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Issues may be cited as Army Law., [date], at [page number].

Periodicals postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Military Justice: The Continuing Importance of Historical Perspective[1]

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In the half-century following enactment of the Uniform Code of Military Justice (UCMJ), the practice of military law has been shaped by both the push of contemporary events and the pull of history. The debates over enactment of the UCMJ and major amendments to the *Manual for Courts-Martial*, as well as the landmark arguments before our court, have been enriched by the skillful advocacy of lawyers and policy-makers imbued with a sense of history. In recent years, however, the historical antecedents of current practices have not received the same degree of attention. The diminished attention to the roots of contemporary military law may reflect the difficulty busy lawyers and public officials face in assimilating, digesting, and applying the rapidly expanding array of information available to the modern practitioner. In this article, by highlighting the role of historical perspective in the development of the military justice system, I hope to encourage a renewed interest in the use of history during consideration of contemporary issues in military law.

The Development of the UCMJ in Historical Context

In our Nation's capital, we are surrounded by the symbols of history, such as the monuments and memorials to our great Presidents–Washington, Jefferson, Lincoln, and, most recently, Franklin Delano Roosevelt. From the dedication of the Roosevelt memorial in 1997 through the millennium celebrations of 1999, a great deal of attention has been given to his impact on the twentieth century.

One of Roosevelt's greatest strengths was his ability, in the darkest of times, to appeal to the best qualities in the American people. Of all his classic addresses to the public, perhaps none has had a greater impact or a more enduring legacy than his evocation of the Four Freedoms.[2]

The Four Freedoms theme was fashioned and dictated personally by President Roosevelt.[3] At the end of New Years Day, 1941, Roosevelt gathered with his staff late in the evening to review his proposed State of the Union address. Despite his personal popularity, Roosevelt faced considerable skepticism about his policies in Congress, in the press, and amongst the general public.

Today, when democracy is triumphant in so much of the world, and when our nation enjoys relative prosperity and productivity, it may be difficult to visualize the desperate atmosphere that gripped the United States in 1941, on the eve of our entry into World War II. Despite the New Deal, much of the country remained plagued by unemployment and the continuing effects of the Depression. The domestic agenda was characterized by fundamental and bitter divisions over the proper responsibilities of government. In the field of foreign affairs, the nation was deeply divided between isolationists and internationalists–so divided that our armed forces, in terms of size and capabilities, were rated well behind most of the industrialized nations of the world.

In Germany, Italy, Russia, and throughout much of the world, dictatorships and totalitarian states were on the rise. The military and economic triumphs of Hitler and his emulators seemed to indicate that success lay in appeals to nationalism, prejudice, and the baser instincts of man.

The temptations were great to focus national policies upon appeals to fear, prejudice, or an insular nationalism. Roosevelt had a different vision, borne of his confidence in the American people, his understanding of history, his personal triumphs over adversity, and his fundamental belief that freedom–based upon classic notions of the democratic process and individual liberty–was the key to the ingenuity, creativity, and strength of the American people.

The draft State of the Union speech presented to Roosevelt by his staff on that New Years Day in 1941 contained many of Roosevelt's familiar appeals to support the Allies by transforming the United States into the "Arsenal of Democracy." After reading the draft, Roosevelt announced that the speech needed something more. Then he paused in silence for what seemed to his staff to be an eternity. Suddenly, he leaned forward and began to dictate. As Samuel I. Rosenman later recalled, the words "seemed now to roll off his tongue as though he had rehearsed them many times to himself."[4]

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1. This article is adapted from the author's remarks presented to the 21st Annual Criminal Law New Developments Course at The Judge Advocate General's School in Charlottesville, Virginia, in November 1997.

2. *See, e.g.*, STUART MURRAY & JAMES MCCABE, NORMAN ROCKWELL'S FOUR FREEDOMS 101-8 (1993). The concept of the "Four Freedoms" was the unifying theme in Roosevelt's annual message to the Congress delivered on 6 January 1941, eleven months before the United States entered World War II. 87 CONG. REC. 44 (1941).

3. For descriptions of the events surrounding development of the Four Freedoms theme, *see, e.g.*, JAMES MACGREGOR BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM 33-35 (1970); MURRAY & MCCABE, *supra* note 2, at 3-6; SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT 262-63 (1952).

In the speech he dictated, and subsequently delivered before a joint session of Congress, Roosevelt spoke of–

> [A] world founded upon four essential human freedoms.
>
> The first is freedom of speech and expression–everywhere in the world.
>
> The second is freedom of every person to worship God in his own way–everywhere in the world.
>
> The third is freedom from want–which, translated into world terms, means economic understanding which will secure to every nation healthy peacetime life for its inhabitants–everywhere in the world.
>
> The fourth is freedom from fear–which, translated in to world terms, means a worldwide reduction of armaments to such a point in such a thorough fashion that no nation will be in a position to commit an act of aggression against any neighbor–anywhere in the world.[5]

He challenged the American people to understand that his remarks were

> no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.[6]

At a time when debate in this country raged between those who favored an all powerful government in both the foreign and domestic spheres and those who favored isolationism and a minimal role for government, Roosevelt set forth his view of a more balanced approach. His Four Freedoms reflected a belief in a government that was strong but not overbearing; a government that was grounded not on goals of efficiency but on a belief in the virtues of liberty.

The first two freedoms that he cited–freedom of speech and freedom of religion–involved freedom from government. The last two–freedom from want and freedom from fear–contemplated an active role for the government in promoting economic security at home and abroad and a dynamic role for the United States in securing international peace.

The speech, along with Roosevelt's "Arsenal of Democracy" fireside chat, set the stage for the critical debates in 1941 over military preparations and aid to Britain. After Pearl Harbor and America's entry into the war, the Four Freedoms were brought to life through the work of another great American, Norman Rockwell, whose classic paintings depicted–

> Freedom of Speech, as shown in a New England Town Meeting.
>
> Freedom of Worship, depicting the offering of prayer by individuals of diverse backgrounds, races, and creeds.
>
> Freedom from Want, illustrated by the gathering of an extended family at a traditional Thanksgiving.
>
> Freedom from Fear, showing parents tucking their children into bed at night, while a newspaper headline carries the tragic news of a world at war.[7]

Roosevelt's words and Rockwell's paintings became the centerpiece of many programs and activities designed to create a greater understanding of the many sacrifices that the American people were called upon to make during the war. A nationwide tour of the paintings was viewed by over 1.2 million people, and raised over $130 million in war bonds–an astonishing sum in those days.[8] Poster-sized reproductions were distributed throughout the nation, and to military units throughout the world. An airman stationed in Alabama at what was then known as Maxwell Field, after viewing Rockwell's Freedom of Speech poster, wrote: "I am indeed thankful that I am able to help defend that right."[9]

Roosevelt's intent in focusing on the Four Freedoms went beyond the immediate needs of wartime propaganda. His prior experiences in life had convinced him of the need to prepare America not only for the conduct of war but also for the world

4. ROSENMAN, *supra* note 3, at 263.

5. 87 CONG. REC. 46-47.

6. *Id.* at 47.

7. *See* MURRAY & MCCABE, *supra* note 2, at 45-51.

8. *Id.* at 91.

9. *Id.* at 65.

that would follow. Earlier in his career, as a member of President Wilson's World War I administration, Roosevelt had observed first-hand the tragic failure of the United States to participate in the post-war League of Nations.[10] Without diminishing America's attention from the successful prosecution of World War II, Roosevelt–through the evocation of the Four Freedoms–sought to prepare the American people for the mantle of leadership in the post-war environment.

As Senator Daniel Patrick Moynihan noted, Roosevelt's vision has prevailed.[11] To quote Moynihan: "The liberal tradition of the West, enlarged and enhanced in the awful travail of the twentieth century is now almost everywhere celebrated after three quarters of a century on the defensive."[12]

Look at what has happened, not only in our lifetime, but also in the lifetimes of our children. When I came to Charlottesville as a new judge advocate in 1976, the Cold War was the central focus of our national security policy. Today, the Soviet Union is no more, and its former puppet states are striving to achieve meaningful democracy. Judge advocates and other military officers participate in a wide variety of training teams that comprise an important part of that effort. While there are many parts of the world where the Four Freedoms have yet to achieve their full flowering, there is–as Senator Moynihan noted–no competing vision.

There are some interesting parallels with the development of the contemporary military justice system. Just as Roosevelt's vision of the Four Freedoms was forged in the crucible of Wilson's failed efforts on behalf of the League of Nations, the post-World War II debate over the UCMJ was heavily influenced by the largely unsuccessful efforts to reform the military justice system in the aftermath of World War I.[13] The military justice system, as it existed in World War I, did not require the provision of a trained attorney to serve as counsel for the accused, and there was no formal appellate review.[14] In one well-known incident, sentences to death at a domestic post were carried out before the case could be subjected to even the most rudimentary appellate review.[15]

Although a few legally trained military officers worked with interested civilians to propose a more formal role for lawyers at trial and appeal, the nation was weary of war and appeared to have little enthusiasm for international relations or military affairs. The post-World War I military justice debate, in today's terms, was largely "inside the beltway," and few changes were made.

The post-World War II environment was different. Perhaps because the war lasted longer, perhaps because there were more courts-martial–more than two million were held–and perhaps because our leaders had prepared the nation for a more active international role after the war, the interest in military justice remained high. Perhaps the emphasis on concepts like the Four Freedoms caused returning veterans to take a hard look at all aspects of military service and assess whether their experiences measured up to the ideals for which they had made so many sacrifices.

After World War II, veterans and their organizations throughout the nation, as well as many returning veterans who served in Congress, promoted a major national debate about military law, which led to the establishment of the UCMJ.[16] Just as Roosevelt's Four Freedoms represented a pragmatic blend of historic and intellectual trends, the same considerations were reflected in the development of the UCMJ. The debates inside the newly formed Department of Defense and in Congress were characterized by a variety of competing proposals–ranging from cosmetic changes to complete civilianization.[17]

The final product, like Roosevelt's Four Freedoms, represented a balance of concerns about individual liberty and the need for effective government action. On the one hand, there were major reforms, including the primacy of lawyers as advocates and presiding officers at trial and on appeal, as well as the creation of our court–an independent civilian tribunal.[18] On the other hand, these reforms were balanced by disciplinary concerns reflected in the continuation of uniquely military offenses and the primary role of commanders in the disposition of

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10. *Id.* at 39. *See* BURNS, *supra* note 3, at 607; Daniel Patrick Moynihan, Address at the Lyndon Baines Johnson Room, U.S. Capitol, in Commemoration of the 50th Anniversary of President Franklin Delano Roosevelt's Four Freedoms Speech (Jan. 30, 1991) (on file with author).

11. Moynihan, *supra* note 10, at 4.

12. *Id.*

13. *See* WILLIAM T. GENEROUS, SWORDS AND SCALES ch. 1 (1973); JONATHAN LURIE, ARMING MILITARY JUSTICE chs. 3-5 (1992); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick Bernays Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989); Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 16-24 (1989).

14. *See* Brown, *supra* note 13, at 18-33.

15. *See id.* at 3-4.

16. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108 (1950). *See* GENEROUS, *supra* note 13, ch. 4; LURIE, *supra* note 13, ch. 6.

17. *See* LURIE, *supra* note 13, at 126-49.

charges.[19] That system of military justice, with relatively few changes, served our country throughout the Cold War, through its harsh baptism on the frozen fields of Korea, in the jungles of Vietnam, in *Desert Shield* and in *Desert Storm*, and during the years of hard but tenuous peace at home and abroad.

To return, for a moment, to contemporary consideration of Roosevelt's Four Freedoms, I would note that the challenge for our generation is not simply to complete Roosevelt's vision but to ensure that it endures. I have always felt very close to that vision–not only because I was raised and educated in upstate New York, less than five miles from Roosevelt's home and library–but also because I was raised and educated by men and women who had experienced the Depression, fought in World War II, and achieved adulthood during the Cold War. Those experiences–which were brought to life for me by those who had lived them–are all too remote for our children.

In a time of relative peace and prosperity, how do we convey to the younger generation that freedom cannot be taken for granted? How do we prepare the next generation to preserve freedom when confronted with the massive technological, social, and economic changes that are likely to characterize the Twenty-first Century?

I would not pretend to suggest a definitive answer, but there are some things that each of us can do in both our personal and professional lives. With respect to our personal lives, we can teach the next generation about the history of our country and the struggle to maintain freedom in a changing world. There are wonderful children's books, thought-provoking museums, and outstanding national park sites that can have an enormous impact on the younger generation. There are numerous opportunities, around the dinner table, to relate current events to the struggles of the past. If we resolve, through our schools, our civic associations, and our families, to make that history come alive for our children, then we at least will have provided them with an intellectual foundation to build the institutions of the future that will preserve and protect the concept of freedom. In our professional lives, we can consider how to use history as an effective tool of advocacy in judicial and legislative forums, which I shall address in the second half of this Article.

The Importance of Historical Perspective in the Consideration of Contemporary Military Justice Issues

The effective use of history in the development of military law is reflected in the experiences of two of the giants of military law–William Winthrop and Frederick Bernays Wiener.[20] Both Winthrop and Wiener had first-hand experience with military affairs in wartime. Winthrop was a thirty-year old lawyer in private practice at the outset of the Civil War. He and his brother responded to President Lincoln's call for volunteers. His brother died in action and Winthrop saw active combat service. His conduct in the field resulted in several wounds and promotion to Captain. In 1863, he was assigned to duty in Washington in the Judge Advocate General's Office. After the War, he obtained a commission in the Regular Army, and remained on active duty until 1895. His period of post-Civil War service encompassed the time in which he produced his two classic works, the *Digest of Opinions of the Judge Advocate General*, and his oft-cited *Military Law and Precedents*.[21]

Frederick Bernays Wiener, like William Winthrop, was a civilian practitioner for several years before entering military service. Wiener took a reserve commission in 1936, and was called to extended active duty in March 1941, on the eve of World War II. At the outset of the war, he served as staff judge advocate for a command that covered most of our forces in the West Indies, then served in the Pacific in New Caledonia and on Guadalcanal. After a tour in Washington, he served with the Tenth Army during the Okinawa invasion and then in the Military Government Section during the occupation of that island. Following the war, he was with the Solicitor General's Office for three years, arguing a number of cases before the U.S. Supreme Court. Subsequently, he developed an active appellate practice, during which he was prevailing counsel in many of the cases that established the constitutional framework for jurisdiction over civilians, including the landmark case of *Reid v. Covert*.[22] He also taught appellate advocacy and military law at George Washington University, authored numerous books and articles covering a wide range of legal topics in both the civilian and military arenas, and continued his military service in the Reserves.

18. *See, e.g.*, Act of May 5, 1950, arts. 26, 27, 28, 66, 70; 10 U.S.C. §§ 826, 827, 838, 866, 870 (1952).

19. *See, e.g.*, Act of May 5, 1950, arts. 22, 23, 24, 60, 64; 10 U.S.C. §§ 822, 823, 824, 860, 864.

20. For biographical information on Winthrop, *see, e.g.*, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 96-100; George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J. 126 (Feb. 1956). For information on Wiener, *see, e.g.*, H.R. 2498, 81st Cong. (1949); Frederick Bernays Wiener, *The Teaching of Military Law in a University Law School*, 5 J. LEGAL EDUC. 475 (1953); Proceedings in memory of Frederick Bernays Weiner, 46 M.J. 204 (1996).

21. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (photo. reprint 1920) (2d ed. 1896).

22. 354 U.S. 1 (1957).

Wiener began his legal career when Oliver Wendell Holmes was still sitting on the Supreme Court, and it is apparent that he was deeply influenced by the thrice-wounded Civil War veteran–described by Wiener as "America's outstanding soldier-jurist."[23] Drawing on a variety of speeches delivered by Holmes, Wiener observed that "the military lawyer is, in a very real sense a special breed, one who combines with the reason of the lawyer the faith of the soldier."[24] He emphasized, however, that a military lawyer need not replicate Holmes' combat experience in order to be successful: "[T]he military lawyer [need not] be a certified combat hero, or have successfully completed the ranger course, or be able to function as a parachutist, or as a frogman, or as a submariner . . . [T]he military lawyer must have, at an irreducible minimum, a high degree of moral courage." He noted that the military lawyer must, of course, treat with respect all of his military superiors. What they direct after discussion must be the guideline of his conduct. But, he added, the military lawyer "is bound to be fearless in tendering advice and in stating his opinion."[25]

Wiener was deeply influenced by Holmes' view, expressed with characteristic understatement, that: "[h]istoric continuity with the past is not a duty, it is only a necessity."[26] Wiener's appellate briefs and scholarly writings reflected an intimate and intense familiarity with the original documents that formed the military law of this country, going well beyond treatises and statutes to include the court-martial orders, records of trial, and review proceedings of the Eighteenth, Nineteenth, and Twentieth Centuries. As I recently re-read his classic 1958 *Harvard Law Review* articles on the application of the Bill of Rights to the military,[27] filled with detailed descriptions of long ago courts-martial, I realized that he must have spent hundreds if not thousands of hours at the National Archives and other repositories pouring over records of trial, organizing the material, and making it come to life.

What is remarkable about Fritz Wiener is that he was not primarily a student of military law, but instead was an active practitioner with a wide range of interests in civil matters and English legal history. In his writings on military law, he demonstrated a consummate knowledge of parallel developments in civilian law and military policy that enabled his audience–lawyers, scholars, and policy makers–to understand the context of the evolution of military law.

In the course of refuting the proposition that the Framers intended the Bill of Rights to apply to the armed forces, Wiener vividly depicted numerous courts-martial, including the 1814 trial of Brigadier General William Hull, the superannuated Revolutionary War hero who surrendered Detroit in 1813 without a shot. At the court-martial, which featured an appearance by Martin Van Buren as a special judge advocate assisting the prosecution, Hull was found guilty and sentenced to be shot to death–they certainly had a highly focused concept of accountability back then–but with a recommendation for clemency in consideration of his Revolutionary War service and advanced age. Exercising the right provided in law at the time for an officer to submit grounds for appeal to the President, Hull protested the court's ruling that his counsel had been restricted to providing the accused with written assistance and could not address the court. Wiener pointed out that President Madison, commonly regarded as the father of the Bill of Rights, approved the court-martial despite the denial of counsel rights that would otherwise be applicable under the Sixth Amendment. Although Madison determined that the results of trial were correct in law, he remitted the sentence as a matter of clemency.[28]

Although Wiener's articles have been cited for the proposition that civilian constitutional rights should not be judicially incorporated into military practice as a matter of constitutional law,[29] his in-depth understanding of military history was also used to challenge portions of the UCMJ granting jurisdiction over civilians in peacetime, provisions which Wiener demonstrated to be inconsistent with traditional military practice in his winning Supreme Court briefs in *Reid v. Covert* and the related cases.[30] Wiener's encyclopedic knowledge of military law was reflected in the variety of cases he would cite, ranging from a 1797 court-martial of an officer for violating a general order against "keeping a mistress"[31] to the execution of three officers in 1792 for desertion.[32]

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23. Frederick Bernays Wiener, *Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith*, 80 MIL. L. REV. 1 (1978).

24. *Id.* at 3.

25. *Id*. at 3-4.

26. Weiner, *supra* note 20, at 489-90 (1953) (quoting HOLMES, LEARNING AND SCIENCE, IN COLLECTED LEGAL PAPERS 139 (1921)).

27. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I & II*, 72 HARV. L. REV. 1 (1958); 72 HARV. L. REV. 266 (1958).

28. *Id.* at 29-31, 45.

29. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25, 33-34 (1976) (declining to reach the constitutional question of whether the right to counsel applies to summary courts-martial on the grounds that a summary court-martial is not a criminal prosecution within the meaning of the Sixth Amendment.)

30. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Kinsella v. Krueger, 354 U.S. 1 (1957).

31. Weiner, *supra* note 27, at 275 n.376.

His purpose was to ensure accuracy in legal and legislative decision-making, not to defend the status quo. This point is emphasized in his classic 1958 articles on the Bill of Rights. After concluding that the Framers did not intend the Bill of Rights to apply to military personnel, he emphasized that "it does not follow . . . that members of those forces must be held to have no constitutional rights today, or that they must be held to be unable to protect their rights in the same manner and by the same proceedings that are now available to civilians."[33] He made four specific points in this regard. First, Congress had filled the gap in many instances by specifying rights under the UCMJ.[34] Second, the then-Court of Military Appeals was "giving to the statutory provisions a content which, in most instances, is indistinguishable from that of the constitutional norms regularly formulated and applied in the federal courts."[35] Third, in civilian life, the concept of due process has gone far beyond the rights contemplated by the Framers, including rights provided to non-citizens.[36]

Finally, and perhaps most important–the position, number, composition, and recruitment of the armed forces is so different by comparison with 1789-1791 that an approach which was adequate and commonplace then is wholly unsatisfactory and inappropriate today. Soldiers then were a few professionals; in today's wars, whole nations are in arms. Then a commander could disapprove proceedings in which a lawyer appeared because the tribunal was "a Court of Honor." Today the court-martial has developed into a court of general criminal jurisdiction.[37]

Weiner anticipated that the Due Process Clause would be read to include military personnel, with the debate taking place not over whether military personnel had constitutional rights, but where "to mark out a line from case to case with due regard to the actualities of the military situation."[38]

Wiener was a strong supporter of the military's professional legal education programs, and what he described as "the excellent training" at the military's law schools.[39] He lamented, however, the paucity of attention to military law by the nation's leading universities. Noting that legal scholarship should go beyond practical training, he quoted an observation from Holmes in 1886 that rings true today:

> It is from within the bar, not from outside, that I have heard the new gospel that learning is out of date, and that the man for the times is no longer the thinker and the scholar, but the smart man, unencumbered with other artillery than the latest edition of the Digest and the latest revision of the Statutes.[40]

It sounds like Holmes was talking about a brief that contains nothing more than citations to the *Manual for Courts-Martial* and references to the most recent appellate cases, without any reflection of the underlying purposes or historical development of the legal principles at issue. Holmes added: "the aim of a law school should be . . . not to make men smart, but to make them wise in their calling–to start them on a road which will lead them to the abode of the masters."[41]

For Wiener, this meant that the teaching of military law should not rest on the "narrow footing of 'military justice'"–that is, how to try and defend a court-martial case–but should encompass "the constitutional extent of military power and the relation between civil and military jurisdiction . . . the war powers . . . martial law . . . and military government."[42] I believe he would be pleased to see the broad curriculum offered at The Judge Advocate General's School in Charlottesville, Virginia, and at the other military law schools, as well as the nascent development of courses at the civilian law schools that address problems in national security law. Such offerings, however, are few and far between.

This is more than a matter of academic concern. Although some appellate issues can be resolved by resorting to leading cases from the digest, many require an understanding of the personnel rules and other administrative matters that govern

32. *Id*. at 287 n.483.

33. *Id*. at 294.

34. *Id.*

35. *Id.*

36. *Id.* at 298-301.

37. *Id.* at 301-02.

38. *Id.* at 303.

39. Weiner, *supra* note 20, at 481.

40. *Id.* at 480.

41. *Id.*

42. *Id.* at 482.

military life. The most important cases require a deep appreciation of military justice in its larger context–the conduct of military policy, the war powers, the separation of powers, and the role of military justice in projecting military power. When such matters are addressed through buzz words rather than critical scholarship, the courts are deprived of an important source of analysis. Moreover, when military justice issues are debated by policy makers in the executive or legislative branches without the benefit of historical perspective and past example, these deficiencies cannot be overcome by a thousand buzz words.

Wiener relied heavily on Winthrop's treatise, and quoted with approval the observation of another commentator that:

> Military Law and Precedents was a masterpiece of painstaking scholarship, brilliant erudition, and lucid prose. It collected for the first time in one work precedents which constitute the framework of military law, gleaned from a bewildering and unusual mass of statutes, regulations, orders, and unpublished opinions from the amorphous body of customs of the service reposing in scattered fragments in the works of military writers and the minds of military men. What Lord Chief Justice Sir Edward Coke did through his Reports and Institutes for the common law Colonel William Winthrop did through his digest and Military Law and Precedents for military law.[43]

Wiener, in 1953, lamented the fact that no one had sought to replicate Winthrop's endeavors for twentieth century military law, particularly in terms of organizing material related to the punitive articles.[44] Nearly half a century later, the gap remains unfilled. Despite the extensive and intense experiences of this nation with military law during the combat environments of the two World Wars, Korea, and Vietnam, as well as experiences of the Cold War and the Gulf War, the focus of military legal scholarship has been almost exclusively on matters of procedure, with far less attention to substantive crimes. As a result, litigation and policy debates concerning substantive crimes often rely exclusively on a few citations from the current digests and a cursory reference to Winthrop. The absence of a serious historical perspective may well reflect the fact that there is no modern authoritative treatise that addresses twentieth century substantive crimes in the same manner that Winthrop addressed the punitive articles in his time.

Admiration for the work of Winthrop and Wiener does not require an uncritical acceptance of their views. There are any number of points made by each, some of considerable significance, with which the reader may disagree. Wiener, himself, acknowledged that some of his predictions had been disproved by experience. What Wiener contributed was not so much his specific recommendations, but the remarkable degree of information and perspective that helped decision makers–in the Pentagon, Congress, and the courts–resolve difficult legal and policy choices.

Today, military discipline and the operation of the military justice system is the focus of more internal and external attention than perhaps at any time since the immediate post-World War II era. Some have asked how much of that attention is informed by a critical understanding of the origins and purposes of military law.

When approaching critical issues of contemporary military law, whether as litigation counsel or legislative counsel, it is useful to ask whether a particular discussion of military law is sufficiently informed by an understanding of the relationship between the law and the history of military activities affected by the law. It is also useful to ask whether today's decision makers–before they determine whether to retain or modify current laws, regulations, or precedents–are being provided with briefs, legislative proposals, and scholarly publications of the same high quality as the materials provided to yesterday's leaders by William Winthrop and Frederick Bernays Wiener. It may be unrealistic to expect that every attorney will produce work of such high caliber in every case, but it is not unrealistic to expect emulation of the standards set by Winthrop and Wiener in major cases and in the development of rules and statutes.

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43. *Id.* at 488-89 n.74, quoting William F. Fratcher, *Colonel William Winthrop*, THE JUDGE ADVOCATE JOURNAL, Dec. 1944, at 12, 14.

44. *Id.* at 488.

Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys

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Alternative dispute resolution (ADR) mechanisms–mediation and arbitration–often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state[1] and federal[2] laws and policies now promote or even mandate ADR.[3]

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are also commonly included in employment contracts.[4] Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts. Almost any kind of dispute[5] may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes.[6]

This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral.

Mediation and Arbitration Distinguished

Mediation and arbitration are the two most common types of ADR. They differ significantly. In mediation, a third-party neutral or mediator assists the parties–they meet, explore options, and negotiate a mutual settlement to resolve their dispute. Mediators do not decide who is right or wrong. Instead, they help the parties reach a solution on their own that works for them. The parties are not required to reach an agreement, and sometimes they do not. Generally, there is no record of the mediation session, and the only document produced is the

1. For example, Texas Government Code, Chapter 2008, provides "It is now the policy of the State of Texas that disputes before state agencies be resolved as fairly and expeditiously as possible and that each state agency support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the agency's operations and programs." TEX. GOV'T CODE ANN. ch. 2008 (West 2000).

2. Examples of federal provisions include: The Federal Arbitration Act, 9 U.S.C.S. §§ 1-307 (LEXIS 2000) (making arbitration agreements that involve or affect interstate commerce enforceable); 28 U.S.C.S. § 471 (LEXIS 2000) (mandating that all U.S. district courts adopt plans to reduce the delay and expense of litigation); "Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . utilization of alternative dispute resolution programs in appropriate cases . . . ." Congressional Statement of Findings to Judicial Improvements Act of 1990, § 102, Pub. L. 101-650, 104 Stat. 5089 (1990); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995) (encouraging the use of ADR to resolve agency procurement protests).

