2) & (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to her official duties. This may include the employee's own official duties; the responsibilities, programs, or operations of the agency, or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the organization. Further, the employee's agency must first determine that the event provides an appropriate forum for the dissemination of the information.

Id. The opinion, however, also states that DOD policy disfavors official speeches at fundraisers, stating that official speeches may only be given "if a more appropriate forum is not available and the DOD information needs to be disseminated within a certain time period." *Id.*

51. Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (1982).

52. The Executive Order is not applicable to all fundraising:

> This Order shall not apply to solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members. Such solicitations shall be conducted under policies and procedures approved by the head of the Department or agency concerned.

Id. sec. 7. Compare this provision with the language in *JER* subparagraph 3-210a(6). The *JER* provision is broader than the scope of the Executive Order in that it expands eligibility to participate in the fundraising activity. While the Executive Order states its inapplicability to fundraising by service members and employees, *JER* para. 3-210a(6) includes fundraising by "organizations composed *primarily* of DOD employees or their dependents . . . ." JER, *supra* note 2, para. 3-210a(6) (emphasis added). *See supra* notes 6, 8.

53. 5 C.F.R. § 950 (1999).

54. *Id*. § 950.102(a).

55. *Id.* § 950.102(d). These solicitations are exempt from the CFC rules. Additionally, they do not require permission of the Director of OPM. *See id*.

56. *See id.* § 950.102(b).

57. *See* JER, *supra* note 2, para. 3-211b (defining the federal workplace to include the entire DOD installation and granting the local commander authority to designate areas on the installation that are considered to be outside of the federal workplace for fundraising purposes).

58. *See* 5 C.F.R. § 950.

the current version of 5 C.F.R. § 950 in that it indicates the definition of fundraising includes the use of food and toy collection boxes.[60]

DOD Instruction 5035.5[61]–This instruction sets out the rules for the CFC campaign in overseas areas. It is similar to *DOD Directive 5035.1*.

DOD Directive 5410.18[62]–This old, but still applicable, directive limits official DOD support of fundraisers from the community relations perspective.[63] A commander at the local level does, however, retain the authority to support fundraising events of interest and benefit to the entire local community.[64]

Joint Ethics Regulation Paragraph 3-209[65]–This provision prohibits official endorsement and preferential treatment of non-federal entities other than those listed in *JER* paragraph 3-210.

Army Rules

The ethics counselor should also consult the applicable Army-specific regulations:

Army Regulation 600-29[66]*–Army Regulation 600-29* authorizes four types of fundraising within DA: fundraising for CFC; fundraising for Army Emergency Relief (AER); locally-authorized fundraising; and religious fundraising.[67]

There is an apparent discrepancy between the language found in the *JER* and the language in *AR 600-29*. As mentioned above,[68] the *JER*, and the opinions that interpret it, indicate that DOD employees can endorse and support fundraising for certain non-federal entities composed primarily of DOD employees and dependents.[69] *Army Regulation 600-29* contains similar language, but further indicates that the only fundraising within the Army that may be conducted for the morale of soldiers is the AER campaign.[70] Army Emergency Relief fundraising is specifically listed in the *JER* at subparagraph 3-210a(3), which implies that fundraising other than AER is authorized by *JER* subparagraph 3-210a(6).

Fundraising events for organizations other than CFC and AER cannot be conducted during any time period that conflicts with those campaigns.[71] *Army Regulation 600-29* also indicates that no organizations, other than CFC and AER, may solicit for funds during duty hours in the federal workplace.[72] Yet, several of the opinions discussed previously indicate that fundraising for those organizations covered by *JER* subparagraph 3-210a(6) is official fundraising and may be conducted on the federal installation. Arguably, insofar as *AR 600-29* can be considered as supplementing the *JER* on this point, the *JER* supersedes it.[73]

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59. U.S. DEP'T OF DEFENSE, DIR. 5035.1, FUNDRAISING WITHIN THE DEPARTMENT OF DEFENSE (28 Aug. 1990) [hereinafter DOD DIR. 5035.1]. This directive addresses fundraisers for military relief organizations such as AER, and states that such fundraisers cannot conflict, in any way, with the CFC. *See id*. para. C-6. It also states fundraising by private voluntary organizations in the workplace is limited, but does not indicate how it is limited, other than stating that fundraising activities in public areas of the installation, such as the sale of poppies by veterans organizations or the use of collection boxes for toys or food, are permissible. *See id*. para. C-7.

60. *See id.* para. C-7. *See also supra* note 13.

61. U.S. DEP'T OF DEFENSE, INSTR. 5035.5, DOD COMBINED FEDERAL CAMPAIGN - OVERSEAS AREA (17 Aug. 1990).

62. U.S. DEP'T OF DEFENSE, DIR. 5410.18, COMMUNITY RELATIONS (3 July 1974) (C1, 10 June 1976). *See id*. sec. V, para. C (mandating a policy requiring denial of armed forces support to fundraising events or projects benefiting a single cause).

63. *See id*. para. C-1 (stating that the policy exists because it is impossible for the government to support all worthwhile organizations). Support to such organizations is provided through the CFC; any other support is limited as being inconsistent with the basic policy underlying the CFC. *Id.* The directive also specifically limits DOD participation in air shows and concerts that have a fundraising purpose. *See id*. paras. C-4, C-5.

64. *See id*. para. C-6.

65. JER, *supra* note 2, para. 3-209.

66. AR 600-29, *supra* note 15.

67. *See id.* para. 1-5.

68. *See supra* notes 6, 8.

69. *See* JER, *supra* note 2, para. 3-210a(6).

70. *See* AR 600-29, *supra* note 15, para. 1-5b.

71. *See id*. para. 1-6. Additionally, the regulation provides that fundraising activities for other organizations cannot in any way substantially interfere with the CFC and AER campaigns. *See id*.

72. *See id.* para. 1-10.

Army Regulation 600-29 also discusses other fundraising activities commanders can authorize locally. These include sales of tokens, such as poppies or lapel flags, by veterans' organizations, and the use of collection boxes in public areas of federal buildings.[74] Current OPM guidelines specifically exclude the collection of gifts-in-kind from their coverage.[75]

Army Regulation 600-29 limits official endorsement of fundraisers. Department of the Army personnel may officially endorse only the CFC and AER campaigns, other fundraisers specifically approved by OPM, and local fundraising on behalf of Army MWR nonappropriated fund instrumentalities.[76]

DA Pamphlet 608-47[77]–Family support groups often have both an official and a non-official component. Unit FSGs are a "command sponsored vehicle for people within the unit to help each other."[78] The unit commander's mission includes direct support to the unit FSG.[79] Army regulations clearly contemplate the FSG operating at times as an arm of the command, even authorizing appropriated fund support for "official" FSG volunteers.[80] Commanders must provide family support systems with sufficient resources to accomplish their missions.[81]

Not every activity of the FSG fits within this umbrella of officiality, however. Family support group funds may be characterized as informal funds or private organizations.[82] Reading these rules consistently, FSGs are "quasi-official." They are treated as non-federal entities when engaged in fundraising[83] or other non-official activities (that is, socials, parties, and the like); yet they are treated as official when they are engaged in traditional FSG duties. Therefore, an ethics counselor must not immediately turn to Chapter 3 of the *JER*[84] when advising on activities of FSGs. Ethics counselors should consult Chapter 3 only after determining that the FSG members are acting in an unofficial capacity and the FSG is in non-federal entity mode. An ethics counselor should only apply the restrictions found in Chapter 3 when the FSG is involved in activities such as fundraising.

Army Regulation 215-1[85]*–Army Regulation 215-1* discusses several different aspects of fundraising. The regulation prohibits nonappropriated fund activities from engaging in charitable fundraising activities.[86]

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73. The foreword to the *JER* states:

> All DOD Component regulations implementing these canceled DOD Directives, and all provisions of other DOD Component regulations, directives, instructions, or other policy documents that are not consistent with this Regulation, will be canceled . . . . The supersessions of this paragraph take effect immediately and will be announced by each DOD Component.

JER, *supra* note 2, foreword.

74. *See* AR 600-29, *supra* note 15, para. 1-5c(3).

75. *See* 5 C.F.R. § 950.102(b) (1998). *See also supra* note 13.

76. *See* AR 600-29, *supra* note 15, para. 1-9. The regulation defines "endorsement" to include support such as public appearances made in conjunction with campaign kickoffs and the use of name, title, and position in routine communications designed to promote the fundraising activity. *See id*. According to this regulation, Army personnel may not officially endorse local fundraising activities other than those engaged in by MWR activities. The regulation also states that Army officials may not endorse private organization fundraising activities under *AR 210-1*. *See id*. This language conflicts with *JER* subparagraph 3-210a(6), which allows official endorsement of certain non-federal entity fundraising activities.

77. DA PAM 608-47, *supra* note 40.

78. *Id.* para. 1-7.

79. *See id*. para. 1-8b.

80. *See id*. para. 3-6c (authorizing support for training and travel, reimbursement of incidental expenses, and awards, banquets, and mementos).

81. *See* U.S. DEP'T OF DEFENSE, DIR. 1342.17, FAMILY POLICY, para. D-5 (30 Dec. 1988).

82. *See* DA PAM 608-47, *supra* note 40, para. 3-7a. This paragraph also states that FSG funds of a net worth exceeding $1000 will be treated as private organizations. In light of a recent Army change, however, the $1000 cap is no longer applicable and local commands may establish dollar limits on informal funds at the command's discretion. *See* GC Notes, *supra* note 39. Additionally, FSGs should not be organized as a private organization. *See id.*

83. *See* DA FSG Information Paper, *supra* note 42, para. 2b.

84. JER, *supra* note 2, ch. 3 (regulating activities with non-federal entities).

85. AR 215-1, *supra* note 4.

86. *See id*. para. 4-12d. Specifically, "NAFIs do not contribute to or engage in fundraising activities for charities, foundations, and similar organizations nor collect or disburse donations of a private or personal nature." *Id*.

Although NAFIS may not engage in charitable fundraising, the regulation indicates that non-federal entities may use certain MWR facilities for fundraisers. Private organizations authorized to operate on an installation may operate resale booths at the installation MWR events and activities when the private organizations enter into a memorandum of agreement with the NAFI.[87] Such activity arguably is not considered support of the private organization.[88]

Army Regulation 215-1 prohibits routine MWR patronage by members of private organizations who are not otherwise authorized.[89] Non-federal entities, however, may fundraise in category C MWR facilities,[90] provided they comply with the *JER*, *DODI 1000.15*, and *AR 600-29*.[91] When an on-post private organization sponsors a function in a military club, the private organization may invite members of the public who are neither members of the club nor members of the private organization. All attendees at functions sponsored by on-post private organizations in military clubs are authorized use of the club.[92] For fundraisers by on-post private organizations, however, participation is limited to private organization members and invited guests.[93] Additionally, an authorized patron may use MWR catering services for these events.[94] In category C facilities, and in accordance with applicable regulations, private organizations may be allowed to fundraise using bingo[95] and casino games.[96] *Army Regulation 215-1* also allows non-federal entities to fundraise in conjunction with sports events.[97]

Army Regulation 360-61[98]*–Army Regulation 360-61* is also a good reference regarding fundraising, especially fundraising for local entities. It allows official Army support for fundraising campaigns authorized by *AR 600-29*; other fundraising appeals authorized by the President or OPM; and fundraising efforts of military service aid societies; and limited local fundraising events.[99]

Army Regulation 930-4[100]–This regulation sets out the specific rules for fundraising for the AER campaign. In addition, it authorizes special AER fundraising events such as marathons, walk-a-thons, car washes, sports competitions, carnivals, and bake sales.[101]

Rules to Consult for JER Paragraph 3-211[102] *Organizations*

As previously mentioned, *JER* subparagraph 3-211a regulates the provision of official logistical support to events sponsored by non-federal entities, while *JER* subparagraph 3-211b addresses support for fundraising and membership drives that fall outside the scope of *JER* paragraph 3-210.[103] *Joint Ethics*

87. *See id*. para. 7-48a(4).

88. The former MWR Regulation specifically stated that such special events co-hosted with on-post, private organizations is not to be construed as support to a private organization. *See* Rescinded AR 210-1, *supra* note 18, para. 7-48c(1)(b). The new regulation, however, does not include such specific language. *See* AR 215, *supra* note 4, para. 7-48.

89. *See* AR 215-1, *supra* note 4, para. 6-2i.

90. *See id*. para. 4-1c, fig. 4-1. Category C MWR activities are those which generate enough income to cover most of their expenses, such as golf courses, clubs, bowling centers, rod and gun activities, and food and beverage operations. *Id*.

91. *See id*. para. 6-2i. *See also supra* notes 17, 18.

92. *See id*. para. 8-17b(7)(g).

