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Article

The Defense Function: The Role of the U.S. Army Trial Defense Service
Lieutenant Colonel R. Peter Masterton

USALSA Report
United States Legal Services Agency

Environmental Law Division Note (CERCLA Remedial Investigations, Feasibility Studies, Proposed Plans
and Records of Decision)
Procurement Fraud Division Note (The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies)
Litigation Division Note (Renting a Car While TDY: Let the Renter Beware)

Claims Report
United States Army Claims Service

CLE News

Current Materials of Interest

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Article

The Defense Function: The Role of the U.S. Army Trial Defense Service 1
Lieutenant Colonel R. Peter Masterton

USALSA Report
United States Legal Services Agency

Environmental Law Division Note

 CERCLA Remedial Investigations, Feasibility Studies, Proposed Plans and Records of Decision 30

Procurement Fraud Division Note

 The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies 35

Litigation Division Note

 Renting a Car While TDY: Let the Renter Beware 41

Claims Report
United States Army Claims Service

Tort Claims Notes

 Use of Annuities for Claims Arising in Foreign Countries 49

 Denials Under Both the FTCA and MCA 50

CLE News 52

Current Materials of Interest 62

Individual Paid Subscriptions to *The Army Lawyer* Inside Back Cover

The Defense Function: The Role of the U.S. Army Trial Defense Service

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Introduction

Military defense counsel have a unique role. Unlike their civilian counterparts, they are subject not only to the ethical rules applicable to all attorneys,¹ but also to military law and regulations.² They are ultimately supervised by the very same agency responsible for the prosecution of military crimes.³ In addition, they represent clients around the world and are routinely deployed to remote locations such as Bosnia or Kosovo.

In 1980 the Army created the U.S. Army Trial Defense Service (TDS) to deal with some of these unique challenges.⁴ The TDS is an independent “stove-pipe” organization made up completely of defense counsel.⁵ It has a separate technical chain of supervision to ensure that a defense counsel stationed at a particular installation will not be evaluated or disciplined by the local commander responsible for prosecution of military crimes.⁶ The TDS also ensures that counsel receive adequate training and support so they can properly represent their clients.⁷

This article discusses the unique issues facing TDS counsel. It describes TDS management, including reporting requirements and training. It explains the procedures for counseling clients pending nonjudicial punishment, administrative separation, and similar adverse actions. Finally, it discusses representation of soldiers at courts-martial. Although this article focuses on the Army TDS, much of the discussion is also applicable to military defense attorneys in other services.⁸

Mission and History of the U.S. Army Trial Defense Service

The mission of the TDS is to provide free defense lawyers to soldiers whenever a military defense counsel is required or authorized.⁹ It provides defense counsel to soldiers pending court-martial, nonjudicial punishment, administrative separation, and similar adverse action. It also provides defense counsel to soldiers suspected of an offense who have requested counsel.¹⁰

1. All judge advocates are required to be admitted to, and to remain members in good standing of, the bar of the highest court of a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a Federal Court. U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICES, para. 13.2(h) (3 Feb. 1995). This is a statutory requirement for any judge advocate detailed as a trial or defense counsel for a general court-martial. UCMJ art. 27(b)(1) (2000) As such, they are subject to the ethical rules of their respective state bars. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, para. 8.5(f) (1 May 1992) [hereinafter AR 27-26] (stating that Army lawyers are subject to both the rules contained in AR 27-26 as well as the rules promulgated by their licensing authority or authorities). *Army Regulation 27-26* contains rules governing the ethical conduct of Army lawyers, military and civilian, and non-government lawyers appearing before Army tribunals under the *Manual for Courts-Martial*. *Id.* para. 1.

2. AR 27-26, *supra* note 1, para. 13.2(h). Army Trial Defense Service counsel are also required to meet Army standards of weight and personal appearance and to comply with local personnel policies, including local duty hours, weapons qualification, physical and military training and Army Physical Fitness Test standards. U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES, paras. 2-7, 2-8 (1 Mar. 2001) [hereinafter TDS SOP]; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, paras. 2-7, 2-8 (24 June 1996) [hereinafter AR 27-10].

3. The Army is ultimately responsible both for the supervision and evaluation of all Army defense counsel and the prosecution of courts-martial. *See generally* AR 27-10, *supra* note 2 chs. 5, 6.

4. Memorandum, The Judge Advocate General, United States Army, DAJA-ZA, to Chief of Staff, Army, subject: Evaluation of U.S. Army Trial Defense Service - Decision Memorandum (20 May 1980) (copy on file with Headquarters, U.S. Army Trial Defense Service) [hereinafter Decision Memorandum].

5. *See infra* notes 11-17 and accompanying text.

6. *See infra* notes 19-30 and accompanying text.

7. *See infra* notes 15-16 and accompanying text.

8. The views expressed in this article are solely those of the author and are not official positions of the TDS or the Army.

9. AR 27-10, *supra* note 2, para. 6-1, states that the mission of TDS is “to provide specified defense counsel services for Army personnel, whenever required by law or regulation and authorized by TJAG or TJAG’s designee.”

The TDS evolved into its current form as a separate defense organization from 1974 to 1980.¹¹ In 1974, The Judge Advocate General encouraged local staff judge advocates to designate “senior defense counsel” to advise and assist other defense counsel within their commands.¹² In 1975, the Army began to require defense counsel to be rated by these senior defense counsel.¹³ In 1978, a test program was initiated in the Training and Doctrine Command (TRADOC) designed to make defense counsel more independent by placing all defense counsel under a separate rating chain.¹⁴ This test program was expanded several times during the next two years.¹⁵ During this time, concerns persisted about the ability of defense counsel to exercise independent judgment.¹⁶ Finally, on 7 November 1980, the U.S. Army TDS was permanently established.¹⁷ A major goal of this new organization was to eliminate the inherent conflict in having defense counsel and prosecutors supervised by the same individual.¹⁸

The TDS falls under the U.S. Army Legal Services Agency (USALSA), a field-operating agency of The Judge Advocate General.¹⁹ The TDS currently has 134 assigned defense coun-

sel working in fifty-four offices throughout the world.²⁰ Each trial defense counsel is supervised by a senior defense counsel, who is in turn supervised by one of eight regional defense counsel. The Chief of the TDS supervises these regional defense counsel.²¹ The USALSA provides limited funds for the TDS counsel.²² For example, USALSA funds TDS counsel travel for training and attendance at Article 32 and court-martial hearings.²³ All other funding, including money to travel to investigate cases, counsel soldiers concerning non-judicial punishment or adverse administrative actions, and represent soldiers at administrative hearings, is funded by the local command through the local staff judge advocate’s office.²⁴ The TDS is responsible for its own training²⁵ and determines which counsel to assign or “detail” to individual soldiers needing defense services.²⁶

To help show soldiers that the TDS attorneys are independent, these officers are not required to wear the shoulder patch or insignia of the local organization or command.²⁷ Instead, TDS counsel wear a special shoulder patch consisting of a blue star on a white background with a red border.²⁸ Originally

10. TDS SOP, *supra* note 2, para. 1-5.

11. For a discussion of the history and development of TDS, see Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983) and *Fact Sheet, U.S. Army Trial Defense Service*, ARMY LAW., Jan. 1981, at 27 [hereinafter *Fact Sheet*].

12. Letter, Office of the Judge Advocate General, United States Army, DAJA-MJ 1973/12018, to Staff Judge Advocates, subject: Providing Adequate Defense Services - The Defense Counsel (24 Aug. 1973), *excerpt reprinted in ARMY LAW.*, Feb. 1974, at 12 (titled *Inter-Corps Relationships for JAG Defense Counsel*).

13. Letter, Office of the Judge Advocate General, United States Army, DAJA-ZA, to All Staff Judge Advocates, subject: Field Defense Services (7 Sept. 1976) (App. B, Letter from Major General Wilton B. Persons, Jr., to all Staff Judge Advocates on training and evaluation of defense counsel (23 July 1975)), *reprinted in ARMY LAW.*, Oct. 1976, at 1, 6.

14. *See The U.S. Army Trial Defense Service Begins One-Year Test*, ARMY LAW., June 1978, at 3, *reprinted in ARMY LAW.*, Oct. 2000, at 1 (reprinting text of letter from Major General Wilton B. Persons, Jr. to all Staff Judge Advocates involved in the TRADOC test of TDS).

15. *See Howell, supra* note 11, at 28-45.

16. *See U.S. Army Trial Defense Service, Exercise of Independent Professional Judgment by Defense Counsel*, ARMY LAW., Sept. 1979, at 39.

17. Decision Memorandum, *supra* note 3; *see also Howell, supra* note 11, at 45; *Fact Sheet, supra*, note 11, at 27.

18. *Fact Sheet, supra*, note 11, at 27. *See also Howell, supra* note 11, at 30-32.

19. AR 27-10, *supra* note 2, para. 6-3.

20. U.S. Army Trial Defense Service Homepage, at www.jagcnet.army.mil/USATDS (Locations) [hereinafter TDS Web site].

21. AR 27-10, *supra* note 2, para. 6-3.

22. *Id.* para. 6-5a.

23. *Id.*

24. *Id.* paras. 6-4, 6-5b.

25. *Id.* para. 6-6.

26. *Id.* para. 6-9.

27. *Id.* para. 6-8b.

28. To view the patch, see TDS Web site, *supra* note 20 (Mission).

designed in 1941 for use by War Department Overhead personnel, the patch is currently worn by soldiers assigned to support the Department of the Army Staff.²⁹ The crest has its origins in the Coat of Arms of the United States and contains the colors of the United States, red, white, and blue.³⁰

Management

Because the TDS is such a large organization, it has a comprehensive management scheme. Most management guidance is contained in the TDS Standard Operating Procedures (SOP).³¹ This SOP provides a wealth of information; each TDS attorney should have ready access to a copy.

Assigning TDS Counsel Cases

Local commanders and prosecutors refer most clients to the TDS upon the initiation of nonjudicial punishment proceedings,³² the referral of court-martial charges,³³ or the taking of other adverse action against soldiers.³⁴ Military law enforcement agencies also refer clients to the TDS when soldiers suspected of an offense invoke their rights to counsel. Some soldiers refer themselves to the TDS when they desire suspect counseling.³⁵ The senior defense counsel ordinarily decides which TDS attorney will represent each client.³⁶

Soldiers pending adverse action can obtain a civilian attorney, either in lieu of or in addition to their TDS attorney. However, since civilian defense attorneys are not provided at government expense, the soldier must arrange for any compensation for civilian defense counsel.³⁷ Some clients hire civilian counsel because they believe such attorneys are more experienced than TDS lawyers.³⁸ This is not the case. The TDS counsel are well-trained and experienced and civilian attorneys may be unfamiliar with military criminal law. Some clients hire civilian counsel because they believe TDS counsel will be inhibited in their representation by the military rank structure.³⁹ To reduce this incorrect perception, the TDS gives its attorneys broad latitude in representing soldiers.

Soldiers pending court-martial can ask to be represented by a specific military lawyer; such an attorney is called an Individual Military Counsel (IMC).⁴⁰ Such requests are generally granted if the attorney is reasonably available.⁴¹ Certain attorneys, such as prosecutors and staff judge advocates, may not serve as IMC because this would conflict with their principal duties.⁴² In addition, attorneys stationed in distant locations generally may not serve as IMC because they are not reasonably available.⁴³ Exceptions to these limitations can be granted if the soldier has already formed an attorney-client relationship with the requested lawyer.⁴⁴

29. *Id.*

30. *Id.*

31. TDS SOP, *supra* note 2.

32. *See* AR 27-10, *supra* note 2, para. 3-18c.

33. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(6), 506(a) (2000) [hereinafter MCM].

34. *See* TDS SOP, *supra* note 2, para. 1-5.

35. *See id.*

36. *Id.* para. 3-7.

37. MCM, *supra* note 33, R.C.M. 506(a).

38. Law Firm of Shaw, Bransford, Veilluex & Roth, *Legally Speaking* (Jan. 6, 2000), at <http://www.militaryreport.com/page56.htm>.