3. *See* American Arbitration Association (AAA) (visited May 10, 2000) <http://www.adr.org> (containing links to federal and state laws). In 1998 alone, the AAA administered over 95,000 cases using mediation or arbitration. *Id.*

4. Many Department of the Army civilian employees may use mediation through the Army when they file an EEO complaint. *See* Captain Drew A. Swank, *Meditation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., Sept. 1998, at 46. Legal assistance attorneys seldom find themselves advising on employment matters because of *Army Regulation 27-3, The Army Legal Assistance Program*'s exclusion of most employment disputes from the scope of the legal assistance program. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-8 (21 Feb. 1996) [hereinafter AR 27-3].

5. *See* "*What Kinds of Cases Can be Mediated?*" (visited May 5, 2000) <http://www.nolo.com/encyclopedia/articles/cm/cm36.html> (discussing the types of cases appropriate for mediation). Many non-criminal disputes may be mediated successfully, including those involving contracts, leases, small business ownership, employment and divorce. For example, a divorcing couple might work out a mutually agreeable child custody agreement. On occasion, criminal disputes may also be mediated successfully, even including felony cases such as manslaughter and burglary. In these cases, the mediation sessions have replaced the traditional plea bargaining between the prosecutor and defense counsel. In many cases, the victims (or victim's survivor) have participated. In some of these, the settlement has included jail time and upon conclusion of the mediation, the parties convene before a judge who imposes the mediation-agreed upon sentence. *See* Jerry Sandel & Sherry R. Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).

6. *See* Divorceinfo.com (last modified Mar. 4, 2000) <http://www.divorceinfo.com/> (offering many helpful, informative pages on such topics as surviving the divorce experience, life after divorce, taxes, bankruptcy, and parenting). In addition, the site has a page entitled "*Divorce Mediation*" that should help clients understand the benefits of mediation in divorce. *Id.*

actual settlement agreement. Agreements are generally enforceable in the same manner as any other written contract. Mediation preparation is often limited, as there is no formal discovery. It offers the parties a chance to communicate and to vent in a neutral, confidential setting in the presence of a "neutral" third party.

Arbitration is a significantly more formal proceeding that provides the parties a hearing before a neutral decision-maker, the arbitrator. Parties may conduct discovery before the hearing. During the hearing, the parties may make opening statements, introduce documents, and examine witnesses under oath. The rules of evidence are relaxed (for example, hearsay is often considered). The arbitrator or a panel of arbitrators listens to both sides, weighs the evidence presented, then decides the case and issues an order (sometimes called an award). Depending upon the contract clause or other agreement that brought the parties to arbitration, the neutral's order can be binding or non-binding. If the order is binding, the parties have limited rights of appeal. If the decision is non-binding, the parties may still go to court.

Mediation

Many clients may benefit from mediation. It works as well for one issue, two-party disputes, as it does for multi-issue, multi-party disputes. Sometimes even parties who have had a protracted dispute settle the case fairly quickly after beginning mediation. What is it about mediation that works? A skilled mediator facilitates communication, encourages an exchange of ideas and information, tests the reality of the parties' perceptions, advises, encourages, suggests, persuades, and translates what is said into a form that detoxifies the emotional baggage of the message. Allowing the parties to vent in a neutral and professional environment can be useful, as many disputes involve egos and feelings, not just legal rights.

Sometimes a mediator will make recommendations to assist the parties in reaching their own agreement. The recommendations are often creative, collaborative solutions to problems that go beyond the mere exchange of money. Hence, mediated settlement agreements can afford the parties more complete relief than a court decree or an arbitration award. During mediation, the parties may expand discussions to issues that are beyond the matters originally cited in the petition or complaint. Experienced mediators may be able to assist the parties to identify concessions that are of little value to one party, but of great value to the other. They can create a "win-win" situation that is extremely important when the parties have an ongoing relationship, as do parents in a child custody dispute.[7]

There are cases that are not appropriate for mediation. The practitioner should think twice before recommending mediation where one party is truly a victim. For example, mediation may not be appropriate in a family law case where there has been serious spouse abuse.[8] Obviously an attorney should not use mediation if one of the client's goals is to establish a legal precedent, given that mediations themselves and the results of mediations are usually confidential.

Policy Guidance

Army Regulation 27-3 recognizes that mediation is an appropriate method of dispute resolution.[9] *AR 27-3* also specifies that legal assistance attorneys are encouraged to share innovative measures with other legal assistance providers.[10] The regulation outlines the services legal assistance attorneys may provide, including mediation.[11] While legal assistance attorneys may serve as mediators, they may not ethically do so after forming an attorney-client relationship with a party to the mediation as they will necessarily have lost their neutrality.[12] In addition, attorneys who serve as mediators or arbitrators must comply with the ethical standards of *Army Regulation 27-26, Rules of Professional Conduct for Lawyers.*[13] Consider this comment to Rule 2.2 when deciding whether you as a legal assistance attorney should serve as a mediator:

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7. Annette Galik, *Mediating Child Support Contempt Cases*, 62 TEX. B. J. 543 (1999).

8. Texas Family Code § 6.602 allows the court on its own motion to order parties to mediation. However, a party in a dissolution of marriage proceeding who has been a victim of spouse abuse may file objections to mediation with the court on the basis that family violence has been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order that appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. Sometimes, while not rising to the level of a victim-offender scenario, the parties nonetheless have power imbalances between themselves that are so extreme that the case is extraordinarily difficult to mediate. TEX. FAM. CODE ANN. § 6.602 (West 2000).

9. AR 27-3, *supra* note 4, para. 3-7j.

10. *Id.* para. 3-4a(5).

11. *Id.* para. 3-7.

12. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 2.2 (1 May 1992). For example, a lawyer who has represented one of the individuals for a long period and in a variety of matters might have difficulty being impartial between the individual and one to whom the lawyer has only recently been introduced.

> Should a legal assistance officer see both the dependent-seller and a soldier-buyer of a used car, the individuals would have potentially conflicting interests and the legal assistance officer would be acting as a mediator in such a situation. Because confusion can arise as to the lawyer's role where each individual is not separately represented, it is important that the lawyer make clear the relationship. A lawyer acts as a mediator in seeking to establish or adjust a relationship between individuals on an amicable and mutually advantageous basis; for example, arranging a property distribution in settlement of an estate or mediating a dispute between individuals. The lawyer seeks to resolve potentially conflicting interests by developing the individuals' mutual interests. The alternative can be that each individual may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the individuals may prefer that the lawyer act as mediator. In considering whether to act as a mediator between individuals, a lawyer should be mindful that if the mediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that mediation is plainly impossible. For example, a lawyer cannot undertake mediation among individuals when contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the individuals has already assumed definite antagonism, the possibility that the individuals' interests can be adjusted by mediation ordinarily is not very good.[14]

In most cases, if an Army attorney is going to mediate, it will be an attorney serving in another section of the Office of the Staff Judge Advocate (such as Administrative Law).[15]

How Does a Client Get to Mediation?

How does a client get to mediation? When you think mediation would benefit your client, one way is to ask the other party to mediate. If your client desires mediation, you as the attorney can forward the request. Another way to get there may be by contract. Many contracts contain pre-dispute ADR provisions. Check to see if the contract contains a mandatory mediation provision.

If your client is already in litigation, the court may on its own motion order the parties to mediate.[16] In such cases, a party is required to participate in good faith[17] and to follow the applicable rules of mediation, but is not required to reach an agreement. Any settlement is always purely voluntary.

How Can You Help Your Client Avoid Mediation?

If a court has ordered your client to mediation but you or your client do not think that the case is either ripe or appropriate for mediation, what should you do? In many instances, the client is allowed a brief period to file objections.[18] There may be a statute that exempts your client from forced mediation. In Texas, for example, courts are barred from ordering victim-

13. *Id*. Rule 2.2 provides:

> (a) A lawyer may act as a mediator between individuals if:
> (1) the lawyer consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the lawyer-client confidentiality, and obtains each individual's consent to the mediation;
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the individuals' best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and
> (3) the lawyer reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the individuals.
> (b) While acting as a mediator, the lawyer shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that individual can make adequately informed decisions.
> (c) A lawyer shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

14. *Id.* This comment also provides sound guidance for legal assistance attorneys serving as mediators on confidentiality and attorney-client privilege.

15. *See infra* note 39 and accompanying text. While lawyers may serve as mediators, there is no requirement that a mediator must be a lawyer.

16. For example, section 154.002 of the Texas Civil Practice and Remedies Code provides that it is the policy in the state to encourage the use of ADR to resolve disputes. Some district courts in Texas automatically refer cases involving children to mediation unless domestic violence is an issue. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2000).

17. As a practical matter it is difficult to enforce the requirement of "good faith."

offender mediation or other ADR in a criminal prosecution arising from family violence.[19]

As a practical matter, however, there is rarely a reason to avoid mediation. The economic cost of participating is usually low, as is the time commitment. Many mediations can be completed in a single session ranging between two and four hours. There is little or no risk involved, as your client is not giving up any right to proceed to arbitration or litigation. At the very least, you and your client will have an opportunity to hear the other side's view of their case. Additionally, if you have a difficult client, the mediator may support some of the positions you have previously articulated to your client.

Agreements to Mediate

Before beginning mediation, the parties need to establish and know the ground rules. They do so in an "agreement to mediate." When ordered to mediate, a court order will often contain or refer to the "rules of mediation." Some courts have standard rules that are part of an order to mediate. If the court does not have established rules, the mediator can provide a set that is applicable for the dispute.

If the parties are already in litigation when they sign an agreement to mediate, legal assistance attorneys should consider whether the agreement constitutes an agreement that should be filed with the court pursuant to the applicable state rules of civil procedure.[20]

An agreement to mediate forces the parties to acknowledge that they understand the rules of the mediation. Perhaps the most important rule is the requirement for confidentiality.[21] It is paramount to a successful mediation. Both an agreement to mediate and the rules for mediation should include a provision that the parties agree and understand that the mediator will not be subpoenaed for any matter arising out of the dispute. Additionally, state law may require that the third-party neutral maintain confidentiality,[22] and may even set out circumstances under which the impartial third party may be precluded from testifying in proceedings relating to or arising out of any matter in dispute.[23] If confidentiality is not the law in your jurisdiction, consider asking the mediator to incorporate a confidentiality provision into the agreement to mediate, as well as into any settlement agreement.

The confidentiality requirement encourages open communication. If you (or your client) are concerned about discovery abuse,[24] seek a private caucus with the mediator and let the mediator guide the mediation without disclosing certain information to other parties. If witnesses or family members attend the mediation, the mediator should ensure that they too understand and agree to the rules.

The Mediation Process

Every mediator has his own way of conducting a mediation, and every mediation differs. The process is flexible and informal. Some mediators require the parties to submit information regarding issues before the first mediation session, while others prefer to wait until the first meeting of the parties.

The mediation often starts with a "general caucus" where the parties and the mediator gather in the same room. The mediator covers the rules of mediation and ensures that any needed agreements to mediate are signed. The parties introduce themselves, and the mediator explains the mediation process. The parties or their representative then make opening statements to identify issues and clarify perceptions.

Many mediators will encourage the parties to begin a dialogue during general caucus. Venting is a legitimate and important part of the mediation process, and can take place at any point in the process. Frequently the emotional needs of the parties need to be addressed prior to any other issues.

After opening statements, the mediator may ask whether there are any offers for settlement, and may ask other questions designed for issue clarification. These questions can encourage

18. In Texas, if a court refers your case to an alternative dispute resolution procedure, you have ten days from receipt of notice to file your objections. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022.

19. S. 1124, 76th Leg., 1999 Tex. Sess., *available at* <http://www.capitol.state.tx.us/tlo/billnbr.htm>.

20. For example, pursuant to Rule 11 of the Texas Rules of Civil Procedure, no agreement between attorneys or parties touching any pending suit will be enforced unless it is in writing, signed, and filed with the papers as part of the record, or unless it is made in open court and entered of record. TEX. R. CIV. P. 11.

21. In Texas, a requirement for confidentiality and impartiality has been legislated. *See* TEX. CIV. PRAC. & REM. CODE ANN., ch. 154. For a discussion of confidentiality in arbitration, see Edward Dolido, *Confidentiality during and after Arbitration* (visited May 8, 2000) <http://www.adr.org/publications/currents/cur1299-2.html> (concluding that confidentiality ultimately depends on the parties).

22. *See* TEXAS CIV. PRAC. & REM. CODE ANN., ch. 154.

23. *See* TEXAS GOV'T CODE ANN. § 2008.054 (West 2000).

24. On occasion, attorneys have expressed the concern that the only reason the other party appeared for the mediation was to learn more about the case rather than participating for the purpose of negotiating a settlement.

the parties to focus on the essential issues of the case rather than on emotional matters.

If the parties are hostile or too emotional, the mediator will separate the parties and shuttle back and forth between them in "private caucuses." A private caucus is a conference between the mediator and one party, without the other party being present. The mediator passes offers and demands between the parties. Conversations between a party and the mediator during private caucus are confidential unless a party authorizes the mediator to disclose information to the other side.

The mediator may do some "reality checking" with the parties in private caucuses. Particularly when parties remain steadfast in their positions, the mediator may probe regarding risks, worst-case, and best-case scenarios. The mediator will try to identify a party's wants, needs, and hidden agendas. The mediator may use general and private caucuses alternatively to help the parties reach agreement.

Some cases require more than one mediation session. Sometimes parties need time to gather additional information or to evaluate the proposal before them. Sometimes the parties just run out of time and need another session to finalize matters.

Whether the case settles or reaches an impasse, the mediator probably will meet with the parties together at the end of the session to thank everyone for participating and then close the mediation. If the case has neither settled nor reached an impasse, the mediator will probably encourage the parties to attend another mediation session. Sometimes the work during a mediation session leads to a future settlement even without another mediation meeting. A telephone conference may be all that is needed to wrap things up. If the case does settle, the mediator will urge the parties to sign a settlement before ending the final mediation session to memorialize the agreement.

Settlement Agreements

Unless the parties sign an agreement to resolve their dispute before leaving the mediation, a party may change his mind and not sign later. A hand written agreement can suffice; the parties can execute a more formal agreement later.

A written settlement agreement is a contract between the parties. If the matter was already in litigation or arbitration when the agreement was reached, the practitioner needs to determine whether asking the judge or arbitrator to incorporate the mediated settlement agreement into an order (or award) is desirable or maybe even required. Such requirements may be found in state rules of civil procedure.[25]

Authority to Settle

Since one of the key goals of mediation is a signed agreement before the parties leave the mediation, the individuals with "authority to settle" need to participate in the process. If the other party is a corporation such as an insurance company, ask the corporate representative during opening session if they have the authority to settle the case. If a representative discloses limits on his or her authority, ask whether the actual person who has authority can at least be reached by telephone. Sometimes attorneys appear at the mediation on behalf of clients (corporate or non-corporate). As long as the attorney has the authority to settle or can obtain authority to settle based on their participation, this should be acceptable. It is not uncommon for the attorney or other person representing a party to make a telephone call to obtain authority to make or to accept particular offers. Having someone present who can settle the case by signing and binding that party to a settlement agreement is the key.

Types and Styles of Mediation

There are different styles of mediation. Two common styles are the directive style and the transformative style.

Most lawyers are familiar with the problem-solving or directive approach to mediation. The mediator using this approach actively participates in moving the parties toward settlement. The mediator asks direct questions, offers ideas, and makes suggestions. The goal of this type of style is to assist the parties in resolving the issues at dispute.

Another approach to mediation is the "transformative" style.[26] Mediators using the transformative approach do not focus on problem-solving or settlement. Rather, the focus is on the parties themselves. The transformative practitioner focuses on changing people and not situations. The mediation is an opportunity for empowerment and recognition for the parties. It is more facilitative than directive.[27] The United States Postal Service currently uses the transformative approach to mediate certain employment disputes, hoping that the parties will gain skills that will assist them in future situations. One goal is to improve work relationships.

A mediator may also use a hybrid approach, particularly in cases such as child custody disputes, where the relationship of

25. *E.g.*, TEX. R. CIV. P. 11; *see supra* note 20. Such requirements may also be found within domestic relations code sections. Section 6.602 of the Texas Family Code provides that mediated settlement agreements are binding on the parties if the agreement (1) provides in a prominently displayed statement that is in boldfaced type or capital letters or underlined that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed. TEX. FAM. CODE ANN. § 6.602 (West 2000).

26. R.A.B. BUSH & J.P. FOLGER, THE PROMISE OF MEDIATION (1994).

the parties and the legal issues need to be addressed. If you believe that your client's case would benefit from a certain style of mediation, then look for a neutral that practices the style you need. Do not hesitate to ask the mediator what his or her approach is. State your preference. Good mediators will adjust their styles to meet the needs of the parties.

Arbitration

Many arbitrations arise out of a "future disputes" clause embedded in a contract; these clauses often provide for binding arbitration.[28] The bottom line in these cases is that the parties have contracted away their right to seek redress in court. They may have also contracted away their rights to certain types of relief, such as punitive damages and attorneys' fees. When the parties have agreed to binding arbitration, either party can usually request it when a dispute arises. If a party refuses to participate, the movant can request a court to issue an order to compel arbitration under either the Federal Arbitration Act or a state's arbitration act.

Although there are some benefits to using arbitration versus litigating, one issue for a legal assistance practitioner to consider is that if your client agrees to settle all disputes arising out of a contract with binding arbitration, your client may be precluded from participating in a related class action. In small dollar cases, this could be most unfortunate for a consumer. Given that there are some expenses involved in arbitration, it may not be feasible for individual clients to pursue low dollar disputes.

Unbeknownst to many consumers, many credit card companies have amended credit card agreements to insert arbitration provisions. As *AR 27-3* provides that legal assistance will be provided to debtors who require help on credit card claims, the legal assistance practitioner may need to advise clients on arbitration procedures.[29]

Credit card companies are not the only ones inserting arbitration provisions in the fine print of their agreements with consumers. Banks, retailers such as Circuit City and Gateway, and long distance companies have done the same. Courts have been upholding the binding arbitration agreements that can be found in many pre-dispute provisions.[30]

When advising a client regarding a consumer dispute or arbitration, be sure to cover these questions:

(1) Is there an agreement to arbitrate?
(2) Which statute governs the arbitration rights and procedures in this case?[31]
(3) Is the dispute within the scope of the arbitration agreement?
(4) Is there any choice possible in the selection of arbitrators?
(5) Has the client waived his or her right to litigate?
(6) Has the client waived his or her right to certain types of damages?
(7) Can the arbitrator's award be changed or overturned?

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27. According to the United States Postal Service, a mediator with a transformative orientation believes that conflict presents opportunities for individuals to change (transform) their interactions with others, if they choose. People can take advantage of these opportunities by exercising their capabilities for both decision-making and perspective-taking. Conversely, a mediator with a directive orientation believes that conflict represents only a problem to be solved or a dispute to be settled. A mediator with a directive orientation assumes ownership of the parties' problem and its solution, and directly or subtly engages in activities that drive, determine, or impose both the definition of the problem and its solution. Houston District Redress Program of the United States Postal Service, 1999 Advance Mediation Skills Training (on file with author).

28. The following is a sample arbitration provision:

> Arbitration: Any claim, dispute or controversy by either you or us against the employees, agents or assignee of the other, arising from or relating in any way to this Agreement or your Account, including Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com or P.O. Box 50191, Minneapolis, MN 55405, telephone 1-800-474-2371. Any arbitration hearing at which you appear will take place at the location within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon any arbitration award may be entered in any court having jurisdiction.
>
> This agreement applies to all Claims now in existence or that may arise in the future except for: (1) claims that you or we have individually filed in a court before the effective date of the amendment of the Agreement adding this arbitration agreement; (2) claims advanced in any judicial class actions that have been finally certified as class actions and where notice membership has been as directed by the court before the effective date of the amendment of the Agreement adding this arbitration agreement; and (3) claims made by or against any affiliated third party to whom ownership of your Account may be assigned after default (unless other Party elects to arbitrate). Nothing in this Agreement shall be construed to prevent any party's use of (or advancement of) any Claims, defenses, or offsets in bankruptcy or repossession, replevin, judicial foreclosure or any debts now or hereafter owned by either party to the other under this agreement.
>
> In the absence of this arbitration agreement you or we may otherwise have a right or opportunity to litigate claims through a court, or to participate or be represented in litigation filed in court by others, but except as otherwise provided above, all claims must now be resolved through arbitration.

29. AR 27-3, *supra* note 4, para. 3-6e.

(8) What costs will the client be responsible for?

Choosing a Neutral

Once the client decides to use ADR, finding a "neutral" becomes paramount. Where should you (or your client) look?

Legal assistance attorneys working with a low-dollar value case or a client with limited financial resources have more than one practical alternative. Many counties have community-based or court-annexed mediation centers. If you do not know whether such a center operates locally, contact a local court or the Council of Better Business Bureaus (BBB). Many court-annexed dispute resolution centers are partially funded by the public through means such as a portion of filing fees. Some of these centers charge a reduced fee for low-income parties or low-dollar cases. The BBB may provide free or low-cost arbitration and mediation services for certain types of consumer disputes.[32] Mediation centers, as well as many BBB programs, often use volunteers as neutrals. While this keeps the cost of the service down, realize that your client may be assigned an unseasoned neutral trying to gain experience.

If the ADR is court-ordered, the court may have already appointed a neutral. If not, determine if there is a statutory or contractual designation of a particular panel of neutrals that must be used. Some statutes and contracts will also designate required procedures.

Both lawyers and non-lawyers serve as neutrals. The fees charged vary from neutral to neutral and from case to case. Fees may be charged on an hourly basis or by the day or half-day. Qualifications vary and should be evaluated as early as possible, but no later than when deciding if conflicts of interest exist. In addition to looking for experience as a neutral, see if the neutral has any expertise in the area of the dispute. For example, if you are dealing with a real estate dispute, it should be possible to find an experienced neutral that has prior experience either in real estate law or as a real estate agent.[33]

If your client's dispute is already in litigation and there is not a contractual or statutory directive controlling the selection of a neutral, the client may petition the court to appoint one. The court is likely to appoint an experienced neutral with whom it is familiar. It is also possible that the court may have a fund to provide for payment of fees for the neutral.

Even if your client is not in litigation, see if your local courts maintain lists of experienced, qualified neutrals that are willing to serve. The going rate for these private practitioners varies. Most attorneys charge their normal hourly rate. Some neutrals charge a flat day or half-day rate. For example, a mediator whose normal billing rate is $250 per hour might charge $500 per party for a half day. If your client cannot afford the quoted fee of a neutral, you can always ask the neutral if he or she could reduce the rate. Sometimes, if one party has a "deeper pocket" than the other, such as an insurance company and an insured, the "deep pocket" will agree to pay a greater portion of the fee.

If there is a governmental agency that regulates the activity that is the subject of the dispute, contact that agency. Some agencies have regulations that provide for the services of a neutral. For example, the Texas Department of Transportation, which regulates shipping companies, contracts with private practitioners to serve as neutrals on disputes between consumers and moving and storage companies. The service is provided at no cost to the consumer.

There also may be a non-governmental agency that polices the activity that is the subject of the dispute. The National Association of Security Dealers (NASD) has panels of arbitrators and mediators for disputes concerning securities. Other organizations, such as the American Arbitration Association (AAA)[344] and the National Arbitration Forum,[35] provide neutrals, are involved in the administration of their services, and may have established policies and procedures. Parties are

30. Gateway's arbitration agreement includes the following:

> Any dispute, controversy, or claim against Gateway, Gateway 2000, Inc. or its affiliates arising out of or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, or any related purchase shall be resolved exclusively and finally by arbitration administered by the American Arbitration Association (AAA) under its rules. You may file for arbitration at any AAA location in the United States upon payment of $100 or any applicable filing fee. The arbitration will be conducted before a single arbitrator, and will be limited solely to the dispute or controversy between you and Gateway. The arbitration shall be held in any mutually agreed upon location in person, by telephone, or online. Any decision rendered in such arbitration proceedings will be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction. The arbitrator shall not award either party special, exemplary, consequential, punitive, incidental or indirect damages, or attorneys' fees and each party irrevocably waives any such right to recover such damages. The parties shall share the costs of the arbitration (including arbitrator's fees, if any) in the proportion that the final award bears to the amount of the initial claim.

See Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

31. Attorneys should determine if the Federal Arbitration Act (9 U.S.C.S. §§ 1-307 (LEXIS 2000)) or a state statute applies.

32. For more information on available services in your area, call the Council of Better Business Bureaus (BBB) at 1-800-955-5100 or visit the BBB's web site at <http://www.bbb.org>.

33. *See* Mediation Information and Resource Center, *What Qualifications Does a Mediator Need?* (visited May 8, 2000) <http://www.mediate.com/about/index.cfm#selectam>.

charged a fee for services. Sometimes the fee is based on the amount in dispute. Yet another source of mediators is The National Association for Community Mediation (NAFCM).[36] This membership organization is comprised primarily of community mediation centers. Its web site contains a by-state directory of community mediation centers.[37] An additional source is the Professional Mediation Association.[38] Last, but certainly not least, contact the state and local bar association for information on ADR providers and other ADR-related information.

A staff judge advocate (SJA) in a community without available low-cost ADR may establish an installation or community panel of neutrals in cooperation with Army Community Service volunteers. If the installation is large enough, the SJA may have enough qualified attorneys who can serve. Of course, a disputing party who is not a service member or a business who routinely serves the military community may be uncomfortable using a "military" neutral because there could be a perception of favoritism toward the service member. However, if the service is free, and all parties sign a disclosure and waiver, this could be an option when the parties cannot afford to pay for the services of a neutral. An example is the arbitration program for landlord and tenant disputes, which was established by The III Corps and Fort Hood Staff Judge Advocate.[39] An SJA could also coordinate with local reserve judge advocates that are willing to serve as a neutral to earn retirement points.[40]

Preparing Your Client for Mediation

Depending on your available time, other clients, and resources, you may help your client prepare for mediation. Preparing for mediation is substantially similar to preparing for trial. Unless you are accompanying your client to the mediation, you should advise the client how to present the case very similarly to presenting a case in small claims court. Several web sites offer helpful checklists, pamphlets or articles.[41]

In addition, the Federal Trade Commission offers *Resolving Consumer Disputes: Mediation and Arbitration* which may help clients understand mediation and arbitration generally.[42] Several other web sites contain useful information.[43]

Conclusion

Mediation and arbitration can help your clients resolve their disputes faster, cheaper, and more privately than litigation. The next time you find yourself advising a client facing what appears to be an irreconcilable dispute, consider mediation or arbitration as an alternative to litigation. Managed wisely, ADR may be in the client's best course of action.[44]

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34. The AAA, the largest and one of the oldest ADR organizations active in the United States, has an interest in all areas of ADR. *See* American Arbitration Association (visited May 10, 2000) <http://www.adr.org> (offering extensive information about the AAA's services, including copies of many of the more important sets of dispute resolution rules and procedures, ethical standards, descriptions of the services available through the Eastman Library, the roster of neutrals, and publications). Particularly useful are the resources on arbitration law which allow one to obtain the text of federal, state, and uniform laws relating to arbitration and to some extent other areas of dispute resolution. *Id.*

35. *See* National Arbitration Forum (visited May 10, 2000) <http://www.arb-forum.com/index.htm>. The Forum is a nationwide network of professional arbitrators, who are retired judges, litigators, and law professors. It administers arbitrations, provides the rules that govern the arbitrations, and schedules the arbitrators who ultimately decide disputes. It is a neutral arbitration company and is not affiliated with any party. Its web site includes a library and some sample clauses. *Id.*

36. The National Association for Community Mediation's mission is "to support the maintenance and growth of community-based mediation programs and processes, to present a compelling voice in appropriate policy-making, legislative, professional, and other arenas, and to encourage the development and sharing of resources for these efforts." *See* The National Association for Community Mediation (visited May 9, 2000) <http://www.nafcm.org>.

37. *Id.*

38. The Professional Mediation Association was established to promote mediation. It has a free mediator referral service for persons, organizations, or companies, and will provide all necessary contact information. *See* The Professional Mediation Association (visited May 10, 2000) <http://www.promediation.com/>.