93. *See id.* para. 8-17e(7)(f).

94. *See id*. para. 8-17c(2)(c). This paragraph also authorizes the use of MWR catering services by authorized patrons for any event sponsored by a non-DOD organization, not just on-post, private organization events.

95. *See id*. para. 8-7f.

96. *See id*. para. 8-9d.

97. *See id*. para. 8-17e(7)(f) (authorizing fundraising by civilian sports organizations at MWR sports events consistent with the *JER*).

98. AR 360-61, *supra* note 44.

99. *See id*. para. 12-2.

100. U.S. DEP'T OF ARMY, REG. 930-4, SERVICE ORGANIZATIONS: ARMY EMERGENCY RELIEF (30 Aug. 1994).

101. *See id*. para. 5-3g.

102. *See* JER, *supra* note 2, para. 3-211a (providing a seven-prong test for commanders to use to determine when official logistical support may be provided to non-federal entity events). This provision does not apply to fundraisers. *Id*. *See also* JER, *supra* note 2, subpara 3-211b (giving guidance on when official support may be provided to fundraisers).

Regulation subparagraph 3-211b[104] allows commanders to provide logistical support to charitable fundraising events sponsored by non-federal entities. The commander must determine that the event meets the first six prongs of the test in *JER* subparagraph 3-211a. The commander must also determine that the non-federal entity is either not affiliated with the CFC or, if affiliated, the Director, OPM, has no objection to DOD support of the event.[105] Normally, the Director, OPM, will deny permission to support such events.[106] The *JER* specifically states, however, that OPM does not object to support of events that do not fundraise in the "federal government workplace," which is determined by the local commander.[107] The *JER* additionally states that an installation commander may authorize fundraising on the military installation, on a limited basis.[108]

Ethics counselors must be able to assist commanders in answering the question: "What type of fundraising can I support under *JER* subparagraph 3-211b?" To approve support to these fundraisers, commanders must apply each of the tests set out in the first six prongs of *JER* subparagraph 3-211a.

Before an ethics counselor applies these six prongs, he must note that *JER* subparagraph 3-211b only authorizes a commander to approve *charitable* fundraising. Logically, since this provision is a DOD supplement, the ethics counselor must examine the basic paragraph of the federal rule it supplements to define "charitable."[109] First and foremost, the commander must determine that the activity to be supported is *charitable* fundraising.[110]

Once the commander has determined that the fundraising is charitable in nature, he must ensure that the requested support qualifies under each of the six prongs referenced in *JER* subparagraph 3-211b.

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103. *See supra* note 7.

104. The regulation states:

> The head of a DOD Component command or organization may provide, on a limited basis, the use of DOD facilities and equipment (and the services of DOD employees necessary to make proper use of the equipment), as logistical support of a charitable fundraising event sponsored by a non-Federal entity when the head of the DOD Component command or organization determines (1) through (6) of subsection 3-211.a of this Regulation, above, and the sponsoring non-federal entity is not affiliated with the CFC (including local CFC) or, if affiliated with the CFC, the Director, OPM, or designee, has no objection to DOD support of the event. OPM has no objection to support of events that do not fundraise on the Federal Government workplace (which is determined by the head of the DOD component command or organization).

JER, *supra* note 2, para. 3-211b.

105. *See supra* notes 53-58 and accompanying text.

106. *See* DOD SOCO Advisory No. 97-09, *supra* note 8, para 1.

> In addition, we may officially render logistical support to charitable fundraising events in accordance with § 3-211 of the *JER*. Under this section, permission from OPM is required only if:
> 1. The organization is affiliated with the CFC;
> 2. The event raises funds, not gifts-in-kind such as food, clothing, or toys;
> 3. The event occurs outside of the CFC campaign season (Sept.1 to Dec. 15), *and*;
> 4. The fundraising occurs in the federal workplace. (The federal workplace includes the DOD installation, although the installation commander may designate a public place on the installation where all similar groups may solicit funds.)

Id.

> Bottom line: OPM, as a matter of policy, is denying requests for support of fundraisers . . . . Savvy ethics officials may assist their clients not by seeking OPM permission, but by assisting their client to structure their fund-raising efforts so that they comport with the *JER* and 5 C.F.R. § 2635.808 yet do not require OPM approval.

Id.

107. *See* JER, *supra* note 2, para. 3-211b.

108. *See id*. para. 3-300a(2) (allowing the commander to designate areas in the federal workplace where DOD employees and dependents may fundraise). These areas include public entrances to buildings, community support facilities, and personal quarters. *See id.*

109. *See supra* notes 10, 11 and accompanying text. The supplemented provision, 5 C.F.R. § 2635.808 (1999), defines fundraising to include participation in events where "any portion of the cost of attendance or participation may be taken as a *charitable tax deduction* by a person incurring that cost." *Id*. § 2635.808(a)(1)(ii) (emphasis added).

110. *See, e.g.*, I.R.S. Pub. 526, (Rev. Nov. 1996). The Internal Revenue Service (IRS) allows charitable deductions for organizations such as nonprofit schools and hospitals; federal, state, and local governments; Boy Scouts, Girl Scouts, Red Cross, Goodwill Industries, Boys and Girls Clubs of America, and the like. *See id.* at 2. The IRS does not allow charitable deductions for fraternal orders, lodges, or other nonprofit groups such as civic leagues, social and sports clubs, labor unions, and chambers of commerce. *See id.* at 6. Additionally, the IRS does not consider groups whose purpose is to lobby for changes in the laws as charitable organizations. *See id.* at 7.

The first prong states: "The support does not interfere with the performance of official duties and would in no way detract from readiness."[111] For example, posting soldiers in uniform during duty hours outside a local restaurant to sell raffle tickets to benefit the American Cancer Society would interfere with the performance of their official duties and, therefore, would be prohibited.

The second prong states: "DOD community relations with the immediate community and/or other legitimate DOD public affairs or military training interests are served by the support."[112] To determine if this prong is met, compare the proposed fundraising with the types of local fundraising authorized in *AR 360-61*.[113] This prong would be met, for example, where the command desired to provide support to a fundraiser for a local rescue squad, volunteer fire department, or humane society. These organizations provide benefits for the entire local community, including soldiers and DA civilians.

The third prong states: "It is appropriate to associate DOD, including the concerned Military Department, with the event."[114] Some organizations do not have core values similar to those of the Army. Army policy would not allow official support of a fundraiser, for example, that benefited extremist organizations or anti-military organizations.

The fourth prong states: "The event is of interest and benefit to the local civilian community, the DOD Component command or organization providing the support, or any other part of DOD."[115] The first part of this prong, requiring that the event be important to the local civilian community, is very similar to the community-relations requirement of the second prong. However, this prong is broader in that the event may merely be of interest to the organization providing the support or to another part of the military community.

The fifth prong states: "The DOD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-federal entities."[116] Basically, this prong restates the long-standing prohibition against preferential treatment of non-federal entities.[117] The regulations simply do not allow a commander to "play favorites." If the commander provides support to a golf tournament sponsored by the Museum Restoration Association to raise money for museum purposes, he should not deny a request for a similar fundraiser from the Museum Volunteers Association. Similarly, a commander who allows AUSA to come on the installation and conduct a charitable fundraiser should not deny a similar request from other military-related associations. This prong requires that commanders exercise diligence in their efforts to keep non-federal entity fundraising under control.[118]

The sixth prong states: "The use is not restricted by other statutes (see 10 U.S.C. § 2012 . . . which limits support that is not based on customary community relations or public affairs activities) or regulations."[119] The referenced statute limits support to activities outside the DOD.[120] Pursuant to the statute, the military services may still support a wide variety of organizations under the umbrella of "customary community relations and public affairs activities."[121] However, the organizations eligible for any other support is very limited. Not surprisingly, the organizations eligible for support are the same organizations that qualify as charitable under the IRS rules. Support may be provided only to governmental entities at the federal, regional, state, and local level; to the youth and charitable organizations specified in 32 U.S.C. § 508;[122] and to other entities the Secre-

111. JER, *supra* note 2, para. 3-211a(1).

112. *Id*. para. 3-211a(2).

113. *See supra* note 44 and accompanying text.

114. JER, *supra* note 2, para. 3-211a(3).

115. *Id*. para. 3-211a(4).

116. *Id*. para. 3-211a(5).

117. *See* 5 C.F.R. § 2635.702 (1999). This provision includes prohibitions on the use of public office for private gain and the use of one's government position to imply the government endorses private activities, products, or services. *See id*. *See also* JER, *supra* note 2, para. 3-209 (addressing endorsement and preferential treatment).

118. One way a commander can prevent fundraising from getting out of control on the installation is by generally not allowing any support to *JER* subparagraph 3-211b fundraisers. Because the organizations that provide the greatest benefits to the military community as a whole usually fit within the parameters of *JER* subparagraph 3-210a(6), a commander can avoid this problem by simply not allowing support to fundraisers under *JER* subparagraph 3-211b. Pandora's box remains closed.

119. JER, *supra* note 2, para. 3-211a(6).

120. 10 U.S.C.A. § 2012 (West 1999). While this statute does not specifically mention fundraising, it does state support may only be provided to activities outside DOD if the assistance is authorized by another provision of law or if the assistance is incidental to military training. *See id.*

121. *Id.* § 2012(b)(1) (stating that the statute is not intended to limit these activities).

tary of Defense approves on a case-by-case basis.[123] The DOD Directive interpreting the new statute did not add any other organizations to the list of those eligible for support.[124]

Ethics counselors must also consider other limiting statutes, such as the restriction on military support to civilian sporting events.[125]

Recommendations

At the DOD Level

The recent revision to *DODI 1000.15* was a step towards eliminating confusion in the area of fundraising. The instruction precludes conflicts with the *JER* by simply referring to the *JER* rules throughout.[126] Instead of adopting the terminology of the *JER* (that is, non-federal entities), however, *DODI 1000.15* still refers to "private organizations." That term is confusing because it is not in the *JER*.[127] The DOD could dramatically improve *DODI 1000.15* by characterizing organizations using the same dichotomy that exists in the *JER*: organizations entitled to the special treatment of *JER* paragraph 3-210, and organizations eligible for support under *JER* paragraph 3-211. The *DODI 1000.15* would much better serve its users by shedding the old terminology and adopting not only the *JER*'s rules, but also its language.

The DOD should also revise *JER* paragraph 3-210 to incorporate DOD SOCO's interpretation of support to which non-federal entities are entitled. Specifically, DOD SOCO has opined that non-federal entities are eligible for official support in addition to official endorsement.[128]

The DOD should also rewrite *JER* subparagraph 3-210a(6) to make it consistent with Executive Order 12,353 and 5 C.F.R. § 950 by deleting the word "primarily."[129] Organizations with any members from outside DOD would fall under *JER* paragraph 3-211 rather than subparagraph 3-210a(6). Additionally, in *JER* subparagraph 3-210a(6), DOD should change the words "among their own members" to read "on the military installation," since that is how the language is interpreted.[130] A statement reflecting the language of 5 C.F.R. § 950 that OPM permission is not necessary for fundraising pursuant to *JER* subparagraph 3-210a(6) would also benefit *JER* users.

The DOD should add a sentence to *JER* subparagraph 3-210a(6) stating that the covered organizations are not authorized to fundraise off the military installation. Keeping these fundraisers on the installation would prevent the perception that DOD is perpetually seeking a handout from the public, above and beyond the public's contribution as taxpayers.

For example, no matter what name FSGs give themselves, the public views these groups as part of the DOD. Downtown merchants who see an advertisement soliciting commercial sponsorship[131] for a DOD event may not participate due to frequent solicitations for funds by FSGs. The merchant may understandably experience difficulty distinguishing the difference between donating to a FSG and providing commercial

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122. 32 U.S.C.A. § 508 (West 1999). Eligible organizations are limited to the Boy Scouts of America, the Girl Scouts of America, the Boys Clubs of America, the Girls Clubs of America, the Young Men's Christian Association, the Young Women's Christian Association, the Civil Air Patrol, the United States Olympic Committee, the Special Olympics, the Campfire Boys, the Campfire Girls, the 4-H Club, the Police Athletic League, and any other youth or charitable organization designated by the Secretary of Defense. *See id*. § 508d.

123. *See* 10 U.S.C.A. § 2012(e)(3).

124. U.S. Dep't of Defense, Dir. 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (30 Jan. 1997).

125. 10 U.S.C.A. § 2554 (specifying the amount and type of support DOD can provide to civilian sporting events).

126. For example, the instruction prevents sanction, endorsement, or support of private organizations except as authorized by the *JER*. *See* DODI 1000.15, *supra* note 34, para. 4. The instruction also requires fundraising and membership drives to comply with the *JER*. *See id*. para. 6.5. It states that logistical support to private organizations may only be provided in accordance with the *JER*. *See id*. para. 6.6. It states that the *JER* governs personal and professional participation in private organizations. *See id*. para. 6.7.