39. *Id.*

40. MCM, *supra*, note 33, R.C.M. 506(b); AR 27-10, *supra* note 2, para. 6-10.

41. MCM, *supra*, note 33, R.C.M. 506(b); AR 27-10, *supra* note 2, para. 6-10.

42. The following attorneys are not considered reasonably available to serve as IMC: (1) general officers, (2) military judges, (3) trial counsel, (4) appellate counsel, (5) principal legal advisors to general court-martial commands, (6) principal assistants to such advisors, (7) instructors and students at service schools, (8) students at colleges and universities, and (9) the staff of the Judge Advocate General. MCM, *supra* note 33, R.C.M. 506(b)(1).

43. The following attorneys are not considered reasonably available to serve as IMC: (1) attorneys in Headquarters, TDS; (2) TDS counsel outside the region where the trial or investigation is being held, unless they are within 100 miles of the trial or investigation; and (3) counsel in Panama, Hawaii, and Alaska, for trials and investigations held outside these areas. AR 27-10, *supra* note 2, para. 6-10.

44. *Id.* para. 5-7e.

Duties of TDS Counsel

The TDS SOP breaks down TDS attorneys' duties into three priorities. Priority I duties are those that TDS attorneys generally must perform. They include representing soldiers at general and special courts-martial and pretrial investigations under Article 32,⁴⁵ and advising pretrial confinees.⁴⁶ Priority II duties are those primarily performed by TDS attorneys, unless TDS does not have sufficient resources. Priority II duties include counseling soldiers pending formal nonjudicial punishment under Article 15,⁴⁷ counseling soldiers suspected of an offense,⁴⁸ representing soldiers at lineups, counseling soldiers regarding summary courts-martial, and representing soldiers recommended for administrative separation.⁴⁹ Priority II duties also include representing inmates at sentence vacation hearings and disciplinary and adjustment boards, and counseling soldiers on administrative actions based on alleged violations of the Uniform Code of Military Justice (UCMJ)⁵⁰ or related to UCMJ proceedings.⁵¹ If the TDS does not have the resources to perform priority II duties, attorneys working for the local staff judge advocate must perform them.⁵² Priority III duties are those legal services not listed above which are usually performed by attorneys in the local staff judge advocate's office, but which TDS attorneys perform pursuant to an agreement with the staff judge advocate.⁵³

Local SOPs and Agreements

Each TDS office should have a local SOP. This SOP should cover issues such as nonjudicial punishment and administrative separation counseling schedules, office hours, professional development, leave and pass policies, and physical and soldier training. In addition, each TDS office should have a memoran-

dum of understanding with the local staff judge advocate dealing with Priority III duties.⁵⁴ The memorandum of understanding should have an "escape clause" which permits defense counsel to decline to perform agreed duties if they do not have adequate resources.

Obtaining Resources

Each TDS office needs sufficient resources to perform the defense mission. The local commander of installations selected as duty stations for TDS are responsible for providing administrative support, to include office space, furniture, computers, telephones, fax machines, office supplies, and research materials.⁵⁵ In addition, the local command is responsible for providing enlisted or civilian clerical support to the TDS.⁵⁶ In most cases, each TDS branch or field office is provided with a legal specialist or noncommissioned officer (NCO). The TDS lawyers should let the local staff judge advocate know if they need additional personnel or equipment. Late spring and early summer is the best time to request new furniture or computer equipment, since this is when staff judge advocates request end of fiscal-year funds.

Good research materials are critical to the TDS mission. One of the best resources available is the TDS Web site.⁵⁷ All TDS counsel have access to this site. It contains a wealth of information including a discussion forum and a document library. The discussion forum contains messages from TDS counsel around the world, to include questions and answers on topics ranging from new case law to defense experts. The document library contains the TDS newsletter, called *The Defender*, and sample documents covering a myriad of topics such as Article 15 counseling and court-martial discovery

45. UCMJ art. 32 (2000).

46. TDS SOP, *supra* note 2, para. 1-5a.

47. UCMJ art. 15 (2000).

48. This includes counseling soldiers who's exercising their right to counsel pursuant to Article 31 of the UCMJ or the Fifth Amendment to the Constitution or when the exercise of military jurisdiction is possible. See UCMJ art. 31 (2000); U.S. CONST. amend. V; TDS SOP, *supra* note 2, para. 1-5.

49. TDS SOP, *supra* note 2, para. 1-5b.

50. UCMJ arts. 1-146 (2000).

51. TDS SOP, *supra* note 2, para. 1-5b.

52. *Id.*

53. *Id.* para. 1-5c.

54. AR 27-10, *supra* note 2, para. 6-8a.

55. *Id.* para. 6-4g.

56. *Id.* para. 6-4h.

57. TDSWeb site, *supra* note 20

requests. The Judge Advocate General's School's Web site⁵⁸ also contains valuable information, including many of the course outlines prepared by the school, and *The Advocacy Trainer*, an advocacy training tool for supervisors.⁵⁹

A number of books are available to assist defense counsel in their research. All TDS counsel should have access to the *West's Military Justice Reporter*, which contains all reported cases from military criminal courts, and the *West's Military Justice Digest*, which provides a digest of these cases. Another valuable resource that many counsel bring into the courtroom is the *Military Rules of Evidence Manual*.⁶⁰ This book contains a reprint of the Military Rules of Evidence (MRE), editorial comments, the drafter's analysis to the rules, and annotated cases relating to each rule. A broader treatment of military law is found in *Military Criminal Justice, Practice and Procedure*.⁶¹ This book provides a comprehensive analysis of the military criminal justice system, including its historical origins, military offenses, nonjudicial punishment, jurisdiction, pretrial restraint, preferral and referral of charges, Article 32 investigations, plea bargains, discovery, motions and trial procedures, sentencing, and review of courts-martial. A more comprehensive review of military criminal justice is contained in the three-volume set *Court-Martial Procedure*.⁶² *Military Evidentiary Foundations*⁶³ provides an excellent analysis of the process for admitting evidence, along with sample foundational questions. *Military Criminal Procedure Forms*⁶⁴ contains sample forms, including pretrial checklists, nonjudicial punishment appeals, pretrial agreements, discovery requests, requests for sanity boards, motions, requests for instructions, and post-trial documents. *Trial Techniques*⁶⁵ provides a wealth of information on trial advocacy. Although not written specifically for military or criminal practitioners, it is a superb source of advocacy tips. The Diagnostic and Statistical Manual of Mental Disorders,

4th Edition (DSM IV),⁶⁶ provides a description of mental illness and psychiatric terms, which is particularly valuable when the mental status of the accused is in issue.

Ethics

The TDS attorneys are subject to the same ethical standards applicable to all military attorneys.⁶⁷ Because of their unique position as military defense attorneys, there are several ethical pitfalls that TDS counsel should be aware of. Defense attorneys must consult with supervisors whenever an ethical problem arises.⁶⁸

The TDS counsel must maintain the confidentiality of the information they obtain during the course of representing clients. This ethical rule is broader than the attorney-client privilege contained in the MRE; it extends not only to information gained directly from the client, but also to any other information related to the representation, including information obtained from other people.⁶⁹ As an exception to this rule, defense attorneys are required to reveal information relating to clients' commission of future crimes that will result in imminent death, substantial bodily harm, or significant impairment of national security or military readiness.⁷⁰ Determining what constitutes significant impairment of national security or military readiness can be difficult. Defense counsel must disclose a client's plans to reveal the classified location of a weapons site if this would likely lead to theft of the weapons; defense counsel are not required to disclose the location of a client who is absent without leave.⁷¹ The TDS legal NCOs and specialists must also maintain client confidences.⁷² The TDS attorneys must ensure that legal NCOs and specialists know the rules and come to them for advice.

58. Available at <http://www.jagcnet.army.mil/TJAGSA> [hereinafter TJAGSA Web site].

59. Faculty, The Judge Advocate General's School, *The Advocacy Trainer, A Manual for Supervisors*, ARMY LAW., Dec. 1999, at 50.

60. STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* (4th ed. 1997).

61. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE* (5th ed. 1999).

62. FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, *COURT-MARTIAL PROCEDURE* (2d ed. 1999).

63. DAVID A. SCHLUETER ET AL., *MILITARY EVIDENTIARY FOUNDATIONS* (1994).

64. DAVID A. SCHLUETER ET AL., *MILITARY CRIMINAL PROCEDURE FORMS* (1997).

65. THOMAS A. MAUET, *TRIAL TECHNIQUES* (5th ed. 2000).

66. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1991).

67. AR 27-26, *supra* note 1, paras. 1, 7, Glossary.

68. *See id.* R. 5.2 and cmt.

69. *Compare id.* R. 1.6(a) ("A lawyer shall not reveal information relating to the representation . . ."), with MCM, *supra* note 33, MIL. R. EVID. 502 ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications . . .").

70. AR 27-26, *supra* note 1, R. 1.6(b). *Cf.* MCM, *supra* note 33, MIL. R. EVID. 502(d)(1) (lawyer client privilege does not apply if the communication "clearly contemplated the commission of a fraud or crime . . .").

Client perjury raises an ethical dilemma for defense counsel. If a client admits guilt and the defense counsel's own investigation establishes the admissions are true, but the client insists on testifying falsely at trial, the counsel must take several actions.⁷³ First, counsel should advise the client against taking the stand to testify falsely.⁷⁴ If the client still insists on testifying falsely, the counsel should seek to withdraw.⁷⁵ If this is not permitted (which is often the case) or the situation arises during trial, the counsel must not aid in the perjury or use the perjured testimony. This means that the counsel must not ask the client questions to elicit the perjury; the client will have to testify in a narrative fashion. It also means counsel may not mention the perjury during argument.⁷⁶ If the client gives perjured testimony, the defense counsel must disclose this to the military judge.⁷⁷

The TDS attorneys should not become involved in handling client funds.⁷⁸ If a client wants to hire a defense expert, the client should pay the expert directly. The TDS attorneys who are required to handle client funds must get approval from their senior defense counsel and make a full accounting of the funds. The funds must never be commingled with the attorney's own funds.⁷⁹

Occasionally, clients will want to turn over illegal drugs or evidence of a crime to a defense attorney. The attorney must avoid taking possession of evidence, if at all possible. If a client offers evidence to a defense counsel, the counsel should refuse to take the evidence, and must not advise the client to destroy or conceal it.⁸⁰ Defense attorneys who come into possession of

contraband evidence (for example, a client leaves illegal drugs in the office) must turn the evidence over to law enforcement authorities.⁸¹

One of the most difficult parts of a TDS counsel's job is dealing with the media. The TDS counsel are not permitted to make public statements without first discussing the matter with their regional defense counsel and Office of the Chief, TDS.⁸² The Army *Rules of Professional Conduct for Lawyers* prohibit Army attorneys from making extrajudicial statements for dissemination to the media if they know or reasonably should know that it will have a substantial likelihood of materially prejudicing a proceeding.⁸³ The rules explain that prejudice is likely to occur if the statements (made by either prosecutors or defense attorneys) relate to the character of suspects or witnesses, possible guilty pleas, contents of confessions or refusal to make statements by an accused, examination or test results, inadmissible evidence, or opinions of guilt or innocence.⁸⁴ Army attorneys may comment on the general nature of a claim or defense, the scope of the investigation, or the scheduling of steps in litigation, and request assistance in obtaining evidence.⁸⁵ Defense attorneys should have a specific purpose for discussions with the media, such as asking for help finding exculpatory evidence. Defense counsel who talk to the media should realize they may focus attention on the client and make it more likely that charges will be preferred or referred and less likely that a pretrial agreement will be approved. Media attention might also prejudice potential members or character witnesses against the client.⁸⁶

71. AR 27-26, *supra* note 1, R. 1.6, cmt.

72. *Id.* R. 5.3(b) ("A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . .").

73. *Id.* R. 3.3.

74. *Id.* R. 3.3 cmt.