39. *See* Lieutenant Colonel Gene Silverblatt & Robert Sullivan, *Arbitration of Landlord-Tenant Disputes at Fort Hood*, ARMY LAW., June 2000, at 32. In this program, landlord-tenant disputes among military personnel are arbitrated under the provisions of the Texas General Arbitration Act. The procedures established apply to disputes of at least $100, and only those cases not involving the United States government. The program does not apply to criminal or disciplinary matters, or matters of official business. The Chief, Administrative & Civil Law, III Corps and the Fort Hood Staff Judge Advocate's office, supervises the arbitration program. The arbitrator who hears the cases is usually a civilian employee and not a lawyer.

40. *See* AR 27-3, *supra* note 4, para. 2-2b (containing general information on reserve judge advocates earning retirement points).

41. *See* ADR Resources (visited May 10, 2000) <http://www.adrr.com/> (containing informative sections entitled *Preparing for Mediation, Mediation Checklist, Using the Mediation Checklist*); Divorceinfo.com (last modified May 22, 1999) <http://www.divorceinfo.com/preparingformediation.htm> (offering information on preparing for mediation); Nolo.com, Self-help Law Center (visited May 10, 2000) <http://www.nolo.com/encyclopedia/cm_ency.html?t=001A0000011011999#Subtopic77> (including general information on mediation); FreeAdvice.com (visited May 10, 2000) <http://www.freeadvice.com/law/559us.htm> (offering general information about mediation).

42. *See* Federal Trade Commission (visited May 10, 2000) <http://www.ftc.gov/bcp/conline/pubs/general/dispute.htm>.

43. *See* The Office of the Executive Secretary, Virginia Department of Dispute Resolution Services (last modified Mar. 7, 2000) <http://www.courts.state.va.us/cons/consumer.htm> (offering several publications: *Mediation: A Consumer Guide*; *Mediation–Resolving Disputes in a Different Way*; *Guidelines for the Training and Certification of Court Referred Mediators*; *Standards of Ethics and Professional Responsibility for Certified Mediators*; *What Every Lawyer's Client Should Know About Mediation*; *Visitation: Factors to Consider*; and links to a coalition of community mediation centers); Georgetown University, E.B. Williams Library (last modified Dec. 20, 1999) <http://www.ll.georgetown.edu/lr/rs/adr.html> (including ADR primary legal materials including Title 9, Arbitration, United States Code (official text through House of Representatives) and links to state statutes on dispute resolution). The Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide* (last modified Aug. 3, 1999) <http://www.opm.gov/er/adrguide/adrhome.html-ssi> provides an excellent seven-chapter comprehensive manual describing the ways in which various government agencies resolve disputes. Chapter 1, organized alphabetically by agency name, describes ADR techniques and practices for twenty-eight different federal agencies. Other sections include "Shared Neutrals Program," "Administrative Appeals Agencies," "ADR Training and Assistance Sources" (which lists both federal and non-federal sources for ADR training), a link to other ADR web sites, and an annotated bibliography. The Appendix contains ADR documents including the ADR Act of 1996, the Presidential Memorandum of 1998, and Executive Order 12,871. *See also* Mediate.com (visited May 10, 2000) <http://www.mediate.com> (consisting of a "Mediation Information and Resource Center, where mediators, mediation organizations, and the public meet," offering extensive, searchable, and clickable lists of mediators and dispute resolution organizations, a useful collection of articles on ADR topics, lists of training programs, professional meetings, newsletters, and other dispute resolution activities); The Academy of Family Mediators (visited May 10, 2000) <http://www.mediators.org.> (describing the Academy, its history, its role in developing important standards for training and mediator ethics, and publishing *Mediation Quarterly*); The American Bar Association Section on Dispute Resolution (visited May 10, 2000) <http://www.abanet.org/dispute>.

44. For examples of agreements to mediate, rules of mediation, and sample short-form pre-dispute clauses, see the June 2000, *The Army Lawyer* ("Miscellaneous Administrative Information") at <http://www.jagnet.army.mil>.

Attachment A

Agreement to Mediate

This case has been referred to mediation [pursuant to an Order of the Court] [by agreement of the Parties hereto] designating _____as the mediator.

Accordingly, it is AGREED as follows:

_____ has been designated to mediate this case and is authorized to conduct the mediation of this case.

In all respects the mediation shall be governed by and conducted in accordance with this Agreement, [any applicable state law], and the "Rules for Mediation," a copy of which is attached hereto.

All mediation sessions shall be private, confidential, and privileged from discovery. The Mediator shall not be required to disclose any information revealed to him/her, unless authorized by the Parties or as otherwise required by law. Each participant agrees not to make any effort to compel any testimony whatsoever of the Mediator regarding any communications, written or oral, made in connection with the mediation. Likewise, each person agrees not to make any effort to compel the Mediator to produce any information or documents provided to him/her by any Party to the mediation.

1. The Parties acknowledge that the Mediator shall be serving as a neutral intermediary only and will not act as an attorney or advocate for any party.

Each participant is advised that if an agreement is reached as a result of this mediation and the Mediator assists in the preparation of a written settlement agreement, then each Party should have the settlement agreement independently reviewed by their own attorney before executing the agreement.

The Mediator is expressly permitted to meet privately with any of the Parties and have such ex parte communications with any party before, during, or after the mediation as the Mediator determines are necessary and proper.

The Mediator has the discretion to terminate the mediation at any time if he/she believes that an impasse has been reached, or that the mediation should not continue for any other reason.

The Court will be advised by the Mediator only as to whether the case settled or not, or whether the mediation was recessed or was reset.

If any Party to this Agreement makes any effort to involve the Mediator in litigation relating to this mediation, or attempts to compel his/her testimony, or attempts to have the Mediator

divulge any information or produce any documents relating to the mediation, such Party agrees to pay all fees and expenses of the Mediator in resisting such efforts, including reasonable attorneys' fees.

AGREED, this ____ day of _____, 20__.

Attachment B

Rules of Mediation

Definition of Mediation. Mediation is a process in which an impartial third person, the Mediator, facilitates communication between the Parties to promote reconciliation, settlement, or understanding. The Mediator may suggest ways of resolving the dispute(s), but may not impose his or her judgment on the issues of the Parties.

Agreement of Parties. Whenever the Parties have agreed to mediation, they are deemed to have made these rules, as amended and as in effect as of the date of the submission of the dispute, a part of their agreement to mediate.

Consent to Mediator. The Parties consent to the appointment of the individual named as Mediator in their case. The Mediator shall act as an advocate for resolution and shall use his or her best efforts to assist the Parties in reaching a mutually acceptable settlement.

Conditions Precedent to Serving as Mediator. The Mediator shall not serve in any dispute in which he or she has a financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstances likely to create a presumption of bias or to prevent a prompt meeting with the Parties. In the event that the Parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.

Authority of Mediator. The Mediator does not have the authority to decide any issue for the Parties, but will attempt to facilitate the voluntary resolution of the dispute by the Parties. The Mediator is authorized to conduct joint and separate meetings with the Parties and to offer suggestions to assist the Parties to achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the Parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the Parties, as the Mediator shall determine.

Commitment to Mediate in Good Faith. While no one is asked to commit to settle a case in advance of the mediation, all Parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.

Parties Responsible for Negotiating Own Settlement. The Parties understand that the Mediator will not and can not impose a settlement in their case and agree that they are responsible for negotiating a settlement. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the Parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

Authority of Representatives. Party representatives must have authority to settle and all persons necessary to the decision to settle shall be present. The names of such persons will be communicated in writing to the Mediator prior to the mediation.[1]

Time and Place of Mediation. The Mediator shall fix the time and place of each session of the Mediation. The Mediation shall be held at the office of the Mediator or any other convenient location agreeable to the Mediator and the Parties, as the Mediator determines.

Identification of Matters in Dispute. Prior to the first scheduled mediation session, each Party shall provide the Mediator with confidential information in the form requested by the Mediator setting forth its position with regard to the issues to be resolved. At or before the first session, the Parties will be expected to produce all information reasonably required for the Mediator to understand the issues presented. The Mediator may require any Party to supplement such information.

Privacy. Mediation sessions are private. The Parties and their representatives may attend the mediation sessions. Other persons may attend only with the permission of the Parties and with the consent of the Mediator.

Confidentiality. The Mediator shall not divulge confidential information disclosed to a Mediator by the Parties or by witnesses.[2] All records, reports, or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regards to the mediation in any adversary proceeding or judicial forum. Any Party who violates this agreement shall pay all fees and expenses of the Mediator and of other Parties, including reasonable attorneys' fees, incurred in opposing efforts to compel testimony by the Mediator.

Stenographic Record. There shall be no stenographic record made of the mediation.

No Service of Process At or Near Site of Mediation. No subpoenas, summons, complaints, citations, writs, or other process may be served at or near the site of any mediation session upon any person entering, attending, or leaving the session.

Termination of Mediation. The mediation shall be terminated: (a) by execution of a negotiated settlement agreement by the Parties; (b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; (c) after the completion of one full

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[1] Depending on the circumstances, this Mediator has allowed parties to be "present" through telephone availability.

[2] Attorneys should determine if the Agreement to Mediate, Order to Mediate, or state law creates an exception to the rule on confidentiality. For example, mediators may have an obligation to report occurrences of child abuse discovered during mediation. The confidentiality requirement may not preclude a party from thereafter using the information if acquired through another source.

mediation session by a written declaration of a Party or Parties to the effect that the mediation proceedings are terminated.

Exclusion of Liability. The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. The Mediator shall not be liable to any party for any act or omission in connection with any mediation conducted under these rules.

Interpretation and Application of Rules. The Mediator shall interpret and apply these rules.

Fees. Each Party is responsible for payment of ½ of the Mediator's fees. Payment of fees is to be made prior to the start of the first mediation session.[3]

[3] This rule would not be applicable to parties using mediation services provided by an agency or organization free of charge.

Attachment C

Sample Short Form Pre-Dispute Clauses

Sample Short-Form Pre-Dispute Mediation Clause

If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

Sample Short-Form Pre-Dispute Arbitration Clause

Upon the demand of any party, whether made before or after the institution of any judicial proceeding, any controversy or claim whatsoever arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Sample Combined Pre-Dispute Mediation and Arbitration Clause

Dispute resolution procedures. The parties desire an expeditious means to resolve any disputes that may arise between them regarding this settlement agreement. Therefore, the parties agree to mediation and arbitration as forth below.

a. Mediation. If a dispute arises out of this Agreement, and if said dispute cannot be settled through negotiation, then the parties agree first to try in good faith to settle the dispute by mediation. If a mediation has not been conducted and the matter resolved within 20 days from request by either party for mediation, the parties may then resolve the dispute by binding arbitration as set forth below.

b. Arbitration. Upon demand of either party, whether before or after the filing of any suit, any controversy or claim whatsoever arising out of or related to this Agreement

shall be settled by binding arbitration in accordance with the Federal Arbitration Act, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If using a provision such as one of the above, note that it does not automatically obligate your client to using the American Arbitration Association, but rather just their rules.

When reviewing or drafting a contract for your client that you want to insert an ADR provision in, consider inserting a mediation and arbitration provision, rather than just one or the other. It is possible to state that all disputes under the contract will first go through mediation, and then if not resolved through mediation, the parties will arbitrate. Inserting a mandatory mediation provision costs your client nothing in terms of giving up of rights. However, the insertion of a mandatory arbitration may preclude your cl client from going to court.

Grounding the Frequent Filer: Successfully Dismissing Equal Employment Opportunity Complaints For Abuse of Process

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Every labor counselor seems to encounter one sooner or later: the frequent filer–the federal employee who periodically files multiple[1] or bizarre[2] Equal Employment Opportunity (EEO) complaints. While theoretically an agency could dismiss a case for abuse of process, rarely would the Equal Employment Opportunity Commission (EEOC) sustain such an action.[3]

On November 9, 1999, the EEOC issued new rules regarding the dismissal of EEO complaints for abuse of process.[4] These rules codify the existing case law and provide additional guidance for dismissing cases for abuse of process.[5] They apply to all federal sector complaints currently pending at any stage in the administrative process.[6] This article, by examining the new rule's guidance and surveying the existing body of EEOC case law, provides practical advice on how to effectively dismiss meritless or abusive EEO complaints.

The New Rules

Recognizing that meritless or abusive cases cause delays in processing cases pending before agencies and the EEOC, undermine the credibility of the EEO process, and impair the rights of complainants with meritorious claims,[7] the EEOC modified Title 29 of the Code of Federal Regulations (C.F.R.), Section 1614.107, to allow agencies to dismiss complaints for abuse of process.[8] The new C.F.R. provision provides that an agency shall dismiss a complaint that either alleges dissatisfaction with the processing of a previously filed EEO complaint or, using the criteria set forth in previous EEOC decisions, demonstrates a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.[9] A clear pattern of misuse of the EEO process requires:

> (i) Evidence of multiple complaint filings; *and*
> (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or
> (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.[10]

The text of the new provision, however, is only part of the equation of understanding how to dismiss cases for abuse of process. Aside from the text, practitioners must figure out how to apply previous EEOC decisions regarding abusive cases.

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1. *See* Hooks v. Runyon, 1995 EEOPUB LEXIS 3339, at *5 (Nov. 28, 1995) (filing eighty-six separate EEO complaints in a single day).

2. *See* Drake v. Perry, 1994 EEOPUB LEXIS 4860, at *1 (Dec. 22, 1994) (filing EEO complaints because he was issued a "Notice of the Right to File a Discrimination Complaint" letter and a "Notice of Receipt of Discrimination" complaint letter).

3. *See generally* Donnelly v. Pena, 1997 EEOPUB LEXIS 4133 (Nov. 17, 1997); Pletten v. West, 1995 EEOPUB LEXIS 334 (Feb. 24, 1995); Drake v. Perry, 1995 EEOPUB LEXIS 261 (Feb. 16, 1995); *Drake*, 1994 EEOPUB LEXIS 4860; Kleinman v. Runyon, 1994 EEOPUB LEXIS 1321 (Sept. 22, 1994).

4. *See* The U.S. Equal Employment Opportunity Commission, *EEOC Fiscal Year 1999 Accomplishments Report Shows Groundbreaking Progress on all Fronts* (last modified Dec. 27, 1999) <http://www.eeoc.gov/press/12-27-99.html>.

5. *See generally* 64 Fed. Reg. 37,643-661 (1999).

6. Reisinger v. Henderson, 1999 EEOPUB LEXIS 6601, at *1 (Nov. 16, 1999).

7. 64 Fed. Reg. 37,643-661.

8. *Id.*

9. *Id*.

10. *Id.* (emphasis added).

The Old Case Law

Prior to the new rules, there was no specific regulation that allowed the EEOC to dismiss abusive complaints. The EEOC had, however, the inherent power to protect its policies, practices, and procedures from misuse and abuse.[11] Historically, abuse of process within the EEO arena was defined as "a clear pattern of misuse of the process for ends other than that which it was designed to accomplish."[12] The new rules clarify this definition by defining abuse of process as "a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination."[13] Central to this definition is determining whether a complainant's behavior betrays an ulterior purpose to abuse the EEO process.[14] Before the new rules, the EEOC rarely dismissed a complaint for abuse of process, due to a policy consideration favoring preserving a complainant's EEO rights whenever possible.[15] Under the new rules, while there is still this desire to preserve a complainant's rights,[16] there is both an acknowledgment that there are complaints that are abusive of the EEO process and a mechanism to properly dismiss them.

What Constitutes Abuse of Process

Generally, dismissal for abuse of process is designed to protect against discrimination complaints "circumventing other administrative processes such as the labor-management dispute process; retaliating against the agency's in-house administrative machinery; or overburdening the EEO complaint system . . . ."[17] An example of where a complainant uses the EEO process as a weapon of revenge against agencies for perceived wrongs is *Fisher v. Cohen.*[18] In that case, the complainant had written to the agency head with an ultimatum "demanding immediate relief and damages within ten days or he would make removal of all the 'responsible officials' a prerequisite 'before there is any discussion of settling any [of his EEO] complaints, allegations and grievances.'"[19] The EEOC found these comments to be evidence of his intent to retaliate and justified dismissal for abuse of process.[20]

Another clear indication of abuse of process is the manner in which complaints are filed. In *Kessinger v. Henderson,*[21] the complainant created a standardized form, in which he would merely "check-off" the particular basis for his complaint. The EEOC held that he was "knowingly filing repetitive complaints and appeals with the intent to clog the EEO system. He has blatantly overburdened the administrative system by filing these complaints."[22] In another case, the complainant merely submitted a photocopied complaint each time she filed.[23]

Perhaps the most common indicator of abuse of process is filing a large number of *duplicate* or *repetitive* complaints.[24] While merely filing numerous complaints is itself not abusive of the EEO process,[25] many dismissed cases involve complainants who have filed fifty or more complaints, repeating the

11. Kessinger v. Henderson, 1999 EEOPUB LEXIS 3065 (June 8, 1999); Sessoms v. Runyon, 1998 EEOPUB LEXIS 3629, at *3 (June 11, 1998); Story v. Henderson, 1998 EEOPUB LEXIS 3273, at *5 (May 22, 1998); Haralson v. Cohen, 1998 EEOPUB LEXIS 1907, at *5 (Mar. 25, 1998); Goatcher v. Runyon, 1996 EEOPUB LEXIS 842, at *1-*2 (Oct. 18, 1996); Hooks v. Runyon, 1995 EEOPUB LEXIS 3339, at *1-*2 (Nov. 28, 1995); Drake v. Perry, 1995 EEOPUB LEXIS 261, at *6 (Feb. 16, 1995) (citing Becker v. Department of the Treasury, EEOC Request No. 05900221 (June 15, 1990) and Buren v. USPS, EEOC Request No. 058550299 (Nov. 18, 1985)); Drake v. Perry, 1994 EEOPUB LEXIS 4860, at *3 (Dec. 22, 1994) (citations omitted).

12. *Buren*, EEOC Request No. 05850299. *See generally Kessinger*, 1999 EEOPUB LEXIS 3065; Fisher v. Cohen, 1998 EEOPUB LEXIS 6242 (Dec. 11, 1998); *Sessoms*, 1998 EEOPUB LEXIS 3629, at *4; *Story*, 1998 EEOPUB LEXIS 3273, at *5; *Haralson*, 1998 EEOPUB LEXIS 1907, at *5; Donnelly v. Pena, 1997 EEOPUB LEXIS 4133, at *11 (Nov. 17, 1997); *Goatcher*, 1996 EEOPUB LEXIS 842, at *2; *Hooks*, 1995 EEOPUB LEXIS 3339, at *2.

13. 64 Fed. Reg. 37,643-661.

14. *Id*.

15. *Donnelly*, 1997 EEOPUB LEXIS 4133, at *11-*12 (citing Love v. Pullman, Inc., 404 U.S. 522 (1972) and Wrenn v. EEOC, EEOC Appeal No. 01932105 (Aug. 19, 1993)). *See generally Kessinger*, 1999 EEOPUB LEXIS 3065; *Fisher*, 1998 EEOPUB LEXIS 6242; *Sessoms*, 1998 EEOPUB LEXIS 3629, at *4; Manley v. Peters, 1998 EEOPUB LEXIS 3244, at *7-*8 (May 29, 1998); *Story*, 1998 EEOPUB LEXIS 3273, at *5; *Goatcher*, 1996 EEOPUB LEXIS 842, at *2; *Hooks*, 1995 EEOPUB LEXIS 3339, at *2; *Drake*, 1995 EEOPUB LEXIS 261, at *6.

16. 64 Fed. Reg. 37,643-661.

17. *Id.*

18. 1998 EEOPUB LEXIS 6242, at *10 n.3.

19. *Id.*

20. *Id.* at *9-*10.

21. 1999 EEOPUB LEXIS 3065, at *7 (June 8, 1999).

22. *Id.*

23. Goatcher v. Runyon, 1996 EEOPUB LEXIS 842, at *5 (Oct. 18, 1996).

same allegations again and again. Filing any number of separate and distinct complaints is permitted and not objectionable, but making the same claims or arguments numerous times is abusive. For example, in *Kessinger v. Henderson*, the complainant had filed 161 redundant complaints and sixty-five class actions;[26] in *Hooks v. Runyon*, the complainant filed 132 redundant appeals in a four-month period, eighty-six on the same day.[27] Likewise, filing complaints about frivolous issues having nothing to do with EEO has been cited as another grounds for dismissing for abuse of process.[28] Examples include complaints that attack EEOC administrative judge rulings in other cases[29] or administrative forums, such as union grievance adjudications or Merit System Protection Board hearings.[30]

Finally, failing to comply with the administrative judge's orders can also result in a finding of abuse of process. In *Fisher v. Cohen*, the complainant's refusal to submit a required affidavit, failure to comply with discovery orders, failure to provide a witness list, and insistence that the administrative judge had no jurisdiction to issue orders in the matter all contributed to the case's dismissal.[31]

What does not Constitute Abuse of Process

Just as important as understanding what has succeeded as persuasive arguments for "abuse of process" dismissals is an understanding of the arguments that have failed.

The case of *Donnelly v. Pena*[32] illustrates "abuse of process" arguments that are unpersuasive. Donnelly appealed to the EEOC alleging that the Department of Energy had improperly denied her sixteen complaints of unlawful employment discrimination. Among other grounds, the agency determined that all sixteen complaints should be dismissed for abuse of process.[33]

> The agency presented five arguments for the dismissal of appellant's complaints for abuse of process: (1) numerosity of the complaints; (2) numerosity of the alleged responsible individuals; (3) attack on individuals responsible for processing the complaints; (4) repeated filing of identical issues; and (5) failure to prevail on the merits of any allegations.[34]

The EEOC analyzed, and ultimately rejected, each agency argument.[35] First, the numerosity of complaints or of responsible individuals, by itself, has never succeeded, in an abuse of process claim.[36] In this case, the appellant filed numerous individual complaints instead of a single consolidated complaint. The agency could have chosen to consolidate the complaints, eliminating the numerosity issue.[37] By not choosing to consolidate the complaints, the agency was estopped from alleging abuse of process merely due to the number of complaints. With respect to the agency's third argument, that the complaints merely attacked the individuals responsible for processing the

24. 64 Fed. Reg. 37,643-661 (1999).

25. *Id.*

26. 1999 EEOPUB LEXIS 3065, at *2-*3 (June 8, 1999).

27. 1995 EEOPUB LEXIS 3339, at *5 (Nov. 28, 1995) (comprising seventeen appeals regarding the prior dismissal of complaints for failure to state a claim, sixty-eight for refusal to meet with her representative, eleven alleging improper EEO counseling, ten for inadequate time to file briefs, and eleven regarding the agency's denial of her requests to be anonymous).

28. Sessoms v. Runyon, 1998 EEOPUB LEXIS 3629, at *6 (June 11, 1998); *Goatcher*, 1996 EEOPUB LEXIS 842, at *6; *Hooks*, 1995 EEOPUB LEXIS 3339, at *6.

29. *Sessoms*, 1998 EEOPUB LEXIS 3629, at *6.

30. Burns v. Henderson, 1999 EEOPUB LEXIS 5519, at *2 (Oct. 8, 1999).

31. 1998 EEOPUB LEXIS 6242, at *4 (Dec. 11, 1998).

32. 1997 EEOPUB LEXIS 4133 (Nov. 17, 1997).

33. *Id.* at *11.

34. *Id.* at *12.

35. *Id.* at *12-*15.

36. *Id.*; Kleinman v. Runyon, 1994 EEOPUB LEXIS 1321, at *25-*26 (Sept. 22, 1994) (noting forty-seven appeals of final agency decisions dismissing his complaints and seventeen requests for reconsideration before the EEOC in a three year period); Drake v. Perry, 1994 EEOPUB LEXIS 4860 (Dec. 22, 1994) (citing Becker v. Department of the Treasury, EEOC Request No. 05900221 (June 15, 1990)); 64 Fed. Reg. 37,643-661 (1999) (noting that evidence of numerous complaint filings, in and of itself, is an insufficient basis for making a finding of abuse of process).

37. *Donnelly*, 1997 EEOPUB LEXIS 4133, at *12; 29 C.F.R. § 1614.606 (1999).

complaints, the EEOC held that the complaints in fact raised substantive claims and not merely frivolous claims lodged against the EEO complaint procedures.[38]

While the agency alleged that the appellant filed complaints raising the same allegations, the EEOC found that the similarities in the issues were how the agency defined them, and not a scheme by the appellant to submit identical complaints.[39] It also rejected the agency's assertion that the appellant's failure to prevail on the merits with previous allegations made the current complaints abusive of the EEO process.[40] A complaint of discrimination cannot be discounted merely because of an appellant's previous failures.[41]

Ultimately, for a complaint to be dismissed for abuse of process, the complainant's actions must be willful and not merely unreasonable.[42] Starting with its decision in *Wrenn v. Department of Veterans Affairs*, the EEOC has held that "[t]he elements of abuse of process include, in addition to the ulterior purpose to misuse the process, a willful act that is not proper in the regular conduct of the proceeding."[43] As long as the complainant is participating in the EEO process in good faith, his conduct will not amount to "abuse of process" even if it is unreasonable.[44] In the past, the EEOC has been extremely tolerant and hesitant to dismiss complaints for abuse of process.[45] In all likelihood, this hesitation will continue.[46]

Practice Pointers

Labor counselors should be aware of several factors when attempting to argue abuse of process. First, under the new rules, to find abuse of process there must be multiple complaint filings.[47] The first EEO complaint, no matter how frivolous or retaliatory, can not be dismissed for abuse of process under the new rules. Second, if abuse of process is to be used as an argument for dismissal it must be raised in the initial agency decision to dismiss the complaint and not for the first time on appeal with the EEOC.[48]

Third, labor counselors should examine previous decisions regarding the complainant. In many instances where the EEOC ultimately did not find abuse of process, it will nevertheless put the complainant on notice that future complaints would be dismissed if abusive.[49] Sometimes, these notice provisions can be very specific. In the case of *Becker v. Department of the Treasury*,[50] the appellant

> [W]as put on notice that future appeals would be summarily dismissed if: (1) appellant failed to timely bring to the attention of the EEO Counselor a specific matter (e.g., a non-selection for a specific vacancy for which he applied); (2) appellant failed to specify the date of the alleged discriminatory event, the effective date of an alleged personnel action, or the date he knew or reasonably should have known of the discriminatory event or personnel action; and (3) a written complaint was not submitted to an appropriate official within 15 calendar days of his receipt of a notice of the right to file a complaint.[51]

38. *Donnelly*, 1997 EEOPUB LEXIS 4133, at *13.

39. *Id.* at *13-*14.

40. *Id.* at *14.

41. *See infra* note 54 and accompanying text.

42. Pletten v. West, 1995 EEOPUB LEXIS 334, at *9 (Feb. 24, 1995).

43. *Id.* (citing Wrenn v. Department of Veterans Affairs, EEOC Request No. 05920705 (April 2, 1993)).

44. *Id.* at 12.

45. *See generally* Kleinman v. Runyon, 1994 EEOPUB LEXIS 1321 (Sept. 22, 1994) (holding in this instance that complaints unrelated to employment, duplicate complaints, and collateral challenges to agency actions are merely "suggestive" of abuse of process).

46. 64 Fed. Reg. 37,643-661 (1999). The EEOC will continue to require strict adherence to abuse of process criteria. *Id.*

47. *Id.* Multiple accusations of discrimination are not enough. The use of "and" in subsection (i) clearly indicates that multiple complaint filings is required for a finding of abuse of process. *Id.*

48. Pletten v. Walker, 1998 EEOPUB LEXIS 1087, at *3 (Feb. 10, 1998).

49. Drake v. Perry, 1994 EEOPUB LEXIS 4860, at *4 (Dec. 22, 1994); *See* Pletten v. West, 1995 EEOPUB LEXIS 334, at *13 n.5 (Feb. 24, 1995) (advising that continued raising of meritless complaints could at some point be characterized as an abuse of process); Nicoloudakis v. Henderson, 1998 EEOPUB LEXIS 5714, at *3 (Oct. 27, 1988).