127. *See supra* notes 31, 32.

128. *See supra* notes 8, 9.

129. *See supra* note 52.

130. *See supra* note 42.

131. *See* AR 215-1, *supra* note 4, para. 7-47a.

> Commercial sponsorship is the act of providing assistance, funding, goods, equipment (including fixed assets), or services to a MWR program(s) or event(s) by an individual, agency, association, company, or corporation, or other entity (sponsor) for a specific (limited) period of time in return for public recognition or opportunities for advertising and other promotions.

Id.

sponsorship to an official morale event. Prohibiting FSG fundraising outside the installation gate would likely result in long-term benefits to commercial sponsorship programs. Additionally, the DOD should revise *DOD Dir. 5035.1* to define fundraising consistently with the current definition in 5 C.F.R. § 950.

At the DA Level

Many of the documentation requirements in *AR 210-1* are no longer necessary. Because *AR 210-1* has been rescinded, ethics counselors should consider adopting the *JER* paragraph 3-210/3-211 dichotomy as suggested above. Non-federal entities with members from outside the DOD no longer need to file a constitution and by-laws with the installation. All organizations requesting support under *JER* paragraph 3-211 should be treated similarly. For instance, the downtown YMCA can qualify for official support under *JER* paragraph 3-211 without filing a constitution and by-laws. The booster club for an on-post school with members from outside the DOD community should be treated the same. The booster club should not be subjected to an audit and to filing requirements when an off-post organization can qualify for similar support without meeting those requirements. Logically, the DA should require financial reports, constitutions, and by-laws only from those organizations that benefit from the favored treatment bestowed by *JER* subparagraph 3-210a(6).

Neither the *JER* nor the revised *DODI 1000.15* place any dollar limits on informal funds.[132] If the DA adopts *JER* terminology and the *JER* paragraph 3-210/3-211 dichotomy in future private organization guidance, it should also provide a new definition for the term "informal funds." The Army should continue to refrain from defining informal funds according to their net worth but should instead categorize them by the way they support themselves. Informal funds would be defined as those funds that do not "fundraise" in the traditional sense; rather, these funds are comprised solely of membership fees and dues. Examples are cup and flower funds, coffee funds, and holiday party funds supported solely by members who "chip in." The DA should require all managers of informal funds that qualify under *JER* subparagraph 3-210a(6) and who seek to raise funds through methods other than payment of dues to provide financial documentation, regardless of their net worth.

The DA should also review the organization of FSG funds as currently described in *DA Pamphlet 608-47*. Family support groups would be exempt from the restrictions in the *JER* if they were considered official morale support activities rather than non-federal entities. Similar to the BOSS[133] program and the United States Marine Corps FSG program,[134] the FSGs would qualify for nonappropriated fund support, and could also have on-post "events" to fill their coffers. With this change in philosophy, the restrictions in Chapter 3 of the *JER* would no longer apply to FSG "events."

The DA should revise *AR 600-29* to bring it up to date with the *JER* and the current 5 C.F.R. § 950. Specifically, the regulation should adopt the policy of *JER* paragraph 3-210. In accordance with that policy, the DA should delete the current restriction in the regulation stating that AER is the only authorized fundraising in the Army among soldiers for their own welfare funds. If this were still a valid restriction, it would render *JER* subparagraph 3-210a(6) meaningless as applied to the Army. Just as the DOD should revise *DOD Directive 5035.1*, the Army should revise the definition of fundraising in *AR 600-29* so that it is consistent with the definition in 5 C.F.R. § 950. Also, the prohibition in *AR 600-29* against official endorsement of private organization fundraising activities should be restated so it is consistent with the *JER*.[135]

The DA should also revise *AR 215-1*. The regulation should adopt the *JER* paragraph 3-210/3-211 dichotomy and use the terminology of the *JER*. The DA should delete the term "private organization." The DA should add a specific provision defining what activities constitute official support to a non-federal entity. If a non-DOD organization pays to use a category C MWR facility, is the organization receiving official DOD support? This matter merits clarification.

At the Installation Level

Commanders can take several precautions to ensure that only appropriate fundraisers receive official support. A commander should have specific, well-publicized channels set up to handle fundraising requests. Before approval, the commander should ensure that requests are staffed through the directorate of community activities, the ethics counselor, and the CFC point of contact. The commander should also implement a local policy that addresses approval procedures, designates specific public areas of the installation where fundraising is authorized, and advises potential participants of any local restrictions (for example, whether FSGs are allowed to fundraise off the installation). To prevent competition with the MWR Commercial Sponsorship Program, commanders should consider limiting the number of fundraisers each organization may have.

132. The Army removed the $1000 cap on informal funds, giving discretion to local commanders to set limits. *See supra* note 18. Enclosure 4 to the ACSIM memo which rescinded AR 210-1 (see *supra* note 17) retains the $1000 limit on informal funds.

133. *See supra* notes 26, 27 and accompanying text.

134. The Marine Corps views FSGs as MWR activities rather than non-federal entities. Telephone Interview with Captain Joe Perlach, Office of the Staff Judge Advocate to the Commandant of the Marine Corps (9 Mar. 1998).

135. *See supra* note 76.

Conclusion

Worthwhile charities are abundant. An individual's decision to support a particular charity is a highly personal and private matter. When the military services provide official support to non-federal entity fundraisers, the support is essentially being funded by a taxpayer who is given no opportunity to participate in the decision to support that particular charity. The numerous fundraising regulations exist to prevent the appearance that the military services are making preferential decisions as to which charities will receive their publicly-funded support.

A commander inundated with these rules can easily become frustrated trying to decide what official support he may provide. Ethics counselors' differing interpretations of these rules aggravate that frustration. A few simple changes to the *JER* and other applicable regulations would resolve these inconsistent opinions and enhance commanders' understanding of the rules regarding public support for private fundraisers.

Leadership Training in the Judge Advocate General's Corps

Major Pamela M. Stahl
1st Armored Division

The most essential dynamic of combat power is competent and confident . . . leadership. Leaders inspire soldiers with the will to win. They provide purpose, direction, and motivation . . . . Thus, no peacetime duty is more important for leaders than studying their profession, understanding the human dimension of leadership, becoming tactically and technically proficient . . . . The regular study and teaching of military doctrine, theory, history, and biographies of military leaders are invaluable.[1]

Introduction

Effective leadership is a subject much in debate in the past year, with political events spurring a renewed interest in the role of leadership.[2] Army judge advocates (JAs) should take this opportunity to reflect upon their own leadership role and explore what the Army expects of them as officers and leaders. Although few JAs will "command" soldiers, as that term is defined by Army doctrine,[3] they are Army officers who likely will supervise and lead junior officers, enlisted soldiers, and Department of the Army civilian employees. This article assists the JA in exploring Army leadership by first discussing the Army's formal leader development system and providing suggestions on how JAs can use this system to develop their own leadership abilities and those of their subordinates. It then outlines the Army leadership model, describing the Army ethos and how it applies to JAs.

Leaders From the Beginning

The Army is an institution, not an occupation. Members take an oath of service to their nation and the Army, rather than simply accept a job . . . the Army has moral and ethical obligations to those who serve and their families; they, correspondingly, have responsibilities to the Army.[4]

When JAs begin their careers in the Judge Advocate General's Corps (JAGC), they, like all army officers, swear "to support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "well and faithfully discharge the duties of [a commissioned officer in the United States Army]."[5] As lawyers, JAs understand the legal consequences of becoming a commissioned officer. For example, they cannot oppress or maltreat persons subject to their orders;[6] act in a manner that is unbecoming their status as officers;[7] or use contemptuous words towards certain officials.[8] Of course, effective leadership goes well beyond simply following a criminal code. Judge advocates must also understand what it means to be an officer in the United States Army; what they represent and what they stand for.

At The Judge Advocate General's School's, U.S. Army (TJAGSA) Fourth Annual Hugh J. Clausen Leadership Lecture,[9] General (retired) Frederick M. Franks, Jr. (former Commanding General, US Army Training and Doctrine Command and Commander, VII Corps during OPERATIONS DESERT SHIELD/STORM) stated that as an officer and lawyer in today's Army:

> In your future duties you will continue to encounter situations where there is no clear precedent to guide you, situations where you

1. U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, 2-11 (14 June 1993).

2. *See generally* Jack Elliot, Jr., *Republican Presidential hopefuls speak oun on Clinton allegations*, ASSOCIATED PRESS, (visited Jan. 6, 2000) <httpL//reagan.com/hottopics.main/hotmike/document-3.2_1988.3.html>.

3. *See generally* U.S. DEP'T OF ARMY, REG. 600-20, COMMAND POLICY, para. 1-5 (3 Mar. 1988).

4. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP, para. 3-4 (June 1999) [hereinafter FM 22-100].

5. 5 U.S.C.A. § 3331 (West 1999).

6. *See* UCMJ art. 93 (West 1998).

7. *See id.* art. 133.

8. *See id.* art. 88.

9. General Frederick M. Franks, Jr., *The Fourth Annual Hugh J. Clausen Leadership Lecture: Soldiering Today and Tomorrow, in* U.S. DEP'T OF THE ARMY, PAM. 27-100-158, MILITARY LAW REVIEW, at 130 (Dec. 1998).

> will call on your education and your considerable ability to think, situations where you have to use your own wits and your knowledge of the law to help your commanders sort their way through conditions or scenarios hard to predict much in advance. But you have something else. You know who you are and what you stand for. You are lawyers, but you are also American soldiers and stand for something.[10]

What is this "something" that JAs stand for? During Vietnam, then Major Franks was severely wounded in combat in Cambodia. During his two-year recovery at Valley Forge General Hospital in Pennsylvania, he concluded that many military leaders had abandoned their soldiers.[11] While in the hospital with other badly wounded soldiers, General Franks observed that there were no leaders who visited the soldiers to tell them that their country was grateful. Franks said that "[he] was a graduate of West Point and truly believed in duty, honor, and country [and] [s]o did these soldiers." He wondered if they were all fools for believing in those things.[12]

Of course, General Franks' subsequent Army career is a testament to the fact that it is not foolish to believe in one's country. General Franks says that his experience created in him a resolve to do whatever he could to see that leaders never again fracture the trust of their soldiers.[13] Judge advocates can learn from General Franks' experiences, which resulted in a great leader who was effective because he had that certain "something"; he did what was right for his soldiers and for his country.

Judge advocates have a responsibility to take the initiative in developing themselves and their subordinates into good leaders. Judge advocates must all have that "something" that General Franks speaks of. The Army attempts to instill that "something" in Army leaders through the Army's leader development system.

Training Leaders through the Army's Leader Development System

The Army's leader development system consists of institutional training and education, duty assignments, and self-development.[14] Judge advocates have an excellent training and education program at TJAGSA. This is just one part, however, of the leader development system. The leadership skills of JAs are also developed and refined in the other two components of the system: duty assignments and self-development.

Duty Assignments

Duty assignments provide JA supervisors the opportunity to train subordinates in Army leadership, while at the same time refining their own leadership skills. Supervisors can accomplish this training through a formal leadership development program and informally through on-the-job training.

First, a formal leadership development program should begin by providing subordinates with the leader's mission focus. These programs should be in writing and contain goals, objectives, and training programs that include study, practice and feedback. Ideally, the program should also have a mechanism for assessment, review and improvement.

Formal leadership instruction, in particular, is a vital component of any leadership development program. The supervisor's direct involvement in leadership training is critical and the supervisor should act as the primary teacher, coach and counselor.[15] Because of their depth and breadth of experience, along with the credibility that those experiences bring, senior JAs, preferably staff judge advocates or deputy staff judge advocates, must provide leadership instruction. Ideally, leadership instruction should be incorporated into an officer professional development (OPD) program. Leadership specific training should be provided at least once each quarter.

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10. *Id.* at 133.

11. Tom Clancy & General Frederick Franks, Jr. (Ret.), Into The Storm 78 (1997).

12. *Id.*

13. *Id.* at 79. Indeed, on 22 February 1991, just two days before OPERATION DESERT STORM began, General Franks visited a field hospital where soldiers from the 1st Cavalry Division who were wounded in combat two days prior were recovering from their injuries. *See id.* at 238.

14. U.S. Dep't of Army, Pam. 350-58, Leader Development for America's Army 3-4 (13 Oct. 1994) [hereinafter DA Pam. 350-58].

15. *Id.* at 27.