75. *Id.* While seeking to withdraw, the defense counsel should not unnecessarily reveal any attorney-client confidences. Counsel should explain that irreconcilable differences with the client have developed rather than volunteering information about the client's intent to give perjured testimony. *Id.* R. 1.6.

76. *Id.* R. 3.3 cmt.

77. *Id.*

78. TDS SOP, *supra* note 2, paras. 1-11, 1-12.

79. AR 27-26, *supra* note 1, R. 1.15.

80. Defense counsel may not accept evidence offered by clients and may not counsel clients to destroy or hide evidence. *Id.* R. 3.4(a) and cmt.

81. *Id.*

82. TDS SOP, *supra* note 2, para. 1-9.

83. AR 27-26, *supra* note 1, R. 3.6(a).

84. *Id.* R. 3.6(b).

85. *Id.* R. 3.6(c).

Cases involving multiple suspects raise conflict of interest problems for TDS counsel. When counsel learn of such cases, they should immediately notify their senior defense counsel so each suspect or accused soldier can be provided a conflict-free TDS counsel. Counsel should attempt to ascertain the total number of suspects and the probable disposition of each case so the senior defense counsel can make intelligent choices when detailing counsel. Senior defense counsel should avoid detailing themselves to multiple accused cases to avoid conflicts of interest with the trial defense counsel who work for them.⁸⁷

Providing Advice to Reservists

Reserve component defense attorneys usually provide legal advice to reserve soldiers pending disciplinary or other adverse action. For example, reserve component attorneys will generally advise reserve soldiers pending nonjudicial punishment and summary courts-martial. However, when a reserve component defense counsel is not reasonably available, active duty TDS counsel can counsel reserve soldiers as an exception to policy.⁸⁸ In addition, when an active duty commander initiates disciplinary action against a reserve soldier, active duty TDS counsel should provide the necessary defense services. Since only active duty commanders can refer charges against reserve soldiers to general or special courts-martial, active duty TDS counsel ordinarily provide representation at these hearings.⁸⁹

If a reserve soldier seeks advice from an active duty TDS attorney, the attorney should contact his supervisor to determine if representation is authorized. The TDS attorney should ascertain the soldier's duty status, since the supervisor will want to know whether the soldier is on active duty or subject to the Uniform Code of Military Justice before deciding whether to permit representation. The soldier's orders will indicate if he is on Active Duty for Training (usually a period of greater than two weeks), Annual Training (usually a two-week period), Inactive Duty Training (usually a weekend drill), or some other status. The orders will also indicate if the soldier is on federal duty status under Title 10 of the United States Code. United States Army Reserve personnel are always on federal duty status when performing reserve duty. Army National Guard personnel are on federal duty status only if properly called to federal service in the Army National Guard of the United States (ARNGUS) or some other federal status.⁹⁰ Otherwise, National Guard personnel are on state duty status under Title 32 of the United States Code and are not subject to the Uniform Code of Military Justice⁹¹ (although they may be subject to a state Uniform Code of Military Justice).⁹²

When active duty TDS counsel provide advice to a reserve soldier, they should familiarize themselves with the special rules applicable to the reserve components. There are separate regulations for the administrative separation of reserve officers⁹³ and enlisted personnel,⁹⁴ the separation authority and processing of these actions differ from active duty separations.

86. See Major Jack B. Patrick, *The Case of the Famous Client: Effects of the Media on Ethics, Influence, and Fair Trials*, ARMY LAW., May 1988, at 24.

87. When a senior defense counsel represents a client in a multiple accused case and a trial defense counsel who works for him or her also represents a client in the case, a conflict of interest may arise. The trial defense counsel, who is rated by the senior defense counsel, may be materially limited in his or her representation because of his or her interest in a favorable rating. In such cases, one of the following alternatives must be chosen: (1) the senior defense counsel may undertake representation of a client if the trial defense counsel determines, based on the specifics of the case, that his or her own interests will not adversely affect representation of the client and the client consents in writing to the potential conflict; or (2) the senior defense counsel will decline to represent any client involved in the case. TDS SOP, *supra* note 2, para 3-3e.

88. *Id.* para. 6-4. Reserve component commanders should contact their Reserve component staff judge advocate or legal advisor for assistance in obtaining defense services. *Id.* para. 6-4b.

89. *Id.* para. 6-4d; AR 27-10, *supra* note 2, para. 21-8a. For other disciplinary actions, reserve component defense counsel will provide the representation if the commander who will decide the case is a reserve component commander. When the decision maker is the commander of an active duty unit or the governing regulation is an active component regulation, active duty TDS counsel should provide the defense services. When the case involves both active and reserve component features, both reserve and active duty defense personnel should collaborate on the case. TDSSOP, *supra* note 2, para. 6-1.

90. For a further discussion of the different statuses of members of the National Guard, see Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994, at 35-40. See also U.S. DEP'T OF ARMY, PAM. 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 6-4 (15 Mar. 1992).

91. UCMJ art. 2(a)(3).

92. Many states have their own equivalents of the Uniform Code of Military Justice that apply to National Guard soldiers in a state duty status. See, e.g., MINN. STAT. § 192A (1999); CAL. MIL. & VET. CODE § 560 (Deering 1999); N.M. STAT. ANN. § 20-12-2 (2000). The punishments authorized under these codes are often limited. See, e.g., N.M. STAT. ANN. § 20-12-6 (stating that punishment at a court-martial shall not exceed that prescribed for a misdemeanor).

93. Separation of reserve component officers is covered by U.S. DEP'T OF ARMY, REG. 135-175, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF OFFICER PERSONNEL (1 May 1971). Separation of active duty officers is covered by U.S. DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS: OFFICER PERSONNEL (1 May 1979).

94. Separation of reserve component enlisted personnel is covered by U.S. DEP'T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE: SEPARATION OF ENLISTED PERSONNEL (1 Sept. 1994). Separation of active duty enlisted personnel is covered by U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

Special rules also apply to nonjudicial punishment of reservists.⁹⁵

Training

Reporting Requirements

The TDS has a number of reporting requirements. Senior defense counsel must submit monthly statistical reports containing the number of clients counseled, courts-martial completed, and hours worked by their defense counsel.⁹⁶ Regional defense counsel and TDS Headquarters use these reports to manage manpower. Senior defense counsel and regional defense counsel also submit quarterly narrative reports discussing significant activities within their offices, such as the arrival of new defense counsel, significant cases tried, and any problems they are having obtaining administrative support.⁹⁷

When the result in a case is particularly favorable to the defense, the TDS counsel involved should submit a Significant Results Report describing the factors that led to the result. Such reports are intended to cover a broad range of favorable results that demonstrate outstanding performance by defense counsel. This includes acquittals, lenient sentences, pretrial dismissals, or other favorable results at a court-martial. This also includes favorable results at an administrative separation board or similar hearing.⁹⁸

Any significant incident must be reported immediately to TDS Headquarters. This includes misconduct by TDS attorneys, misconduct by senior officers (lieutenant colonel and above), potential capital cases, and incidents that may receive media coverage. These events should be reported to TDS Headquarters through the senior defense counsel and regional defense counsel.⁹⁹

Training TDS counsel is critical. Most training is conducted on-the-job. New defense counsel usually serve as “second-chair” or assistant defense counsel to a more experienced defense counsel for their first few trials before representing soldiers at courts-martial alone. In many regions, this “second-chair” training continues throughout a TDS counsel’s career; even experienced counsel are assigned to second chair other counsel during complex or serious contested cases.

Senior defense counsel that supervise other trial defense counsel should conduct local training sessions. This training should be conducted at least monthly, if possible. This training often includes advocacy drills and updates on the law. Except in Korea, each regional defense counsel also conducts region-wide training biannually. These training sessions are generally week-long conferences. Often, two or more regions combine to conduct this training.

In addition to local training, there are a number of formal training opportunities for defense counsel. The Army Judge Advocate General’s School in Charlottesville, Virginia, offers a number of courses for military justice practitioners. New defense counsel attend the Criminal Law Advocacy Course, currently held twice a year in the spring and fall. This two-week course includes intensive advocacy training and classroom instruction on evidence and trial topics. Senior defense counsel should attend the Military Justice Managers’ Course, currently offered in the summer. This provides instruction on the management issues faced by senior defense counsel. Senior defense counsel in the Continental United States generally attend the Criminal Law New Developments course, currently offered in the fall, which provides an update on military justice case-law during the last year.¹⁰⁰ At least one TDS counsel from each area should attend a capital litigation course. These courses are offered by a number of agencies¹⁰¹ and are a must for counsel assigned to represent a soldier in a capital case.¹⁰² Many other government and civilian training opportunities

95. MCM, *supra* note 33, pt. V, para. 5e, provides that when nonjudicial punishment amounting to deprivation of liberty is imposed on reserve component personnel during a period of inactive duty training, punishment may only be served during the normal period of inactive duty training or subsequent periods of active duty. Unserved punishments may be carried over to subsequent periods of duty. *Id.* Commanders may not reduce Active Guard Reserve (AGR) soldiers in the grade of Staff Sergeant or higher through nonjudicial punishment. U.S. DEP’T OF ARMY, REG. 140-158, ENLISTED PERSONNEL CLASSIFICATION, PROMOTION, AND REDUCTION, para. 7-9a (1 July 1990).

96. TDS SOP, *supra* note 2, paras. 4-1 to 4-4.

97. *Id.* para. 4-5.

98. *Id.* para. 4-6.

99. TDS SOP, *supra* note 2, para. 1-8; U.S. ARMY TRIAL DEFENSE SERVICE REGIONAL DEFENSE COUNSEL HANDBOOK, para. 6-e (1 May 1997).

100. Information on registering for these courses can be found on the TJAGSA Web site, *supra* note 58, or in the CLE News, Course Schedule section of the *The Army Lawyer*.

101. The Naval Justice School offers such a course in the summer. Information on the course can be obtained from the Naval Justice School at 360 Elliot Street, Newport, Rhode Island 02841-1523, or through the school’s Web site, <http://www.njs.jag.navy.mil>. The National Legal Aid and Defender Association also offers such courses; information can be obtained from their Web site at <http://www.nlada.org>.

exist. The Department of Justice offers a number of criminal law and advocacy courses at the National Advocacy Center in Columbia, South Carolina. Counsel must apply for attendance at these; the National Advocacy Center Web site contains information on the courses available and the application process.¹⁰³ The National Institute of Trial Advocacy offers a number of courses on advocacy and critiquing.¹⁰⁴ Many other federal, state, and local agencies and bar associations also offer excellent training on criminal law topics. Counsel should aggressively seek out these training opportunities.

Client Counseling

Client counseling is the largest part of the TDS mission. The TDS legal NCOs and specialists play a critical role in this area. They set up appointments, screen clients, provide initial information, and ensure that counseling is conducted efficiently and effectively. The TDS legal NCOs and specialists must ensure clients complete a client card or similar document recording their name, rank, and unit, as well as the name of the attorney providing advice. These cards must be properly filed so TDS attorneys can identify the soldiers they have advised and avoid conflicts of interest if a co-accused later seeks counseling for the same matter.¹⁰⁵ The TDS legal NCOs and specialists also keep a log of the number of soldiers counseled by each attorney so this information can be included in the senior defense counsel's monthly statistical report.¹⁰⁶

Nonjudicial Punishment Counseling

All soldiers pending formal Article 15¹⁰⁷ proceedings are entitled to consult with an attorney before punishment can be

imposed.¹⁰⁸ Most soldiers rely on the TDS to provide this counseling.¹⁰⁹

Every TDS office should have established procedures for providing Article 15 counseling. Smaller offices usually see Article 15 clients by appointment. Larger TDS offices may establish regular times each week when Article 15 counseling is provided on a walk-in basis. Some offices use a combination of appointments and regularly scheduled walk-in sessions to provide Article 15 counseling. Regardless of how Article 15 clients are seen, no soldier should have to wait more than five duty days to be counseled.¹¹⁰

When Article 15 clients report to the TDS office, the TDS legal NCO or specialist should ensure they have their DA Form 2627, Record of Proceedings Under Article 15,¹¹¹ and supporting paperwork. Either a TDS attorney or a legal NCO or specialist should counsel the clients concerning their procedural rights. This can be done individually, if only one or two clients are present, or in a group. The TDS has developed a videotape that provides all of the necessary information. Showing clients this videotape ensures that they are fully briefed on all of the procedural aspects of nonjudicial punishment. The TDS legal NCO or specialist should augment the videotape with information unique to the local command. It is important that clients understand their rights to "turn down" the Article 15 and demand trial by court-martial, to request an open or closed hearing, to request a spokesperson, to present evidence in extenuation and mitigation, and to appeal.¹¹² Clients should also understand the maximum punishment possible¹¹³ and the filing options for the Article 15 record.¹¹⁴

During the briefing, clients should be given an Article 15 fact sheet, which provides a written explanation of procedural

102. See *United States v. Murphy*, 50 M.J. 4 (1998) (finding two defense counsel in capital case ineffective because, among other things, neither had attended capital litigation training).