50. EEOC Request No. 05900221 (June 15, 1990).

If the complainant has been previously warned about potential abuse of process, it should be advocated in subsequent motions to dismiss. Merely because a previous case contains a notice provision, however, is no guarantee that subsequent complaints will be successfully dismissed for abuse of process.[52]

Fourth, previous findings of abuse of process can also be used. While a previous finding, by itself, does not prove that a current complaint is abusive, it nevertheless can be used to support the proposition. In *Kessinger v. Henderson*,[53] the EEOC in determining abuse of process, noted that twenty requests for consideration and fifty appeals of the complainant had been previously dismissed for abuse of process.[54]

Fifth, the argument for dismissing for abuse of process can be stronger based on the sophistication of the complainant. The more the complainant has used the EEO process, their knowledge and experience makes abusive behavior less excusable.[55]

Finally, labor counselors should pay close attention to complaints filed by former employees, focusing on the time between the end of employment and the filing of the complaint. In *Kleinman v. Runyon*, almost three years had elapsed since the appellant ceased working for the agency and when he filed the complaint.[56] As time goes by,

> [T]he ability of appellant to assert allegations of discrimination relating directly to his employment will and has diminished. Accordingly, the Commission will examine carefully allegations of discrimination that appellant presents on appeal or in requests for reconsideration in order to determine whether they relate to employment or concern matters sufficiently removed from the work place as to be indicative of abuse. If the latter, the Commission will not hesitate to impose the sanction identified in *Buren* as appropriate in such circumstances, that is, the summary dismissal of appeals and requests for reconsideration filed by appellant with the Commission.[57]

Allegations of abuse of process can therefore be bolstered if there is a lag between employment and the complaint.[58]

Conclusion

The EEOC has taken two important steps in combating abuse of the EEO process. First, it recognized the magnitude of the problem. Second, by modifying 29 C.F.R. § 1614.107 and providing additional guidance, it clarified how complaints should be dismissed for abuse of process. Labor counselors must take the third and final step and identify those complaints that are abusive and work to get them removed from the EEO process. Pursuing complaints that are abusive may some day make the frequent filer a thing of the past, and make the entire EEO process more efficient, effective, and fair.

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51. *Id.*

52. See the various appeals of Richard Becker against a variety of agencies, beginning with *Becker v. Department of the Treasury*, EEOC Request No. 05900221 (June 15, 1990), in which he was warned that under certain circumstances, future appeals would be summarily dismissed if meritless. This case is cited, and he is warned again, in several subsequent EEOC decisions, but never with a finding of abuse of process. *See* Becker v. Brown, 1997 EEOPUB LEXIS 373, at *2 (Feb. 21, 1997); Becker v. Brown, 1997 EEOPUB LEXIS 204, at n.1 (Feb. 28, 1997); Becker v. Summers, 1999 EEOPUB LEXIS 5593, at *3 n.1 (Oct. 6, 1999).

53. 1999 EEOPUB LEXIS 3065, at *2-*3 (June 8, 1999).

54. *Id.* (citing Kessinger v. USPS, EEOC Request No. 05970898 (Jan. 4, 1999)). *See* Fisher v. Cohen, 1998 EEOPUB LEXIS 6242 (Dec. 11, 1998).

55. *See generally* Sessoms v. Runyon, 1998 EEOPUB LEXIS 3629, at *6 (June 11, 1998); Card v. Runyon, 1996 EEOPUB LEXIS 3573, *5-*6 (Oct. 25, 1996) (stating "We are, moreover, not unmindful that appellant is not a novice in regard to the EEO complaint process. The Commission takes notice, for example, that in an eight-month period (January 1995 - September 1995) thirty-five decisions were issued on appellant's appeals from agency dismissals").

56. Kleinman v. Runyon, 1994 EEOPUB LEXIS 1321, at *7 (Sept. 22, 1994).

57. *Id.* (citations omitted).

58. *See Fisher*, 1998 EEOPUB LEXIS 6242, at *9 (observing in a decision to dismiss for abuse of process that all but four of the complainant's cases were decided after his removal from agency employment; appeal of removal was lost before the Merit Systems Protection Board; appeal of that decision was dismissed in federal district court over four years prior to the instant complaint).

Legal Assistance Note

What Do You Mean My Ex's New Spouse Gets the SGLI? The Judge Said It Was Mine

Just when legal assistance attorneys (LAAs) thought they had everything under control, another wrinkle in divorce and separation counseling comes along to ruin things. For years, LAAs counseled military clients to update their Service member's Group Life Insurance (SGLI) forms whenever a life-changing event–such as a marriage, divorce, birth of children–occurs. This has been, and continues to be, good advice.

This advice, however, differs considerably from the divorce and separation advice given to non-military clients (that is, the spouses of service members). Legal assistance attorneys routinely advise these clients to seek, and courts just as routinely order, that they or the children of that marriage continue being designated SGLI beneficiaries, because it is often the only life insurance that a service member has. A recent case highlights the fact that LAAs, and the civilian attorneys calling for advice on military issues, should not rely solely upon a SGLI policy to provide for the former spouse or children of that marriage.

In *Lewis v. Estate of Lewis*,[1] the North Carolina Court of Appeals relied upon the Supreme Court case of *Ridgway v. Ridgway*[2] to hold that a service member's beneficiary designation under the Service member's Group Life Insurance Act (SGLIA)[3] prevails over a state child support order requiring the service member to maintain life insurance for his children.

In *Lewis*, the former wife and daughter of a deceased service member brought suit against his estate, seeking a constructive trust against the decedent's SGLI death benefits.[4] The decedent's wife at the time of his death was the SGLI beneficiary and the defendant in this action.[5]

When decedent and his former spouse divorced,[6] the decree contained the following provision:

> For so long as there is a child support obligation, [decedent] shall maintain life insurance coverage (or aggregate life insurance policies) on his life which makes [Ebony (his daughter)] the primary irrevocable beneficiaries [sic] in the face amount of $50,000. If [decedent] dies without the required life insurance, his estate shall be liable to [Ebony] in the amount of insurance that should have been maintained. This provision is subject to further orders of the Court.[7]

Despite the language of the divorce decree, decedent named defendant as his SGLI beneficiary shortly after they married.[8] When he died, his daughter from his previous marriage applied for the $50,000 SGLI payment ordered in the divorce decree, and was denied.[9] The defendant received the entire $200,000 SGLI payment.[10]

Plaintiffs sued both the decedent's estate and the defendant, alleging in the latter case that defendant was unjustly enriched and seeking a $50,000 constructive trust for the daughter's benefit.[11] Plaintiffs also requested specific performance and enforcement of the state divorce decree under the federal Full Faith and Credit for Child Support Orders Act.[12] Both parties filed motions for summary judgment.[13] Plaintiffs prevailed against the decedent's estate,[14] but not against the defendant. To the contrary, defendant's motion against the plaintiffs was successful.[15] Plaintiffs' appealed defendant's summary judg-

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1. No. 99-551, 2000 N.C. App. LEXIS 250 (N.C. Ct. App. Mar. 21, 2000).

2. 454 U.S. 46 (1981).

3. 38 U.S.C.S. § 1917(a) (LEXIS 2000).

4. *Lewis*, 2000 N.C. App. LEXIS at *3

5. *Id.*

6. Decedent and plaintiff former spouse were married on 15 April 1985 and divorced in Hawaii on 21 February 1991. Decedent then married the defendant on 16 December 1995, and they were still married at the time of decedent's death on 17 November 1996. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

ment, arguing that the defendant held a constructive trust for the plaintiff daughter because the decedent committed fraud and breached a fiduciary duty to her by failing to list her as a beneficiary.[16] Defendant denied the allegations, arguing that decedent could name anyone as his SGLI beneficiary,[17] and further stating that any alleged violation of state law or a state court order did not overcome the provisions of the SGLIA.[18]

Both the trial court and the appellate court agreed with the defendant.[19] Looking first at the SGLIA, the appellate court found that the decedent had the right to choose his beneficiary, stating "[t]he insured shall have the right to designate the beneficiary or beneficiaries of insurance . . . and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."[20]

Notwithstanding the statute and the *Ridgway* decision, plaintiffs also argued that the decedent's fraud and breach of a fiduciary duty defeated the SGLIA provisions.[21] This argument also failed, although the appellate court noted that the *Ridgway* court did state, albeit in dicta, that the SGLIA's beneficiary and anti-attachment provisions might be overcome where the claimant had a property right in the proceeds.[22] However, there was no such claim made in this case.[23]

Plaintiffs also argued that state law preempted the SGLIA provisions.[24] However, although the court recognized that "[s]tate law is not preempted by federal law unless it is the clear and manifest purpose of Congress," [25] it also noted that the *Ridgway* court held that Congress has a clear and manifest purpose in having the SGLIA's controlling provisions prevail over and displace inconsistent state law.[26]

Although this result seems unfair, it highlights an important point for legal assistance attorneys. It is essential that attorneys, service members and family members alike recognize that the SGLI designation belongs to the service member alone, and that the named beneficiary will receive the payment, regardless of the service member's current marital status, what may have been promised, or what a court orders. Other estate assets and benefits at death can be used to satisfy family obligations; however, the fact that SGLI comprises the largest part of many service members' assets—yet passes outside the estate—cannot be ignored. Major Boehman.

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11. *Id* at *3-*4. Plaintiffs alleged, among other things, that decedent wrongfully induced plaintiff into signing the divorce decree by representing that he would maintain at least $50,000 in life insurance for his daughter; that this statement was false, and [plaintiff former spouse] relied on it to her detriment; that after entry of the divorce decree he changed his life insurance so that defendant was the sole beneficiary; and that he did not comply with the court's order to provide the death benefit to his daughter due to fraud, breach of duty, or other wrongdoing. *Id*. at *4.

12. *Id.*

13. *Id.*

14. *Id.* However, since the bulk of the decedent's estate that did not pass directly to the defendant was his SGLI policy, there were insufficient assets to satisfy the judgment.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (quoting 38 U.S.C.A. § 1917(a) (West 1991)).

21. *Id.* at *6.

22. *Id*. (discussing *In re* Marriage of Gonzalez, 168 Cal. App. 3d 1021 (1985), where a life insurance policy covering the husband was originally a military policy but had been converted to an individual policy under the SGLIA with community funds when the husband retired and the parties were still married; in that case, the appellate court held that the policy was properly designated as community property by the trial court).

23. *Id*.

24. *Id.*

25. *Id.* (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

26. *Ridgway*, 454 U.S. at 60.

Labor and Employment Law Note

Midterm Bargaining: Unions Can Now Initiate!

Last month, your commander signed a new collective bargaining agreement with the installation's exclusive bargaining representative. It was a long and frustrating process, but the parties finally agreed to an agreement with which both sides can live.

Today, the union representative walked into the commander's office and said the union wants to talk about a proposal requiring the agency to pay environmental differential pay to bargaining unit employees allegedly exposed to asbestos.[27] *The commander was shocked. He called you, as the installation labor counselor, and said, "What's going on? We just finished bargaining; do we have to do this again now? Why didn't the union ask to talk about environmental differential pay when we were sitting at the table last month?"*

How do you respond?

Last year, you might have relied on a split in the federal courts and told your commander that he does not have to reopen negotiations with the union on this issue. However, on 28 February 2000, the Federal Labor Relations Authority (Authority) issued an opinion that now requires your commander to talk to the union about its proposal if the parties did not bargain over it when formulating the new collective bargaining agreement.[28] This note discusses the issue of union-initiated midterm collective bargaining and explains the current state of the law. It also offers advice to labor counselors on ways to preclude having to bargain over union-initiated midterm bargaining proposals that may interfere with day-to-day agency operations.

Background

The Federal Service Labor-Management Relations Statute (Statute) requires agencies and exclusive representatives to "meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement."[29] Both agencies and unions agree that this provision means the parties must meet and negotiate an initial collective bargaining agreement when requested by an exclusive representative. It also means the parties must renegotiate the agreement if requested by either side during the open window period of an existing collective bargaining agreement. Issues may arise, however, when discussing whether there is a duty to engage in midterm bargaining.[30]

Either party to a collective bargaining agreement can refuse to engage in midterm bargaining if the issue proposed is contained in or covered by[31] the existing collective bargaining agreement.[32] "In examining whether a matter is contained in or covered by an agreement, [the Authority is] sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter."[33] To prevent the parties from having to bargain over a matter that they previously bargained over when formulating their agreement, it therefore established the following three-part

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27. Wage grade employees must be paid environmental differential pay when they perform duty that involves "unusually severe working conditions or unusually severe hazards." 5 U.S.C.A. § 5343(c)(4) (West 2000); 5 C.F.R. § 532.511 (1999). General schedule employees must be paid a hazardous pay differential when they are exposed to similar hazards. *See* 5 U.S.C.A. § 5545(d) (authorizing pay differentials "for duty involving unusual physical hardship or hazard"); 5 C.F.R. pt. 550. The amount of the pay differential depends on the type of employee and the type of hazard to which the employee is exposed. For example, a wage grade employee who works in "an area where airborne concentrations of asbestos fibers" may expose him "to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury" is entitled to an eight percent pay differential. 5 C.F.R. pt. 532, subpt. E, app. A.

How much exposure is enough to trigger an entitlement to environmental differential pay is determined at the local level, either in a collective bargaining agreement or through arbitration. *See* American Fed'n of Gov't Employees, Local 2004 and United States Dep't of Defense, Defense Logistics Agency, 55 F.L.R.A. 6, 15 (1998) (upholding the parties' contractual agreement to apply OSHA's permissible exposure limits). The parties are free to negotiate, consistent with law and regulation, a specific quantitative level of asbestos exposure that would be used in assessing employee entitlement to environmental differential pay. *See infra* note 62. However, if the parties do not agree on a minimally acceptable level in a collective bargaining agreement, then arbitrators have broad discretion to determine the appropriate level. *See, e.g.*, American Fed'n of Gov't Employees, Local 2144 and United States Dep't of Air Force, 51 F.L.R.A. 834 (1996) (holding that where the parties did not negotiate a quantitative level of asbestos exposure, an arbitrator may find that the agency adopted the OSHA standard). An arbitrator's finding that "there is no safe threshold level of exposure" has been found to be an appropriate determination. Allen Park Veterans Admin. and American Fed'n of Gov't Employees, Local 933, 34 F.L.R.A. 1091, 1101 (1990). *See also* United States Dep't of the Army, Red River Army Depot and American Fed'n of Gov't Employees, Local 3961, 53 F.L.R.A. 46 (1997) (finding that where the parties did not negotiate a quantitative level of exposure, the arbitrator could determine that any level of exposure to asbestos entitles wage grade employees to an environmental differential); Dennis K. Reischl, *Arbitral Dilemma: The Resolution of Federal Sector Asbestos Differential Disputes*, LAB. L.J. 16 (Mar. 1982) (on file with author) (discussing the various issues involved in federal sector grievances involving claims for environmental differential pay based on occupational exposure to asbestos).

28. United States Dep't of the Interior and National Fed'n of Fed. Employees, Local 1309, 56 F.L.R.A. 45 (2000) (concluding that an agency is required to bargain over a proposal that obligates the agency to engage in midterm collective bargaining over matters not contained in or covered by the agreement).

29. 5 U.S.C.A. § 7114(a)(4). The statute defines collective bargaining as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement." *Id.* § 7103(a)(13).

30. There is no statutory definition of midterm bargaining. However, practitioners commonly use the term to refer to bargaining that takes place "while a basic comprehensive labor contract is in effect." National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior, 526 U.S. 86 (1999).

framework for deciding whether a proposal is covered by an agreement:

> Initially, [the Authority] will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, [the Authority does] not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute . . . .
>
> If the provision does not expressly encompass the matter, [the Authority] will next determine whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." In this regard, [the Authority] will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision . . . .
>
> To determine whether [the matter sought to be bargained is an aspect of matters already negotiated and therefore covered by the agreement, the Authority] will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. In this examination, [the Authority] will, where possible or pertinent, examine all record evidence . . . . If the subject matter in dispute is only tangentially related to the provision of the agreement and, on examination, [the Authority] conclude[s] that it was not a subject that should have been contemplated as within the intended scope of the provision, [the Authority] will not find that it is covered by that provision . . . [and] there will be an obligation to bargain.[34]

What happens when a party wants to bargain midterm over an issue that is not contained in or covered by an existing collective bargaining agreement? Initially, the Authority held that there was only a duty to bargain midterm when the agency initiated the proposals, but not when a union initiated the midterm proposals.[35] However, after a federal circuit court disagreed with the Authority and set aside its decision, the Authority changed its position and found that there is a statutory duty to bargain midterm over union-initiated proposals concerning matters that are not covered by the collective bargaining agreement.[36] While the Authority has adhered to this position since 1987, there has been a split in the federal circuits on whether

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31. The "covered by" doctrine generally applies in three circumstances. First, it applies when an agency proposes to take a specific action concerning a condition of employment, but refuses to negotiate with the union over the matter because the agency believes the matter has already been the subject of negotiations and is therefore covered by the parties agreement. Under this circumstance, management must implement the change in strict accordance with the specific terms of the collective bargaining agreement. Second, it applies when an agency refuses to negotiate over union proposals presented during the term of an agreement because the agency believes the subject of the proposals has already been negotiated. Third, it applies when a union refuses to negotiate over agency proposals presented during the term of an agreement because the union believes that the subject of the proposals has already been negotiated. Federal Labor Relations Authority, *General Counsel Issues Guidance on the Impact of Collective Bargaining Agreements on the Duty to Bargain and Other Statutory Rights* (Mar. 5, 1997) (visited May 6, 2000) <http://www.flra.gov/gc/kmemo>.

32. Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162, 166 (1987) (finding that the agency had a duty to bargain with the union during the term of a collective bargaining agreement over negotiable proposals that were not contained in the agreement unless the union waived its right to bargain about these matters).

33. United States Dep't of Health and Human Serv. Soc. Security Admin. and American Fed'n of Gov't Employees, 47 F.L.R.A. 1004, 1017 (1993) (concluding that the agency did not have a duty to bargain with the local union president over any of the proposals submitted because they were all covered by the existing collective bargaining agreement).

34. *Id*. at 1018-19 (citing C & S Industries, Inc., 158 N.L.R.B. 454, 459 (1966), *cited with approval in* Department of the Navy, Marine Corps Logistics Base v. Federal Labor Relations Authority, 952 F. 2d 48, 60 (D.C. Cir. 1992)). Since announcing this standard, the Authority has found that the vast majority of proposals raised in unfair labor practice proceedings are covered by the existing collective bargaining agreements. *See, e.g.*, McClellan Air Force Base and American Fed'n of Gov't Employees, Local 1857, 47 F.L.R.A. 1161 (1993) (control tower hours); Fort Benjamin Harrison and American Fed'n of Gov't Employees, Local 1411, 48 F.L.R.A. 6 (1993) (paycheck delivery); Marine Corps, Barstow and American Fed'n of Gov't Employees, Local 1482, 48 F.L.R.A. 102 (1993) (health and safety fatigue mats); Forest Service and National Fed'n of Fed. Employees Forest Serv. Council, 48 F.L.R.A. 857 (1993) (details). *See generally* the list of Authority decisions involving the "covered by" doctrine at <http://www.flra.gov/gc/kattach1.html>.

35. Internal Revenue Serv. and National Treasury Employees Union, 17 F.L.R.A. 731, 736 (1985). The Authority relied on the legislative history behind the duty to bargain in reaching this conclusion. *Id*. (discussing a Senate report that addressed proposals initiated by management).

36. Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162 (1987) (finding a statutory duty to engage in midterm bargaining initiated by the union when the matters proposed are not addressed in a collective bargaining agreement and the union has not waived its right to bargain about the matters). The Authority did not offer a detailed explanation for its complete change in position on this issue. It merely stated that it agreed with the D.C. Circuit's opinion and analogous private sector case law on this issue.

there is a duty to bargain over union-initiated proposals during the term of a contract. That split reached a climax in 1999 when the Supreme Court addressed the issue.

Split Within the Federal Courts

In *National Treasury Employees Union*, the United States Court of Appeals for the District of Columbia Circuit became the first federal court to address whether there is a duty to bargain over union-initiated proposals made during the term of a collective bargaining agreement.[37] The Authority had previously heard the case and decided that the agency had no duty to bargain over such proposals.[38] On appeal, the court set aside the Authority's decision because it was not in accordance with law.[39] The court found that the Federal Service Labor-Management Relations Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining."[40] In the absence of any statutory distinction between midterm and basic negotiations, the court stated that Congress intended to protect the special needs of management in the bargaining process by limiting the areas that are subject to bargaining,[41] and not through implied restrictions on who can initiate midterm proposals in the collective bargaining process.[42]

Five years later, the Fourth Circuit took a different position on the issue of union-initiated midterm bargaining. In *Social Security Administration*, the court held that "union-initiated midterm bargaining is not required by the statute and would undermine the congressional policies underlying the statute."[43] The court acknowledged that the Statute does not explicitly discuss union-initiated midterm bargaining,[44] but relied on the fact that Congress knew of the issue and yet chose language to exclude that possibility in reaching its decision.[45] "Union-initiated midterm bargaining risks serious interference" with the effective and efficient operation of the government.[46] It also "diminish[es] 'the ability of the parties to rely upon . . . basic [collective bargaining] agreements as a stable foundation for their day-to-day relations.'"[47] Refusing to allow such disruptions to occur, the court ultimately set aside the Authority's decision and refused to enforce its order to have the agency bargain over union-initiated proposals.[48]

Last year, in *National Federation of Federal Employees, Local 1309*, the Supreme Court considered the basic question that divided the circuits: "Does the Statute itself impose a duty

37. National Treasury Employees Union v. Federal Labor Relations Auth., 810 F. 2d 295 (D.C. Cir. 1987).

38. *Id*. at 296 (citing *Internal Revenue Serv*., 17 F.L.R.A. at 736-37).

39. *Id*. at 301. The Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the [Federal Service Labor-Management Relations Statute] to the complexities' of federal labor relations." Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 (1983) (quoting National Labor Relations Bd. v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)). However, courts may set aside the Authority's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (West 2000).

40. *National Treasury Employees Union*, 810 F. 2d at 298. The court stated that "[t]o allow management to raise new issues, but to deny that right to the employees' representatives would produce an inequity in bargaining power without express statutory support or strong policy justification." *Id*. at 301.

41. For example, the Statute enumerates specific areas which are not subject to negotiations because management alone has the right to make decisions in those areas. *Id*. (citing 5 U.S.C.A.§ 7106(a)). The Statute also established permissive topics that are subject to negotiations only if management consents. *Id*. (citing 5 U.S.C.A. § 7106(b)(1)). "These protections operate throughout the bargaining process, without regard to whether the negotiation is . . . a union proposal or a management proposal, or a midterm or basic agreement." *Id*.

42. *Id*. On remand, the Authority adopted the court's decision in *Internal Revenue Serv. and National Treasury Employees Union*, 29 F.L.R.A. 162 (1987).

43. Social Security Admin. v. Federal Labor Relations Auth., 956 F. 2d 1280, 1281 (4th Cir. 1992).

44. The Statute discusses midterm bargaining for when an agency has to negotiate the impact and implementation of a condition of employment midterm. *Id*. at 1284 (citing 5 U.S.C.A. § 7106(b)(2)). The court used this discussion of midterm bargaining by Congress to bolster its position that Congress would have spelled out a specific duty of midterm bargaining if that is what it had intended in the Statute.

45. *Id*. (stating that "Congress was surely aware that union-initiated midterm bargaining was an available option, [yet] it chose language that appears to exclude that possibility").

46. *Id*. at 1288. The court believed that permitting union-initiated bargaining would discourage negotiating issues as part of the basic collective bargaining agreement and encourage seriatim midterm bargaining over individual issues. *Id*.

47. *Id*. (citing the Authority's original opinion on this issue in *Internal Revenue Serv. and National Treasury Employees Union*, 17 F.L.R.A. 731, 736 (1985)).

48. *Id*. at 1290. The Fourth Circuit took a similar position in 1997 when it held that an agency cannot be compelled to bargain over a proposal that would contractually obligate the agency to engage in union-initiated midterm bargaining. United States Dep't of Energy v. Federal Labor Relations Auth., 106 F. 3d 1158, 1163 (4th Cir. 1997). *See* United States Dep't of the Interior v. Federal Labor Relations Auth., 132 F. 3d 157 (4th Cir. 1997) (refusing to enforce an Authority decision ordering an agency to negotiate over a union-initiated proposal to include in a collective bargaining agreement a requirement that it bargain over union-initiated midterm proposals).

to bargain during the term of an existing labor contract?"[49] However, the Court failed to resolve the issue. It instead found "the Statute's language sufficiently ambiguous or open on the point as to require judicial deference to reasonable interpretation or elaboration by the agency charged with its execution."[50] The Court refused to follow the statutory interpretation by either the D.C. Circuit or the Fourth Circuit because they each reached absolute decisions that were inconsistent with the ambiguity created by the Statute's general language.[51] "The statutory ambiguity is perfectly consistent, however, with the conclusion that Congress delegated to the Authority the power to determine, within appropriate legal bounds, whether, when, where, and what sort of midterm bargaining is required."[52] While the Authority had previously determined that the parties must bargain over union-initiated midterm proposals, the Court concluded that it had done so in response to the D.C. Circuit's holding.[53] The Supreme Court therefore remanded the case so that the Authority could consider the issue of midterm bargaining while it is "aware that the Statute permits, but does not compel, the conclusions it reached."[54]

Resolution of the Split

Pursuant to the instructions from the Supreme Court, the Fourth Circuit remanded the case of *United States Department of the Interior*[55] to the Authority for final resolution of the midterm bargaining issue. The Authority invited the parties to the dispute and interested persons to "file briefs addressing whether and under what circumstances agencies are obligated to engage in midterm bargaining."[56] The Authority received twelve briefs, all of which it summarized in its opinion issued on 28 February 2000.[57] After thoroughly considering all of the arguments made, the Authority held that federal agencies have a statutory duty "to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not 'contained in or covered by' the term agreement, unless the union has waived its right to bargain about the subject matter involved."[58] Because the agency in this case refused to bargain midterm with the union on a negotiable issue, the Authority ultimately found that it committed an unfair labor practice.[59]

Preventive Measures

Labor counselors advising commanders and civilian personnel offices involved in labor-management negotiations can recommend several ways to minimize the potential adverse impact union-initiated midterm bargaining proposals may have on day-to-day agency operations. First, labor counselors should ensure that agency negotiators are familiar with the "covered by" doctrine.[60] Pursuant to that doctrine, negotiators should consider including all appropriate issues in their collective bargaining agreement.[61] If a union later requests negotiations on an issue that is expressly contained in the agreement, the agency may rely on the "covered by" doctrine and refuse to discuss the proposal until it is time to renegotiate the agreement. However,

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49. National Fed'n of Fed. Employees, Local 1309, v. Department of the Interior, 526 U.S. 86, 119 S. Ct. 1003, 1007 (1999) (as this case is not yet paginated, the 119 S. Ct. 1003 cite will be used for the rest of this article).

50. *Id*. The Court noted that:

> The D.C. Circuit, the Fourth Circuit, and the Authority all agree that the Statute itself does not expressly address union-initiated midterm bargaining. The Statute's relevant language simply says that federal agency employer and union representatives "shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement."

Id.

51. *Id*. at 1010.

52. *Id*.

53. *Id*. at 1011.

54. *Id*.

55. United States Dep't of the Interior v. Federal Labor Relations Auth. II, 174 F. 3d 393 (4th Cir. 1999).

56. 64 Fed. Reg. 33,079 (1999).

57. United States Dep't of the Interior and National Fed'n of Fed. Employees, 56 F.L.R.A. 45 (2000). The Authority received briefs from its General Counsel, the Respondent, the Charging Party, and nine amici curiae.

58. *Id*. at 50.

59. *Id*. at 54. The Authority ultimately ordered the agency to cease and desist from failing to negotiate, required it to bargain over a proposal authorizing union-initiated midterm bargaining, and directed it to post a copy of the Authority's order for 60 consecutive days. *Id*. at 55.