Second, in addition to a formal leadership program, all JA supervisors can enhance subordinate leader development by: (1) assigning progressively more complex and demanding duties; (2) assessing performance against standards, and providing information on strengths, weaknesses, and developmental needs; (3) counseling and coaching; and (4) helping prepare and execute self-development plans, which are discussed below.[16]

Like all Army leaders, JAs have a fundamental responsibility to counsel their subordinates.[17] Leaders may feel uncomfortable performing this counseling because they are unfamiliar with the counseling requirements. Consequently, all JAs could benefit from a good leadership counseling training program.[18] Leaders should incorporate such a program into their OPD schedules.

Leadership development training may seem like an enormous task to those who are already stretched thin. The benefits, however, of instilling in JAs important leadership skills are immeasurable. Such skills will result in effective leaders who are better prepared to carry out the Army mission.

Self-Development

Judge advocates are also responsible for their own leadership development, regardless of their length of service. The most effective method to accomplish this goal is through a written self-development plan for leadership development that is structured to meet each JA's specific goals and needs. Plans may include self-study, reading programs, and civilian education.[19]

To be effective, supervisors must establish and maintain a climate and training environment that promotes self-development. For example, formal leadership instruction may include time for JAs to discuss literature that they have read on legal issues or Army history. Supervisors can also establish a reading list for their subordinates, and maintain an informal library containing recommended books.

Self-development plans should contain a list of ways to improve leader knowledge and skills. It is not important whether the JA accomplishes every action in the plan. What is important is that JAs consider the various ways in which they can improve their own leadership skills and strive to take action to improve those skills whenever possible.

Training Leaders Through Instruction in the Army Leadership Model

Good leadership training should stress the Army leadership model. As Army officers, JAs must understand and abide by this leadership framework, which articulates the Army ethos. According to this model, three words clearly and concisely state the characteristics of Army leaders: Be, Know, Do.[20]

"Be" describes a person's character; the values and attributes that are generally demonstrated through behavior.[21] "Know" describes a person's level of knowledge and competency.[22] Of course, to be a good leader, character and knowledge are not enough. "Do" describes how JAs apply what they know, and act as leaders to influence their subordinates, accomplish the mission, and improve their organization.[23]

What a Leader Must "Be"

When George Bush, a Navy combat flier in World War II, was running for President, he was asked what he thought about as he drifted in hostile seas after being shot down. He answered, "Oh, you know–the usual things, duty, honor, country." As a political answer, it was a groaner. Nonetheless, it was probably very close to the essence of George Bush.[24]

In his own matter-of-fact way, former President Bush was simply describing what the military had instilled in him as a young Navy flier over fifty years ago; that is, the values and attributes of a member of the United States military. These values and attributes make up a person's character.

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16. *Id*. at 6-7.

17. U.S. Dep't of Army, Field Manual 22-101, Leadership Counseling 7 (3 June 1985).

18. *See id.*

19. DA Pam. 350-58, *supra* note 14, at 7.

20. FM 22-100, *supra* note 4, para. 1-21.

21. *Id*. para. 1-22.

22. *Id*. para. 1-25.

23. *Id*. para. 1-6.

24. Tom Brokaw, The Greatest Generation 274-75 (1998).

Army Values. The seven Army values that guide all effective Army leaders are loyalty, duty, respect, selfless service, honor, integrity, and personal courage.[25] As leaders, JAs must understand these values, but more importantly, they must believe in them and teach their subordinates to accept them.

First, as Army officers, JAs have an obligation to be *loyal* to their country and their Army, including both superiors and subordinates.[26] Judge advocates must also perform their *duty* to the best of their ability and treat all people with *respect*.[27] This concept of respect for others is the basis for the Army's Consideration of Others program.[28]

Selfless service. Judge advocates should not make decisions and take actions that will help their careers at the expense of others.[29] Judge advocates must also place the needs of the Army and the nation before their own interests. This does not mean, however, that JAs are expected to neglect their families and themselves to "get ahead."[30] General Franks eloquently explained this concept as follows:

> In the military, it often happens that a professional soldier will deny his family, give up time with them—holidays, vacations, evenings, weekends—normally for the often-unexpected call of duty. The military is a demanding and sometimes cruel profession that exacts a toll on families, all in the name of duty and service. Too often, the present gets mortgaged for the future. You tell yourself, "Well, I'll have time for that later in life, after I retire. For the time being, I have to work hard, and maybe the family has to pay the price." Most of the time, duty leaves you little choice.
>
> Now I came to realize that the present is the only time you have. . . . You are successful only by taking care of the present. . . . I began to realize I was not powerless in this tension between the demands of duty and family considerations. . . . And within my circle of responsibility I could help others cope better by establishing policies that help.[31]

The JA leader also serves with *honor* and *integrity.* Judge advocates must live by all Army values and do what is right, both legally and morally.[32] Judge advocates must also have the personal *courage* to face adversity, both physical and moral.[33]

Army Attributes. The other part of what a leader must "Be" includes certain attributes. Attributes are a person's fundamental qualities and characteristics; some they are born with and others are learned and can be changed. The Army expects its leaders to have certain mental, physical, and emotional attributes.[34]

First, Army leaders must have the mental attributes of will, self-discipline, initiative, judgment, self-confidence, intelligence, and cultural awareness.[35] Second, Army leaders must have the physical attributes of health and physical fitness, and military and professional bearing.[36] These are the most visible competencies that JAs maintain. Judge advocates must lead by example. Therefore, the junior JA who may be exposed to the military for the first time must be taught how to wear the uniform and common Army courtesies. Subordinates must also learn the importance of maintaining physical fitness and meeting height and weight standards.[37]

Finally, the Army teaches that leaders must have the emotional attributes of self-control, balance, and stability.[38] If a

25. FM 22-100, *supra* note 4, para. 2-6.

26. *Id*. para. 2-10.

27. *Id*. para. 2-14.

28. *Id*. para. 2-21.

29. *Id*.

30. *Id.* para. 2-22

31. CLANCY, *supra* note 11, at 80.

32. FM 22-100, *supra* note 4, paras. 2-26, 2-31.

33. *Id*. para. 2-34.

34. *Id*. paras. 2-40, 2-41.

35. *Id*. para. 2-42.

36. *Id*. para. 2-67.

37. *Id.* para. 2-73.

leader wants his subordinates to be calm and rational under pressure, the leader must also display those emotions.[39]

What a Leader Must "Know"

The best JA leaders always strive to improve, to be better Army officers as well as better lawyers. Judge advocates must focus on learning more about their profession, thereby building competence in their subordinates and themselves. According to the Army leadership model, the JA must have interpersonal, conceptual, and technical skills.[40]

The JA must continually work with clients, including commanders, individual soldiers and family members, with personal legal problems. Therefore, the JA must have the proper *interpersonal skills* to interact with clients who may be superiors, peers, subordinates, or their families. The JA must also learn how to interact with their own subordinates, to include coaching, teaching, counseling, and motivating.[41] In addition, JAs must have proper *conceptual skills*; they must be competent at handling ideas. For most JAs, this is not difficult because of their law school training. This skill involves sound judgment, however, as well as the ability to think creatively and reason analytically, critically, and morally.[42] Finally, JAs must have the *technical skills* expected of an Army lawyer; they must be competent in job-related tasks.

What a Leader Must "Do"

Finally, according to the Army leadership model, leaders must work to influence people, operate to accomplish the mission, and act to improve their organizations.[43]

A leader development program is designed to teach appropriate skills, values, and attributes. Real leadership begins, however, only when the leader acts.

Leaders *influence people* toward a goal. Good leaders do this through communication, decision-making, and motivation.[44] In providing advice and counsel, JAs are also expected to use sound judgment and logical reasoning in their decision-making process.

Leadership action also includes *operating skills*. For the JA, this means getting the job done on time and to standard. It also includes taking care of their people and efficiently managing their resources.[45]

In addition, leaders always strive to *improve* themselves and their organizations. To improve, JAs must set priorities and balance competing demands. Judge advocates also must invest adequate time and effort to develop subordinates as leaders.[46] This includes establishing a formal leader development program, performing counseling, and helping subordinates institute a self-development plan.

Conclusion

General Franks described one of his JAs as "a friend, legal counselor, combat veteran from Vietnam, and a soldier with a total appreciation of the problem. He was also an American with a sense of what was right."[47] It is difficult to imagine any higher praise of a JA by his commanding officer. Certainly, this is the JA that all should strive to be and the JA that [WE] should train our subordinates to be. In doing so, it is vital that JAs completely appreciate the legal aspects of a given situation, and that they have that "sense of what is right." Both can be taught through effective leadership training. Judge advocates are all responsible for leader training, both in duty assignments and through self-development. An integral part of leadership training is instruction on the Army leadership model and inculcation of the values and attributes that are vital to effective Army leadership.

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38. *Id*. para. 2-74.

39. *Id*. para. 2-79.

40. *Id*. para. 2-107.

41. *Id.*

42. *Id*.

43. *Id.* para. 2-111.

44. *Id*. para. 2-113.

45. *Id*. paras. 2-114, 2-115.

46. *Id.* para. 2-117.

47. DA PAM. 27-100-158, *supra* note 9, at 132. General Franks states that in negotiating with Iraq in March 1991, one of the biggest problems was how to get United States' troops out while attempting to deal with the growing population of refugees fleeing the brutality of the Iraqi government. He turned to his staff judge advocate for advice on the situation. *Id.*

Congress passed the CDA in 1978.[1] The CDA changed the payment mechanism for both judgments and board awards in contract cases.[2] Before the CDA, court judgments against the United States were paid from the Judgment Fund with no requirement that it be reimbursed.[3] Claims adjudicated before the boards of contract appeals were not paid out of the Judgment Fund; instead, federal agencies paid these claims out of their own funds.[4] Consequently, the procuring agency had some incentive "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds."[5]

Absent a specific statutory requirement, an agency is not required to reimburse the Judgment Fund.[6] Section 612(c) of the CDA provides such a statutory requirement. It requires the agency to reimburse the Judgment Fund for the payment of claims made pursuant to a court judgment or monetary award.[7] Under the CDA, a court judgment or monetary award by the boards of contract appeals is viewed as giving rise to a new liability.[8] Hence, repaying the Judgment Fund must be made out of funds current at the time of the judgment, or by obtaining additional appropriations for such purposes.[9]

Although reimbursement is mandatory, the CDA is silent as to the time period in which repayment must occur.[10] Thus, the agency has some discretion in the matter, as the General Accounting Office has recognized.[11]

> It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could have just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid.

Hence, an agency may violate the Act if reimbursement does not occur by "the beginning of the second fiscal year following the fiscal year in which the award is paid."[12]

At the same time the Judgment Fund issues a check to pay the judgment or monetary award, the Department of the Treasury, Financial Management Service (FMS), simultaneously bills the procuring agency. *Department of Defense Regulation 7000.14-R* suggests that the agency follow the procedures listed below to reimburse the Judgment Fund:[13]

> (1) Determine "what appropriation originally funded the portion of the contract that led to the claim and subsequent judgment."

1. *Id.*

2. S. REP. NO. 95-1118, at 33 (1978).

3. *Id.*

4. GENERAL ACCOUNTING OFFICE, *supra* note 23, at 12-76.

5. S. REP. NO. 95-1118, at 33.

6. Financial Management Service Home Page (visited November 28, 1999) <http://www.fms.treas.gov/judgmentfund/history.html>. *See* Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987).

7. 41 U.S.C.A. § 612(c) (West 1999). Although monetary awards adjudicated at the board of contract appeals are usually paid directly by the agency, the Judgment Fund may be used to pay those awards in certain circumstances; for example, when the agency has insufficient funds to pay the award.

8. *Id*. *See* Bureau of Land Management–Reimbursement of Contract Disputes Act Payments, 63 Comp. Gen. 308, 312 (Apr. 24, 1984).

9. 41 U.S.C.A. § 612(c). *See* U.S. DEP'T OF DEFENSE REG. 7000.14-R, Vol.3, BUDGET EXECUTION–AVAILABILITY AND USE OF BUDGETARY RESOURCES, para. 080304 (Dec. 1996) [hereinafter DOD REG. 7000.14-R].

10. 41 U.S.C.A. § 612.

11. Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987). *See* DOD REG. 7000.14-R, para. 080304(F).

12. *Id.*

13. *Id.*

(2) Find funds (if possible) that were "currently available for new obligation at the time of the judgment. Expired appropriations that were current at the time of the judgment also may be used."

(3) Reprogram funds "from existing allocated funds within the appropriation. If sufficient funds do not exist within the appropriation, then supplemental funds must be sought."

(4) "Upon identification of funds to be charged and completion of any reprogramming actions, forward the package to the Defense Finance and Accounting Office having accounting responsibility for the designated fund accounts to process the payment."