103. Information can be found at <http://www.usdoj.gov/usao/eousa/ole>. If the Department of Justice approves the application, it will fund meals, lodging, and travel to and from the course.

104. Information on these courses can be found at the National Institute for Trial Advocacy Web site at <http://www.nita.org>.

105. See AR 27-26, *supra* note 1, R. 1.7, R. 1.9.

106. See *supra* notes 96-99 and accompanying text.

107. UCMJ art. 15 (2000).

108. AR 27-10, *supra* note 2, para. 3-18c.

109. TDS SOP, *supra* note 2, para. 1-5b(5).

110. This time period is based on the author's experience as a defense counsel and is not official TDS policy. Soldiers pending formal nonjudicial punishment have a reasonable time period to seek counsel, normally forty-eight hours. This time may be extended for good cause. AR 27-10, *supra* note 2, para. 3-18f(1). Unavailability of TDS counsel should constitute good cause to extend the forty-eight hour time period.

111. *Id.* fig. 3-2.

112. *Id.* para. 3-18.

113. For a breakdown of the authorized punishments see *id.* para. 3-19.

rights. These fact sheets provide soldiers with an excellent reminder of their rights after they leave the office.¹¹⁵

Either a TDS attorney or the TDS legal NCO or specialist should review the Article 15 form and supporting evidence of each client to ensure there are no legal problems. For example, if the evidence appears to be weak, this should be discussed with the client.¹¹⁶

Once the soldier has been briefed and the paperwork reviewed, the soldier should be given the opportunity to talk individually with a TDS attorney. During this counseling, the attorney needs to fully discuss the facts of the case to determine if the soldier should “turn-down” the Article 15 and demand trial by court-martial, or exercise any other rights. The attorney should explain that the burden of proof at the Article 15 hearing is proof beyond a reasonable doubt¹¹⁷ and provide specific advice on the use of a spokesperson, witnesses, and documentary evidence at the Article 15 hearing.¹¹⁸ The attorney may assist the client in preparing a statement for the commander’s consideration during the hearing. Also, the defense attorney should encourage the soldier to appeal if the commander finds the soldier guilty. The soldier should be told that the TDS counsel can assist in preparing written matters in support of the appeal.

It may be necessary to counsel Article 15 clients in remote locations telephonically or by video-teleconference. Such counseling is not as effective as face-to-face counseling and should be conducted only when necessary. If such counseling is necessary, the TDS attorney must receive a complete copy of the Article 15 paperwork before counseling the soldier. The soldier should be shown the TDS Article 15 videotape and pro-

vided with an Article 15 fact-sheet. Such telephonic or video-teleconference counseling should address the same topics discussed with a client in face-to-face counseling.

Soldiers do not have the right to have a TDS attorney serve as their spokesperson at an Article 15 hearing.¹¹⁹ However, a TDS attorney may attend the hearing if the commander imposing the Article 15 and the senior defense counsel agree.¹²⁰ A TDS attorney should be present if the commander imposing the Article 15 insists. A TDS attorney may also ask to attend the hearing if the soldier was initially pending trial by court-martial but was given the opportunity to have the matter resolved under Article 15 instead. Senior defense counsel should be cautious about permitting TDS attorneys to represent soldiers at these hearings, as other soldiers may complain when TDS attorneys do not represent them at their hearings.

Soldiers pending summarized Article 15 proceedings do not have the right to consult with a defense attorney.¹²¹ This is because summarized Article 15s are filed locally¹²² and the punishments are limited.¹²³ The senior defense counsel can permit such soldiers to receive counseling as an exception to policy.¹²⁴ The soldier’s commander is not, however, required to delay the proceedings until the soldier consults with an attorney.¹²⁵

Administrative Separation Counseling and Representation

Representing soldiers pending administrative separation is another important mission of the TDS. It is critical to provide these soldiers the best advice possible, since the administrative separation rules are complex and the consequences for the soldier are significant.

114. For soldiers in the grade of E4 and below, the record of Article 15 punishment will be filed in the local nonjudicial punishment file and destroyed after two years or when the soldier is reassigned. For other soldiers the imposing commander decides whether the record will be filed in the restricted or performance fiche of the Official Military Personnel File. *Id.* para. 3-17.

115. A sample fact sheet is contained on the TDS Web site, *supra* note 20.

116. The TDS legal NCO or specialist plays a critical role in providing Article 15 counseling. TDS attorneys must ensure that they are properly supervised and do not engage in the unauthorized practice of law. AR 27-26, *supra* note 1, R. 5.3, R.5.5. However, legal NCOs and specialists are typically extremely familiar with Article 15 procedures and particularly talented at spotting and pointing out evidentiary weaknesses to their supervising attorneys.

117. AR 27-10, *supra* note 2, para. 3-181.

118. *Id.* para. 3-18.

119. *Id.* para. 3-18h.

120. TDS SOP, *supra* note 2, para. 1-5d(2).

121. AR 27-10, *supra* note 2, para. 3-16b.

122. *Id.* para. 3-16f.

123. The punishments at a summarized Article 15 are limited to fourteen days extra duty, fourteen days restriction, and an admonition or reprimand. *Id.* para. 3-16a.

124. TDS SOP, *supra* note 2, para 1-5d(2)(a).

125. AR 27-10, *supra* note 2, para. 3-16b.

There are three types of services TDS provides soldiers facing administrative separation. First, TDS attorneys provide initial advice to soldiers pending administrative separation. Second, if the soldier is entitled to an administrative separation board, TDS attorneys can represent the soldier at the board.¹²⁶ Finally, TDS attorneys provide advice on appeals to administrative separations and assist soldiers trying to upgrade their discharges.¹²⁷

Initial Separation Counseling

The TDS counsel who provide initial separation counseling are known as “counsel for consultation.”¹²⁸ Because there are so many different types of separations, most TDS offices provide this counseling on an individual basis. Soldiers can either be seen by appointment or on a walk-in basis (often at the same time walk-in Article 15 clients are seen). Soldiers should not have to wait more than five duty-days to be counseled.¹²⁹

During the initial client screening, the TDS legal NCO or specialist should ensure that the soldier possesses a complete separation packet. After this, a TDS attorney or legal NCO or specialist should provide the soldier with an initial briefing on procedural rights. Most of these rights are listed in the notification memorandum signed by the soldier’s commander, which is in the separation packet.¹³⁰

Once the soldier understands the procedural rights, a TDS attorney must personally counsel the soldier and complete an election of rights.¹³¹ The attorney should carefully review the

separation packet. Soldiers with six or more years of active and reserve service and soldiers facing discharge under other than honorable conditions have a right to a board hearing.¹³² The attorney should not rely on the commander’s notification letter to determine if a soldier has a right to a board; these letters sometimes incorrectly state that soldiers do not have a right to a board when, in fact, they do.

If the soldier has a right to a board, the TDS attorney should explain the possibility of a conditional waiver. This is a waiver of the right to a board contingent upon approval of a more favorable discharge.¹³³ For example, a soldier facing the possibility of a discharge under other than honorable conditions, may want to waive the board contingent upon the approval of a more favorable general discharge.¹³⁴

If the soldier is being separated for unsatisfactory performance or a pattern of misconduct, the attorney should look through the packet to see if the soldier was properly counseled before the separation was initiated. The separation packet must contain a written counseling statement explaining that the soldier can be separated if his or her poor performance or misconduct continues and what type of discharge may result.¹³⁵ If the required counseling is missing, the soldier can point out this deficiency to the separation authority or board. The attorney should also look to see if the soldier received a rehabilitative transfer to another unit before the separation was started.¹³⁶ If the soldier did not receive such a transfer, this requirement may be waived.¹³⁷ However, the soldier may argue that waiver is inappropriate because the soldier could have benefited from a “second chance” in another unit.

126. TDS SOP, *supra* note 2, para. 1-5b(8).

127. *Id.* para. 1-5d(1)(b).

128. AR 635-200, *supra* note 94, para. 2-2a. Soldiers pending separation also have the right to consult with civilian counsel retained at no expense to the government. *Id.*

129. This time period is based on the author’s experience as a defense counsel and is not official TDS policy. Soldiers have a reasonable period of time (no less than three days) to consult with counsel. *Id.* para. 2-2a. This time period can be extended for good cause. *Id.* para. 2-2g. The unavailability of TDS counsel should constitute good cause to extend the time period.

130. This is the memorandum used by the commander to notify soldiers that they are pending administrative separation. *See id.* figs 2-2, 2-4.

131. This is the endorsement soldiers pending separation send back to the commander to acknowledge receipt of the notification memorandum and to indicate what rights the soldiers will exercise. *See id.* fig. 2-4.

132. *Id.* para. 2-2d.

133. *Id.* para. 2-5b, fig. 2-3.

134. Soldiers pending administrative separation may receive one of three types of discharges: (1) an honorable discharge, which is the best discharge possible; (2) a general discharge, which is a separation under-honorable-conditions and is issued to soldiers whose record, while satisfactory, is not sufficiently meritorious to warrant an honorable discharge; and (3) a discharge under other than honorable conditions, which is generally issued for misconduct and usually results in denial of veteran’s benefits. Soldiers issued the latter type of discharge generally have a right to an administrative separation board. *Id.* para. 3-7.

135. The counseling must be performed prior to initiation of separation action. *Id.* para. 1-18b. Such counseling is also required before a soldier can be separated for parenthood, personality disorder, entry level performance and conduct and minor disciplinary infractions. *Id.* para. 1-18a.

136. *Id.* para. 1-18c. The rehabilitative transfer must generally be between at least battalion sized units and permit the soldier at last two months of duty in each unit. *Id.* para. 1-18c(2).

When soldiers do not have the right to a board, the TDS attorney should explain their right to submit matters to the separation authority.¹³⁸ These matters may convince the separation authority not to discharge the soldier or to issue the soldier a more favorable discharge. The TDS attorney can help the soldier prepare these matters.

During the counseling the soldier should be given a separation fact sheet. These help soldiers prepare their cases.¹³⁹

Separation Boards

Soldiers are entitled to representation by a military defense counsel at administrative separation boards.¹⁴⁰ These attorneys are called “counsel for representation.”¹⁴¹

Administrative separation boards are excellent advocacy opportunities for TDS counsel. The MRE do not apply at these hearings.¹⁴² As a result, TDS counsel can be creative in presenting evidence and making arguments to the board.

To prepare for the board TDS counsel should interview everyone mentioned in the separation packet, the client’s chain of command, fellow soldiers, friends, and family. Counsel should ask the recorder to secure the attendance of favorable witnesses.¹⁴³ Distant witnesses can testify by telephone or video-teleconference.¹⁴⁴

Counsel should also develop a packet of documentary evidence to present at the board. Hearsay is admissible, including written statements from supervisors and other soldiers, awards, certificates, memoranda of appreciation, and letters from family and friends.¹⁴⁵ Counsel should make enough copies so each board member can be given a packet of defense evidence.