60. *See supra* notes 31-36 and accompanying text discussing the "covered by" doctrine.

agency negotiators must be aware that the "covered by" doctrine also limits management from raising "covered by" issues during the life of the agreement. For example, if a collective bargaining agreement provides that management will afford employees 120-days' notice before a reduction in force, and the Office of Personnel Management modifies its regulations to require only 60-days' notice, the union can prevent the implementation of the 60-day notice period during the life of the parties' agreement. As such, agency negotiators must establish a balance between the areas to which they want to bind the union during the life of the agreement and those areas to which management will likewise be bound.[62]

Even if an issue is not expressly contained in a collective bargaining agreement, it will still be covered by the agreement, and therefore not negotiable, if the parties fully discussed it during the contract negotiations and later withdrew it by mutual agreement of the parties.[63] Agency representatives involved in the negotiations should take detailed minutes during the process and file them with the final agreement in case issues arise midterm. If possible, the agency should develop these minutes jointly with the union representatives. The information contained in these minutes may become critical to the agency's case if the union initiates midterm bargaining and the Authority has to decide whether a negotiated issue is one that is covered by the agreement.[64] Further, jointly developed negotiation minutes will be extremely useful in overall contract administration and in resolving various negotiated grievances and unfair labor practices where the issues involve contract intent.

Labor counselors may also recommend that agency negotiators strive to include a "zipper clause" in their collective bargaining agreements. A zipper clause is one that is "intended to waive [or limit] the obligation to bargain during the term of the agreement on matters not contained in the agreement."[65] When considering such clauses, the Authority will look for a "clear and unmistakable waiver of the union's right to initiate bargaining."[66] Specifically, the Authority "will examine the wording of the [contract] provision as well as other relevant provisions of the contract, bargaining history, and past practice."[67] While

61. Expressly including issues into a collective bargaining agreement may help minimize disruptions to agency operations, but negotiators must ensure that both sides have a mutual understanding over what matters may be reopened and what matters are foreclosed from negotiations during the term of the agreement. The Authority's General Counsel listed several ways the parties can contractually address these issues in the following excerpt from a 1997 memo to the Authority's Regional Directors.

> [T]he parties may agree that the contract contains the full understanding and obligation of the parties to negotiate over a specific matter during the term of the agreement. The parties could also agree to reserve bargaining over a specific possible management action during the life of the agreement, but perhaps limit that bargaining to a specific time schedule, perhaps even providing for post-implementation impact bargaining so that an action consistent with existing contract terms could be implemented and not delayed. The parties could also limit any bargaining, whether pre- or post-implementation to specific matters, such as the impact of the proposed action on adversely affected unit employees when that impact is not, or could not have been, addressed at the time of contract negotiations; for example, specific impact matters which are particular to the specific management action at issue.

Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, subject: The Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights pt. I.E.2 (5 Mar. 1997) *available at* <http://www.flra.gov/gc/kmemo.html>. *See id.* at pt. V (discussing the duty to bargain pursuant to reopener clauses contained in collective bargaining agreements). If both parties do not have a mutual understanding of how they will deal with each other during the term of the agreement,

> the possibilities increase that the agency will take action based on its belief that there is no obligation to give notice and bargain because of the "covered by" doctrine, the union will then file an unfair labor practice charge . . . and the matter will result in litigation and decision-making by a third party.

Id.

62. Using the scenario from the beginning of this note, agency representatives should strongly consider negotiating a quantifiable standard of exposure to standardize entitlement to environmental differential pay and including it in their collective bargaining agreement. Inclusion of OSHA standards is the most commonly negotiated standard. Agreement to adhere to OSHA standards, or any negotiated level of exposure, must be clear and unmistakable to ensure an arbitrator's enforcement. In the last several years, unions have been aggressively seeking this pay because of worker exposure to asbestos. Lieutenant Colonel Melvin Olmscheid, *Environmental Law Division Note: Asbestos Management Program*, ARMY LAW., Apr. 1996, at 51. This has resulted in the Army paying several multimillion-dollar environmental differential pay awards to employees for asbestos exposure. *Id.* Negotiating a specific quantifiable standard may help the unions establish entitlement to environmental differential pay for bargaining unit employees more quickly, while providing the commander a clear, enforceable benchmark for determining environmental differential pay eligibility. A quantifiable standard also helps establish minimum abatement efforts for cleaning asbestos from the workplace, allows for the uniform application of the environmental differential pay standard, and limits the potential for unjustified or unwarranted arbitrator awards of environmental differential pay.

63. While some practitioners believe that union representatives may try to evade the "contained in or covered by" doctrine by withholding matters from negotiations, agency representatives must remember that union representatives do not unilaterally control the breadth and scope of negotiations. United States Dep't of the Interior and National Fed'n of Fed. Employees, 56 F.L.R.A. 45, 53 (2000). "Rather, during term negotiations, either party has the ability and the right to bargain over any condition of employment, and it is an unfair labor practice for the other to refuse to engage in bargaining over such negotiable matters." *Id.*

64. *See supra* note 34 and accompanying text explaining that the Authority will examine all record evidence to determine whether a matter sought to be bargained is an aspect of matters already negotiated and therefore covered by the agreement. *See also* Internal Revenue Serv. and National Treasury Employees Union, 29 F.L.R.A. 162, 167 (1987) (stating that a union may waive its right to discuss an issue midterm if it offered a proposal during negotiations, but later withdrew it in exchange for another provision).

negotiating to include a zipper clause in the agreement is a viable option, practitioners should know that such clauses may not be the ultimate solution to the problem.

> Neither the [Authority] nor any court has resolved the question whether such waivers are mandatory subjects of bargaining that an agency may negotiate to impasse. If waiver clauses are only permissive subjects of negotiation, an agency would be denied access to [impasse] arbitration over a union's refusal to accept such a clause in the basic labor contract.[68]

In fact, when the parties raised the issue of zipper clauses in the Authority's latest decision on midterm bargaining, the Authority intentionally refused to consider it[69] and admitted that it may have to decide the issue in a future case.[70]

Conclusion

The issue of union-initiated midterm collective bargaining is finally resolved. Unions now have the same statutory right as agencies to initiate midterm bargaining over issues not previously subject to collective bargaining. As such, labor counselors must aggressively help their clients mitigate the potential disruptions that union-initiated midterm bargaining may cause. Insuring that all negotiated issues are either expressly contained in the collective bargaining agreement or documented in a joint bargaining history is a great start. Persuading the union to waive or limit its right to bargain midterm through the use of a zipper clause is another tactic. Regardless of how agencies try to avoid potentially disruptive midterm bargaining, labor counselors must be ready when the commander says "We just finished bargaining; do we have to do this again now?" Hopefully, your final answer will be, "No, Sir, we have it covered."[71] Major Holly Cook.[72]

Reserve Component Notes

Ready Reserve Mobilization Insurance Program (RRMIP) Redux: The Tax Man Cometh

The 1996 Department of Defense Authorization Act included a provision to offer optional mobilization insurance to Ready Reserve and National Guard members who are involuntarily ordered to active duty for thirty-one days or more.[73] The program was dubbed "The Ready Reserve Mobilization Insurance Program" (RRMIP).[74] Enrollment in the program never met expectations, and as a result there were insufficient reserves to support payments of mobilization insurance to

65. *Internal Revenue Serv.*, 29 F.L.R.A. at 166. A union may also contractually waive its right to initiate bargaining over a particular subject matter. *Id*. Before seeking to include a zipper clause in a collective bargaining agreement, agency representatives should keep in mind that, like the "covered by" doctrine, zipper clauses typically preclude both the agency and the union from initiating midterm proposals.

66. *Id*. "Because determinations as to whether a waiver is 'clear and unmistakable' are made on a case-by-case basis, an agency will often be unsure whether the [Authority] will, in fact, find a particular contractual provision to be an adequate waiver." Social Security Admin. v. Federal Labor Relations Auth., 956 F. 3d 1280, 1289 (1992).

67. *Internal Revenue Serv.*, 29 F.L.R.A. at 166.

68. *Social Security Admin*., 956 F. 3d at 1288.

69. United States Dep't of the Interior and National Fed'n of Fed. Employees, 56 F.L.R.A. 45, 54 (2000). The Authority specifically refused to address "whether 'zipper clauses' are a mandatory subject of negotiation, whether there may be limits on official time for midterm negotiations, and whether the Authority's current application of the 'contained in or covered by doctrine' should be broadened or constricted." *Id*. The Authority determined it was not required to resolve these issues in the current case and refused to consider them until the issues are squarely presented. *Id*.

70. If the Authority ultimately finds that zipper clauses are permissive topics of bargaining, then forcing a union to impasse over a zipper clause may be held to be an unfair labor practice. *See, e.g.*, United States Food and Drug Admin. Northeast and American Fed'n of Gov't Employees, AFL-CIO, Council No. 242, 53 F.L.R.A. 1269, 1274 (1998) (stating that "[w]hile parties are free to make proposals over permissive subjects, they may not insist to impasse on such proposals").

71. Using the scenario from the beginning of this note, labor counselors will only be able to give this final answer if the parties thoroughly discussed the issue of environmental differential pay and either expressly included it in their collective bargaining agreement or documented it in the joint bargaining history. *See supra* notes 27 and 62 and accompanying text. It should be noted, however, that even if environmental differential pay is covered by the agreement, unless quantitative standards have been negotiated, entitlement to environmental differential pay would still be grievable and ultimately subject to an arbitrator's "arbitrary" determination.

72. The author would like to thank Mr. David Helmer, Labor Relations Officer, Office of the Assistant Secretary of the Army-Manpower and Reserve Affairs, for his helpful comments in the development of this note.

73. Pub. L. No. 104-106, § 512, 110 Stat. 186, 299-305 (1996) (codified at 10 U.S.C.S. §§ 12,521-12,532 (LEXIS 2000)). *See* DEP'T OF DEFENSE, INSTR. 1341.10, READY RESERVE MOBILIZATION INSURANCE PROGRAM (RRMIP) PROCEDURES (5 Jul. 1996); Major Paul Conrad, *Congress Authorizes Mobilization Insurance for Reserve Component Service Members*, ARMY LAW., Mar. 1997, at 19.

74. 10 U.S.C.A. § 12,522(a).

enrolled Reserve and National Guard troops called up for peacekeeping missions in Bosnia and elsewhere.[75] As a result, appropriated funds were used to provide mobilization insurance payments, thus prompting Congress to terminate the program after only one year.[76] The termination legislation set the cutoff date for the RRMIP coverage as 18 November 1997.[77] Neither Congress nor the Department of Defense have raised the possibility of resurrecting the RRMIP as of this date.

While reservists who received payments under RRMIP thought there were no further surprises associated with this program, a new bombshell is revealed. At an earlier time, the Internal Revenue Service (IRS) informally advised the Department of Defense that RRMIP insurance proceeds would be federally taxable as income because they were not specifically excluded from defined income under the Internal Revenue Code and were not subject to the Combat Zone Tax Exclusion.[78] A recently issued IRS letter ruling on the taxability of RRMIP proceeds clarified this informal position.[79] The IRS ruled that RRMIP payments should have been reported as gross income to the extent they exceeded the amount the reservist paid in premiums to the RRMIP.[80] The IRS determined that RRMIP payments received by a reservist ordered to active duty and serving in a Qualified Hazardous Duty Area are not tax exempt from gross income inclusion.[81] The IRS reasoned that while the payments were received while the reservist was in a Qualified Hazardous Duty Area, they were not compensation for active service in a combat zone.[82] Instead, the RRMIP payments were intended to be proceeds paid to fulfill the RRMIP insurance contract, which required as a condition to payment that the beneficiary be involuntarily ordered to active duty.[83]

What does this mean for reservists who received RRMIP payments? The IRS has made it clear that it expects reservists to have reported as income any RRMIP payments on their federal income tax returns to the extent the payments exceeded amount that had been paid as RRMIP premiums. Failure to amend federal tax returns to include such RRMIP payments as gross income could subject reservists to penalties and interest on their taxes, if audited. Lieutenant Colonel Conrad.

Reserve Officer Separation Boards Redux: Too Many Colonels?

Congress, in the Fiscal Year 2000 National Defense Authorization Act (NDAA), amended Title 10, U.S. Code Section 14,906, to specify the composition of boards of inquiry (involuntary separation boards) for Reserve Component officers.[84] Under the Reserve Officer Personnel Management Act (ROPMA), Congress required that involuntary separation boards for Reserve Component officers be composed of officers holding the grade of colonel (O-6), thus mirroring the provisions for Active Component officers.[85] Unfortunately, requiring Reserve Component involuntary separation boards to be composed of all colonel board members causes serious problems for commands that have a limited number of Reserve Component colonels available to sit on such boards.[86] Prior to

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75. H.R. REP. NO. 105-340 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2251.

76. Pub. L. No. 105-85, § 512, 111 Stat. 1729 (1997) (codified at 10 U.S.C.A. § 12,533).

77. *Id.*

78. Conrad, *supra* note 73, at 21, n.64. The combat zone tax exclusion, Internal Revenue Code § 112(a), provides that gross income does not include "compensation for active service" as a military member below the grade of commissioned officer for any month the member "served in a combat zone." Internal Revenue Code § 112(c)(2) provides that "combat zone" means any area which the President by executive order designates for purposes of this section as an area in which United States forces are or have engaged in combat. Public Law 104-117, § 1(a)(2), further provided that for purposes of Internal Revenue Code § 112, a "qualified hazardous duty area" shall be treated in the same way as a combat zone. Pub. L. 104-117, § 1(a)(2), 110 Stat. 827 (1996). The Department of Defense Finance and Accounting Service reported RRMIP payments both to the reservist and to the Internal Revenue Service (IRS) on Form 1099-R. Eventually, the IRS matches these employer submitted information returns with the amount of income reported on the taxpayer's 1040. Therefore, in order to stop the accumulation of interest, reservists should amend now rather than wait for the IRS to detect the omission.

79. 2000 Tax Notes Today 49-18 (13 Mar 00) (reprinting Priv. Ltr. Rul. 99-200010007 (Nov. 5, 1999)).

80. *Id. Cf.* Rev. Rul. 59-5, 1959-1 C.B. 12 (stating that unemployment benefits paid by a private fund established and contributed to by fund members constitute reportable gross income to the extent they exceed the amount the member personally contributed to the fund). *See also* Williams v. Commissioner, 35 T.C. 685 (1961); Johnson v. Wright, 175 F. Supp. 215 (D. Idaho 1959) (amounts received from private unemployment insurance fund, in excess of the amount contributed to the fund, are taxable income).

81. *Id.*

82. *Id.*

83. *Id.*

84. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No.106-65, § 504, 113 Stat. 590-591 (1999). Section 504(b) provides in part, "Subsection (a) of section 14,906 of such title is amended to read as follows: (2) 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." *Id.*

ROPMA, the Reserves had no such requirement for their officer separation boards.[87]

Recognizing the difficulties in implementing the ROPMA requirements for board composition, Congress amended the law to require only one colonel on Reserve Component officer involuntary separation boards.[88] The Department of Defense (DOD) has moved quickly to amend its instruction covering officer separation boards for all the services.[89] Lieutenant Colonel Conrad.

85. Reserve Officer Personnel Management Act (ROPMA), Pub. L. No. 103-337, § 1611, 108 Stat. 2960 (1994) (codified at 10 U.S.C.S. § 14,906(2)) (LEXIS 2000). Section 14,906(s) states in part, "An officer many not serve on a board under this chapter unless the officer holds a grade above lieutenant colonel or command . . . . " *See* U.S. DEP'T OF ARMY, REG. 600-8-24. OFFICER TRANSFERS AND DISCHARGES, para. 4-7a (21 Jul. 1995) (providing that all Regular Army officer and Reserve Component officers on active duty for a period of 30 or more consecutive days will be separated by a board of inquiry with voting members "in the rank of Colonel or above."

86. Lieutenant Colonel Paul Conrad, *Changes for United States Army Reserve Component Officer Involuntary Separation Boards*, ARMY LAW., Jan. 1998, at 127. *See* Lieutenant Colonel Paul Conrad, *Fiscal Year 2000 National Defense Authorization Act Impacts Army Reserve Boards of Inquiry for Officers*, ARMY LAW., Feb. 2000, at 26.

87. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2-25a (22 Feb. 1971). Paragraph 2-25a states: "Boards will be composed of commissioned officers, all of whom must be of equal or higher grade and senior in rank to the officer under consideration for involuntary separation." The regulation has no minimum grade requirement for all board members. This regulation has not been updated to reflect ROPMA or the post-ROPMA changes to Reserve Component officer separation board procedure. The regulation is in the process of being rewritten at this time. *Id.*

88. National Defense Authorization Act for Fiscal Year 2000 § 504b (to be codified at 10 U.S.C.S. § 14,906(a)(2) (LEXIS 2000)).

89. U.S. DEP'T OF DEFENSE, INSTR. 1332.40, SEPARATION PROCEDURES FOR REGULAR AND RESERVE COMMISSIONED OFFICERS (16 Sept. 1997). The Secretary of Defense has modified the Instruction to incorporate the NDAA 2000 amendment to 10 U.S.C.S. § 14,906(2), by memorandum, dated 23 May 2000. The Instruction will be updated within 90 days (unpublished memorandum on file with the author).

Note from the Field

Arbitration of Landlord-Tenant Disputes at Fort Hood

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III Corps & Fort Hood

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Since 1989, Fort Hood has offered arbitration services to help area landlords and military tenants resolve disputes that otherwise might require court proceedings. Annually, ten to twelve soldiers take advantage of this free service where the stakes involved range from several hundred dollars to as high as $1500. Those soldiers who use this procedure frequently save themselves court costs, time, and considerable trouble.

Soldiers and landlords may use the arbitration services by mutual agreement or under the Fort Hood Deposit Waiver Program.[1] Under the Deposit Waiver Program, participating soldiers apply for a waiver from local security or utility deposit requirements in exchange for agreeing to binding arbitration.[2] When clearing Fort Hood at the end of the soldier's tour, arbitration is used to resolve any unpaid rent or damage.

The Fort Hood arbitration program provides for the resolution of landlord and tenant disputes by a neutral arbitrator under the provisions of the Texas General Arbitration Act.[3] The procedures apply to disputes arising from private transactions not involving the United States, the Army, or its agents; are limited to disputes involving at least $100; and do not apply to criminal or disciplinary matters or matters of official business. The Chief, Administrative and Civil Law, III Corps and Fort Hood Staff Judge Advocate's office, supervises the proceedings.

Prior Settlement Efforts

To participate in Fort Hood's arbitration program, the parties must affirmatively show that mutual pre-arbitration efforts to resolve the dispute have failed. When a soldier-tenant is involved, there must be evidence that the soldier's chain-of-command also has been unsuccessful in resolving the dispute.

In addition to soldiers participating in the deposit fee waiver program, other parties may agree to resolve disputes through arbitration:

> (1) *before* a dispute by including a dispute resolution clause in the lease,[4] or
>
> (2) *after* a dispute has arisen that is not covered by a lease provision, by agreeing in writing to submit the matter to the resolution procedures.

Where an existing lease provides an agreement to arbitrate, the application for arbitration must include a copy of the lease agreement as well as the standard agreement to arbitrate showing the signature of each party. In the case of a dispute without a pre-existing agreement to arbitrate, all parties must sign the application.

Either party may refuse to consent to arbitration or withdraw from the arbitration proceeding before an award occurs. Any party withdrawing after the commencement of arbitration, however, is liable for costs incurred.

The Hearing

The III Corps Staff Judge Advocate appoints a knowledgeable and neutral individual arbitrator from a panel of available arbitrators. To avoid conflicts of interest, no one may serve as an arbitrator if he has prior knowledge of the facts of the dispute or any personal interest that might prejudice the decision. Either party to the dispute can challenge the appointment of an arbitrator on this basis.

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1. Fort Hood Regulation 210-50, Fort Hood Deposit Waiver Program (15 Jan. 1999).

2. *Id.*

3. Tex. Civ. Prac & Rem. Code Ann. § 171.001 (West 2000). *See* American Arbitration Association (visited May 3, 2000) <http://www.adr.org> (containing links to state arbitration laws).

4. One suggested form of a standard arbitration clause for a lease agreement involving security deposits is: "Any controversy or claim arising out of or relating to this agreement, or the breach of this agreement, shall be submitted to arbitration upon request of either party, and judgment upon the award rendered by an arbitrator may be entered in any court having jurisdiction."

The standard of proof is by preponderance of the evidence. Strict rules of evidence and rules of judicial procedure ordinarily are not observed, except to preserve decorum and good order. A party has the right to be represented by an attorney at the hearing, at no cost to the government, although ordinarily neither party has counsel present. The parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing. Witnesses testify under oath. When necessary, the arbitrator visits the apartment or house covered by the lease to personally view and assess the evidence or alleged damage.

Remedies and Damage Awards

In the absence of a lease provision, the arbitrator applies the principles of equity in fashioning an appropriate remedy within the scope of the parties' arbitration agreement and the Texas General Arbitration Act. If the parties settle their dispute during the course of the arbitration, the arbitrator may enter any award agreed upon by the parties at the time of the hearing. The arbitrator renders the award promptly and, unless otherwise agreed by the parties, not later than five working days after the hearing ends, or if an oral hearing has been waived, from the date of submission of the final statements and evidence to the arbitrator. Although the consent to arbitration states that it is binding, Fort Hood has no enforcement mechanism, so the prevailing party may ultimately have to resort to judicial enforcement.

Legal Assistance attorneys looking for an inexpensive way to help soldiers avoid the requirement to make security deposits should consider the Fort Hood Deposit Waiver Program as an alternative model. In addition, local community alternative dispute resolution services may be available to avoid litigation.[5]

5. For additional information on Landlord/Tenant Dispute Resolution Procedures, and examples, see the June 2000, *The Army Lawyer* ("Miscellaneous Administrative Information") at <http://www.jagcnet.army.mil>.

Appendix A

Landlord/Tenant Dispute Resolution Procedure

This provides rules for the resolution of landlord/tenant disputes among military personnel and other eligible personnel by a neutral arbitrator. These rules are applicable to disputes that arise from private transactions not involving the United States, the Army or its agent. These rules are limited to disputes involving at least $100. These rules do not apply to criminal or disciplinary matters, or matters of official business.

1. Policy. To encourage the settlement of landlord/tenant disputes among eligible personnel. Personnel are encouraged to act reasonably and negotiate disputes privately if possible. If initial attempts at private settlement with chain of command involvement are unsuccessful, the parties may submit the dispute for resolution by arbitration.

2. Rules Not compulsory; Binding Effect of Award. Submission of landlord/tenant disputes to these procedures is voluntary. Individuals may elect to seek resolution in civilian court. However, if a dispute is submitted for resolution the arbitrator's decision is binding, except when:

a. The award was obtained by corruption, fraud or other undue means.

b. The rights of a party were substantially prejudiced by misconduct of the arbitrator.

3. Definitions.

a. "Arbitration" means a non-judicial determination of a disputed matter by a neutral person or persons under the provisions of the Texas General Arbitration Act.

b. An "Arbitrator" means a neutral person or persons to whom a disputed matter is submitted for arbitration. Arbitrators shall perform their duties without any service charge to the parties.

c. "Award" means the decision of the arbitrator(s) after consideration of the evidence presented by the parties.

d. "Dispute" means any question concerning obligations arising between the parties as a result of a lease agreement. This includes all questions relating to property damage or fees for such damage, nonpayment of rental fees and/or other charges, and other allegations involving breaches of a lease.

e. "Party" means a soldier or family member tenant or a landlord who has entered into a lease agreement. The United States and its agencies, officers, or employees, in their official capacity cannot be a "party" under these rules. A party may obtain the advice of an attorney, or be represented by an attorney during the course of the arbitration; however, attorneys are not required and parties are encouraged to present their own cases.

4. Administration. Arbitration proceedings are supervised by the III Corps Staff Judge Advocate, Chief, Administrative & Civil Law Division (SJA-C, ACL), and will conform to the requirements of the Texas General Arbitration Act.

5. Dispute Resolution Agreement. Parties may agree to resolve disputes through arbitration:

a. Before a dispute by inclusion of a disputes resolution clause in the lease, or

b. After a dispute has arisen which is not covered by a lease provision, by agreeing in writing to submit the matter to the resolution procedures.

c. Either party may refuse to consent to arbitration or withdraw from the arbitration proceeding prior to rendition of an award. Any party withdrawing, however, after the commencement of arbitration will be liable for costs incurred.

6. Form of Agreement for Future Disputes Involving Waiver Deposit Leases.

Standard Arbitration Clause. "Any controversy or claim arising out of or relating to this agreement, or the breach of this agreement, shall be submitted to arbitration upon request of either party, and judgment upon the award rendered by an arbitrator may be entered in any court having jurisdiction."

7. Form of Agreement for Disputes. Where there is no standard contractual.

"We, the undersigned parties, hereby agree to submit to arbitration, the dispute described above, under the rules set forth in The Fort Hood Dispute Resolution Procedure and the Texas General Arbitration Act. We agree the dispute may be submitted to an arbitrator selected by the SJA-C, ACL. We further agree that we will abide by and perform any award rendered by this arbitrator and that a judgment of the court having jurisdiction may be entered upon the award."

8. Panel. The panel of available arbitrators consists of knowledgeable and neutral individuals appointed by the SJA-C, ACL.

9. No Conflict of Interest.

a. No panel member may serve as arbitrator if he/she has prior knowledge of the facts of the dispute, or any personal interest, which might prejudice the decision.

b. A party may challenge he appointment of an arbitrator by demonstrating that the selectee has prior knowledge of the parties or the facts or a conflict of interest that would tend to prejudice the decision.

10. Rule of Law to be Used. The laws of the State of Texas shall be applied by he arbitrator.

Initiation of Arbitration Proceedings

11. Prerequisites. In order to participate in arbitration proceedings that parties must affirmatively show that mutual efforts to informally resolve the dispute have been unsuccessful. When a soldier tenant is involved in the dispute, there must be evidence that involvement by the tenant's chain of command has been unsuccessful in resolving the dispute.

12. Application. Arbitration is initiated by submitting a written application to Headquarters, III Corps, Staff Judge Advocate, Administrative & Civil Law Division, Fort Hood, Texas 76544-5008 (Building 1001, Room C222) or the Arbitration/Hearing Officer (Building 209, Room 205).

a. The application form is available at the Fort Hood Housing Referral Office, Building 108, Legal Assistance Offices, or Arbitration/Hearing Officer.

b. In the case of a pre-existing lease agreement to arbitrate, the application must include a copy of the lease agreement as well as the standard agreement to arbitrate showing the signatures of both parties.

c. In the case of a dispute without a pre-existing agreement to arbitrate, all parties must sign the arbitration application.

13. Notice: Assignment of Hearing Date.

a. All parties to the arbitration will receive a notice of the proceedings. When an application is submitted, a hearing date will be set.

b. A copy of the application, bearing the time and date of the hearing and the arbitrator, will be served personally or by certified, restricted delivery mail upon all parties to the dispute.

c. The service or mailing of the application will provide each party with at least five days notice of the hearing. This notice requirement may be waived upon written agreement of all parties to the dispute. If a hearing is not set while the parties are present to submit their application, notice will be mailed to the respective parties.

14. Procedure.

a. The arbitrator or co-arbitrators will preside over the hearing, and rule on the admission and exclusion of evidence and questions of hearing procedure.

b. The parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing. Strict rules of evidence and rules of judicial procedure ordinarily will not be observed. The testimony of witnesses shall be under oath. A party has the right to be represented by an attorney at the hearing, if desired. Soldiers desiring representation must obtain counsel at no cost to the government. Basic standards of decorum will

be recognized and the arbitrator will instruct on procedure at the time of the hearing. When necessary, the arbitrators may visit the apartment or house covered by the lease in order to personally view and assess the evidence.

c. Oral hearing may be waived by any or all parties and the matter submitted to the arbitrator on written statements, under oath, and any other documentary evidence.

d. Arbitration may proceed in the absence of a party, who, after notice and agreement to submit the dispute fails to appear. A soldier who is precluded from attending the scheduled hearing because of military duty will be granted a new hearing date upon receipt of a written request for delay signed by the soldier's commander.

e. The standard of proof to be used by the arbitrator will be one of the preponderance (or greater weight) of the evidence. In the absence of a lease provision as to remedies the arbitrator will apply the principles of equity.