(5) If the Judgment Fund reimbursement exceeds $1,000,000, have the cognizant Assistant Secretary of the Military Department (Financial Management and Comptroller) or Defense Agency Comptroller approve the reimbursement.[14]

If reimbursement does not occur, then the FMS will send follow-up inquiries. The tools normally available to the Department of the Treasury to collect a debt from a private party are not available when the debtor is another federal agency.[15] The Department of the Treasury cannot sue another federal agency that fails to reimburse the Judgement Fund, charge interest, or offset the claim against present or future appropriations.[16] If the agency still fails to pay, then FMS could report the agency to Congress.

Reimbursement requirements are not onerous. With a basic understanding of the CDA and *DOD Regulation 7000.14-R*, Army attorneys and the contracting officers they advise can avoid common pitfalls that could embarrass their command. Major Key.

14. *Id.*

15. Antitrust, Fraud, Tax, and Interagency Claims Excluded, 4 C.F.R. § 101.3(c) (1999).

16. *Id.*

How to Stop Surreptitious Recording of Conversations in the Federal Workplace

Captain Drew A. Swank
Instructor, Legal Research and Communications Department
The Judge Advocate General's School

So tell me Monica, what is this guy's name?[1] A variety of Merit System Protection Board (MSPB) and Equal Employment Opportunity Commission (EEOC) cases illustrate that federal employees record their conversations with supervisors or coworkers without the other parties' knowledge or consent with some regularity. They do this because they perceive they are being harassed, discriminated, or retaliated against.[2] Such surreptitious behavior can be extremely disruptive in the workplace, destroying morale and impairing productivity.

This article offers approaches to combat surreptitious recording in the federal workplace. First, the article overviews the law, or lack thereof, regarding this type of behavior. Next, the article advises how agencies may stop such behavior and deal with employees who engage in it. Finally, the article explains how agency counsel should deal with surreptitious recordings in administrative hearings.

Laws, Regulations, and Policies

While there are various federal and state laws prohibiting the interception and covert recording of conversations by third parties,[3] most do not apply when a party to the conversation makes the recording or consents to it.[4] Likewise, there are no federal, Department of Defense, or Department of the Army regulations, that prohibit employees from surreptitiously recording conversations in the workplace.[5] Unless the recording took place in one of the few states that prohibits nonconsensual recording,[6] there is nothing to prevent a federal employee from surreptitiously recording his co-workers or supervisors absent an order or local policy.

Pushing the "Stop" Button on Surreptitious Recordings

Several techniques can be used to stop employees from recording conversations. First, supervisors can order individual employees to stop taping conversations once they are discovered doing so. Once employees have been ordered not to surreptitiously record conversations with others, they can be disciplined for failing to comply with the order.[7] A better approach, however, is to issue a local policy prohibiting the tape recording of conversations in the workplace with an exception for law enforcement or official investigation purposes.[8] With such a policy in place, management could discipline employees who surreptitiously record other employees without having to issue a prior order to stop.

1. Linda Tripp is not the only federal employee to covertly tape-record conversations with coworkers. *In re* Sealed Case, 162 F.3d 670, 674 (D.C. Cir. 1999). Allegedly, Linda Tripp, a Department of Defense employee, secretly tape recorded conversations with her former coworker and friend, Monica Lewinsky. These recorded conversations, in part, led to the impeachment trial of President Clinton.

2. *See generally* Capeless v. Department of Veterans Affairs, 1998 MSPB LEXIS 761 (June 24, 1998); McCartin v. Runyon, 1996 EEOPUB LEXIS 1794 (Nov. 7, 1996); Linares v. Widnall, 1995 EEOPUB LEXIS 285 (Feb. 22, 1995); Sawyer v. Browner, 1994 EEOPUB LEXIS 3900 (May 12, 1994); Sternberg v. Department of Defense Dependents Schools, 1989 MSPB LEXIS 456 (June 6, 1989).

3. *See, e.g.*, 18 U.S.C.A. §§ 2510-2520 (1999). The statute provides both criminal penalties and a civil cause of action for interception or recording of conversations. Section 2511(2)(d) provides, however, that the statute generally does not apply when the interception or recording is made by or with the consent of one of the parties to the communication.

4. *But see* CAL. PENAL CODE § 631 (West 1999); CONN. GEN. STAT. § 52-570d (1999); FLA. STAT. ch. 943.03(2)(a)3(d) (1999); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(C)(3) (1999); N.H. REV. STAT. ANN. § 570-A:2 (1999); OR. REV. STAT. § 165.543 (1999); PA. CONS. STAT. § 5704(4) (1999); WASH. REV. CODE. ANN. § 9.73.030(1)(b) (West 1999). These states (California, Connecticut, Florida, Maryland, New Hampshire, Oregon, Pennsylvania, and Washington) require the consent of all parties to a conversation prior to recording. If an employee records conversations in these states without full consent, they could be criminally prosecuted under the applicable state law. *See generally* Burton Kainen & Shel D. Myers, *Turning Off the Power on Employees: Using Employee's Surreptitious Tape-Recordings and E-Mail Intrusions in Pursuit of Employer Rights*, 27 STETSON L. REV. 91 (1997).

5. The one exception is the EEOC's MANAGEMENT DIRECTIVE 110, FEDERAL SECTOR COMPLAINT PROCESSING MANUAL 2H2, *available at* <http://www.eeoc.gov/federal/md110.html>. This directive prohibits the recordings of telephone conversations during attempts to informally resolve Equal Employment Opportunity complaints.

6. *See supra* note 4.

7. Capeless v. Department of Veterans Affairs, 1998 MSPB LEXIS 761 (June 24, 1998); Sternberg v. Department of Defense Dependents Schools, 1989 MSPB LEXIS 456 (June 6, 1989).

8. In *Geissler v. Runyon*, the Employee Labor Relations Manual specifically prohibited employees fromsurreptitiously recording other employees without their consent; the appellant's violation of this provision led to a letter of warning. 1996 EEOPUB LEXIS 3852 (Nov. 21, 1996).

An additional advantage of the latter approach is that it can prevent discrimination or retaliation allegations lodged against the agency by a disciplined employee. In the EEOC appeal of *Linares v. Widnall*, the appellant alleged discrimination when he was ordered to stop recording conversations with coworkers while other employees who also tape recorded conversations were not.[9] The EEOC administrative judge, in order to determine if the appellant had been discriminated against, ordered the agency to investigate whether other employees taped conversations, if agency officials were aware of the practice, and if the officials ordered them to cease recording.[10] Whether recording is stopped through a direct order or by a local policy, supervisors need to ensure that all employees are treated alike to avoid allegations of discrimination, as in *Linares.*

Trying to "Erase" Recordings used in Administrative Hearings

Many federal employees who tape conversations with supervisors or coworkers are trying to get evidence of discrimination or harassment to use before the EEOC or other administrative forums. Unfortunately, administrative judges' acceptance of surreptitious recordings gives employees the incentive to continue recording conversations.

One agency has specifically requested the EEOC to create an evidentiary rule requiring a party seeking admission of a recording to first establish its authenticity and to prove it was made consensually.[11] Yet, there is no prohibition against the use of tape recordings as evidence during EEOC hearings and they are normally freely admitted.[12] In one case, these liberal admission rules allowed an employee to submit tape recordings she withheld during the agency investigation as evidence during the hearing.[13] Likewise, surreptitious recordings are admissible in MSPB hearings because "[h]earsay evidence is admissible in Board proceedings."[14] The original tapes, copies of tapes, or transcripts of tapes are all equally admissible as there is no "best evidence" rule in MSPB proceedings.[15]

In McCartin v. Runyon, however, an EEOC administrative judge excluded the surreptitious employee recordings, believing that there would be a "chilling effect on [Equal Employment Opportunity] proceedings if complainants started surreptitiously taping telephone conversations with agency personnel."[16] The EEOC denied that the administrative judge's ruling was an abuse of discretion.[17]

Conclusion

Surreptitious recording of workplace conversations degrades morale and productivity. Prohibiting such practices can help labor counselors from being "sandbagged" in an administrative hearing, and can encourage frank discussions during the entire complaint process. As a preventive law measure, labor counselors should work with their command to create a policy prohibiting tape recording of conversations within the workplace and enforce it equally with respect to all employees. Having such a policy in place can avoid subsequent allegations of discriminatory treatment if an employee is disciplined for making surreptitious recordings.

Finally, agency labor counselors, when practicing before the EEOC and MSPB, should reiterate the request for an evidentiary rule prohibiting surreptitious recordings as evidence. Until such a prohibition is created, labor counselors can and should argue that per *McCartin*, the administrative judge can and should exclude non-consensual tape recordings.

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9. Linares v. Widnall, 1995 EEOPUB LEXIS 285 at *3 (Feb. 22, 1995).

10. *Id.* at *14.

11. Williams v. Peterson, 1995 EEOPUB LEXIS 3383 at *13 (Nov. 9, 1995).

12. McCartin v. Runyon, 1996 EEOPUB LEXIS 1794 at *5 (Nov. 7, 1996) (citing 29 C.F.R. § 1614.109(c) (stating formal rules of evidence are not strictly applied in EEOC hearings).

13. Sawyer v. Browner, 1994 EEOPUB LEXIS 3900 (May 12, 1994). *But see* Federman v. Brown, 1997 EEOPUB LEXIS 395 *9 n.3 (Mar. 27, 1997) ("The Commission declines to consider these tapes as evidence in this case because there is no indication that this evidence was not available during the investigation of appellant's complaint, and there are no assurances as to the authenticity of the tapes").

14. Middleton v. Department of Justice, 1984 MSPB LEXIS 889 at *5 (Sept. 21, 1984) (citing Banks v. Department of the Air Force, 4 MSPB 342, 343 (1980)).

15. *Id.*

16. *McCartin*, 1996 EEOPUB LEXIS 1794 at *5.

17. *Id.* at *6.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Note

The Spot Delivery: A Deceptive Auto Sales Technique[1]

While the vast majority of auto dealers do business in an ethical manner, some engage in deceptive practices to increase sales or profit margins. One of these practices, occurring more and more frequently, is the "spot delivery." The spot delivery, also known as the "gimme back sale,"[2] occurs in the following manner: a soldier goes to a car dealership, chooses one, signs all of the sale and loan papers apparently necessary to purchase the car, and drives it off the lot. Six weeks or two months later, the dealer contacts the soldier claiming that the deal fell through for one reason or another. One common reason given is that financing was not approved and that the soldier needs another loan (at a higher interest rate of course) or he must return the car. If the soldier traded in his old car as part of the sale, the dealer often claims that the trade-in has already been sold.[3]

This practice note provides legal assistance attorneys with a number of legal bases and arguments to help the soldier or family member victimized by "spot delivery" practices. Widespread reports of this practice within the auto sales industry led the National Consumer Law Center (NCLC), as part of the 1999 Cumulative Supplement, to add Section 5.4.4.9a, "Spot Delivery Abuses" to their Unfair and Deceptive Acts and Practices Manual.

Despite the fact that legal assistance practitioners rarely, if ever, represent a legal assistance client in a judicial action, this information can be part of a preventative law program or used to assist legal assistance clients.[4] The following legal arguments and consumer protection laws can assist legal assistance attorneys in obtaining substantial settlements for their clients: the Unfair and Deceptive Acts and Practices (UDAP),[5] Equal Credit Opportunity Act (ECOA),[6] the Truth in Lending Act (TILA),[7] various state retail installment sales acts (RISA), state auto titling laws, and state laws focused on preventing "spot delivery" abuses.[8]

Another method to challenge "spot delivery" relates to the dealer's disposal of the customer trade-in vehicle. The auto dealer assumes that the asserted sale of the trade-in increases the pressure on the customer to accept a more expensive financing deal (or possibly a higher renegotiated sale price) instead of just returning the newly purchased auto. One of the initial steps in assisting a client is to determine whether the dealer has sold the trade-in vehicle. If the trade-in has been sold, "[I]f the sale is truly contingent and has not been finalized, then the dealer ha[d] no right to sell the trade-in because the dealer does not own the trade-in."[9]

In those states with laws governing retail installment sales transactions, a legal assistance attorney can determine whether making the sale contingent on financing is a violation of those

1. *See* Jon Sheldon, *Spot Delivery as Widespread Dealer Abuse*, 5 CONSUMER ADVOCATE 17 (Mar.-Apr. 1998); *New Spot Delivery Decisions*, 18 NAT'L CONSUMER L. REP., DECEPTIVE PRACTICES AND WARRANTIES ED. 2 (July-Aug. 1999); Elizabeth Renuart & Tom Domonsoske, *Applying The Truth In Lending Act and Other Laws To 'Spot Delivery,'* CONSUMER L. CENTER, Nov. 7, 1999 at 1.