Trial Defense Service counsel should be careful to ensure that the recorder does not introduce impermissible evidence. Army regulations prohibit the introduction of certain evidence, such as lawyer-client conversations, involuntary confessions, evidence obtained from bad faith unlawful searches, and polygraph results (unless both parties agree).¹⁴⁶ Trial Defense Service counsel should know these rules and use them aggressively.

Trial Defense Service counsel should also educate the board members on the law.¹⁴⁷ Since the members are not attorneys, they may not know the requirements for separation. Counsel should explain the rules favorable to the soldier, such as the requirements to counsel soldiers and provide them rehabilitative transfers.¹⁴⁸ Defense counsel can also provide copies of favorable regulatory provisions to the board members.

Appealing Separations and Upgrading Discharges

The TDS attorneys should ensure that clients pending separation are aware of their appellate rights, should they be discharged. If an administrative separation board recommends

137. The separation authority can (and often does) waive this requirement. *Id.* para. 1-18d.

138. *Id.* para. 2-2b.

139. Individual fact sheets relating to each ground for separation can be found on the TDS Web site, *supra* note 20.

140. AR 635-200, *supra* note 94, para. 2-4e. Soldiers may also retain civilian counsel at no expense to the government to represent them at an administrative separation board. *Id.*

141. *Id.*

142. *Id.* para. 2-11a; U.S. DEP’T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 3-6a (11 May 1988) [hereinafter AR 15-6].

143. Respondents at administrative separation boards may request the attendance of witnesses. The authority which convened the board may authorize the expenditure of funds for such witnesses if: (a) their testimony is not cumulative, (b) personal appearance is essential, (c) written or recorded testimony will not accomplish the same objective, (d) the need for live testimony is substantial, material, and necessary, and (e) the significance of personal appearance, balanced against the difficulties of obtaining the witness, favors production. AR 635-200, *supra* note 94, paras. 2-10b(3), 2-10b(4).

144. While not specifically provided for in the applicable regulations, telephonic testimony is consistent with the other types of testimony permitted at administrative separation boards. *See, e.g. id.* paras. 2-10b(2) (stating that depositions and affidavits of unavailable witnesses may be presented), 2-10b(4)(c) (stating that recorded testimony permitted).

145. AR 15-6, *supra* note 142, para. 3-7c(5).

146. *Id.* para 3-6c.

147. Lieutenant Colonel Kevin Lovejoy, *The Art of Trial Advocacy, To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards*, ARMY LAW., Mar. 1999, at 35.

148. AR 635-200, *supra* note 94, para. 1-18.

discharge, the soldier can still submit matters to the separation authority raising legal objections.¹⁴⁹ Once soldiers are discharged, they can request additional review and obtain reinstatement to active duty or an upgrade of the discharge.

Discharged soldiers can apply to the Army Discharge Review Board¹⁵⁰ to upgrade their discharges. Upgrades are not automatic; clients must submit convincing evidence that the discharge was improper or inequitable.¹⁵¹ For example, clients who declined nonjudicial punishment and had their cases handled by administrative separation, rather than court-martial, may be able to prove this unfairly denied them the opportunity to contest their guilt. New evidence, such as statements of witnesses who were not available at the board or the results of proceedings against co-accuseds, may also help the client obtain relief.

Applications to the board are made on DD Form 293, Application for Review of Discharge or Separation from the Armed Forces of the United States. Although the Army Discharge Review Board has a fifteen-year statute of limitations,¹⁵² soldiers should not delay in submitting a request to the board. Personal appearance before the board is authorized;¹⁵³ generally soldiers who appear before the board in person are more successful than those who do not. Soldiers can generally expect a decision on their application within four months. In 1997, the Army Discharge Review Board granted relief on approximately ten percent of the applications submitted to it.¹⁵⁴

Discharged soldiers can also seek relief from the Army Board for Correction of Military Records (ABCMR). This board has broad powers to change any military record to correct an error or remove an injustice.¹⁵⁵ It can reinstate soldiers to active duty¹⁵⁶ or upgrade discharges.¹⁵⁷ Soldiers can appeal to this board even though they have already unsuccessfully applied to the Army Discharge Review Board for relief. However, the board will only grant relief if the soldier can demonstrate that the separation was in error or unjust.¹⁵⁸

Applications to the (ABCMR) are made on DD Form 149, Application for Correction of Military Records.¹⁵⁹ The board has a three-year statute of limitations; however, this can be waived if the soldier presents good reasons for failing to meet the three-year limitation.¹⁶⁰ As with the Discharge Review Board, soldiers can request a hearing before the ABCMR.¹⁶¹ The board processes most applications for relief in ten months. In 1999 the ABCMR granted relief in approximately fifteen percent of the cases it considered.¹⁶²

Suspect Counseling

Counseling soldiers suspected of offenses is another important duty of TDS counsel.¹⁶³ Soldiers who request an attorney when questioned by military law enforcement agents are routinely referred to TDS. Soldiers suspected of an offense may also seek TDS advice without any referral from the command or law enforcement authorities.¹⁶⁴ These soldiers should be

149. *See id.* para. 2-6a.

150. *See* U.S. DEP'T OF ARMY, REG. 15-180 ARMY DISCHARGE REVIEW BOARD (1 MAY 1980) [hereinafter AR 15-180]; 10 U.S.C. § 1553 (2000).

151. U.S. DEP'T OF DEFENSE, DIRECTIVE 1332.28, DISCHARGE REVIEW BOARD PROCEDURES AND STANDARDS, encl. 4, (11 Aug. 1982) reproduced in AR 15-180, *supra* note 150, app. A.

152. 10 U.S.C. § 1553a.

153. *Id.* § 1553c.

154. Captain Bronte I. Montgomery, *Note from the Field, Army Discharge Review Board Streamlines and Reduces Processing Times*, ARMY LAW., Nov. 1997, at 47.

155. 10 U.S.C. § 1552(a)(1).

156. *Id.* § 1552(d).

157. *Id.* § 1552(a)(1).

158. U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (29 Feb. 2000) [hereinafter AR 15-185].

159. The full title of the form is Application for Correction of Military Records Under the Provisions of Title 10, U.S. Code, Sec. 1552. *See* AR 15-185, *supra* note 158, para. 2-3b.

160. The board may excuse the failure to file within three years if it is in the interests of justice. 10 U.S.C. § 1552(b); AR 15-185, *supra* note 158, para. 7.

161. AR 15-185, *supra* note 158, para. 4.

162. Karl F. Schneider, Director, Army Review Board Agency, Address at the Office of the Staff Judge Advocate, 1st Infantry Division, Wuerzburg, Germany (Jan. 27, 2000).

163. TDS SOP, *supra*, note 2, para. 1-5b(1), (3).

seen immediately; they should not be required to make an appointment. They should also be screened carefully to identify possible conflicts of interest.¹⁶⁵

It is rarely wise for a suspect to make a statement until the TDS counsel has the opportunity to review all the evidence against the suspect. Generally, TDS counsel should accompany a suspect who decides to speak to commanders or law enforcement authorities. Also, counsel should stress the importance of not talking to anyone, including law enforcement agents, supervisors, family, and friends.

If the soldier seeking advice is scheduled to be transferred to a distant installation, it may be best to have a TDS counsel at the new duty station provide the advice by telephone. For example, if a suspect seeks advice from a TDS attorney in Germany and will be transferred to Texas the next day, it may be best to have a TDS attorney stationed in Texas provide the suspect counseling. This procedure generally avoids unnecessary expense and inconvenience. However, if telephonic counseling with a Texas counsel is impossible or impracticable, the attorney in Germany should provide the counseling. A suspect should not be denied access to a TDS attorney solely because the representation may become inconvenient or expensive.

Suspects should be provided a fact sheet explaining their right to remain silent. These fact sheets serve as valuable reminders to soldiers after they leave the TDS office.¹⁶⁶

TDS attorneys should tell law enforcement agents and commanders that they represent the suspect and demand to be

present during any questioning about the suspected offenses. The notification should be in writing, if possible.¹⁶⁷

Lineups

Soldiers have a right to counsel at lineups, show-ups, and similar identification procedures if they occur after pretrial charges or the imposition of pretrial confinement.¹⁶⁸ The TDS provides these counsel.¹⁶⁹

The TDS counsel representing soldiers at such identifications should ensure that clients make no statements. Counsel should also bring a notepad and, if possible, a camera, to record precisely how the identification is conducted. Unduly suggestive lineups may be successfully challenged at trial.¹⁷⁰

Summary Courts-Martial

Trial Defense Service counsel routinely counsel soldiers regarding summary courts-martial.¹⁷¹ Counsel should meet individually with such clients to carefully discuss their procedural rights, including the right to “turn-down” the summary court-martial and demand trial by a higher level of court-martial.¹⁷² Counsel should also discuss the soldier’s rights to demand production of evidence and witnesses. A soldier’s right to production of evidence and witnesses is essentially the same at a summary court-martial as it is at a special and a general court-martial.¹⁷³ Counsel may want to help the soldier prepare questions for particular witnesses, or prepare an evidentiary statement or argument for consideration by the

164. Trial Defense Service attorneys are authorized to counsel soldiers suspected of offenses as required under Article 31 of the U CMJ or the Fifth Amendment or when the exercise of military jurisdiction is possible. TDS SOP, *supra* note 2, para. 1-5.

165. AR 27-26, *supra* note 1, R. 1.7, R. 1.9. Suspects should be given the opportunity to discuss their cases fully with a TDS attorney as soon as possible. Since this involves forming an attorney-client relationship, TDS attorneys must ensure they have not counseled other soldiers concerning the same misconduct. *Id.*

166. A sample fact sheet can be found at the TDS Web site, *supra* note 20.

167. If a suspect has an appointed counsel, that counsel must be present before the suspect may be interrogated by law enforcement agents after pretrial charges, unless the accused initiates the communication and waives the right to counsel. MCM, *supra* note 34, MIL. R. EVID. 305(e). *United States v. McComber*, 1 M.J. 380 (C.M.A. 1976), created a requirement for the government to notify counsel and give him a reasonable opportunity to be present at any interrogation, once the government is aware that the accused is represented by counsel. This requirement was codified in a former version of Military Rule of Evidence 305(e), but was eliminated in a 1994 amendment to the rules. See MCM, *supra* note 33, app. 22-16 (Analysis of the Military Rule of Evidence). However, arguably the notice to counsel rule is still effective since *McComber* has never been overruled. See Major Mark David “Max” Maxwell, *McComber’s Obituary: Do Not Write It Quite Yet*, ARMY LAW., Sept. 1999, at 17. But see MCM, *supra* note 33, app. 22-16; Major Robert S. Hrvoj, *The Viability of United States v. McComber: Are Notice to Counsel Requirements Dead or Alive?*, ARMY LAW., Sept. 1999, at 1.

168. MCM, *supra* note 33, MIL. R. EVID. 321(b)(2).

169. TDS SOP, *supra* note 2, para. 1-5b(2).

170. MCM, *supra* note 33, MIL. R. EVID. 321(b)(1), states that: “A lineup and other identification process is ‘unlawful’ if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.”

171. TDS SOP, *supra* note 2, para. 1-5b(4).

172. MCM, *supra* note 33, R.C.M. 1303.

173. *Id.* R.C.M. 1301(f).

summary court officer. The soldier should be provided with a summary court-martial fact sheet before leaving the office. These fact sheets will help the soldier prepare his or her case.¹⁷⁴

Usually, a soldier does not have a right to representation by a TDS attorney at a summary court-martial. However, the regional defense counsel may waive this limitation in appropriate circumstances.¹⁷⁵ For example, if the soldier was pending a higher level of court-martial and the convening authority withdrew the charges and re-referred them to a summary court, it may be appropriate for the TDS attorney working on the case to represent the soldier at the summary court hearing. A soldier also has a right to have a civilian attorney represent him at a summary court-martial.¹⁷⁶

Counseling Inmates

Trial Defense Service attorneys located near confinement facilities may represent inmates during sentence vacation hearings.¹⁷⁷ A “vacation” is the reimposition of a suspended court-martial sentence. A suspended sentence is one that is not imposed or “executed,” as long as the accused abides by the terms of the suspension, which generally means the accused must not commit any future misconduct.¹⁷⁸ If the accused violates the terms of the suspension, the suspension may be “vacated” and the original sentence imposed. Before this can be done, the accused is entitled to a hearing. The accused has

the right to attend the hearing, present evidence, and be represented by counsel.¹⁷⁹

Counsel representing soldiers at such hearings should brief them on their procedural rights and fully discuss their cases. Counsel should interview all of the necessary witnesses and be prepared to call witnesses and present evidence at the hearing. The rules for production of witnesses and presentation of evidence are the same as those at an Article 32 investigation; the MRE do not apply.¹⁸⁰ Therefore, counsel can be creative in presenting evidence at these hearings.