The Award

15. Time. The arbitrator must render the award promptly and, unless otherwise agreed by the parties, not later than five working days from the date of the close of the hearing, or if oral hearing has been waived, from the date of submission of the final statements and evidence to the arbitrator.

16. Scope. The arbitrator may grant any remedy or relief which is deemed just and equitable and within the scope of the arbitration agreement of the parties and the Texas General Arbitration Act.

17. Settlement. If the parties settle their dispute during the course of the arbitration, the arbitrator may enter any award agreed upon by the parties at the time of the hearing.

18. Delivery of the Award. The placing of a copy of the award in the mail (certified, restricted delivery, return receipt requested) addressed to each of the parties at their last known address, or personal delivery at the time of the hearing or thereafter constitutes legal delivery of the award.

Appendix B

Landlord/Tenant Dispute Resolution

Application for Arbitration & Docket Record

1. Names of parties, mailing addresses, organizations, and phone numbers:

Landlord: _____

_____

Tenant: _____

_____

Tenant's Commander: _____

_____

Witnesses (if any): _____

_____

_____

2. Brief description of dispute:

a. (Tenant or Fort Hood Housing Referral completes) _____

_____

_____

_____

_____

b. (Landlord completes) _____

_____

_____

_____

_____

c. Tenant's commander completes) _____

_____

_____

_____

_____

3. Is this application based on a previous written lease agreement to submit to arbitration? Yes ___ No ___. If yes, attaché a copy of the agreement showing the signature of both parties. All parties must sign this application below.

4. We, the undersigned parties, hereby agree to submit to arbitration, the dispute described above, under the rules set forth in the Fort Hood Landlord-Tenant Dispute Resolution Process. We agree the dispute may be submitted to as arbitrator selected under the arbitration program. Further, we agree that we will abide by and perform any award rendered by the arbitrator and that a judgment of the court having jurisdiction may be entered upon the award.

5. Having agreed to arbitration we request/waive the right to a 5-day notice of the Hearing.

_____

_____

Signature of Tenant Signature of Landord/owner/agent

Subscribed and sworn before me this ___ day of _____, 200_.

_____

Signature

The arbitration hearing officer completes this section and returns a copy to each party.

Hearing Date: _____ Docket No. _____

Time: _____

Location: _____

The Art of Trial Advocacy

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

"It's Like Déjà Vu All Over Again!"[1] Yet Another Look at the Opening Statement

> Thank you, your honor. Members of the panel, I need your help. I don't know where to begin. I've been presented with this morass of inscrutable facts that the opposing counsel claims are the important points of this case and that will lead to a finding favoring her side, but believe me, it just isn't so. There are so many inconsistencies she didn't mention, so much evidence she's simply ignoring or, more insidiously, hiding. Her version of events is simply not worthy of belief. Thank you.

An objectionable opening statement? Certainly. How often is this approach used in courts-martial? Mercifully, probably never, although a few of its component parts may have crept into my own plaintive cries of despair before various panels over the years. Nevertheless, this rather extreme example represents what many counsel encounter during trial preparation: the visceral, voice-in-the-wilderness sensation that urges us to leap to our feet crying "Objection, your honor! That is not fair! Counsel knows those aren't the facts of the case!" Unfortunately, to represent our clients effectively, we must be slightly more articulate than that. Getting past such histrionics and presenting a plausible, persuasive opening statement of one's case must be the goal of every counsel preparing for a contested court-martial case.[2] All counsel can articulate the notion that the opening statement is based on facts, and that facts, not argument, must be the focus. But most counsel are occasionally assailed by unease, for how does one advocate facts? How do counsel avoid arguing?

One answer is this: do not talk about the law. Often, counsel feel bound, as part of describing the "roadmap," or theory of their case, to set out the elements of the offenses that the government has to prove and the burden the government bears. Virtually nothing could be more distracting to juries, potentially injurious to counsels' theories, and damaging to the smooth flow of counsels' presentation to the panels. For instance:

> It's my job, as the prosecutor, to prove to you beyond a reasonable doubt that the accused took the victim's motorcycle, and that he did so with the permanent intent to deprive the alleged victim of the use and benefit of that vehicle. The evidence will convince you that we have met our burden, because we'll show you that the accused was seen riding Specialist (SPC) Snuffy's motorcycle and that SPC Snuffy never consented to that, so you'll be able to infer that there's no way the accused could reasonably believe he had license to use the vehicle, so he must have had the permanent intent to deprive SPC Snuffy of–
>
> Objection! Argument![3]

How negative this opening sounds! All the talk of "burden," what an uphill battle the prosecutor has. And those elements, so complicated. Moreover, they (the elements) are wrong: it's the *intent* to *permanently deprive*, not vice-versa, but I, for one, have heard it presented this way in court. What do counsel gain from this frolic into the law? Only an objection, to derail the already uneven flow of this opening statement.

The above rendition is also unappealing. It drives a wedge between the panel and counsel. The smooth flow of the story that should be interesting to the members is interrupted abruptly by argument that becomes jarring and bumpy as it clambers through the thicket of the elements. As we can see, there is truly an aesthetic component to opening statement that dictates giving the law a wide berth indeed.

Moreover, it is clear that when counsel start talking about the elements, they necessarily shift their focus from the facts to the *inferences* that the facts support and how those inferences fit into the requisite elements of the offenses. We have just hit upon the recipe for closing argument! So, because it is awfully difficult to talk about the elements and the law without straying into argument, counsel should save the elements, the law, and the inferences for closing. That is where they were meant to be.

Counsel should also consider what the opening statement is *not*. It is not just another military briefing. Counsel are not just members of brigade commanders' staffs giving informational briefings. Many counsel feel–and some judge advocates adopt this as an approach to advocacy–that they are in "briefing" mode when talking to panels. But that is a meaningless distortion of their role. For counsel in a military conference room describing rules of engagement, it may be true that the judge advocate is just another staffer, but in a military courtroom, counsel should reign supreme. Counsel are the advocates, the combatants, seeking victory on the field of honor, not mere functionaries on a staff. Counsel who lose sight of this fact will never achieve the vital transcendent sense of perspective one

1. "It's like déjà vu all over again." *Famous Yogi Berra Quotes* (visited May 5, 2000) <http://www.yogiberraclassic.org/quotes.htm>.

2. *Cf.* Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1990, at 21-22 ("Opening statements are critical to trial success.").

3. Of course, the defense may not object. The first rule of trial practice is: when your adversary is self-destructing, do not interfere.

must have to achieve success, to appear believable and–most importantly–more *compelling* to the members than one's opponent. I am not suggesting that military panels want a dog and pony show from a smarmy snake oil salesman. But I am suggesting that, whether the panel members will admit it or not, they want a "hook"; they want to be presented with a recitation of the facts that will draw them in, effortlessly, and give them a vision of the case that they can believe in right from the start. It may be for this reason that most juries are usually convinced after opening statements of the outcome for which they will vote.[4] Basically, it is the judge advocate's job to make the factual retelling interesting.

Defense counsel have an especially difficult time constructing an opening statement, usually because they will not be presenting much evidence during the defense case.[5] Even if counsel plan to present evidence, a general theory of "reasonable doubt" probably will focus more on blunting the inferences the prosecution wants to draw than on presenting a completely new or different "story" to the panel. For trial counsel, the logical flow is usually more apparent. Trial counsel can build the facts into an opening statement in such a way as to leave the panel with a compelling, convincing picture of the government's theory without counsel ever explicitly commenting on it.

So how do counsel urge their version of the facts to the jury without embellishment or decoration, without directly telling the panel "Believe us, don't believe them"? The answer may lie, at least in part, in the way counsel present the facts in their opening statement and the way in which counsel highlight the facts that are important to their theories. Counsel may employ certain rhetorical devices that will help present forceful opening statements that remain factually-focused and help steer the ships of advocacy clear of the dangerous shoals of argument. Exploring rhetorical devices as potential aids could help counsel answer the questions "Why do I want to argue?" and, as importantly, "What would I want to argue?" Thus, it may be that we can recognize and avoid the tendency to argue, and, finally, create a more compelling, resolute opening statement.

Compounding the dilemma is the fact that, put plainly, counsel *like* to argue. It is what we, as counsel, do. We also like it because, in a way, it seems easy and because it is the indispensable bridge between the facts and the results counsel wish juries to reach. Counsel tend to gravitate toward argument because that is counsels' training and inclination. By the time counsel become judge advocates, the urge to argue, to clearly state one's position on the facts within the context of law, has become instinctive. Partly because of this instinctive desire to argue, opening statements present, in my estimation, the greatest challenge to counsel. Fortunately, some tools exist that can help deal with, if not completely suppress, the urge to argue. While these tools are not by any means foolproof, their use may prevent counsel from straying into objectionable argument during opening statements.[6]

Opening statement is especially demanding because it requires counsel to present facts in a compelling manner. Counsel must emphasize from the beginning that they are "telling a story" to the panel. "Telling a story" is the best way to structure an opening statement,[7] that is, to present the opening statement with a compelling recitation of the facts, using inflection and language[8] to highlight some facts and minimize others, and to create empathy with the panel for counsel's theory of the case. Counsel can also use devices to add emphasis and to suggest disbelief. Such devices include repetition, vivid imagery, and oratorical techniques such as dramatic pauses and pacing. Let us review some of those techniques.

Previewing Witness Testimony

"The evidence will show that . . . ." Many counsel dislike this rather shopworn prefix or "tag" as distracting to the members because it makes the "story" sound artificial. Moreover, it interrupts the flow of the story presented in opening statement (a less artificial tag might be "You will hear that . . ."). Nevertheless, it can be a useful tool for it forces counsel to speak with the voices of their witnesses and see the facts through the eyes of their witnesses. Its employment truly forces counsel to tell a story by reiterating the statements that the witnesses will make. It distracts counsel from the legal inferences that counsel inevitably want to argue in opening and which should be saved for closing argument. Finally, it is simply a better crutch than the oft-condemned "I think."[9]

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4. L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 38 EMORY L.J. 107, 115 (1999) (stating that psychological and communications research suggests that many jurors make up their minds about the case after the opening statement) (citations omitted).

5. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 36 (1991) ("The defendant has a tougher problem making an introduction exciting and interesting, because the story is usually not the defendant's to tell.").

6. "The preferred remedy for curing error by members hearing an improper opening statement is a curative instruction, so long as the instruction negates any prejudice to the accused." United States v. Castonguay, No. ACM 28678, 1992 CMR LEXIS 251 (A.F.C.M.R. Feb. 27, 1992) (citing United States v. Nixon, 30 M.J. 501 (A.F.C.M.R. 1989)).

7. *See* Major Martin Sitler, *The Art of Trial Advocacy: The Art of Storytelling*, ARMY LAW., Oct. 1999, at 30.

8. Language is critical to the opening statement. *See* DUBIN, *supra* note 5 ("[Y]ou can say, 'John Smith went from here to there.' . . . Or, you can say that John Smith 'ambled' or 'sashayed' or staggered' or 'stumbled' . . . The idea is to pick the word that conveys the feeling you want to convey.").

Confronting the Opposition

Confronting key pieces of opposing evidence can be an excellent lead-in for counsel because, without explicitly arguing inferences, it suggests immediately that there is something suspect about the other side's presentation. Thus, it allows one side to directly reference, and implicitly refute, contentions made by the other. It most often begins with a quote directly from the other side's opening and then juxtaposes that piece of evidence with evidence that seems to be contradictory. For example, in an indecent assault case, counsel could begin with:

> The government would have you believe that, after being sexually assaulted, traumatically assaulted, by my client, the alleged victim, Private (PVT) Snuffy, got back into the *same* HUMVEE where my client was sleeping. The evidence will clearly show, however, that there were several HUMVEEs containing his squad members only a few feet away. You will also hear that PVT Snuffy then went back to sleep after being–allegedly–assaulted.

While it may not win the case, this passage is rhetorically powerful, because it suggests that the government's evidence will be incredible or absurd. More importantly, by juxtaposing the opposing side's "story" (that the victim was assaulted) with the fact that victim returned to sleep in the same HUMVEE in which, supposedly, he had been assaulted, counsel presents two pieces of evidence that are seemingly irreconcilable. Such a presentation may sow the seed of reasonable doubt.

The Rhetorical Question

The rhetorical question can be a very important tool in an opening statement. Perhaps in recognition of this fact, courts are very leery of it and may impede its use.[10] Nevertheless, it is worth discussing, because it can lend strength to an opening statement and, as importantly, it can be done in a manner that is not objectionable.

The strength of this device lies in the fact that, in essence, without arguing the law or inferences based upon the facts, counsel can question the facts to insinuate that, for example, a witness is lying. Using a rape scenario, for example, counsel could say:

> You were just told the alleged victim was trapped by the accused in his bedroom. You have heard that she screamed several times at the top of her lungs before breaking free of the accused and running out into the hallway. Well, as we go through the facts of this case, ask yourselves: [Pause] What did she say to the other soldiers who rushed out of their rooms and were milling around her door after she screamed and then burst out of the room screaming? [Pause] What did those several soldiers, drawn to the sound of the victim's screams, do with the accused? [Pause] The answer to these questions is [Pause] . . . nothing. There was nothing to say, because there was no one there. You'll hear that no one was drawn out into the hallway by those supposed screams. No independent evidence will be presented that there was any screaming or that there were the sounds of running feet or slamming doors. But you will hear from the defense witnesses, from witnesses who live right across the hall from the victim's room, and how they heard nothing at all that night, until the military police arrived in the early hours of the next morning.

Without arguing the law or legal inferences, the defense has suggested that the alleged victim's version of events is unbelievable.

Emphasize Others

This technique highlights the role of the complainant or someone other than the accused as the active decision maker in the events leading up to the crime. The idea is that the shift diffuses the emphasis on one of the participants in the case. While often effective for the defense, this is not solely a defense approach. Government counsel could employ it also, to preempt the defense theory that the accused was merely carried along by a tide of events he could not control. Again, an example of a possible defense opening statement in a rape case:

---

9. "It is unprofessional for trial counsel to state his or her personal opinion as to the truth or falsity of any testimony or evidence." United States v. Horn, 9 M.J. 429 (C.M.A. 1980) (citation omitted) (improper for trial counsel to state "I think" fifteen times in opening).

10. *See, e.g.*, United States v. Hoyle, No. ACM S289 58, 1998 CCA LEXIS 309 (A.F. Ct. Crim. App. Nov. 6, 1995) (military judge should have sustained appellant's timely objection to the prosecutor's rhetorical question on closing: "Did the defense offer you a negative urinalysis result?"). *See also* United States v. Gallagher, 576 F.2d 1028 (3d Cir. 1978) (stating that it was an error for the prosecutor to ask "What motive did [the government witness] have to lie against [one of the defendants]? There is none, because she was telling the truth."); Ohio v. Williams, 1997 Ohio App. LEXIS 1158 (Ohio Ct. App. Mar. 26, 1997) (stating that it was improper for prosecutor to ask, in opening, "Why is the defendant making [the child] go through this?").

It is not my purpose to suggest that counsel employ a tactic that courts perceive to be inappropriate practice, and I advocate that counsel not ask objectionable, inappropriate rhetorical questions. Rather, the purpose of this portion of the article is to point out the distinction between asking a question like "How do we know the victim is lying? Well, I'll tell you . . ." versus the more appropriate questions mentioned in the passage below.

> You will hear that *the complainant* was the one who told her friends, "I want to get a man tonight." You will hear that *she* then asked my client to dance. *She* chose the slowest song the band played that evening. *She* began touching my client. *She* struck up a conversation with my client when they returned to the table. *She* bought my client three beers during the time they spent together. *She* asked my client if she could ride back to the barracks with him when the bar was closing. *She* invited my client up to her room for a nightcap. *She* poured my client a glass of tequila. And *she* took their relationship to another level when she agreed to the heavy petting by responding to my client's kiss while they were sitting together on the sofa.

Should counsel take the final step and state that "the evidence will show that *she* consented to the sex that occurred that night"? Certainly, but only if there is to be direct evidence on that point (that is, from the accused). There are several reasons for this. If counsel does not believe the accused is going to take the stand and testify as to consent, and there is to be no other direct evidence of consent, stating "consent" based on the above passage is a legal inference that is otherwise argumentative and objectionable. Of course, the trial counsel may object and say "argument," but the military judge will not *know* if there is to be direct evidence of consent. The military judge may, out of necessity, overrule the objection, but if it turns out there is no such evidence produced, there could be stern admonitions from the judge. So long as counsel can state in good faith[11] that some evidence of consent will be presented (that is, to show that the statement in opening is more than an "inference" based on the complainant's conduct), an objection to this statement should be overruled.

Clearly, the emphasis on the complainant's active role alerts the jury that the complainant was an active and consenting participant in virtually all of the chronology leading up to the allegation of rape, possibly implanting in the jury's mind, if only tacitly, the notion that the accused could have reasonably believed that the two would have consensual sex that evening. And all without uttering a word of argument. Obviously, the facts here tend to favor the defense, but the role of any good opening statement is to marshal the facts that most support the proponent's theory and to present them in a clear, logical, unadorned–but inherently persuasive–fashion.

The Sleazy Underworld

It should be self-evident that trial counsels' opening statements may benefit greatly from introducing the accused to the members in a context that suggests immediate condemnation. Trial counsel are allowed some latitude in presenting their initial theories, provided they do not abuse the necessary but apparently forgivable inferences they must make. Coupled with this latitude may be the need to account for damaging evidence. A prosecutor in a drug case, for example, may be stuck with the dilemma of how to handle her own witnesses' credibility problems. If the facts supported such an opening, she might state: "The evidence in this case will show that during the two-year period between January 1987 and January 1989, the accused virtually lived on methamphetamine, virtually lived on crank.[12]" This strong language sets the tone immediately for the panel members, depicting the accused as a shadowy, desperate character, and implicitly suggests that any associates he might have would be similarly afflicted denizens of the accused's underworld.[13]

The Dramatic Pause

Perhaps we remember our college English courses in which we studied poetry and learned of the caesura, or pause. This also is an excellent tool for an opening statement. Used properly, silence can be as powerfully articulate as language. Revisit the Rhetorical Question passage above and picture the silence in the courtroom as, during the dramatic pauses, the panel members lean forward, straining to hear what counsel discloses in response to the questions. And imagine the dramatic impact of "Nothing!"

---

11. *See infra* note 13.

12. United States v. Toro, 34 M.J. 506 (A.F.C.M.R. 1991).

13. *Id.* at 512 ("[T]he evidence of other misconduct of the witnesses and the involvement of [accused's girlfriend] was inescapable and not inadmissible. Therefore, there was no error when trial counsel described the testimony expected in good faith.") (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 913(b), Discussion (1998); Annotation, *Prosecutor's Reference in Opening Statement to Matters Not Provable or Which He Does Not Attempt to Prove as Grounds for Relief*, 16 A.L.R. 4th 810, § 15, at 875 (1982); 23A C.J.S. *Criminal Law* § 1240 (1989)). *See* Wilhelm v. State, 326 A.2d 707, 714 (Md. 1973) (stating that defense objected to prosecution's reference in opening to purportedly inadmissible hearsay statement; judge instructed jury that opening statements are not evidence):

> While the prosecutor should be allowed reasonable latitude in his opening statement he should be confined to statements based on facts that can be proved and his opening statement should not include reference to facts which are plainly inadmissible and which he cannot or will not be permitted to prove, or which he in good faith does not expect to prove. . . . To secure a reversal based on an opening statement the accused is usually required to establish bad faith on the part of the prosecutor in the statement of what the prosecutor expects to prove or establish substantial prejudice resulting therefrom.

Id. (citations omitted).

Pacing the Opening

From the government perspective, pacing, in conjunction with other tools such as the dramatic pause, can be devastatingly effective in establishing the elements of a particular offense without requiring counsel ever having to mention the elements by name. The dramatic pause can be especially effective when counsel are trying to show deliberation or premeditation, whether as an element of an offense or in aggravation. Again, this requires only that counsel be conscious of the way in which the language and rhetorical devices they use can alter the way the facts are received. For example, consider a case in which the accused stole his roommate's automatic teller machine (ATM) card and emptied the roommate's bank account of several hundred dollars. Rather than simply stating that on 23 February 1999 the accused stole $600 from his roommate, and then trying to suggest how the elements are met, trial counsel could "pace" the opening like this:

> The evidence will show that, at approximately 2030 on 23 February, the accused, having seen his roommate depart for a field exercise only ten minutes before, walked the ten steps from his side of the barracks room to SPC Brushfire's desk. He went directly to the desk and opened the middle drawer. He then reached into the drawer and took out SPC Brushfire's wallet. Specialist Brushfire will tell you today that two days before this, he had told the accused that he always left his wallet in his desk when he went to the field. He had also told the accused that he was leaving his ATM card and the personal identification number (PIN) in his wallet so that his girlfriend could borrow it to get money if she needed any.
>
> The accused reached into the wallet and seized the card. He took the card out, and placed the card in his pocket. He also removed a little piece of paper on which SPC Brushfire had written his PIN so his girlfriend could use the card. He remained in his room for only a moment or two after that, perhaps long enough to grab his coat, before he got in his car and drove away. He drove approximately one mile across post to an ATM machine. He drove to the ATM machine and he got out of his car. He walked up to the ATM machine and he inserted SPC Brushfire's card. He took out the small piece of paper on which was written the PIN of SPC Brushfire. The accused punched in four numbers–8-9-6-4. Those were the numbers on the piece of paper SPC Brushfire had left for his girlfriend, his PIN access number he had left for his girlfriend. His girlfriend, he will tell you, not the accused.
>
> The accused punched in those four numbers. The testimony from Mr. Forbes, the bank manager, and the film you will see today will show that someone looking similar to the accused (and not like SPC Brushfire's girlfriend) inserted that card at 2045 on 23 February and told the machine to make a withdrawal from SPC Brushfire's account.
>
> The accused then requested that the machine withdraw $200.00 from SPC Brushfire's account. This was the maximum amount permissible per transaction at that machine at that time. He pocketed the money and told the machine he was done. After he got the card back, he inserted the card again, for a second time, and again punched in the four numbers from the little piece of paper. Again, he told the machine to take $200 out of SPC Brushfire's account. Again, he received $200. He put the money in his wallet. Then he walked away . . . .

Without belaboring the point, the language of this opening has broken one transaction into a multitude of small transactions, each one requiring deliberate thought and action. This painstaking exposition of the facts will suggest to the panel the deliberation, intent and, ultimately, culpability on the part of the accused, without arguing about the elements of the offense. Perhaps equally important, counsel has laid the groundwork for the sentencing argument by setting up some of the offense's aggravating circumstances (such as, the suggestion that the accused had planned the theft and that he waited until his roommate had deployed on an exercise; the deliberate nature of the theft; and the apparent lack of remorse or guilty conscience along the way).

Marry Rhetorical Tools with the Facts

Ultimately, the rhetoric counsel use is just a tool for making more compelling the facts that will present counsel's theory to the members. There are no shortcuts to creating a sound theory that highlights the helpful evidence and accommodates or explains away the detrimental evidence. A good theory must account for all the evidence, and the rhetorical devices help marshal the facts that will support the theory to present it in a persuasive manner.

Counsel should always remember that they have to make the opening statement their own, and that they have to practice, practice, and practice their opening if it is to flow as a compelling narrative for the panel. The techniques suggested here may assist counsel in focusing on their theory and the evidence they wish to highlight in support of that theory.

> [O]pening statement does not need to be limited to a factual recitation of what is expected

to be elicited from the prospective witness. Counsel are entitled to make what rhetoricians call an exordium–that part of the opening statement intended to make listeners heed you and to prepare them for what is to follow. We do not mean to suggest that the performing artists be given a "broad range" in their efforts at advocacy. Each case must depend on its own peculiar facts and both counsel–for the prosecution as well as for the defense–are enjoined in their eloquence to circumspection, lest in their enthusiasm for their cause they create a condition that is likely or apt to instigate prejudice against the accused–or the prosecution.[14]

I make no guarantee about either the effectiveness of these "exordia" before a particular panel, nor do I warrant that each one will survive the military judge's scrutiny (with some military judges the techniques will be acceptable, with others not).[15] As a final disclaimer, this note is not advocating that counsel present information in opening unless they have a good faith basis to believe such evidence may be admitted.[16]

The role of rhetorical devices is not to trick or hoodwink the panel. Ultimately, it is to steer counsel away from argument, to focus them on developing the facts of their case in a clear, compelling manner and, to help all of us improve our advocacy skills. Major Saunders.

14. *Wilhelm*, 326 A.2d at 727 (citations omitted).

15. *See* Perrin, *supra* note 4, at 117 ("[M]ultiple test (or, more accurately, rules of thumb) are used to identify argument, none of which are adequate to provide lawyers with the guidance they need. As a result, application of the rule against argument varies widely from jurisdiction to jurisdiction, from courtroom to courtroom and judge to judge.") (citations and footnotes omitted).

16. *Id. See supra* note 13 (citing cases which reviewed the propriety of counsel's opening statements); *see also* United States v. Matthews, 13 M.J. 501, 515 (A.C.M.R. 1982) *rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983) (stating that in an opening statement, trial counsel must avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered; opening statement should be limited to matters which prosecutor believes in good faith will be available and admissible).

CLAMO Note

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> The Judge Advocate General

Introduction

Over fifty attorneys and legal personnel . . . gathered at one place, turned loose in a newly constructed town, invited as guests to the town's new hotel at no charge, issued weapons and live ammunition, put in the middle of roadblocks, riots, and demonstrations, and, given the authority to take prisoners. What's wrong with this picture? Absolutely nothing if you are members of the Army's Judge Advocate General's Corps, spending a weekend training on the law of war, rules of engagement, treatment of prisoners of war, and basic soldier skills. This was the scene last summer at Fort Knox's new Mounted Urban Combat Training (MOUT) site at Wilcox Range. As summer and warmer weather approach and thoughts of training dance in the mind, it is an appropriate time to remember this first of its kind "JAGX," and to consider how this concept might be used to provide valuable training to judge advocates.

The Fort Knox Office of the Staff Judge Advocate hosted the first ever JAGX last August 27-30, 1999. Participants included active, reserve, and National Guard judge advocates and legal specialists from the following units: Kentucky National Guard; Indiana National Guard; Illinois National Guard; Michigan National Guard; 100th Division (Training); U.S. Army Armor Center and Fort Knox; First U.S. Army; 88th Reserve Support Command; 91st Legal Support Organization (LSO); USARC; USAREC; 300th MPPW Command; 5064th USAG; 21st TAACOM (CA); 123d ARCOM; 214th LSO; 38th Infantry Division; 76th Special Infantry Brigade; 33d ASG; and the Center for Law and Military Operations (CLAMO). The end product was a very worthwhile three days of training, and a valuable template of how to better train soldier-lawyers.

The Concept

The concept was twofold: let judge advocates see operational law issues from the soldier's perspective; and train both sides of the "soldier-lawyer" equation. Reserve Component (RC) and Active Component (AC) judge advocates provided operational law training, and AC personnel provided support in terms of personnel and logistical resources. Through JAGX, AC and RC judge advocate personnel were able to train together and to learn from each other about functioning as judge advocates in an operational environment. The goals of the JAGX were to enhance the ability of RC personnel to train operational law issues within the command and control arena, as well as to allow them to practice their skills in the core legal disciplines. Additionally, it was intended that the JAGX demonstrate the power of Situational Training Exercise (STX) lanes as a training tool, and enable judge advocates to use this device as a means to train their supported units.

The training took place over three days. Day One included in-processing, a sample Soldier Readiness Processing Point (SRP), and 9mm-pistol marksmanship training and qualification. Day Two consisted of STX lane training in the areas of rules of engagement (ROE), handling of enemy prisoners of war and law of war issues, and a tour of the new Fort Knox MOUT facility. Day Three was Common Task Training and classroom instruction on operational law. In the end, the event was a resounding success and served as a good model for future judge advocate training.