2. Renuart & Domonsoske, *supra* note 1, at 1.

3. NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES MANUAL 307 (4th ed. 1997).

4. The NCLC reports that:

> A number of consumer attorneys report that spot delivery abuses lead to individual consumer settlements in the $7500 to $10,000 range, and even as high as $80,000. A settlement strategy can be to report the case to the state agency regulating the dealer, because dealers are concerned with protecting their license.

NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, 1999 CUMULATIVE SUPPLEMENT, 97 (1999) [hereinafter NCLC SUPPLEMENT].

5. 15 U.S.C.A. § 45(a)(1) (West 1999). A UDAP argument might be successful when the dealer fails to clearly make it known to the customer that the sale is conditioned on final credit approval and lets the customer leave the dealership believing he owns the car. In that situation, "the dealer's attempt to undo a binding credit agreement is unfair, deceptive, and wrongful, leading to potential UDAP, fraud, and breach of contract claims." NCLC SUPPLEMENT, *supra* note 4, at 93.

6. 15 U.S.C. § 1691.

7. 15 U.S.C. §1601. For a primer on TILA to "spot delivery," arguments, see Renuart & Domonoske, *supra* note 1. Some of the bases they describe include: whether the credit contract is actually conditional in nature, and determining TILA was violated during the sale (that is, whether it is possible to learn how much credit was actually extended to the customer, irregularities in delivery or transfer of the title, and failure to inform the customer that the requisite financial disclosures were in fact only estimates). Renuart & Domonoske, *supra* note 1, at 1-12.

8. *Id*. at 93-97. *See* ADMINISTRATIVE AND CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-265, CONSUMER LAW GUIDE, 1-16, ch. 3, (June 1999). A number of states specifically regulate "spot deliveries," including North Carolina, Virginia, and Washington. All of these states have large military populations who are potential legal assistance clients. NCLC REPORTS, *supra* note 1, at 3.

laws. In many "spot delivery" transactions, "[t]o firm up their legal position, dealers increasingly use a separate contingency agreement stating that the deal is subject to financing being approved."[10] At least one state appellate court held that use of a separate document to make the "spot delivery" transaction contingent violated that state's installment sales act.[11] Moreover, the dealer practice of not signing the installment sales contract can also violate the state installment sales act.[12] When the dealer offers the customer a previously completed contract,[13] that presentment of the contract is the offer and the customer's signature is the acceptance.[14]

Additionally, the federal courts are hearing customer suits arising out of "spot delivery" transactions where there are alleged violations of TILA and UDAP.[15] This is a bargaining position when representing a client victimized by a dealer's "spot delivery." If the legal assistance attorney cannot get a favorable result for the client, including ensuring that no adverse information relating to the transaction is placed in the credit report, consider referring the client to a civilian attorney. In many cases, civilian attorneys may take a "spot delivery" abuse case, even where the actual damages are viewed as being limited, due to the potential for award of attorneys' fees.[16]

Legal assistance attorneys must ensure that clients put the dealer and finance company on written notice of any dispute regarding the termination of the transaction or return of the car in a "spot delivery" case. The dealer may sometimes report the car's return as a repossession. Under the Fair Credit Reporting Act,[17] the creditor (that is, a supplier of information to the credit reporting agency) is required to report the debt as a disputed matter, if at all, pending resolution of the dispute.[18]

In most spot delivery transactions, the dealer fails to comply with the detailed state laws governing transfer of title, use of dealer plates, and insurance.[19] The legal assistance attorney should be aware that "unless the seller explicitly retains title in the vehicle, delivery of the car passes title to the consumer, even if the seller makes the sale contingent on financing."[20] However, if the dealer only retains a security interest in the vehicle, the dealer is then required to comply with UCC Article 9 repossession, notice, and disposition requirements.[21] Legal assistance attorneys should avoid being overly quick in advising a client to allow voluntary repossession of a newly purchased vehicle. Assist clients in ensuring that dealer's comply with the applicable enactment of UCC Article 9. The requirement to comply with UCC Article 9 should be asserted even if the dealer contends the repossession is based on termination of the sale transaction.

In summary, warnings about deceptive trade practices in "spot deliveries" by auto dealers should be incorporated into preventive law programs. As part of such a preventative law program, encourage soldiers and their families to consult a legal assistance attorney before signing purchase contracts or financing agreements for automobiles, especially before executing a new financing agreement on a car that has already left the dealer's lot.[22] Major Jones.

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9. NCLC SUPPLEMENT, *supra* note 4, at 96.

10. *Id.*

11. NCLC REPORTS, *supra* note 1, at 2 (citing Scott v. Forest Lake Chrysler-Plymouth-Dodge, 598 N.W. 2d 713 (Minn. Ct. App. 1999)).

12. *Id.*

13. *Id.*

14. *Id.*

15.[5] *Id.* at 2 (citing Janikowski v. Lynch Ford, Inc., 1999 U.S. Dist. LEXIS 3524 (N.D. Ill. Mar. 12, 1999). In *Janickowski*, the court denied Lynch Ford's motion to dismiss the claims under the TILA and UDAP arising out of the spot delivery transaction between it and Janikowski).

16. An excellent way to identify civilian attorneys in your local area and obtain assistance with issues in the area of automobile fraud is to join the National Consumer Law Center, "autofraud" electronic mail group. For information on joining contact Jsheldon@nclc.org or Dloonin@nclc.org. Once you are a member you can ask questions and obtain answers from experienced practitioners. It can also be useful in identifying civilian attorneys in your area that specialize in consumer law cases representing the consumer.

17. 15 U.S.C.A. § 1681 (West 1999).

18. JA 265, *supra* note 8, at 9-44.

19. NCLC REPORTS, *supra* note 1, at 2-3.

20. *Id.* at 3 (citing Johnson v Imported Cars of Maryland, Inc. 230 B.R. 466 (Bankr. D.C. 1999)).

21. *Id.*

22. If you are unable to obtain any of the references cited in this article and are dealing with a spot delivery case please free to email: Kevin.Jones@hqda.army.mil for assistance. Also joining the NCLC Autofraud email group is an invaluable free resource in the autofraud and consumer law area. The NCLC has email groups for other consumer law areas, such as debt collection and credit reporting email groups.

Reserve Component Note

Fiscal Year 2000 National Defense Authorization Act Impacts Army Reserve Boards of Inquiry for Officers

Congress passed some helpful legislation in the Fiscal Year 2000 Department of Defense Authorization Act.[23] It amended 10 U.S.C. § 14906(2), which previously required that members of Reserve Officer Boards of Inquiry be above the grade of lieutenant colonel or commander and be senior in grade and rank to any officer considered by the board.[24] The requirement that these boards must consist of three colonels was very burdensome for Reserve commands.[25] While the board members must still be senior in rank and grade to the respondent, Congress eliminated the "above lieutenant colonel" requirement. The new legislation provides that "each member of the board shall hold a grade above major or lieutenant commander, except that at least one member of the board shall hold a grade above lieutenant colonel or commander."[26] These requirements do not appear in *Army Regulation 135-175, Separation of Officers*, which has not been updated since 1971.

At least one member of the board must also be an active status member of the same service as the respondent.[27] The United States Army Reserve Command (USARC) Staff Judge Advocate's office opined that this active status member may be active Army, or active Guard Reserve, or a drilling Reservist on active status, such as when performing annual training or "Active Duty for Special Work."[28]

Finally, remember that USARC has not withdrawn their directive that respondents be notified of their right to request a minority board member within fifteen days upon receipt of their notice of their Board of Inquiry.[29] Lieutenant Colonel Conrad.

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23. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 504 (b), 113 Stat. 591 (1999). This note does not address Active Guard and Reserve officers, who are separated under *Army Regulation 600-8-24*.

24. 10 U.S.C.A. § 14906 (West 1999). *See* Lieutenant Colonel Paul Conrad, *Changes for United States Army Reserve Component Involuntary Separation Boards*, ARMY LAW., Jan 1998, at 127.

25. *Id*.

26. National Defense Authorization Act for Fiscal Year 2000, § 504(b)(2).

27. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2-25a(1) (22 Feb. 1971).

28. Electronic mail with Lieutenant Colonel James Wolski, USARC SJA Office (Feb. 25, 1999).

29. Conrad, *supra* note 24.

Note From the Field

Potential Effect of SSCRA on Proposed Settlement in *Vollmer v. Publishers Clearing House*

Captain Jonathan R. Hirsch
Office of the Staff Judge Advocate
Headquarters, U.S. Army, Southern European Task Force
Vicenza, Italy

One purpose of the Soldiers' and Sailors' Civil Relief Act[1] (SSCRA) is to protect the legal rights of service members while in the military. Section 525 of the SSCRA ensures that time in military service is not counted in determining whether a service member has missed a legal deadline.[2] An on-going case serves as an excellent example of how to invoke the protection of Section 525.

Publishers Clearing House (PCH), defendants in a class action lawsuit, pursuant to the district court's order sent out a "Notice of Class Action, Proposed Settlement and Final Fairness Hearing" to all identifiable members of the plaintiff class.[3] The notice required members of the plaintiff class to respond by letter postmarked by 18 October 1999 to receive a refund for magazine subscriptions or merchandise purchased from 3 February 1992 through 30 June 1999.[4] Recipients automatically excluded themselves from the plaintiff class if they did not respond by 18 October 1999.

Assume a service member walks into a legal assistance office requesting advice regarding the notice after the October deadline. Through Section 525 of the SSCRA, the legal assistance attorney can petition both parties and the court for timely inclusion into the plaintiff class. The statute suspends the running of the clock for an action or proceeding in court during the period of military service.[5] In this case, the statute suspends time with respect to the deadline for joining the plaintiff class.

The SSCRA provides valuable rights to military members. The statute in this case guarantees that service members can participate in ongoing litigation.

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1. 50 App. U.S.C.A. §§ 501-591 (West 1999).

2. *Id.* § 525.

3. Notice of Class Action, Proposed Settlement and Final Fairness Hearing, Vollmer v. Publishers Clearing House/Campus Subscriptions, Inc. (S.D. Ill 1999) (99-434-GPM) *available at* <www.pch.com>.

4. The proposed settlement requires the claimant to provide a sworn statement that the purchase was made because the claimant believed that the purchase would increase his chances of winning a prize in a PCH promotional sweepstakes. *Id.*

5. *In re* A.H. Robins Co., 996 F.2d 716 (4th Cir. 1993). In *Robins*, an Army nurse was allowed to join the plaintiff class against the Robins estate in bankruptcy, and be treated as having timely filed, almost four years after the district court had ordered no new plaintiff class members would be allowed. *Id.* at 717.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Worried About Objecting to a Document? Just BARPH.[1]

You are the defense counsel in a general court-martial. Your client is charged with aggravated assault of his squad leader, who was stabbed while sleeping during a field training exercise. A Criminal Investigation Command agent is testifying about a letter found during a consent search of the accused's quarters. The agent found the following letter on the nightstand of the accused's wife.

> *Dear Sweetheart,*
>
> *I miss you. The field problem is almost over. I look forward to seeing you this weekend. This month in the field has been tough. That sergeant is still picking on me, like I told you during the last phone call, but I showed him. I probably shouldn't have done it, but I couldn't take it anymore. Don't mention it to anyone. I will tell you all about it when I get home.*
>
> *Love,*
> *Your L'il Sugarplum*

The trial counsel offers the letter into evidence. You stand up and object. The judge looks at you and asks for the basis of your objection. You know there is a valid objection, but you cannot think of it. You think back to your evidence class in law school, but all the rules are just a jumbled mess in your mind. Your client is looking at you. The judge says, "Well, counsel?" You are lightheaded and start to feel sick to your stomach.

BARPH is a mnemonic device to assist trial advocates in remembering the different foundations that are commonly required for documentary evidence: **B**est evidence, **A**uthentication, **R**elevance, **P**rivilege, and **H**earsay.[2] Documentary evidence is a part of most courts-martial. In some trials, there are enough documents to wallpaper the courtroom. However, foundational requirements for documents intimidate some advocates. One of the main reasons is that documents often require multiple foundations, which vary in number and type for each document. The mnemonic enhances trial advocacy by arming counsel with the ability to respond quickly with the possible objections to documents.[3] Both trial counsel and defense counsel offer documents into evidence, so counsel on both sides of the bar need to be able to recall the different foundational objections. As Professor James McElhaney says, "The trouble with foundations is that they lurk everywhere, waiting for a chance to trip you up."[4] A mnemonic can assist the opponent in enlisting the help of those lurking villains by articulating the bases of foundational objections. For example, in the above scenario, the defense counsel could go through the following analysis.

Best Evidence Rule. To prove the contents of a "writing," the "original" is generally required.[5] In the above scenario, the rule would not be a valid objection, because the trial counsel is offering the original letter into evidence.