The TDS attorneys may also counsel inmates pending disciplinary and adjustment boards.¹⁸¹ These boards can recommend imposition of administrative disciplinary measures, such as forfeiture of “good conduct time,” and disciplinary segregation.¹⁸² The loss of “good conduct time” is important to inmates, since this can substantially reduce their time in confinement.¹⁸³ In some circumstances, inmates have the right to consult with an attorney before the board. Inmates do not have the right to have an attorney represent them at the board.¹⁸⁴

Since the rules at these boards are unique, counsel should familiarize themselves with the board procedures.¹⁸⁵ Counsel should explain the inmate’s right to present evidence in defense, mitigation, and extenuation, and the right to cross-examine accusers.¹⁸⁶ Counsel may want to help the inmate prepare questions for witnesses or a statement for presentation to the board.

174. A sample fact-sheet can be found on the TDS Web site, *supra* note 20.

175. TDS SOP, *supra* note 2, para. 1-5d(2)(c).

176. The accused has the right to be represented by civilian counsel provided at his or her own expense if such representation will not unduly delay the proceedings and military exigencies do not preclude it. MCM, *supra* note 33, R.C.M. 1301(e).

177. TDS SOP, *supra* note 2, para. 1-5b(9).

178. MCM, *supra* note 33, R.C.M. 1108.

179. *Id.* R.C.M. 1109(d)(1), (e); UCMJ art. 72a (1996).

180. MCM, *supra* note 33, R.C.M. 1109(d)(1)(C), (e)(3).

181. TDS SOP, *supra* note 2, para. 1-5b(10).

182. U.S. DEP’T OF ARMY, REG. 190-47, MILITARY POLICE, THE ARMY CORRECTIONS SYSTEM (15 Aug. 1996) [hereinafter AR 190-47]. These boards can also impose minor disciplinary measures. *Id.*

183. Inmates accrue five days of good conduct credit per month for sentences that are less than a year. Inmates accrue six days of good conduct credit per month for sentences not less than one year but less than three years. They accrue seven days per month for sentences not less than three years but less than five years. They accrue eight days per month for sentences not less than five years but less than ten years. They accrue ten days per month for sentences of 10 years or more, excluding life. U.S. DEP’T OF ARMY, REG. 633-30, APPREHENSION AND CONFINEMENT, MILITARY SENTENCES TO CONFINEMENT, para. 13 (6 Nov. 1964).

184. Inmates only have the right to consult with an attorney if the board is composed of three members. Such boards are authorized to impose “major” disciplinary measures, such as forfeiture of good conduct time. One-member boards are only authorized to impose “minor” disciplinary measures. AR 190-47, *supra* note 182, paras. 12.11, .13.

185. *Id.* ch. 12 (describing these procedures).

186. *Id.* para. 12.13.

Other Adverse Administrative Action

Trial Defense Service attorneys provide counseling on a variety of administrative actions not mentioned above that are based on alleged violations of the UCMJ or are related to UCMJ proceedings.¹⁸⁷ This counseling is considered a “priority II” duty, which means that it is generally conducted by TDS.¹⁸⁸ For example, if a soldier commits a crime and her commander issues her a reprimand, rather than pursuing nonjudicial punishment or court-martial, TDS would generally offer the soldier counseling as a priority II duty.

Trial Defense Service attorneys may also provide counseling on administrative actions unrelated to UCMJ violations, based on an agreement with the local staff judge advocate.¹⁸⁹ This counseling is a “priority III” duty, which means that it would ordinarily be performed by attorneys working for the local staff judge advocate, absent an agreement with TDS.¹⁹⁰ For example, if a soldier displays a poor attitude and is given a written reprimand, TDS would offer the soldier counseling as a priority III duty only if this was consistent with an agreement with the staff judge advocate; otherwise the soldier would be referred to the local legal assistance office. Trial Defense Service counsel should not conduct this priority III counseling if it interferes

with priority I and priority II duties. Counsel should separate priority II duties from priority III duties for purposes of the monthly statistical report.¹⁹¹

Trial Defense Service attorneys can provide advice on administrative reprimands,¹⁹² adverse efficiency reports,¹⁹³ reports of survey,¹⁹⁴ inspector general investigations,¹⁹⁵ line of duty investigations,¹⁹⁶ bars to reenlistment,¹⁹⁷ security clearance revocations,¹⁹⁸ physical and medical evaluation boards,¹⁹⁹ flags (suspensions of favorable personnel actions),²⁰⁰ and flying evaluation boards.²⁰¹ Counsel should refer to the applicable regulations to ensure their advice is accurate. Fact sheets on many common administrative actions are available on the TDS Internet site.

Court-Martial Representation

Representing clients at courts-martial is the most important part of the TDS mission.²⁰² A court-martial is the most severe disciplinary option available to commanders. The rules are complex and the potential punishments are great.²⁰³ Soldiers facing court-martial need well-trained defense attorneys. Soldiers rely on the TDS to provide such counsel.

187. TDS SOP, *supra* note 2, para. 1-5b; U.S. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6(g)(2) (10 Sept. 1995) [hereinafter AR 27-3].

188. *See supra* notes 47-52 and accompanying text.

189. TDS SOP, *supra* note 2, para. 1-5c; AR 27-3, *supra* note 187, para. 3-6(g)(3).

190. *See supra* note 53 and accompanying text.

191. *See supra* notes 96-99 and accompanying text.

192. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

193. *See* U.S. DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION: OFFICER EVALUATION REPORTING SYSTEM (1 Oct. 1997); U.S. DEP'T OF ARMY, REG. 623-205, PERSONNEL EVALUATION: NONCOMMISSIONED OFFICER EVALUATION REPORTING SYSTEM (31 Mar. 1992).

194. *See* U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 1994).

195. *See* U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (15 Mar. 1994).

196. *See* U.S. DEP'T OF ARMY, REG. 600-8-1, PERSONNEL AFFAIRS: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986).

197. *See* U.S. DEP'T OF ARMY, REG. 601-280, PERSONNEL PROCUREMENT: ARMY RETENTION PROGRAM (29 Sept. 1995).

198. *See* U.S. DEP'T OF ARMY, REG. 380-67, SECURITY: PERSONNEL SECURITY PROGRAM (9 Sept. 1988).

199. *See* U.S. DEP'T OF ARMY, REG. 635-40, PERSONNEL SEPARATIONS: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, AND SEPARATION (15 Sept. 1990) (covering physical evaluation boards); U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL SERVICES: MEDICAL DENTAL, AND VETERINARY CARE (15 Feb. 1985) (covering medical evaluation boards).

200. *See* U.S. DEP'T OF ARMY, REG. 600-8-2, PERSONNEL AFFAIRS: SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (30 Nov. 1987).

201. *See* U.S. DEP'T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS (15 Dec. 1994). *See generally* Captain Michael P. Ryan, *Note from the Field, Flying Evaluation Boards: A Primer for Judge Advocates*, ARMY LAW., Aug. 1998, at 43.

202. TDS SOP, *supra* note 2, para. 1-5a.

203. For a chart of maximum punishments see MCM, *supra* note 33, app. 12.

Pretrial Confinement Strategies

For many soldiers, the court-martial process begins with pretrial confinement. All soldiers placed in pretrial confinement must be counseled on their rights²⁰⁴ and provided with a military attorney upon request.²⁰⁵ The TDS counsel typically give this counseling and assist soldiers once they have been confined.²⁰⁶

When providing a soldier initial pretrial confinement advice, counsel should explain the nature of the offenses for which the soldier is being confined, the right to remain silent, the right to civilian and military counsel, and the procedures by which the pretrial confinement will be reviewed.²⁰⁷ Counsel can provide this advice without forming an attorney-client relationship. However, the TDS attorney who provides the initial counseling will probably be detailed to represent the soldier during subsequent pretrial confinement hearings and the court-martial. Before providing the counseling, TDS attorneys should ensure that they do not have any conflicts of interest with other soldiers involved in the case.²⁰⁸ Counsel should stress the right to remain silent and explain that fellow inmates can also be called to testify concerning statements made to them in confinement. The only safe statements are those made to the defense attorney.²⁰⁹

There are a number of reviews of pretrial confinement. The first is the forty-eight hour probable cause determination. Within forty-eight hours of confinement, a neutral and detached officer (usually a military magistrate) must review the case to determine if probable cause exists to continue pretrial confinement.²¹⁰ The TDS counsel representing the soldier should, if appropriate, submit matters to this official indicating why probable cause does not exist.

The soldier's commander conducts the second review. Within seventy-two hours after a soldier is ordered into pretrial

confinement, the soldier's commander must decide whether confinement will continue. The commander must order release unless he or she finds probable cause that (1) the prisoner committed an offense triable by court-martial, (2) confinement is necessary because it is foreseeable that the prisoner will not appear at trial or pretrial hearings or the prisoner will engage in serious misconduct, and (3) lesser forms of restraint are inadequate.²¹¹ The commander must prepare a memorandum documenting his decision.²¹² The commander's review is often conducted at the same time the soldier is confined. Therefore, the TDS counsel may not have much success appealing to the commander for release from confinement.

A military magistrate conducts the third review, which must occur within seven days of confinement.²¹³ This is a TDS counsel's best chance of "springing" the client. Both counsel and the client have a right to appear before the magistrate and submit matters for consideration. The MRE do not apply to this hearing, so counsel can introduce hearsay to support the defense case.²¹⁴ The magistrate must conclude by a preponderance of the evidence that the soldier committed the offense and that confinement is the only means of restraint appropriate under the circumstances.²¹⁵

To be successful at the hearing, the TDS counsel should attack the basis for the confinement, contained in the commander's memorandum. If the memorandum asserts that the client is a "flight risk," counsel may be able to rebut this with evidence that the client has family in the area or cooperated fully with authorities at every opportunity. If the memorandum asserts that the client will engage in "serious criminal misconduct," counsel may rebut this with evidence that the client is a good soldier who has not engaged in misconduct in the past. Counsel may also be able to show that the commander did not attempt lesser forms of restraint.²¹⁶

204. *Id.* R.C.M. 305(e).

205. *Id.* R.C.M. 305(f).

206. TDS SOP, *supra* note 2, para. 1-5a(4).

207. MCM, *supra* note 33, R.C.M. 305(e).

208. *See* AR 27-26, *supra* note 1, R. 1.7.

209. MCM, *supra* note 33, MIL. R. EVID. 801(d)(2).

210. *Id.* R.C.M. 305(i)(1); *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993). This review may be combined with the third review, discussed below.

211. MCM, *supra* note 33, R.C.M. 305(h)(2).

212. *Id.* R.C.M. 305(h)(2)(C).

213. *Id.* R.C.M. 305(i)(2).

214. *Id.* R.C.M. 305(i)(2)(A)(ii).

215. *Id.* R.C.M. 305(i)(2)(A)(iii).

The magistrate must prepare a written memorandum memorializing his or her decision.²¹⁷ The client may request reconsideration of a decision to continue confinement based upon significant new information.²¹⁸ Once the case has been referred to trial, the military judge assigned to the case can also review the pretrial confinement decision.²¹⁹ In appropriate cases, TDS counsel should take full advantage of these opportunities to appeal.