Day One: Welcome to Fort Knox. Put some rounds down range

The first day started as any deployment would, with a model SRP. Here, pre-deployment legal issues such as wills and powers of attorney were discussed, and SRP stations were demonstrated. Actual wills and powers of attorney were generated for those who required them.

All tactical gear was placed in a holding room, and no time was lost in moving into 9mm-pistol marksmanship training. The opportunity to check the annual weapons qualification block was welcomed by active and reserve component soldiers alike. Training included basic marksmanship, unlimited "rounds" at the Beam Hit Trainer–the Army's official version of a laser-firing pistol video "game," and firing on the "pop-up' target qualification range.

After declarations of "no brass, no ammo," the crew of camo-clad soldier-lawyers moved out, en masse, to a small town in the notional country of Cortina. Accommodations were provided in the town's hotel and the embassy building. Although the MOUT city was still under construction, it was easy to envision rooms complete with beds and linens, offices with desks, bookshelves, and operating computers, and more–all of which will be included when the training facility is completed.

Day Two: Watch . . . your lane!

OPORD Brief

The most challenging but rewarding day involved STX lanes, complete with live role players, pyrotechnics, weapons, and lane "graders." A different unit planned and ran each set of lanes. The 91st LSO opened with a briefing on the notional operational setting and ROE. They presented a scenario derived from the Joint Readiness Training Center, and successfully tied general ROE instruction into a mini-operations order (OPORD) brief to prepare participants for the lanes they were about to encounter. As the scenario played out, the U.S. forces entered the notional nation of Cortina to protect its citizens from Cortina's dictatorship, a move condemned by the majority of the Cortinian people. Simulated protests and violent opposition lurked around every corner, as participants dealt with civilians on the battlefield, armed attack by rebels, detainees, and numerous other problem situations.

React to Contact

As the briefing ended and questions were answered, all lawyers and legal specialists were organized into four platoons, and "volunteers" were chosen to be platoon leaders and sergeants. Their mission: to lead their platoons, mounted patrols, safely through the town. With only minutes to organize into a coherent unit, the troops mounted the trucks and were on their way. The first platoon rounded the first corner and encountered a potentially hostile roadblock. Members of the Fort Knox 1st Squadron, 16th Cavalry Regiment played soldiers of the "host" nation. "Platoon" responses to the same scenario varied widely. Some had no deaths and took all hostile soldiers captive, while others suffered multiple casualties on both sides.

Moments after resolving the first situation, the platoons encountered a makeshift roadblock set up by demonstrating civilians. The longer a platoon remained stagnant and failed to take control of the situation, the closer the water-balloon wielding demonstrators came to the vehicle. In the end, if not stopped, a woman carrying a blanket, wrapped as though it contained a baby, would approach the rear of the vehicle and throw a bomb. The value of these and the other lane events was the fact that judge advocates–attorneys with years of education and even more years of experience–were able to discern firsthand how difficult a task it is to apply a given set of ROE to a fluid and uncertain situation. The Michigan National Guard, with the assistance of Fort Knox and other personnel, drew upon real life events from past operations in order to craft these STX lanes. All participants gained a new appreciation of the difficult mission faced by commanders and their judge advocates in training and preparing soldiers to make split second life or death decisions.

Handle Detainees and Prisoners

After the four "platoons" encountered four challenging STX lane events and eventually made it to the other side of town, the time had come to deal with all the detainees. Little did the members of the 100th Division of Louisville, Kentucky, know that the training scenarios they had devised would later be reflected in the reality of ground operations in Kosovo. Role players included civilians, military personnel, paramilitary personnel, liars, truth tellers, physically injured, mentally ill, and more. The scenarios succeeded in exercising the participants' soldier skills in the "Five S's" of enemy prisoner of war handling: search, silence, segregate, safeguard, and speed to the rear. Also required was a working knowledge of the law of war and an understanding of how to determine the status of combatants, noncombatants, medical personnel, and others.

Evaluate Law of War Issues

Next on the agenda was a series of scenarios giving rise to Law of War (LOW) issues. Certain lanes simply had role players acting out a scenario, while participants observed and evaluated the issues that arose. Other lanes drew the participants into the actual fray. The idea was to "train the trainer"–to demonstrate to judge advocates how to go home and train soldiers in the basics of the LOW.

We Own the Night

Evening offered no rest for the weary. Throughout the night, opposition forces conducted reconnaissance missions, raids, and ambushes. This provided an opportunity for judge advocates to stand guard mount, to patrol, and to attempt to show their tactical prowess. Basic concepts forgotten in the garrison environment were refreshed, such as challenge and password procedures, sleep plans, cover and concealment, and squad-level tactics.

Day 3: Know Soldier Skills or "Die"

After a night full of explosions and small arms fire, it was time to return to basics. Many participants noted that it had been an extended period of time, years for some, since they had trained on soldier common tasks. The professional Fort Knox soldiers conducting the instruction all had tales of how a particular common task had been crucial to successfully dealing with situations that they, or someone they knew, had encountered on a recent deployment.

Conclusion: Train, Train, and Train Some More

The Fort Knox sponsored JAGX was an extraordinary success. It forced judge advocates to view ROE and legal training through the eyes of the ordinary soldier. It trained judge advocate soldier-lawyers to be soldiers and lawyers. It allowed judge advocates to train in an environment of peers, uninhibited by concerns of inexperience or ignorance. Most importantly, it is an idea and model that can be replicated by judge advocates in the field. The complete program of instruction, supporting

documents, and some video clips are available from the Office of the Staff Judge Advocate, Fort Knox and the Armor Training Center, or from the Center for Law and Military Operations (CLAMO), via electronic mail at CLAMO@hqda.army.mil.

Major Randolph; Captain Joe Topinka, OSJA, Fort Knox; and Major Daniel P. Marsh, Michigan Army National Guard.

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. The latest issues, volume 7, numbers 1, 2, and 3, are reproduced in part below.

Land Use Controls and Federal Common Law in Real Property Transfers

Introduction

A question has arisen regarding whether federal case law could be read to find a federal property right sufficiently strong to supersede traditional state common law rules in the area of land use controls (LUCs). Specifically, in states that have not enacted statutes in the area of land use controls, there is some support for the notion that federal property interests could be used to enforce LUCs, even though under traditional state law the LUC (likely a deed restriction on future use of the land) would not be enforceable. The lack of enforceability would be predicated upon the fact that the covenant did not run with the land[1] in a transfer to a subsequent transferee, and upon the basis that an equitable servitude[2] was not recognized in that particular state.

Case Law

There are three federal cases in this area that could lend support to the position that federal property law interests trump state property law based in common law in the area of land use.

United States v. Little Lake Misere Land Company[3]

In this case, the U.S. Supreme Court considered the question of whether a Louisiana statute which had the effect of making a reservation of mineral rights "imprescriptible" with respect to lands acquired by the United States subject to reservations was properly applied. Pursuant to the Migratory Bird Conservation Act,[4] the United States acquired two parcels of land in Louisiana, one by deed in 1937 and one by condemnation in 1939.[5] Both the deed and condemnation judgment reserved oil, gas, sulfur, and other mineral rights to the Little Lake Misere Land Company for a period of ten years.[6] At the end of ten years (assuming other conditions had not been met), the reserved rights would terminate, and complete fee title would become vested in the United States.[7] The parties stipulated that the fee title ripened ten years from the date of creation of the rights.[8] Little Lake relied upon Louisiana Act 315 of 1940 (Louisiana Act)[9] in continuing to claim its mineral rights. Little Lake claimed that the Louisiana Act rendered inoperative the conditions set forth in the deed and judgment for the extinguishment of the reservations.[10] In reversing the federal district court and

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1. A "covenant running with the land" is a covenant that is annexed to the estate, and which cannot be separated from the land and transferred without it. Essentials of a covenant running with the land are that the grantor and grantee must have intended that the covenant run with the land, that the covenant must effect or concern the land with which it runs, and that there must be privity of estate between the party claiming the benefit and the party who rests under the burden. BLACK'S LAW DICTIONARY 329 (5th ed.) (citing Greenspan v. Rehberg, 224 N.W. 2d 67, 73 (Mich. Ct. App. 1974)).

2. An equitable servitude is "[a] restriction on the use of land enforceable in court of equity. It is broader than a covenant running with the land because it is an interest in land." BLACK'S LAW DICTIONARY 484 (5th ed.).

3. 412 U.S. 580 (1973).

4. Migratory Bird Conservation Act, 16 U.S.C.S. § 715 (LEXIS 2000).

5. *Little Lake Misere*, 412 U.S. at 582.

6. *Id*.

7. *Id*. at 583.

8. *Id.* at 584.

9. Louisiana Act 315 of 1940, LA. REV. STAT. ANN. § 9:5806 A (West Supp. 1973). The Act provides:

> When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.

Id.

the Fifth Circuit, the U.S. Supreme Court held that the federal land interests were not necessarily defined by state law, and that the Louisiana Act does not apply to the mineral reservations agreed to by the parties.[11] The Court ruled that since the land acquisition agreement was explicitly authorized, though not precisely governed by, the Migratory Bird Conservation Act, and because the United States was a party to the agreement, it would be construed by federal law.[12] The Court ruled that the Louisiana law would not be borrowed in this case because it was plainly hostile to the interests of the United States.[13] Finally, the Court held that the terms of the agreements were unequivocal regarding the termination of the reservations.[14] In a telling passage, the court stated:

> To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.[15]

Equally noteworthy in this case is the fact that the Court rejected the government's argument that "virtually without qualification . . . land acquisition agreements of the United States should be governed by federally created federal law."[16]

United States v. Albrecht[17]

In this case, the principle set out in *Little Lake Misere* was extended. In *Albrecht*, the Eighth Circuit affirmed a district court's decision ordering a farmer to restore drainage ditches on his land and permanently enjoining further drainage of potholes on the land.[18] The issue arose from a waterfowl easement to the United States Fish and Wildlife Service (USFWS), which included a prohibition against draining prairie potholes on the land.[19] The USFWS discovered through aerial surveillance that ditching was present on the land in violation of the terms of the easement.[20] The defendant argued that North Dakota law did not recognize waterfowl easements, and that the easement was therefore invalid.[21] Relying on *Little Lake Misere*, the court stated:

> [U]nder the context of this case, while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling, particularly if viewed as aberrant or hostile to federal property rights. Assuming *arguendo* that North Dakota law would not permit the conveyance of the right to the United States in this case, the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. *Little Lake*, supra at 595, 596. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production

10. *Little Lake Misere*, 412 U.S. at 584.

11. *Id*. at 590-604.

12. *Id*. at 590-93.

13. *Id*. at 594-97.

14. *Id*. at 604.

15. *Id*. at 597.

16. *Id*. at 595.

17. 496 F.2d 906 (8th Cir. 1974).

18. *Id*. at 912.

19. *Id*. at 908.

20. *Id*. at 909.

21. *Id*.

areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the "interests therein."[22]

North Dakota v. United States[23]

This case also dealt with federal acquisition of waterfowl easements. Section 3 of the Wetlands Loan Act of 1961[24] provided for state governor approval of waterfowl habitats. Between 1961 and 1977, the governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in North Dakota.[25] In the mid-1970s, cooperation between the state and federal government began to break down.[26] In 1977, North Dakota enacted statutes restricting the ability of the United States to acquire easements over wetlands, permitting landowners to drain wetlands created after the negotiation of the waterfowl easements, and limiting the maximum terms of easements to ninety-nine years.[27] The Court ruled that gubernatorial consent could not be revoked at will, as nothing in the federal legislation authorized the withdrawal of approval previously given.[28] Citing to *Little Lake Misere*, the Court further ruled that the state law provisions authorizing the drainage of after-created wetlands and limiting the terms of easements to ninety-nine years were hostile to federal interests and may not be applied.[29] The Court stated, "The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U.S.C § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement."[30]

Application to U.S. Army Land Use Controls

The cases set out above arguably establish a federal position of strength in those states where land use controls are difficult to enforce under traditional common law property doctrines. The position that federal interests would be viewed as superior to aberrant or hostile state laws could certainly be argued in an attempt to enforce land use controls against subsequent transferors. It appears, however, that there are factors that distinguish the rule of the above cases from the scenario with which the Army may find itself faced in the enforcement of land use controls.

The paramount limiting factor of the above cases is that the federal courts were deciding state-federal disputes in which federal action was backed by specific federal law (Migratory Bird laws) authorizing the United States to acquire wetlands and the "rights therein." State legislation was then passed to specifically undermine the federal interests as enunciated in the statutes. Under these circumstances, the federal courts were willing to elevate the federal interest over the state interest.

In the context of land use controls, we are dealing with a situation in which there really is no federal law authorizing or encouraging the creation of federal rights. The Army could argue that the purposes of human health and environmental protection under environmental statutes provide a federal interest akin to the federal interests in land acquisition in the above cases. The states could counter, however, that outside of the environmental statutes, public health and safety and traditional police powers are local in nature. In addition, real property law is a traditional area of state law preeminence. Rather than the existence of state laws hostile to federal interests, we are most concerned with the absence of state law in the area of LUCs that

22. *Id*. at 911.

23. 460 U.S. 300 (1983).

24. Pub. L. No. 87-883, 75 Stat. 813 (1961).

25. *North Dakota*, 460 U.S. at 305.

26. *Id*. at 306.

27. *Id*. at 306-08.

28. *Id*. at 312-16.

29. *Id*. at 316-20.

30. *Id*. at 319.

potentially impedes the future enforcement of LUCs. This situation is distinguishable from the case law described above.

Based upon the foregoing, it is recommended that the *Little Lake Misere* line of cases be used as a fallback position should traditional state law enforcement mechanisms fail in future attempts to enforce LUCs. Working within existing state property laws is a more reasonable approach in light of an analysis of the case law and its application to situations we are likely to face in the transfer of Army properties. Major Tozzi.

Friends of the Earth Has Friends at the Court

On 12 January 2000, the Supreme Court decided the latest in a series of significant environmental standing cases.[31] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court addressed constitutional article III standing requirements, deciding that citizen-suit plaintiffs have standing to bring an action for civil penalties payable to the United States Treasury. The seven-to-two majority, however, remanded the case, directing the lower courts to decide whether the case was now moot, the basis upon which the Fourth Circuit had dismissed the action.[32] The decision in this closely watched case arguably lowers the standard of proof for environmental plaintiffs in pursuing citizen suits to enforce environmental laws.

The state of South Carolina issued a National Pollution Discharge Elimination System (NPDES) permit to Laidlaw shortly after Laidlaw bought a hazardous waste incineration facility in that state in 1986. The permit allowed Laidlaw to discharge wastewater into the North Tyger River, subject to effluent limitations on specified pollutants. Laidlaw exceeded permit limits almost 500 times between 1987 and 1995.

Friends of the Earth[33] properly gave sixty-days' notice to Laidlaw, the EPA, and the state of its intent to file a citizen suit to enforce the effluent limitations in Laidlaw's permit.[34] In response, Laidlaw invited South Carolina to sue it, drafted a complaint for the state, and reached a settlement with regulators on the fifty-ninth day of the sixty-day notice period. The settlement required Laidlaw to pay a $100,000 penalty, and to promise to make "every effort" to comply with the permit.

Before the district court, Laidlaw challenged the plaintiffs' standing to sue, and argued that the state's "diligent prosecution" precluded further citizen enforcement.[35] The district court denied both motions, finding that plaintiffs proved standing "by the slimmest of margins" and that the state's enforcement was not "diligent prosecution."

Five years later, the district court rendered final judgment, making several critical findings. First, the district court found that Laidlaw had violated its NPDES permit thirty-six times between the start of the lawsuit and the final judgment. Second, Laidlaw had enjoyed $1,092,581 in economic benefits through its pattern of non-compliance before the suit was brought. Third, Laidlaw's permit violations did not harm the environment or human health. Fourth, notwithstanding the thirty-six violations, Laidlaw had been in substantial compliance with its permit since 1992. As a consequence of this last finding, the court denied plaintiffs' prayer for injunctive relief. Instead, it imposed $405,800 in civil fines to be paid to the United States Treasury, an appropriate amount, the trial court felt, given its "total deterrent effect."

Friends of the Earth appealed to the Fourth Circuit, contending that the civil fine was inadequate. It did not appeal the denial of injunctive relief. *Laidlaw*, in turn, cross appealed and pressed its position that the plaintiffs lacked standing and that the action was barred by South Carolina's diligent prosecution.

In an unusual twist, the Fourth Circuit assumed that plaintiffs had standing, but dismissed the case for mootness. The Fourth Circuit reasoned that a plaintiff must maintain the three elements of standing throughout the litigation, or else the case becomes moot. The court observed that civil penalties were "the only remedy currently available" because the district court declined to grant injunctive relief. It concluded that civil penalties paid to the United States would not redress plaintiffs' claimed injury, and that plaintiffs' case was moot. Once again, *Friends of the Earth* sought review, and the Supreme Court granted certiorari.

Justice Ginsburg wrote the majority opinion for the Supreme Court. After reviewing the procedural history of the case, her opinion undertook the standing analysis the Fourth Circuit had assumed away. Because standing must be found in every federal case, Justice Ginsburg analyzed standing on the record available to the district court.

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31. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 696 (2000). In 1998, the Court decided *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (finding no standing for citizens seeking civil penalties for wholly past violations of the Emergency Planning and Community Right to Know Act); and in 1997, the Court in *Bennett v. Spear* (520 U.S. 154 (1997)) found that ranchers had standing, under the prudential "zone of interests" test to challenge Fish and Wildlife Service's biological opinion proposing restricted use of reservoir water in order to protect endangered sucker fish.

32. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303 (4th Cir. 1998).

33. Citizens Local Environmental Action Network (CLEAN) and the Sierra Club also joined as plaintiffs.

34. 33 U.S.C.S. § 1365(b)(1)(A) (LEXIS 2000).

35. *Id*. § 1365(b)(1)(B).

In federal courts, the concept of standing has a well-settled constitutional basis, firmly rooted in the so-called "case or controversy" requirements of article III, section 2 of the U.S. Constitution.[36] To prove standing to sue, a plaintiff must show three elements: injury in fact; causation; and redressability. Injury in fact is harm that is real and concrete, not merely speculative or conjectural. Causation requires a reasonable nexus between the action or inaction of the defendant and the claimed injury. To show redressability, a plaintiff must show that some relief the court might award would rectify plaintiff's harm.[37]

Federal courts have recognized that harm to recreational and aesthetic interests can suffice to show standing since at least the case of *Sierra Club v. Morton*.[38] In this case, the Court agreed that the record, largely in the form of affidavits, showed generally that plaintiffs were "concerned" with the pollution from Laidlaw's facility and avoided using the river into which it discharged its waste water. There was also evidence that one plaintiff "believed" that pollution discharge accounted for the low value of her home relative to similar homes more distant from Laidlaw's facility. Laidlaw countered that the district court specifically found that none of Laidlaw's discharges had harmed the environment and therefore could not have caused the injury plaintiffs claimed. The Court, however, distinguished between a showing of harm to the environment and harm to the plaintiffs' interests. Here, although the defendant's discharges did no harm to the environment, the plaintiffs' "reasonable concerns" about those discharges directly affected their enjoyment of the surrounding area, and led them to avoid use of the North Tyger River.

Justice Ginsburg next discussed the redressability requirement in the context of civil penalties.[39] Laidlaw argued that civil penalties paid to the United States Treasury could not redress the plaintiffs' claimed loss of aesthetic and recreational enjoyment or any possible economic harm. The majority disagreed, reasoning that the deterrent effect of a civil penalty would redress plaintiffs' injury by making the defendant more likely to meet its permit limitations in the future, resulting in a cleaner river and environment.

Having found standing, the majority turned its attention to the issue the Fourth Circuit found dispositive: whether Laidlaw's voluntary conduct–compliance with its permit after the suit was filed or closing the waste incineration plant altogether–rendered the case moot. Here, Justice Ginsburg sympathized with the Fourth Circuit's erroneous application of the Court's past treatment of the mootness doctrine. In the past, the Court had seemingly equated mootness with "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[40] The majority here, however, held that the correct standard for determining when a defendant's voluntary conduct renders a case moot is not merely whether the elements of standing are met throughout the litigation. Rather, the test in such a case is whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur"–a test Justice Ginsburg describes as a "formidable burden."[41]

Having properly framed the mootness inquiry, the Court remanded the case. On remand, the parties are free to dispute whether it is absolutely clear that Laidlaw's permit violations are not likely to recur, either because of its voluntary compliance, or because the facility is no longer operating. If so, then the case has been mooted, and presumably subject to dismissal.

Justice Scalia saw in all of this the impending collapse of democratic government. In Scalia's view, article III is an appropriate starting point for standing analysis, but its three-part test should not have ended the inquiry. The dissent disapproved of citizen suits in general, and suggested that they run afoul of article II, section 3 of the Constitution. That provision directs the President to "take Care that the laws be faithfully executed." Because this issue was not considered in the lower courts and was not briefed or argued, however, Justice Scalia did not focus on it in his dissent.[42]

Instead, Justice Scalia analyzed the record using the same three part article III test that Justice Ginsburg applied. He arrived at several very different conclusions. First, he dis-

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36. In fact, that section does not address "cases or controversies" in so many words. The relevant text states that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

37. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

38. 405 U.S. 727, 735 (1972).

39. All parties agreed that a plaintiff must demonstrate standing with respect to each type of relief it seeks.

40. Arizonans for Official English v. Arizona, 520 U.S. 43, 68 (1997).

41. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 696, 709 (2000).

agreed that the plaintiffs' affidavits showed cognizable injury in fact. The "concern" they showed for the environment falls short of real injury and was based on the type of contradictory, unsubstantiated, conclusory allegations the Court had rejected in a previous standing case.[43] Justice Scalia concluded that a "concern for the environment" standard is a sham that will confer standing any time there is a permit violation.

Justice Scalia was no more convinced by the Court's redressability analysis, which he called "equally cavalier" to its consideration of the injury in fact question. To begin with, the Court had recently held that civil penalties could not redress citizen injury for past violations of environmental laws.[44] Furthermore, in Scalia's view, the deterrent effect of civil penalties in general is speculative, because past Supreme Court cases found no "logical nexus" between the threat of enforcement action and future compliance with various laws. He went on to analyze the lack of evidence that the specific penalty in this case would serve as a deterrent sufficient to redress plaintiffs' injuries, and concluded that the redressability test was not met.

This case leaves several unanswered questions, and could have serious consequences. First, what effect would a finding of mootness on remand have on the civil penalty imposed by the district court? Justice Stevens's concurring opinion expresses his view that the penalty should stand, whether or not the case became moot at some point. The majority opinion is silent on this issue. Second, the Court still has not squarely addressed Justice Scalia's argument that citizen suit provisions may run afoul of the "take care" clause of article II. Justice Kennedy's concurrence indicates that he is sympathetic with those concerns. Finally, the dissent raises legitimate concerns for the effect the Court's opinion will have on the law of standing. At the core, standing requirements are a limit on judicial power–recognizing that courts are best suited to resolve concrete disputes between interested parties with something real at stake. By finding that payment of civil penalties to the United States somehow offers "redress" for citizens' "concerns" for the environment, the Court effectively empowers those citizens to usurp the government's enforcement prerogative. Because of the Court's willingness in this case to find injury in fact on such a scant record, it is very likely that more citizens will pursue citizen suits more vigorously. Lieutenant Colonel Connelly.

Fourth Circuit Cites *Laidlaw* to Lay Law Down

The U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, recently reversed its earlier decision in a Clean Water citizen suit. Citing the Supreme Court's recent *Laidlaw* case, the court of appeals found in *Friends of the Earth v. Gaston Copper Recycling Corporation*[45] that at least one of the citizens involved had jurisprudential standing to pursue the case.

Gaston Copper operated a smelting facility in South Carolina and was subject to a Clean Water Act National Pollution Discharge Elimination System (NPDES) permit.[46] The company's discharges frequently exceeded the limits in the permits.

Two environmental groups sued Gaston Copper under the citizens' suit provision of the Clean Water Act, which states that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter."[47] This includes violations of NPDES permits. The act defines "citizen" as "a person or persons having an interest which is or may be adversely affected."[48] Congress intended that this provision confer standing to the full extent allowed by the Constitution.[49]

One plaintiff group member was Mr. Shealy. He lived next to a pond four miles downstream from the Gaston plant. He stated that the pollution or threat of pollution from Gaston had made his family curtail its fishing and swimming activities because of fear of the adverse effects the pollutants could cause. The district court dismissed the suit after a six-day trial, finding that none of the plaintiffs' members had standing because they had not shown "injury in fact."[50] The district court pointed to the absence of certain types of evidence: "No evidence was

42. Justice Kennedy wrote a separate concurrence expressing the same reservations about citizen suits, choosing to reserve judgment for another day and another case. *Id.* at 713.

43. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

44. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

45. 204 F.3d 149 (4th Cir. 2000).

46. National Pollution Discharge Elimination System, Clean Water Act § 402, 33 U.S.C.S. § 1342 (LEXIS 2000).

47. *Id.* § 1365(a).

48. *Id.* §1365(g).

49. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16, (1981) (citing S. CONF. REP. NO. 92-1236, at 146, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823).

50. Friends of the Earth v. Gaston Copper Recycling Corp., 9 F. Supp. 2d 589 (D. S.C. 1998).

presented concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented."[51] The original panel of the court of appeals upheld this decision.[52]

The *en banc* court began its discussion by setting out the article III constitutional minimum for standing: a plaintiff must allege (1) injury in fact; (2) traceability; and (3) redressability. The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of, and not by the independent action of some third party not before the court. Finally, under the redressability prong, it must be likely, and not merely speculative, that a favorable decision will remedy the injury.[53] The court also noted that the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* had recently held that an effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing.[54]

Examining the status of Mr. Shealy, the court of appeals found that he had produced evidence of actual or threatened injury to a waterway in which he had a legally protected interest. In fact, Shealy alleged precisely those types of threats to swimming and fishing that Congress intended to prevent by enacting the Clean Water Act.[55] The court continued:

> Shealy is thus anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them. He is a real person who owns a real home and lake in close proximity to Gaston Copper. These facts unquestionably differentiate Shealy from the general public. The company's discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his family's well-being–not some ethereal public interest. We in turn are presented with an issue "traditionally thought to be capable of resolution through the judicial process."[56]

Regarding the district court's requirement of actual evidence of damage to the water, the court found that this would eliminate claims of those who were directly threatened but not yet engulfed by the unlawful discharge. Shealy's reasonable fear and concern were sufficient; he did not have to wait for his lake to become barren. The court also noted that the Supreme Court did not require actual damage in *Laidlaw.*[57]

Having found injury in fact,[58] the court also found that the injury was "fairly traceable" to Gaston Copper. Plaintiffs had produced evidence to show that Shealy's lake was within the range of the discharge. The court concluded that the injury was redressable by the court, especially since Gaston Copper's violations continued throughout the period of the litigation.

Interestingly, the court found not only that article III did not require rejection of Shealy's claims, but also that the Constitution's separation of powers structure *prohibited* it. To bar the suit would undermine the citizen suit provision of the Clean Water Act. This, in turn, would undermine Congress, and "separation of powers will not countenance it."[59]

Army lawyers must still examine citizen suit claims carefully to determine whether plaintiffs or members of plaintiff organizations have standing. To the extent standing requirements may have been tightened under the original *Gaston Copper* decision, they have now been loosened again under *Laidlaw.* Lieutenant Colonel Howlett.

Where Does TSCA End and CERCLA Begin? *Be All That You Can* PCB

Question: When can a polychlorinated biphenyls (PBC)[60] cleanup be handled under the risk-based approach of the Comprehensive Environmental Response, Compensation, and Lia-

51. *Id.* at 600.

52. Friends of the Earth v. Gaston Copper Recycling Corp., 179 F.3d 107 (4th Cir. 1999).

53. Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

54. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 705 (2000). The concurring opinions to the court of appeals case under discussion argue that the *Laidlaw* decision itself, rather than preexisting jurisprudence, required reversal.