Authentication. The proponent must present proof that an object is what it is purported to be.[6] In the scenario, the trial counsel is purporting the letter to be from the accused. If it was not from the accused, it would be irrelevant (or possibly exculpatory). The letter could be authenticated by the handwriting. An expert could compare the letter to exemplars, a lay person familiar with the accused's handwriting could offer an opinion, or the trier of fact could compare the letter to known writings of the accused. If that has not been done, then the defense counsel should object on the basis of authentication.

Relevance. The evidence must make a fact of consequence to the case more or less probable.[7] In the scenario, if the letter is authenticated as being from the accused, then it does make it more likely that the accused stabbed his squad leader. Relevance would not be a valid objection.

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1. Not to be confused with the word "barf," which is a slang noun of uncertain origin from circa 1955-1960 that means vomit. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 167 (2d ed. 1998).

2. While I would like to take credit for this colorful mnemonic, I picked it up at Notre Dame Law School in 1992. Several of the professors used the mnemonic during trial advocacy classes.

3. This article offers a mnemonic device to identify possible objections to documents, but it does not attempt to provide a detailed explanation of the different foundations. The explanations of each of those foundations would require articles of their own.

4. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 304 (3d ed. 1994).

5. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1001-1008 (1998).

6. *Id.* MIL. R. EVID. 901-903.

7. *Id.* MIL. R. EVID. 401-414.

Privilege. Section V of the Military Rules of Evidence (MRE) contains several different rules on privileges, including the marital privilege in MRE 504. In the scenario, it appears that the letter was a confidential communication from the accused to his wife. The defense counsel should object on the basis of marital privilege.

Hearsay. An out-of-court statement offered to prove the truth of the matter asserted is hearsay and not admissible, unless it falls within an exemption or exception.[8] In the scenario, if the letter is authenticated as being from the accused, then it falls within the party-opponent exemption in MRE 801, and hearsay would not be a meritorious objection.

In the scenario, after BARPHing, the defense counsel could stand and confidently state, "Your Honor, I object to the admission of the exhibit on the grounds of insufficient authentication and privileged communication." The mnemonic helped the defense counsel to maintain credibility and control, which are key to persuading the members of the court-martial.[9] Some mnemonics themselves are hard to remember, but hopefully BARPH evokes such a colorful image that it stays in your long-term memory ready to be used when needed. Major Grammel.

8. *Id.* MIL. R. EVID. 801-806.

9. Although the mnemonic provides a helpful advocacy tool for quickly articulating objections to documents, a thorough understanding of the foundational requirements in the rules of evidence is necessary. Also, pretrial preparation is crucial to success. *See generally* Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21 (proposing a methodology of backward planning for trial preparation). As a part of pretrial preparation, trial advocates should consider possible objections to expected exhibits.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law.

Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction

On 25 October 1999 the President signed the Defense Appropriations Bill for Fiscal Year (FY) 2000.[1] The bill will have a dramatic effect on how the Army processes and approves the settlement of environmental fines. Section 8149 of the bill directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of *the* fine or penalty has been specifically authorized by law."[2]

The section further provides that funds expended to perform supplemental environmental projects (SEPs) pursuant to a settlement agreement are considered "payment of the penalty." Although some attorneys have pointed out that this section may simply restate the age-old requirement for explicit authorizing statutory language before federal agencies can pay penalties, in fact, the bill's mandate for "the" fine to be specifically authorized is controlling. The ELD interprets Section 8149 to require specific congressional approval for the use of FY 2000 funding to pay for any fines or SEPs.

This interpretation of Section 8149 also corresponds with the general understanding of its origin and purpose. The main catalyst for including this provision in the appropriations bill was Environmental Protection Agency's (EPA) proposal to issue a massive fine at Fort Wainwright, Alaska.[3] Although the installation has not yet received a formal complaint for alleged Clean Air Act violations, the EPA opened preliminary negotiations with a proposed penalty of over $16 million. This single penalty would equal the total for nearly 200 assessed penalties received throughout the Army from all environmental regulators under all media statutes over the past seven years.

Even more alarming than the sheer magnitude of the EPA's settlement offer, however, is the basis for it. Over ninety-nine percent of the proposed fine is based on two types of "business" penalty assessment criteria that have no relevance to federal agencies. First, the EPA proposes to recover $10.5 million for alleged "economic benefits" received by the installation for non-compliance. Second, the EPA is seeking an additional nearly $5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that the EPA presumes the Army can sell or mortgage to raise money to pay for penalties. It is understood that the EPA's attempt to extend these business-based concepts to federal facilities in such a dramatic fashion caused Senator Stevens from Alaska (who is also Chairman of the Senate Appropriations Committee) to press for adding Section 8149 to the appropriations bill while it was being considered by a House-Senate conference committee.

At present, nearly all fines are settled through consent agreements between installation commanders and federal or state regulators, after receiving concurrence by the ELD. The new legislation will require the Army and the Department of Defense (DOD) to maintain strict centralized scrutiny of all such agreements and obtain prior approval from Congress of any penalty payments with FY 2000 funds. On 23 November 1999 Gary D. Vest, Principal Assistant Deputy Under Secretary of Defense (Environmental Security) issued the DOD guidance on the implementation of Section 8149.[4] In addition, the Army ELD has published supplementary guidance to Army installations regarding implementation of Section 8149.[5]

As noted in each of the guidance letters, Section 8149 does not alter the basic aspects of negotiating settlement agreements. Installation environmental law specialists (ELSs) will continue to negotiate consent agreements with federal or state regulators,

1. Pub. L. No. 106-79, 113 Stat. 1212 (1999).

2. *Id.* § 8149 (emphasis added).

3. Letter from United States Environmental Protection Agency to Staff Judge Advocate, Ft. Wainwright, Alaska (Aug. 25, 1999) (on file with author).

4. Memorandum, Gary D. Vest, Acting Deputy Under Secretary of Defense (Environmental Security) to Deputy Assistant Secretary of the Army (Environment, Safety & Occupational Health), Deputy Assistant Secretary of the Navy (Environment & Safety), Deputy Assistant Secretary of the Air Force (Environment, Safety & Occupational Health), Director, Defense Logistics Agency, subject: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act (23 Nov. 1999) *available at* <http://www.denix.osd.mil/denix/Public/ES-Programs/Compliance/Memos/Section8149/note6.html>.

5. Memorandum, Chief, Environmental Law Division, to United States Army Staff Judge Advocates, subject: Approval of Environmental Consent Agreements under the Defense Appropriations Bill for Fiscal Year 2000 (3 Dec. 1999). This memorandum was distributed via e-mail to all Staff Judge Advocates on 7 December 1999 (on file with author).

and installation commanders will continue to be the Army's signatories for those agreements.

Two significant changes have been implemented, however. First, all consent agreements must include a provision indicating that any payment of fines or SEPs is subject to congressional approval. Second, installations are now required to prepare a settlement memorandum that explains why any payments for fines and SEPs are appropriate. The settlement memorandum is necessary for DOD to pursue receiving a line-item budget authorization from Congress. In cases where the value of a SEP exceeds the reduction in fine amount, particular care must be given to point out whether regulatory agencies are giving penalty offset credit for SEPs that were already programmed into environmental budgets prior to the enforcement action. Major Cotell.

Shedding Some Light on Tritium Exit Signs

Tritium exit signs have been used on Army installations for a number of years. Legal requirements apply to the installation, servicing, removal, and transfer of tritium exit signs.[6] This note outlines the legal requirements and issues installation environmental law attorneys should be aware of in this admittedly obscure but important area of law.

Tritium is defined as a rare radioactive hydrogen isotope with atomic mass.[7] The radioactive properties of tritium are useful in the production of a continuous light source. A continuous light source can be produced by mixing tritium with a chemical that emits light in the presence of radiation (a phosphur). Typically such continuous light sources are useful where dim light conditions require illumination without the use of electricity or batteries. Exit signs are an example of the practical use of tritium to produce a continuous light source that is reliable in the event of power outages and blackouts, where generator or battery power is unavailable as a backup power source.[8]

Tritium exit signs are regulated by the Nuclear Regulatory Commission (NRC), which issues a general license to federal government agencies (among others) to "acquire, receive, possess, use or transfer . . . byproduct material contained in devices designed and manufactured for the purpose of . . . producing light or an ionized atmosphere."[9] The Army is considered a general licensee by definition, and no application for a general license is required. As a general licensee the Army must comply with certain requirements regarding tritium exit signs.

These requirements include assuring that labels affixed to the sign stating that removal of the sign is prohibited are maintained;[10] installing, servicing, or removing tritium exit signs be performed by a person holding a specific license to perform such activities;[11] maintaining records of the performance of installation, servicing, and removal from the installation of tritium exit signs[12] for a period of three years;[13] and not abandoning a device containing byproduct material (tritium).[14] The requirements to test devices containing byproduct material do not apply to devices containing only tritium,[15] thus the exit signs do not have to be tested.

The above requirements should not present major problems for installations that currently use tritium exit signs in their buildings. Environmental law attorneys should ensure that appropriate installation personnel (local Radiation Safety Officers and Directorates of Public Works personnel) are aware of the above requirements to insure compliance. Particular attention should be paid to situations where demolition of buildings is contemplated. If the Army is demolishing buildings, tritium signs should be removed and disposed of prior to demolition in accordance with *Army Regulation 11-9*.[16] It is important to note that the NRC recently cited an Army installation for failure to maintain records for generally licensed

6. *See generally* 10 C.F.R. § 31.5 (1999).

7. The American Heritage Dictionary 723 (2d ed. 1983).

8. Information formerly available on University of Michigan School of Public Health Homepage (last modified Oct. 7, 1999) <http://www.sph.umich.edu:80/group/eih/UMSCHPS/tritium.htm> (on file with author).

9. 10 C.F.R. § 31.5(a).

10. *Id.* § 31.5(c)(1).

11. *Id.* § 31.5(c)(3)(ii).

12. *Id.* § 31.5(c)(4). *See* U.S. Dep't of Army, Reg. 11-9, The Army Radiation Safety Program, paras. 1-4(k)(4), 2-7(b) (28 May 1999) (requiring each commander to maintain an inventory of radiation sources in accordance with the requirements of NRC licenses and providing radioactive waste disposal guidance).

13. 10 C.F.R. § 31.5(c)(4)(iii).

14. *Id.* § 31.5(c)(6).

15. *Id.* § 31.5(c)(2)(ii).

16. U.S. Dep't of Army, Reg. 11-9, The Army Radiation Safety Program.

devices, and for unauthorized disposal of licensed materials, illustrating the importance of compliance with the above requirements.[17]

Perhaps the more challenging situation occurs where the Army attempts to transfer buildings containing tritium exit signs to a third party through the Base Realignment and Closure (BRAC) process. Army real property is often transferred through the BRAC process to a third party called a Local Reuse Authority (LRA). Typically the LRA then develops the property pursuant to a reuse plan. In this situation the Army, as a general licensee, may only transfer tritium exit signs to another general licensee where the signs remain in use at the transferred building.[18] General licenses are issued to "commercial and industrial firms and research, educational and medical institutions, individuals in the conduct of their business, and Federal, State or local government agencies."[19] Local Reuse Authorities are sometimes local government agencies or quasi-governmental entities. In cases where the LRA is a government entity, the restriction on transfer only to another general licensee poses no legal impediment to the transfer. Where the transferee is quasi-governmental or private in nature, however, an analysis as to whether the transferee is considered a general licensee under 10 C.F.R § 31.5(a) is required.

Additional requirements exist when transferring tritium exit signs in intact buildings to a third party. Assuming that the transferee is a general licensee, the Army must provide the transferee with a copy of 10 C.F.R § 31.5 and safety documents identified in the label of the device (exit signs) within thirty days of the transfer.[20] The Army must also report to the NRC the manufacturer's name and model number of the device transferred, the name and address of the transferee, and a point of contact between the NRC and the transferee.[21] Individuals working on BRAC transfers of buildings containing tritium exit signs must be aware of the above legal requirements. Model language for transfer documents providing notice of the presence of tritium signs is currently under development.

This information will aid the environmental law attorney in analyzing legal issues involving tritium exit signs. Major Tozzi.

General Conservation Permitting Policy May Cut Much Red Tape

On 28 October 1999, the Fish and Wildlife Service (FWS) published a proposed policy on general conservation permits that may offer efficiencies in how Army activities are permitted by FWS to conduct natural resource research, management and conservation activities.[22] The FWS is accepting comments on the proposed policy until 27 December 1999.

The policy will test the concept of a permit similar to state scientific collecting permits. Under the proposed policy, a single general conservation permit could be issued in lieu of a number of individual permits, with the permitted activities reflecting those whose benefits outweigh their risks to the resource (species or habitat) in question. Under the policy, a general conservation permit would only be available to individuals and institutions that have outstanding professional credentials and that are conducting scientific, management, and conservation activities. The scope of the policy is virtually all activities for which the FWS currently issues permits.