If the client remains in confinement, counsel should consider raising a speedy trial motion. Although there is no set time-frame for the government to proceed to trial when the accused is in confinement (other than the 120-day time limit applicable to all courts-martial),²²⁰ the government is required to process the case with “due diligence.”²²¹

Counsel should also remember to request appropriate sentence credit for pretrial confinement. There are four basic types of sentence credit: (1) day-for-day credit for actual pretrial confinement;²²² day for day credit for restriction tantamount to confinement;²²³ (3) additional day-for-day credit for violation of the pretrial confinement rules;²²⁴ and (4) additional credit for pretrial punishment.²²⁵

Pretrial agreements can be a great benefit to the defense. Pretrial agreements require the convening authority to take action favorable to the accused, generally in the form of a sentence limitation.²²⁶ The disadvantage is that the accused gives up the right to contest the charges.²²⁷

Either a defense counsel or prosecutor can initiate pretrial agreement negotiations.²²⁸ Most pretrial agreements consist of a promise by the accused to plead guilty to some or all of the charges. A less common form of pretrial agreement consists of a promise to enter into a confessional stipulation to certain charges.²²⁹ In either case, the military judge will conduct a “providency inquiry” to ensure that the accused’s plea or confessional stipulation is entered into voluntarily, that the accused understands its effect, that there is a factual basis for the plea or stipulation, and that the accused understands and agrees to the terms of the pretrial agreement.²³⁰ The accused can include a number of other promises in a pretrial agreement, including a promise to enter into a stipulation of fact (included in nearly every pretrial agreement), a promise to testify against a co-accused, a promise to provide restitution to a victim, a promise not to engage in future misconduct, and a promise to waive procedural requirements, such as an Article 32 investigation, the right to trial by members, or the right to the production of witnesses.²³¹

216. See Captain Stephen J. Pflieger & Major Denise K. Vowell, *Pretrial Confinement: A Defense Perspective*, ARMY LAW., Apr. 1990, at 36.

217. MCM, *supra* note 33, R.C.M. 305(i)(2)(D).

218. *Id.* R.C.M. 305(i)(2)(E).

219. *Id.* R.C.M. 305(j).

220. *Id.* R.C.M. 707a requires the accused to be brought to trial within 120 days of referral of charges or imposition of restraint, whichever is earlier. Delays approved by the convening authority or military judge are excluded when determining when this time period has run.

221. *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).

222. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

223. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

224. MCM, *supra* note 33, R.C.M. 305k.

225. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983); UCMJ art. 13 (2000). See generally Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW. Aug. 1999, at 1.

226. MCM, *supra* note 33, R.C.M. 705(c)(1).

227. *Id.* R.C.M. 705(b)(1).

228. *Id.*

229. *Id.*

230. The military judge is always required to conduct this type of inquiry when the accused pleads guilty. *Id.* R.C.M. 910(c)-(f); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). A similar inquiry is required for stipulations that practically amount to a confession. MCM, *supra* note 33, R.C.M. 811(c), discussion. Such an inquiry is not required where the stipulation does not amount to a confession because the accused contests guilt by presenting evidence. For example, a stipulation that drugs were found in the accused’s vehicle would normally amount to a confession if no other evidence were presented. However, it would not amount to a confession if the defense presents evidence that the accused was not aware of the presence of the drugs. *Id.*

Most pretrial agreements contain a limit on the sentence the convening authority can approve after trial. The convening authority can also promise to refer the charges to a lower level of court-martial, to refer a capital case as noncapital, to withdraw certain charges or specifications, or have the government present no evidence on certain charges or specifications.²³²

Before negotiating a pretrial agreement, defense counsel should determine what the client really wants. If confinement is the main concern, counsel should attempt to obtain a favorable sentence limitation. If providing support for the client's family is important, counsel should work on a favorable limitation on forfeitures. If the accused does not desire trial by members, counsel can offer to waive this right in return for other favorable terms.

Agreeing on a stipulation of fact can be the most difficult part of a pretrial agreement negotiation. The prosecutor often tries to include as much aggravation as possible, including uncharged misconduct. The defense counsel wants to minimize the amount of damaging evidence in the stipulation. If there is a disagreement on the stipulation of fact, the military judge usually will not resolve it. The judge will typically rule that there is no pretrial agreement if the parties cannot agree on the required stipulation.²³³ Therefore, the contents of the stipulation should be agreed to well before trial.²³⁴

Discovery is an important tool for TDS counsel. The judge or members will decide the case based on the facts presented in court. Discovery is how counsel finds the relevant facts to present at trial.

The prosecutor is required to disclose a great deal of information to the defense without a discovery request. The prosecutor must disclose exculpatory evidence as soon as practicable.²³⁵ The prosecutor must provide the defense all of the papers and evidence that accompanied the charges as soon as practicable after service of charges.²³⁶ Before the beginning of trial on the merits, the prosecution must notify the defense of witnesses they intend to call,²³⁷ and prior convictions of the accused that they may offer on the merits.²³⁸ Prior to arraignment, the prosecutor must give the defense "Section III" notice.²³⁹ This notice must include grants of immunity or leniency to a prosecution witness,²⁴⁰ the accused's written or oral statements,²⁴¹ evidence seized from the accused that the prosecution intends to offer at trial,²⁴² and evidence of a prior identification of the accused that the prosecution intends to introduce at trial.²⁴³

The defense can obtain additional evidence from the prosecutor by filing a timely discovery request. Upon a defense request, the prosecutor must permit the defense to inspect evidence and reports that are material to the defense or that the prosecution intends to use at trial.²⁴⁴

231. *Id.* R.C.M. 705(c)(2). Certain pretrial agreement terms are specifically prohibited. A term will not be enforced if the accused did not voluntarily agree to it or if it deprives the accused of a fundamental right, such as the right to counsel, the right to due process, the right to challenge jurisdiction, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. *Id.* R.C.M. 705(c)(1).

232. *Id.* R.C.M. 705(b)(2).

233. If the stipulation of fact contains objectionable evidence, such as uncharged misconduct, the defense may be able to successfully object to this evidence at trial. However, if the stipulation of fact contains an agreement that its contents are admissible against the accused, the defense objection will not be successful. *See* *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

234. *See generally* Captain R. Peter Masterton, *Pretrial Agreement Negotiations: A Defense Perspective*, *ARMY LAW.*, Apr. 1990, at 28.

235. MCM, *supra* note 33, R.C.M. 701(a)(6); *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors must exercise due diligence in searching their files and readily available police files for exculpatory evidence. *United States v. Simmons*, 38 M.J. 386 (C.M.A. 1993).

236. MCM, *supra* note 33, R.C.M. 701(a)(1).

237. *Id.* R.C.M. 701(a)(3).

238. *Id.* R.C.M. 701(a)(4).

239. "Section III" refers to the third section of the MRE. *Id.* MIL. R. EVID. 301-21.

240. *Id.* MIL. R. EVID. 301(c)(2).

241. *Id.* MIL. R. EVID. 304(d)(1). The requirement only extends to statements relevant to the case that are known to the trial counsel and within the control of the armed forces. *Id.*

242. *Id.* MIL. R. EVID. 311(d)(1).

243. *Id.* MIL. R. EVID. 321(c)(1).

244. *Id.* R.C.M. 701(a)(2).

Trial Defense Service counsel should make discovery requests early and in writing. They should specify the documents sought, explain why the request is reasonable, and explain why the documents are relevant and necessary.²⁴⁵

One danger of submitting a discovery request is “reverse discovery.” Once the defense submits a discovery request the prosecutor can ask the defense to produce similar materials. If the defense asks to inspect the government’s evidence or reports, the government can ask to inspect the defense’s evidence or reports.²⁴⁶ However, before the prosecutor can take advantage of reverse discovery, he or she must fully comply with the defense discovery request.²⁴⁷

The defense also has certain discovery obligations. These include the duty to notify the government of defense witnesses, to provide signed statements made by the witnesses,²⁴⁸ and to notify the government of a defense of alibi, innocent ingestion, or lack of mental responsibility.²⁴⁹

The material obtained from the prosecution during discovery should serve as the beginning, not the end, of the defense counsel’s own investigation. The TDS counsel should interview all of the government witnesses to see if they have favorable information not mentioned in their pretrial statements. Counsel should ask the accused to identify further witnesses to interview. Counsel should also interview the accused’s chain of command and other soldiers in the accused’s unit, to determine what character and sentencing witnesses to call. The more witnesses defense attorneys interview, the more likely they are to find favorable evidence and fully prepare for potential unfavorable testimony.

Defense counsel should inspect the entire military police or Criminal Investigation Division (CID) file related to the case, if one exists.²⁵⁰ Counsel should also inspect any physical evidence held by the police. If the police are unwilling to permit a defense counsel to see the entire file, counsel should obtain assistance from the prosecutor or the military judge.

The TDS counsel should always visit the crime scene prior to trial. If possible, counsel should bring a camera along and take photographs of the scene. If measurements or locations are important, counsel should bring a tape measure and note pad to create a diagram. Counsel should also bring a TDS legal specialist or NCO along to serve as a witness, in case the photographs or diagrams are later needed at trial.

The TDS counsel should also consider obtaining defense experts. The defense may obtain expert witnesses at government expense when such witnesses are necessary to the defense case.²⁵¹ The defense counsel should do some research to find the best expert possible.²⁵² The government is not required to hire an expert specifically requested by the defense if it can produce an adequate substitute.²⁵³ Defense attorneys who are dissatisfied with the government’s substitute can ask the military judge to order the government to provide the requested expert.²⁵⁴ The defense has the burden of showing that employment of an expert is necessary and that the government’s substitute is inadequate. One way to do this is to show that the requested expert has a different scientific opinion than the government’s substitute.²⁵⁵

The TDS counsel can also request an expert be appointed as part of the defense team to help them prepare their case. Such experts are covered by the attorney-client privilege; the prosecution is not permitted to talk to these experts unless the

245. Major Edye Moran, *The Art of Trial Advocacy, The Art of Military Criminal Discovery Practice? Rules and Realities for Trial and Defense Counsel*, ARMY LAW., Feb. 1999, at 37. Sample discovery requests are available on the TDS Web site, *supra* note 20.

246. MCM, *supra* note 33, R.C.M. 701(b)(3)-(4).

247. *Id.* R.C.M. 701(b)(4).

248. *Id.* R.C.M. 701(b)(1).

249. *Id.* R.C.M. 701(b)(2).

250. *See* United States v. Gibson, 51 M.J. 198 (1999) (stating that defense counsel were ineffective because they failed to read final CID report that contained information strongly suggesting the alleged victim was not a credible witness).

251. MCM, *supra* note 33, R.C.M. 703(d); MIL. R. EVID. 706.

252. Names of appropriate experts can be found on the TDS Web site, *supra* note 20. Another source of expert witnesses is the Technical Advisory Service for Attorneys, which can be contacted at (800) 523-2319.

253. MCM, *supra* note 33, R.C.M. 703(d).

254. *Id.* Since employment of an expert can be critical to the preparation of the defense case, counsel should consider requesting an extraordinary writ if the military judge refuses to order the government to provide an expert. Defense counsel should coordinate such requests with their senior defense counsel. *See generally* Major Matthew Winter, *Putting on the Writs: Extraordinary Relief in a Nutshell*, ARMY LAW., May 1988, at 20.

255. United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988).

defense later decides to call them as witnesses.²⁵⁶ For example, when the accused's mental condition is in issue, defense counsel may request that a psychiatrist be appointed to the defense team to help prepare their psychiatric evidence.²⁵⁷ When accused soldiers hire experts at their own expense, such experts are also covered by the attorney-client privilege.²⁵⁸

Article 32 Investigations

An Article 32 investigation is required before charges are referred to a general court-martial.²⁵⁹ The accused has the right to be present at the hearing and be represented by counsel.²⁶⁰ The TDS attorneys provide this representation.²⁶¹

The Article 32 investigation is an excellent discovery tool. It provides an opportunity for the defense to discover what the government witnesses have to say and how they respond to direct and cross-examination.

The defense may present evidence in defense, extenuation, or mitigation at the hearing.²⁶² The investigating officer is required to gather evidence and produce witnesses requested by the defense that are reasonably available.²⁶³ However, presenting defense evidence gives the government the opportunity to discover the defense case. As a result, the defense often presents little or no evidence at the investigation.