55. *Gaston Copper Recycling Corp.*, 204 F.3d. at 156. *See* 33 U.S.C.S. § 1251(a)(2) (LEXIS 2000).

56. *Gaston Copper Recycling Corp.*, 204 F.3d. at 156-57.

57. *Laidlaw,* 120 S.Ct. at 705.

58. The Court of Appeals remanded the case to the district court to determine "injury in fact" in the light of *Laidlaw.*

59. *Gaston Copper Recycling Corp.*, 204 F.3d. at 161.

bility Act[61] (CERCLA), instead of the Toxic Substances Control Act's[62] (TSCA) numerical cleanup standards?

Why Think About This: The CERCLA promotes the notion that cleanup standards should be based on risk and site-by-site assessments. The TSCA invokes the idea of numerical standards–clean to a certain level, unless there is a reason not to. So, suppose you are in the midst of a CERCLA cleanup and among the types of contamination to be addressed are PCBs. Which approach do you take–the risk-based CERCLA option, or a blanket application of the TSCA's numerical standards?

The answer will depend on the facts of the cleanup. Should you have the proper type of site–say, one with little likelihood of residual environmental impact–the Environmental Protection Agency (EPA) may permit a CERCLA-esque risk-based approach. Because your decision will be fact driven, the following background information will assist you in determining the appropriate course of action.

TSCA and PCBs

The scope of the TSCA and its definitions is extraordinarily broad.[63] The bulk of the TSCA's key requirements apply to persons who manufacture and process chemical substances that are distributed into commerce. The TSCA section 2605 authorizes EPA to prohibit or limit the manufacture, processing, distribution, use, or disposal of chemical substances found to present an unreasonable risk of injury to health or the environment. The EPA has sought to expand its authority to regulate specific substances, such as PCBs. In particular, the TSCA section 2605(e)(1) requires that the EPA Administrator promulgate rules for the disposal of PCBs, which led to the development of the PCB Mega Rule.[64] Note that although the TSCA does not generally apply to federal agencies, the Department of Defense (DOD) has been made subject to the TSCA by executive order and DOD policy.[65]

The PCB Mega Rule on the TSCA and CERCLA

The PCB Mega Rule outlines PCB cleanup requirements, but does not say how the TSCA will interface with CERCLA (hazardous substance cleanups) or the Resource Conservation and Recovery Act (RCRA)[66] (hazardous waste corrective actions).[67] What it does say is this: (1) the TSCA does not affect the applicability of other laws, such as RCRA and CERCLA; and (2) when more than one requirement may apply, the more stringent approach must be taken.[68]

The Mega Rule goes on to say that RCRA corrective actions and CERCLA remediation may result in "different outcomes" from the traditional the TSCA approach to PCB spills.[69] But the Rule does not provide any further detail on how to resolve conflicts among regulatory approaches–other than to advise taking the stricter approach.

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60. This substance was once commonly used in electrical transformers and capacitors.

61. 42 U.S.C.S. § 9601 (LEXIS 2000).

62. 15 U.S.C.S. § 2601 (LEXIS 2000).

63. *Id.* The EPA's authority under the TSCA is focused on the ability to require the following:

(a) Inventory of Chemical Substances.
(b) Reporting and Recordkeeping Requirements.
(c) Import and Export Requirements.
(d) New Chemical Review and Premanufacture Notices.
(e) Testing of Existing Chemicals.
(f) EPA authority to refer responsibilities to other agencies.
(g) Direct Regulation of Existing Chemical Substances.

64. *See generally* 40 C.F.R. pt. 761 (2000).

65. Exec. Order No. 12,088, Federal Compliance with Pollution Control Standards (1978); U.S. DEP'T OF DEFENSE, INST. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996).

66. 42 U.S.C.S. § 6901.

67. *See* 40 C.F.R. pt. 761, subpt. G. Look in vain for more guidance. The TSCA's § 2608, entitled "Relationship to other Federal laws," was intended to prevent overlap and unnecessary duplication of toxic substance regulation. This looks hopeful–at first. But, this section mainly provides the EPA with guidelines on how it can refer duties to other agencies. It provides little help on how to resolve conflicts among regulatory approaches.

Likewise, few cases craft a line between the TSCA and CERCLA. Instead, courts seem to assume that the two laws would work seamlessly together. In fact, the bite of specific the TSCA penalties often finds its origin in CERCLA's notion of strict and joint/several liability, meaning that the TSCA relies on CERCLA's overarching reach to bring in and hold liable parties to deal with past contamination. As such, little conflict is anticipated between CERCLA and the TSCA. *See, e.g.*, Reading Co. v City of Philadelphia, 823 F. Supp. 1218 (D. Pa 1993).

68. 40 C.F.R. § 761.120(e)(1).

This implies that the TSCA's fairly strict numerical approach–one cleans to preset levels–should be favored over a more flexible, site-by-site consideration of risk. But the Mega Rule anticipates that a risk-based (CERCLA-type) approach may be quite appropriate for certain types of PCB cleanup. So what is a responsible party to do?

First, look at the TSCA's Mega Rule. If your remediation lends itself to a risk-based cleanup, you may be able to use a more flexible approach. Be aware, however, that large cleanups involving high levels of PCBs may require strict adherence to the TSCA's numerical standards.

PCB Cleanup Approaches

The TSCA's Mega Rule anticipates different approaches to remediation, including the use of risk-based standards. These options are:

> (1) *Spills that require more stringent cleanup levels*.[70] This may involve a site where there is a high potential that groundwater contamination will linger after cleanup.[71]
> (2) *Site-by-site application of less stringent or alternative cleanup requirements.*[72] This is your risk-based option and is discussed below.
> (3) *Cleanup of spills exempted from the Mega Rule*. This option also allows for a site-by-site decision regarding cleanup standards, but the emphasis is on the necessity for more control or a totally different approach.[73]

Risk-Based Cleanup

If circumstances provide, EPA will allow the use of more flexible standards in a PCB cleanup. The agency would require the responsible party to demonstrate that cleanup to numerical standards is "clearly unwarranted" or that such compliance is not feasible.[74] This means that you need to consider the following:

> (a) the determination can only be on a site-by-site basis;
> (b) the facts must demonstrate that a more extensive cleanup is not warranted because (i) risk-mitigating factors are present; (ii) compliance with the TSCA procedures or numerical standards is impractical given the circumstances at your site; or (iii) these site-specific issues make the cleanup cost-prohibitive; and
> (c) the EPA agrees that a risk-based approach is acceptable. (The EPA may consider the impact of this decision on other sites to ensure consistency of spill cleanup standards.)[75]

As a practical matter, you will consider these options in light of your cleanup facts. The determinative issue will be the amount of PCBs released. If your cleanup does not involve significantly high levels of PCBs and the issue of potential contamination (mainly to groundwater) does not loom large, you may be able to use a flexible remediation approach. To justify your application to the EPA, you will be required to demonstrate that your proposed risk-based approach will be protective, given the facts of your cleanup. You do so by presenting data confirming your assumptions about the level of risk involved, while outlining the exact method of remediation.

PCB Disposal

Remediation often involves the issue of disposal–what do you do with the PCBs you have unearthed? Well, the PCB Mega Rule has also incorporated risk-based principles in its requirements for the disposal of PCB-contaminated soil. The general rule is that a responsible authority may dispose of soil contaminated with a PCB concentration of less than fifty parts per million (ppm) at a municipal nonhazardous waste site. If the soil is contaminated at a concentration equal to or in excess of fifty ppm, the responsible party would likely send the soil to a RCRA landfill or a TSCA-qualified landfill.[76] Disposal options are:

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69. *Id.* § 761.120(e)(2). This paragraph states that "inevitably" there will be times when the TSCA standards will be applied to cleanups undertaken in accordance with other laws, such as CERCLA or RCRA. In such circumstances, alternate outcomes may result because these laws involve "different or alternative" decision-making factors. So, the EPA recognizes the problem, but provides little advice on how to resolve these potential conflicts.

70. *Id*. § 761.120(b).

71. *Id*. § 761.120(b)(1).

72. *Id.* § 761.120(c).

73. *Id*. §§ 761.120(d); 761.120(a)(1). The rationale is that some spills may involve more pervasive contamination, so a blanket approach should not be taken.

74. *Id*. § 761.120(c).

75. *Id*.

(1) *Self-implementing disposal*.[77] This form of disposal is similar to the PCB Spill Cleanup Policy. This approach also incorporates risk-based, site-specific issues into plans for disposal.
(2) *Performance-based disposal*.[78] This would involve the use of existing and approved disposal technologies.
(3) *Risk-based disposal.*[79] As with risk-based remediation, this option allows for the disposal of PCB remediation waste in a manner different than options (1) or (2), as long as the EPA agrees.

Regulatory Roundup

The PCB Mega Rule explicitly provides the option of risk-based cleanup and disposal–largely based on the PCB concentrations at issue. This option would allow a remediation agent to step out of the TSCA's numerically driven approach (clean to a preset level, no matter what) and move towards a CERCLA-esque approach (site-specific risk levels). This flexibility is particularly important when approaching the cleanup of moderately-sized sites where there is little likelihood of residual contamination. Should the regulator agree that a flexible approach makes sense, you could tailor a cleanup solution to meet your needs. Ms. Barfield.

What's the Frequency Kenneth? FCC Case Broadcasts Guidance on Use of the NEPA Functional Compliance Doctrine

The U.S. Court of Appeals for the Second Circuit recently took a fresh look at the "functional compliance" doctrine. In *Cellular Phone Taskforce v. Federal Communications Commission*,[80] the court considered whether rulemaking by the Federal Communications Commission (FCC) met the requirements of the National Environmental Policy Act (NEPA).[81]

The FCC adopted a rule that set guidelines for radio frequency radiation from transmitters, including maximum permitted exposure (MPE). The FCC also categorically excluded from formal NEPA review tower-mounted telecommunications antennae ten meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to radio frequency (RF) radiation in excess of MPE levels.

Petitioners challenged the rules on a variety of grounds, including FCC's failure to perform a NEPA analysis for the radiation rule and the alleged arbitrariness of the categorical exclusion. The court dealt with the challenge to the categorical exclusion first. In light of the low probability of excluded facilities violating MPE levels, the court found it was reasonable to exclude them from detailed NEPA analysis. Moreover, the licensees were still responsible for compliance, and an interested person could petition the FCC for review of a site believed to violate the MPE levels. The court found the FCC's approach was rational, and upheld the adoption of the categorical exclusion.

The court then decided the issue of whether the FCC was required to prepare an environmental impact statement (EIS) in conjunction with its rulemaking. To begin, a rulemaking can be subject to NEPA if it constitutes a major federal action significantly affecting the quality of the human environment. The court noted, however that "where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."[82]

The function of NEPA is to allow the decision-maker to take a hard look at the environmental impacts of a proposed action, to consider alternatives to it, and to allow public participation in the analysis. The court concluded that the FCC rulemaking functionally met the requirements of NEPA "both in form and substance."[83]

First, the rulemaking included public participation. The FCC also "consulted with and obtained the comments of any Federal agency which has jurisdiction by law or special expertise with respect to [the] environmental impact involved," another requirement of NEPA.[84] The FCC also considered

76. *Id.* § 761.61(a)(5)(i)(B)(2)(ii) & (iii).

77. *Id.* § 761.61(a).

78. *Id.* § 761.61(b).

79. *Id.* § 761.61(c).

80. 205 F.3d 82 (2d Cir. 2000).

81. 42 U.S.C.S. § 4321 (LEXIS 2000).

82. *Cellular Phone Taskforce*, 205 F.3d at 94 (quoting Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247, 1257 (D.C. Cir. 1973)).

83. *Id.*

environmental impacts, including cumulative effects. Although the court did not mention this, the rulemaking also considered alternatives in that it looked at a variety of possible MPE levels. Finally, any site-specific impacts would be analyzed through the NEPA process when individual facilities are planned.[85] The court concluded that the FCC rulemaking met the functional compliance test.

Army Regulation 200-2[86] recognizes the functional compliance test. Generally, the regulation allows decision-makers to determine that an action has been adequately addressed by existing documents and found not to be environmentally significant.[87] The agency must memorialize its determination in a record of environmental consideration (REC). The regulation also recognizes that a CERCLA[88] feasibility study eliminates the need for a NEPA analysis "[i]n most cases."[89] A REC is not required, but the cover of the feasibility study should state that it is meant to comply with NEPA.[90]

Outside the world of CERCLA, it is quite risky for Army planners to rely on the functional compliance doctrine. If there is time to do a proper NEPA analysis, it should be done. If an existing study looked hard at environmental impacts, considered alternatives, and involved the public, it could be relied upon to serve the function of NEPA. This course of action, however, could result in a court returning the issue back for a real NEPA analysis. Lieutenant Colonel Howlett.

National Atlas of the United States Available Online

Come forth into the light of things, Let Nature be your teacher.

-William Wordsworth (1798)

A public-private venture of the U.S. Geological Survey and various federal and non-governmental organizations has made the National Atlas of the United States available on the Internet. The address for the Atlas is <http://www.nationalatlas.gov/>. Environmental law specialists may find the atlas useful for a number of purposes. It includes zoom in and out features, as well as the ability to include or exclude point sources of pollution, Superfund cites, hazardous waste storage sites, as well as hydrologic, geographic, political, and census data. Major Robinette.

Litigation Division Note

Just How Hostile is "Hostile"? Eleventh Circuit Searches for the "Baseline of Actionable Conduct" in Hostile Environment Sexual Harassment Claims under Title VII

The U.S. Court of Appeals for the Eleventh Circuit recently attempted to further delineate the "baseline of actionable conduct" in Title VII hostile environment sexual harassment claims. In an effort to determine the "minimum level of severity or pervasiveness necessary for harassing conduct to constitute discrimination in violation of Title VII," the court analyzed several decisions throughout the federal circuits where sexual harassment claims were rejected for failing to meet the minimum baseline of actionable conduct.

This practice note reviews the standard set forth by the Supreme Court for analyzing hostile environment sexual harassment claims,[91] and discusses the Eleventh Circuit's recent application of this standard in *Mendoza v. Borden.*[92] Finally, this note reviews guidance published by the Equal Employment

84. 42 U.S.C.S. § 4332(c).

85. Essentially, this means that the non-NEPA rulemaking is serving a "tiering" function.

86. U.S. Dep't of Army, Reg. 200-2, Environmental Effects of Army Actions (23 Dec. 1988) [hereinafter AR 200-2].

87. *Id.* para. 3-1a. Elsewhere in the regulation (paras. 2-3d(1) and 2-3e(1)), the previous document relied upon must be either a NEPA environmental assessment or an environmental impact statement. Reliance on coverage on non-NEPA documents is not shown in the regulation's NEPA flow chart. To the extent this creates ambiguity, one must hope it will be resolved as AR 200-2 is rewritten.

88. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.S. § 9601.

89. AR 200-2, *supra* note 86, para. 2-2a(8). Whether the documentation for a CERCLA removal action can legitimately serve as a NEPA substitute is beyond the scope of this article.

90. *Id.*

91. Title VII does not specifically describe sexual harassment as prohibited conduct. However, the Supreme Court has long recognized that the "phrase 'terms, conditions, or privileges of employment' evinces a Congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

92. Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999), *cert. denied*, 2000 U.S. LEXIS 2606 (Apr. 17, 2000), *cited in* Pryor v. Seyfarth, 2000 U.S. App. LEXIS 9624 (7th Cir. May 11, 2000); Abel v. Dubberly, 2000 U.S. App. LEXIS 8249 (11th Cir. Apr. 27, 2000); Lacy v. Amtrack, 2000 U.S. App. LEXIS 2933 (4th Cir. Feb. 28, 2000); Taylor v. Alabama, 2000 U.S. Dist. LEXIS 5939 (M.D. Ala. Apr. 19, 2000); Allen v. Amtrack, 2000 U.S. Dist. LEXIS 2751 (E.D. Pa. Mar. 13, 2000). The court noted that "motions for summary judgment or judgment as a matter of law are appropriate to 'police the baseline for hostile environment claims.'" *Id.* at 1244 (quoting Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (5th Cir. 1999)).

Opportunity Commission to assist its investigators in determining whether offensive conduct has risen to the level of a Title VII violation.

"Severe and Pervasive Conduct"

In *Harris v. Forklift Systems, Inc.*,[93] the Supreme Court attempted to delineate the substantive contours of the hostile environment sexual harassment claim under Title VII. The Court held that sexual harassment constitutes actionable sex discrimination under Title VII only when the workplace is "permeated with 'discriminatory intimidation, ridicule, and insult,'" that is "'sufficiently *severe or pervasive* to alter the conditions of the victim's employment and create an abusive working environment.'"[94]

In Harris, the Supreme Court rejected the district court's holding that a plaintiff is required to prove psychological injury to prevail on a hostile environment sexual harassment claim. Instead, the Court adopted a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause psychological injury."[95] The Court then described both objective and subjective components in the analysis of whether a hostile environment existed. Conduct that is not "severe or pervasive enough to create an *objectively* hostile or abusive environment" from the perspective of a reasonable person is "beyond Title VII's purview" and not actionable.[96] In addition, "if a victim does not *subjectively* perceive the environment to be abusive," the conduct has not actually affected the work environment and is not actionable.[97]

Acknowledging that this analysis is not a "mathematically precise test," the Court concluded that determining whether an environment was "hostile" or "abusive" requires consideration of the totality of the circumstances.[98] Some of the factors to consider include:

> (1) the frequency of the discriminatory conduct;
> (2) the severity of the discriminatory conduct;
> (3) whether the conduct was physically threatening or humiliating, or a mere utterance; and
> (4) whether the conduct unreasonably interfered with the employee's work performance.[99]

The effect of the conduct on the "employee's psychological well-being" is also relevant, but proof of a specific injury is not required so long as "the environment would reasonably be perceived, and is perceived, as hostile or abusive."[100]

Reiterating the standard established in *Harris*, the Supreme Court has recently stated, "We have made it clear that conduct *must be extreme* to amount to a change in the terms and conditions of employment."[101] "A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[102] Significantly, the Court noted that these demanding standards for assessing allegations of hostile environment were created to ensure that Title VII does not become a "general civility code."[103]

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93. 510 U.S. 17 (1993).

94. *Id*. at 21 (quoting Meritor Savings Bank, 477 U.S. at 67) (emphasis added).

95. *Id.*

96. *Id*. (emphasis added). The "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23).

97. *Harris*, 510 U.S. at 22 (emphasis added).

98. *Id*. at 23.

99. *Id.*

100. *Id.* (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

101. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (emphasis added).

102. *Id.* (citations omitted).

103. *Id*. at 787-88. "Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Id*. at 788 (quoting B. LINDERMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)). *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (noting that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex").

Mendoza v. Borden: Eleventh Circuit Searches for a Baseline of Actionable Conduct

The lower courts continue to struggle in determining the severity of offensive conditions necessary to constitute actionable hostile environment sex discrimination under Title VII. In *Mendoza v. Borden*, the Eleventh Circuit recently applied the *Harris* analysis to uphold a district court's dismissal of a hostile environment sexual harassment claim. The court also conducted an extensive review of the other federal circuits to examine how they have applied these factors and "to delineate a minimum level of severity or pervasiveness necessary for harassing conduct to constitute discrimination in violation of Title VII."[104]

The plaintiff in *Mendoza* alleged that her supervisor was "constantly watching" her and "following" her around the office, in the lunchroom, and in the hallways; was "constantly . . . looking [her] up and down . . . in an obvious fashion"; twice "looked [her] up and down, and stopped in [her] groin area and made a . . . sniffing motion"; once "walked around her desk and sniffed"; and once "rubbed his right hip up against [her] left hip" while touching her shoulder and smiling.[10506] In addition, once when she confronted the supervisor by entering his office and saying, "I came in here to work, period," he responded, "Yeah, I'm getting fired up too."[106]

Applying the four *Harris* factors, the Eleventh Circuit found that the conduct alleged by plaintiff fell "well short of the level of either severe or pervasive conduct sufficient to alter Mendoza's terms or conditions of employment."[107] The court also compared the facts in *Mendoza* to the facts in cases in other circuits where the alleged conduct was deemed insufficiently severe or pervasive to constitute discrimination.[108] The court concluded that "[m]any decisions throughout the circuits have rejected sexual-harassment claims based on conduct that is as serious or more serious than the conduct at issue in this appeal."[109]

Examining the facts in light of the *Harris* factors, the Eleventh Circuit first found nothing in the record to show that the alleged conduct adversely affected the plaintiff's job performance.[110] Second, the court found that Mendoza did not present evidence that the alleged conduct was "physically threatening or humiliating."[111] The court contrasted the conduct alleged by the plaintiff with more threatening conduct alleged by plaintiffs in other circuits.[112] Third, the court found that the alleged conduct was not "severe," finding her allegations were "much less severe than the incidents of sexual banter and inappropriate touching described, and found insufficient," in cases from other circuits.[113] The final factor, frequency, was also "for the most part lacking, but to the extent Mendoza showed frequent conduct, the frequency of it [did] not compensate for the absence of the other factors."[114] The court concluded that, given "normal office interaction among employees," the "following" and "staring" in the manner described by Mendoza did not give rise to an actionable claim, even if such conduct was, as she alleged, "constant," and thus satisfying the "frequent" factor under *Harris*.[115]

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104. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999).

105. *Id.* at 1242-43.

106. *Id*. at 1243.

107. *Id.* at 1247.

108. *Id*. at 1246-48.

109. *Id.* at 1246. *See, e.g.*, Shephard v. Comptroller of Public Accounts of Texas, 168 F.3d 871, 872-75 (5th Cir. 1999) (holding that several incidents over a two-year period, including comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, touching plaintiff's arm, and attempts to look down the plaintiff's dress, were *insufficient* to support a hostile-environment claim).

110. *Id*. at 1249.

111. *Id*. at 1248 ("Even construing the evidence in the light most favorable to Mendoza, [her supervisor's] statement 'I'm getting fired up' and the sniffing sounds are hardly threatening or humiliating.").

112. The court compared the severe and threatening conduct found in *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (finding sexual harassment was established by evidence that female employees were held down so that other employees could touch their breasts and legs) with the non-threatening conduct found in *Long v. Eastfield College*, 88 F.3d 300, 309 (5th Cir. 1996) (holding sexually-oriented joke is the kind of non-threatening "utterance" that *cannot* alone support hostile environment claim).

113. The court cited the Second Circuit's decision in *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (holding a comment about the plaintiff's "posterior" and touching of her breasts with some papers did not create a hostile environment) and the Fourth Circuit's decision in *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 753-54 (4th Cir. 1996) (holding that multiple instances of inappropriate conduct, including placing a magnifying glass over the plaintiff's crotch, did not establish sexual harassment). The court also noted that the conduct was not alleged to be intimidating or threatening, and it was never described as "stalking," "leering," "intimidating," or "threatening." *Mendoza*, 195 F.3d at 1249.

114. *Mendoza*, 195 F.3d at 1248.

Affirming the district court's decision to dismiss the plaintiff's sexual harassment claim, the court noted, "Were we to conclude that the conduct established by [plaintiff] was sufficiently severe or pervasive to alter her terms or conditions of employment, we would establish a baseline of actionable conduct that is far below that established by other circuits."[116]

Equal Employment Opportunity Commission Guidance

In published guidance based on *Harris v. Forklift Systems, Inc*., the Equal Employment Opportunity Commission (Commission) instructs its investigators, in "evaluating welcomeness and whether conduct was sufficiently severe or pervasive to constitute a violation . . . to 'look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"[117] Citing the *Harris* factors, the Commission instructs investigators to "evaluate charges by considering the factors listed in *Harris* as well as any additional factors that may be relevant in a particular case."[118]

The Commission emphasizes that the *Harris* case applied the "reasonable person" standard for assessing hostile environment claims, and notes that the Commission had previously adopted such a standard: "In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'"[119] Noting that the *Harris* decision did not "elaborate on the definition of reasonable person," the Commission states that the decision is nonetheless "consistent with the Commission's view that a reasonable person is one with the perspective of the victim."[120] The Commission therefore instructs investigators to "continue to consider whether a reasonable person in the [victim's circumstances] would have found the challenged conduct sufficiently severe or pervasive to create an intimidating, hostile, or abusive work environment."[121]

In addition to the objective element, complainants must have subjectively perceived the environment as hostile or abusive. The Commission requires investigators to "consider whether the alleged harassment was 'unwelcome . . . verbal or physical conduct of a sexual nature.'"[122] The Commission has adopted the Eleventh Circuit's definition of "unwelcome conduct": "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."[123]

Applying Mendoza

As explained above, the Commission has adopted the *Harris* standard in its guidance to investigators. Obviously, labor counselors must be aware of the established boundaries of the hostile environment sexual harassment case as set forth in this guidance. But when applying this standard, labor counselors should also consider the "baseline of actionable conduct" that is developing in such cases as *Mendoza* and the numerous other federal circuit cases analyzed in that opinion.

In *Mendoza*, the Eleventh Circuit drew the baseline above certain misconduct that some employees might otherwise view as hostile and abusive.[124] Apparently in an effort to set a stan-

115. *Id*. at 1249.

116. *Id*. at 1238.

117. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON *Harris v. Forklift Systems, Inc*. (1994) (quoting 29 C.F.R. § 1604.11(b) (1994)) [hereinafter EEOC ENFORCEMENT GUIDANCE]. In 1999, following the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742* (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Commission published new guidance to address issues of vicarious liability raised by those decisions, but stated that the Commission's previous "guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment *remains in effect*." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999) (emphasis added).

118. EEOC ENFORCEMENT GUIDANCE, *supra* note 117.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (quoting 29 C.F.R. § 1604.11(a) (1999)).

123. *Id.* (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)). "In making this analysis, the investigator should consider the charging party's behavior." *Id.*

124. As noted in a seething dissent by Circuit Judge Tjoflat, "Out of nowhere, the court has decided that evidence of stalking or leering by a harasser should be given short shrift when used by a plaintiff to support a claim for hostile environment sexual harassment." Mendoza v. Borden, Inc., 195 F.3d 1238, 1269 (11th Cir. 1999) (Tjoflat, J., dissenting). "From on high, the majority has determined that female employees should feel no humiliation or anxiety when their bosses sniff in the direction of their groins, touch their hips, and follow them around the office, staring at them in a sexually suggestive manner; but the court never explains *why* this is the case." *Id*. at 1261 (Tjoflat, J., dissenting).

dard high enough to discourage frivolous lawsuits, the court determined that such conduct was not sufficiently severe or pervasive to be actionable. Thus, even where a plaintiff may subjectively perceive alleged harassment as abusive or hostile, the plaintiff must also prove that a reasonable person in his or her shoes would have found the conduct to be severe or pervasive. As demonstrated in *Mendoza,* the baseline of such actionable conduct is not low. For labor counselors, the Mendoza holding will be a helpful analysis to employ in the defense of hostile environment claims before the Commission. Major Gilligan.

Guard and Reserve Affairs Items

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

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 the Guard and Reserve Affairs, 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.

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

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).
7-9 June	Professional Recruiting Training Seminar.
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).
12-14 June	3d Staff Judge Advocate Team Leadership Seminar (5F-F52-S).
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).
21-23 June	Career Services Directors Conference.
26 June-14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

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).
18-22 September	47th Legal Assistance Course (5F-F23).
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).
2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
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).
27 November- 1 December	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).
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).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January- 2 February	2001 JAOAC (Phase II) (5F-F55).
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).
26 February- 2 March	59th Fiscal Law Course (5F-F12).

26 February- 9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
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).
30 April- 11 May	146th Contract Attorneys Course (5F-F10).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
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).

Note: This workshop has been cancelled.

30 April- 18 May	44th Military Judge Course (5F-F33).

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. 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.*

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

For a complete listing of the TJAGSA Materials Available Through DTIC, see the March 2000 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2000 issue of *The Army Lawyer.*

An item on page i of the April 2000 and the May 2000 Table of Contents did not accurately reflect the actual contents of the issues. On the second to last page of this issue, you will find corrected versions which you may use to paste over pages i of the April and May 2000 editions of The Army Lawyer. We apologize for any confusion this may have caused.