Although the policy does not directly address federal agencies, it does not exclude federal agencies from applying for permits under the policy. Conceivably, an installation natural resource manager could obtain a permit for all research, management, and conservation activities on an installation for up to five years. Major Robinette.

Litigation Division Note

Reimbursement of the Judgment Fund under the Contract Disputes Act

Recently, several installations have inquired about their requirement to reimburse the Judgment Fund[23] for settlements or judgments paid pursuant to the Contract Disputes Act (CDA).[24] This note reviews the substantive and procedural requirements of reimbursing the Judgment Fund.

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17. Message, 041953Z Oct 99, Headquarters, Dep't of Army, DACS-SF, subject: Tritium Exit Signs, para. 3. (4 Oct. 1999).

18. 10 C.F.R. § 31.5(c)(9)(i).

19. *Id*. § 31.5(a).

20. *Id*. § 31.5(9)(i).

21. *Id*. The report should be made to the Director of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

22. Proposed Policy on General Conservation Permits, 64 Fed. Reg. 58,086 (1999).

23. Supplemental Appropriation Act of 1957, 70 Stat. 678, 694 (codified at 31 U.S.C.A. § 1304 (West 1999)). *See* General Accounting Office, 3 Principles of Federal Appropriations Law 14-12 (2d ed.). The Judgment Fund is a *permanent, indefinite* appropriation. This means that it has no fiscal year limitations, no limit on the amount of the appropriation, and no need for Congress to appropriate funds to it annually or otherwise. It operates completely independent of the congressional authorization and appropriation process. It is, in effect, standing authority to disburse money from the general fund of the Treasury.

Congress passed the CDA in 1978.[25] The CDA changed the payment mechanism for both judgments and board awards in contract cases.[26] Before the CDA, court judgments against the United States were paid from the Judgment Fund with no requirement that it be reimbursed.[27] Claims adjudicated before the boards of contract appeals were not paid out of the Judgment Fund; instead, federal agencies paid these claims out of their own funds.[28] Consequently, the procuring agency had some incentive "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds."[29]

Absent a specific statutory requirement, an agency is not required to reimburse the Judgment Fund.[30] Section 612(c) of the CDA provides such a statutory requirement. It requires the agency to reimburse the Judgment Fund for the payment of claims made pursuant to a court judgment or monetary award.[31] Under the CDA, a court judgment or monetary award by the boards of contract appeals is viewed as giving rise to a new liability.[32] Hence, repaying the Judgment Fund must be made out of funds current at the time of the judgment, or by obtaining additional appropriations for such purposes.[33]

Although reimbursement is mandatory, the CDA is silent as to the time period in which repayment must occur.[34] Thus, the agency has some discretion in the matter, as the General Accounting Office has recognized.[35]

> It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could have just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid.

Hence, an agency may violate the Act if reimbursement does not occur by "the beginning of the second fiscal year following the fiscal year in which the award is paid."[36]

At the same time the Judgment Fund issues a check to pay the judgment or monetary award, the Department of the Treasury, Financial Management Service (FMS), simultaneously bills the procuring agency. *Department of Defense Regulation 7000.14-R* suggests that the agency follow the procedures listed below to reimburse the Judgment Fund:[37]

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24. Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (West 1999).

25. *Id.*

26. S. REP. NO. 95-1118, at 33 (1978).

27. *Id.*

28. GENERAL ACCOUNTING OFFICE, *supra* note 23, at 12-76.

29. S. REP. NO. 95-1118, at 33.

30. Financial Management Service Home Page (visited November 28, 1999) <http://www.fms.treas.gov/judgmentfund/history.html>. *See* Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987).

31. 41 U.S.C.A. § 612(c) (West 1999). Although monetary awards adjudicated at the board of contract appeals are usually paid directly by the agency, the Judgment Fund may be used to pay those awards in certain circumstances; for example, when the agency has insufficient funds to pay the award.

32. *Id.* *See* Bureau of Land Management–Reimbursement of Contract Disputes Act Payments, 63 Comp. Gen. 308, 312 (Apr. 24, 1984).

33. 41 U.S.C.A. § 612(c). *See* U.S. DEP'T OF DEFENSE REG. 7000.14-R, Vol.3, BUDGET EXECUTION–AVAILABILITY AND USE OF BUDGETARY RESOURCES, para. 080304 (Dec. 1996) [hereinafter DOD REG. 7000.14-R].

34. 41 U.S.C.A. § 612.

35. Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987). *See* DOD REG. 7000.14-R, para. 080304(F).

36. *Id.*

37. *Id.*

(1) Determine "what appropriation originally funded the portion of the contract that led to the claim and subsequent judgment."

(2) Find funds (if possible) that were "currently available for new obligation at the time of the judgment. Expired appropriations that were current at the time of the judgment also may be used."

(3) Reprogram funds "from existing allocated funds within the appropriation. If sufficient funds do not exist within the appropriation, then supplemental funds must be sought."

(4) "Upon identification of funds to be charged and completion of any reprogramming actions, forward the package to the Defense Finance and Accounting Office having accounting responsibility for the designated fund accounts to process the payment."

(5) If the Judgment Fund reimbursement exceeds $1,000,000, have the cognizant Assistant Secretary of the Military Department (Financial Management and Comptroller) or Defense Agency Comptroller approve the reimbursement.[38]

If reimbursement does not occur, then the FMS will send follow-up inquiries. The tools normally available to the Department of the Treasury to collect a debt from a private party are not available when the debtor is another federal agency.[39] The Department of the Treasury cannot sue another federal agency that fails to reimburse the Judgement Fund, charge interest, or offset the claim against present or future appropriations.[40] If the agency still fails to pay, then FMS could report the agency to Congress.

Reimbursement requirements are not onerous. With a basic understanding of the CDA and *DOD Regulation 7000.14-R*, Army attorneys and the contracting officers they advise can avoid common pitfalls that could embarrass their command. Major Key.

38. *Id.*

39. Antitrust, Fraud, Tax, and Interagency Claims Excluded, 4 C.F.R. § 101.3(c) (1999).

40. *Id.*

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

Colonel Tom Tromey,.....Thomas.Tromey@hqda.army.mil
Director

Dr. Mark Foley,.....Mark.Foley@hqda.army.mil
Personnel Actions

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) began processing all applications for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by GRA, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1999-2000 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Colonel Tromey, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6381 or (800) 552-3978, ext. 381. You may also contact Colonel Tromey on the Internet at Thomas.Tromey@hqda.army.mil. Colonel Tromey.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1999-2000 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
5-6 Feb	Columbus, OH 9th MSO	AC GO BG Barnes RC GO COL (P) Walker Contract Law Int'l & Op Law GRA Rep TBD	Contract Law Administrative Law	POC: LTC Mark Landers (937) 255-3203, ext. 215
19-20 Feb	Salt Lake City, UT 87th MSO/UTARNG	AC GO BG Marchand RC GO COL (P) Walker GRA Rep TBD	Criminal Law: Fraternization Administrative & Civil Law	POC: MAJ Jay Woodall (801) 531-0435 Host: COL Christiansen ((801) 366-7861
26-27 Feb	Indianapolis, IN INARNG	AC GO BG Barnes RC GO COL (P) Walker Criminal Law Int'l & Op Law GRA Rep TBD	CLAMO: Legal Issues in JRTC Training Criminal Law Professional Responsibility tape to be shown.	POC: LTC George Thompson (317) 247-3491/3449 Host: COL George Hopkins (765) 457-4349
11-12 Mar	Washington, DC 10th MSO	AC GO BG Barnes RC GO BG DePue Criminal Law Int'l & Op Law GRA Rep TBD	Criminal Law Administrative & Civil Law	MAJ Gerry P. Kohns kohnsg@hq.navfac.nav.mil Host: COL Jan Horbaly (202) 633-9615
11-12 Mar	San Francisco, CA 75th LSO	AG CO BG Romig RC GO BG O'Meara GRA Rep TBD	Contract Law Administrative & Civil Law: POR—How to get ready to deploy	POC MAJ Douglas Gneiser (415) 673-2347 Host: COL Charles O'Connor (415) 436-7180
18-19 Mar	Chicago, IL 91st LSO	AC GO BG Marchand RC GO BG DePue GRA Rep TBD	Contract Law International & Operational Law	POC: MAJ Tom Gauza (312) 443-1600 Host: COL Johnny Thomas (210) 226-5888
25-16 Mar	Charleston, SC 12th LSO	AC GO MG Altenburg RC GO BG DePue Int'l & Op Law Criminal Law GRA Rep TBD	International & Operational Law Criminal Law: Fraternization	COL Robert P. Johnston (704) 347-7800 Host: COL Dave Brunjes (912) 267-2441

1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Op Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
21-23 Apr	Easter Weekend			
29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	International & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	POC: MAJ Jerry Hunter (978) 796-2140 1-800-554-7813
5-7 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administrative & Civil Law	POC: LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Administrative & Civil Law	POC: CPT Lance W. Von Ah (205) 795-1511 fax (205) 795-1505 lance.vonah@usarc-emh2.army.mil

*Topics and attendees listed are subject to change without notice.

Please notify Colonel Tromey if any changes are required, telephone (804) 972-6381.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), 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, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School 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, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
7-12 May	1st JA Warrant Officer Advanced Course (Phase II, Active Duty) (7A-550A-A2).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).

5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO)
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Career Services Directors Conference.
26 June-14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

5-7 July	Professional Recruiting Training Seminar.
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July-	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July-22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July-1 September	2d Court Reporter Course (512-71DC5).
31 July-11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August-1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October-21 November	3d Court Reporter Course (512-71DC5).
9-16 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Course (5F-F23).
13 October-22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November-1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November-1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8 January-27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January-6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).

18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar.
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
20 July-28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

4 February ICLE	Advocacy and Evidence Sheraton Colony Square Hotel Atlanta, Georgia
11 February ICLE	Truth, Whole Truth & Nothing But The Truth Atlanta, Georgia
18 February ICLE	Motion Practice Sheraton Colony Square Hotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually

South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer*.

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail <Karl.Goetzke@hqda.army.mil>. LTC Goetzke.

Current Materials of Interest

1. The 50th Anniversary of the Uniform Code of Military Justice.

Call for Papers

Deadline for Submissions is March 1, 2000

The journals, *Military Law Review* and *The Army Lawyer*, seek submissions for a special issue and commemorative series on **The 50th Anniversary of the Uniform Code of Military Justice**. We are interested in papers based on empirical research as well as commentary on the history and current status of the Uniform Code of Military Justice (UCM).

Of particular interest are papers about notable courts-martial, influential judge advocates, and comparisons of the military and civilian justice system. The UCMJ was ahead of its time in some respects (Art. 31 rights warnings, providence inquiry, appointment of appellate defense counsel, etc.). Is the UCMJ still in the innovative lead? How has the Supreme Court addressed UCMJ issues?

Papers about the UCMJ and the *Manual for Courts-Martial (MCM)* during different eras in American history are also of interest. Specifically, articles dealing with the drafting and enacting of the UCMJ and *MCM* 1945-1951, employment of the UCMJ and *MCM* during the Korean War, the Vietnam War, the Cold War, Desert Storm, and during deployments in the 1990s (Haiti, Grenada, Bosnia, etc.).

Papers that critically review the roles of the various players in the military justice system are also invited. Does the commander have too much authority over the court-martial process? What should be the role of the staff judge advocate? Is the trial defense service sufficiently independent, or should civilian attorneys serve as trial defense counsel? How should military judges be selected? Should military judges have a fixed term of office? Should the role of the Court of Appeals for the Armed Forces be expanded?

Historical and critical reviews of courts-martial procedure are also invited. Do the pretrial and investigatory procedures offer sufficient constitutional protections for service members? Should service members be entitled to grand jury investigations, or is the Article 32b process sufficient? Should court members (jurors) be selected by the convening authority, or is it time for random selection? Historically, how has command influence affected the credibility of courts-martial? Does the Fourth Amendment (search and seizure) apply to service members in the barracks? Is the providence inquiry/guilty plea process sufficient, or over-kill? Are the military capital proceedings constitutional?

Deadline for submissions is March 1, 2000. Please send proposal, papers, or inquires to: Captain Mary J. Bradley, Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, 600 Massie Road, Charlottesville, Virginia 22903; (804) 972-6395; Mary.Bradley2@hqda.army.mil.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1999 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 1999 issue of *The Army Lawyer.*

4. Articles

The following information may be useful to judge advocates:

Margaret Chandler, *Media Access to Court Documents*, 17 U. TASMANIA L. REV. 186 (1998).

Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. FLA. L. REV. 315 (January 1999).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and Pentium PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by

ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.