Occasionally a defense counsel may want to present evidence at the Article 32 hearing. For example, where the charges against the accused are weak, the defense may be able to "win"

the case by presenting evidence at the hearing. Although the investigating officer's recommendation is not binding on the convening authority,²⁶⁴ a favorable recommendation may convince the convening authority to dismiss the charges or dispose of them under Article 15 or by summary court-martial. Defense counsel should be careful before calling the accused as a witness, since the accused's testimony can be used against him or her later at a court-martial.²⁶⁵

The TDS counsel should be prepared for an Article 32 investigation. In particular, defense counsel should be ready to cross-examine critical government witnesses, such as the victim in a rape case. If such witnesses later become unavailable, the government may try to introduce testimony from the investigation at trial.²⁶⁶ In this case, the defense's only opportunity to effectively cross-examine the witness may be at the Article 32 investigation.

The defense can request that the Article 32 investigation be closed to the public. The TDS counsel should consider making such a request if media attention could prejudice potential jurors or the defense case.²⁶⁷

If the investigation is inadequate or the accused has been denied procedural rights, the defense counsel may want to challenge the Article 32 investigation. Counsel can object to the commander who ordered the investigation within five days of receipt of the report.²⁶⁸ Defense counsel may also raise objections to the Article 32 investigation prior to trial.²⁶⁹ Unfortunately, the only remedy is generally a delay sufficient to reopen the investigation or to conduct a new one.²⁷⁰

256. *See* United States v. Toledo (C.M.A. 1987).

257. The defense can also request a sanity board under RCM 706 to develop psychological or psychiatric evidence helpful to the defense. Although this examination is not covered by the attorney-client privilege, the prosecutor is only able to obtain very general information relating to the exam. MCM, *supra* note 33, R.C.M. 706.

258. *Id.* MIL. R. EVID. 706(c).

259. UCMJ art. 32 (2000).

260. *Id.* R.C.M. 405.

261. TDS SOP, *supra* note 2, para. 1-5a(3).

262. MCM, *supra* note 33, R.C.M. 405(f)(11).

263. *Id.* R.C.M. 405(f)(9)-(12). Witnesses located within 100 miles of the investigation are generally considered reasonably available. *Id.* R.C.M. 405(g)(1)(A).

264. *See id.* R.C.M. 405(j).

265. *Id.* MIL. R. EVID. 801(d)(2).

266. *See generally* Captain Mark Cremin, *Use of Article 32 Testimony at Trial? A New Peril for Defense Counsel*, ARMY LAW., Jan. 1991, at 35.

267. *Id.* R.C.M. 405(h)(3).

268. *Id.* R.C.M. 405(j)(4).

269. *Id.* R.C.M. 905(b)(1), 906(b)(3).

270. *See id.* R.C.M. 906(b)(3) discussion.

Motion Practice

Defense counsel should raise appropriate objections at the beginning of a court-martial. Motions based on defects in the charges or the preferral and referral process, motions to suppress evidence, motions for discovery, motions for severance, and objections related to counsel must all be raised prior to the entry of pleas.²⁷¹ Many other defenses and objections can also be raised before trial.²⁷²

Defense counsel should prepare written briefs in support of motions.²⁷³ This not only assists the military judge, but also helps counsel clarify the issues. Counsel should not delay in preparation of motions and service of briefs until the last minute unless there is a good reason for doing so. Late submission of motions usually only means that the defense will not see the government response until shortly before trial.²⁷⁴

When a motion involves evidentiary issues, defense attorneys must request all of the necessary witnesses to support their position.²⁷⁵ Defense counsel should not rely on the prosecutor to stipulate to the necessary facts during a motion hearing. Witness testimony is often the best way (and sometimes the only way) to develop facts favorable to the defense.

Before the hearing, counsel should find out all of the information they can about the judge, since the judge is the sole decision-maker on motions. Judges are unwilling to make rulings without knowing all the relevant law. Defense counsel should find appropriate case law to cite in support of their positions.²⁷⁶

Trial Preparation

Defense counsel can only be effective if they are prepared and organized. Most cases are won by careful preparation before trial, not brilliant advocacy during trial.

The best way to organize a case is to start from the end and work backwards. Counsel should determine the theory of the case and then work backwards from there to develop proposed instructions, closing argument, direct examination of defense witnesses, cross examination of government witnesses, opening statement, and, finally, voir dire.²⁷⁷

A trial notebook is an essential tool for any trial advocate. It helps counsel organize all of the documents and notes needed during trial, such as witness questions and arguments. It allows counsel to find items quickly when they are needed, rather than fumbling for them during trial. The form of a trial notebook may vary from counsel to counsel. Some prefer three ring binders; others prefer accordion folders or binders with pockets.

A trial notebook should contain, at a minimum, separate sections for each of the following areas: (1) the trial script; (2) relevant documentary evidence, including the offer to plead guilty and all defense exhibits; (3) motions and supporting case law; (4) voir dire questions, panel member questionnaires and a panel schematic; (5) cross-examination questions for government witnesses, the witnesses' prior statements, and witness interview notes (a separate divider should be used for each witness); (6) direct examination questions for defense witnesses, prior statements and interview notes (again, separate dividers should be used for each witness); (7) proposed instructions; (8) closing argument; (9) cross and direct examination of all sentencing witnesses; and (10) sentencing argument.²⁷⁸

Defense counsel must have all of the necessary items with them in the courtroom. In addition to the trial notebook, counsel will need a copy of the *Manual for Courts-Martial*²⁷⁹ and the *Military Judge's Benchbook*.²⁸⁰ Many defense counsel also bring the *Military Rules of Evidence Manual*²⁸¹ with them to court.

271. *Id.* R.C.M. 905(b).

272. *See id.* R.C.M. 905 (motions generally), 906 (motions for appropriate relief), 907 (motions to dismiss), 909 (capacity of the accused to stand trial).

273. *Id.* R.C.M. 905(h) (written motions permitted).

274. *See* Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

275. Upon request, either party is entitled to a motion hearing to present argument or evidence. MCM, *supra* note 33, R.C.M. 905(h).

276. Major Walter Hudson, *The Art of Trial Advocacy, Advocacy in Front of the Military Judge*, ARMY LAW., Nov. 1999, at 36.

277. Lieutenant Colonel James L. Pohl, *Note from The Field, Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.

278. *See generally* Faculty, The Judge Advocate General's School, *The Art of Trial Advocacy, Trial Notebook*, ARMY LAW., Oct. 1997, at 40.

279. MCM, *supra* note 33.

280. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK (30 Sept. 1996) [hereinafter DA PAM 27-9].

281. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (4th ed. 1997).

Voir Dire

Defense counsel should carefully consider the accused's forum selection before trial. There are three options for enlisted soldiers: trial by military judge alone, trial by an all-officer panel, and trial by a panel consisting of officers and at least one-third enlisted members.²⁸² Some military attorneys believe that trial by members is more likely to result in an acquittal, but that a military judge is more likely to impose a lenient sentence. Some believe that officer panels adjudge more lenient sentences for military offenses, such as absence without leave and disrespect, than enlisted panels. Unfortunately, these assumptions are difficult to prove statistically.²⁸³

Counsel should find out as much as possible about the members and military judge who will sit on the case so they can make an intelligent forum selection. Counsel should review prior sentences to find out if the members and military judge are strict disciplinarians or are sensitive about particular offenses.

Voir dire is a defense counsel's first opportunity to speak with the court members; it should not be squandered. Counsel should prepare for voir dire by doing research on the individual members. The member questionnaires should only be the beginning of the inquiry. Counsel should also talk to other defense counsel and soldiers within the members' units to find out if any members have anything in their background, such as law enforcement experience, which might justify a challenge.

Counsel should use their theory of the case to develop voir dire questions. For example, if the theory is that the victim consented to an alleged rape, counsel might ask the members if

they would be unable to believe a person could consent to sex and later allege rape. The TDS Web site has a number of effective voir dire questions to serve as a starting point.²⁸⁴

Counsel must carefully listen to the answers to voir dire questions and have a procedure for recording them. If a co-counsel is appointed, he or she should record the answers.

Defense counsel can raise a challenge for cause against any member who may not be impartial.²⁸⁵ Examples of such grounds for challenge include personal interests in the case, hostile attitudes toward the defense, inelastic attitudes on sentencing,²⁸⁶ relationships with other court members (such as a member who rates another member),²⁸⁷ relationships with the prosecutor,²⁸⁸ relationships with witnesses,²⁸⁹ knowledge of the case or the evidence,²⁹⁰ or prior experience as a victim of a similar crime to that charged.²⁹¹ Such challenges should be liberally granted.²⁹²

Both the prosecution and the defense can make one peremptory challenge.²⁹³ Such challenges may not be based on race or gender.²⁹⁴ If the prosecutor peremptorily challenges a female or minority member, the defense counsel should object and require the prosecutor to state a race or gender neutral reason for the challenge. The prosecutor can raise the same objection to defense peremptory challenges, so defense counsel should be prepared with appropriate race and gender neutral grounds for their challenges.²⁹⁵ When a defense challenge for cause against a particular member is denied, a peremptory challenge must be exercised in order to preserve the issue for appeal. Additionally, if the peremptory challenge is made against the member unsuccessfully challenged for cause, counsel must state that

282. MCM, *supra* note 33, R.C.M. 903, 503(a).

283. See Major John E. Baker & Major William L. Wallis, *Predicting Courts-Martial Results: Choosing the Right Forum*, ARMY LAW., June 1985, at 71.

284. TDS Website, *supra*, note 20.

285. MCM, *supra* note 33, R.C.M. 912(f)(1)(N).

286. *Id.* R.C.M. 912(f) discussion.

287. *Cf.* United States v. White, 36 M.J. 284 (C.M.A. 1992) (stating that rater-ratee relationship between members is *not per se* disqualifying).

288. *Cf.* United States v. Hamilton, 41 M.J. 22 (C.M.A. 1994) (stating that member who received legal advice from assistant trial counsel not disqualified).

289. *Cf.* United States v. Ai, 49 M.J. 1 (1998) (stating that member's prior working relationship with witness was not disqualifying).

290. United States v. Coffin, 25 M.J. 32 (C.M.A. 1987).

291. United States v. Smart, 21 M.J. 15 (C.M.A. 1985).

292. *White*, 36 M.J. at 284.

293. MCM, *supra* note 33, R.C.M. 912(g)(1).

294. *Batson v. Kentucky*, 476 U.S. 79 (1986) (basing prosecutor's peremptory challenge on race is an unconstitutional denial of equal protection of law); *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (*Batson* applies to military); *JEB v. Alabama*, 511 U.S. 127 (1994) (*Batson* doctrine includes peremptory challenges based on gender).

295. *United States v. Whitham*, 47 M.J. 297 (1997).

they would have exercised the peremptory challenge against another member, had the causal challenge been granted.²⁹⁶

Many defense counsel automatically challenge the senior member of the panel, assuming that this individual will be the harshest disciplinarian. This is not always the case. A better approach is to rely on pretrial research to identify those members who should be peremptorily challenged.²⁹⁷

Finally, counsel should consider the “numbers game.” In most cases, it is easier to obtain an acquittal with a panel consisting of five members than it is with a panel consisting of four or three members. In each case, the defense only needs one vote for acquittal; this is only twenty percent of a five-person panel, while it is twenty-five percent of a four-person panel and thirty-three percent of a three-person panel. Similarly, eight person panels are generally better than seven or six person panels, and eleven person panels are better than ten or nine person panels.²⁹⁸ In appropriate cases, defense counsel may want to exercise a peremptory challenge to obtain a favorable number of members.²⁹⁹ Any panel divisible by three is bad for the defense on findings.

Opening Statement

The opening statement is counsel’s first opportunity to give the members or judge a summary of the facts of the case. Defense counsel should use the opening statement as a roadmap to explain where the defense is going. The best way to do this is to use storytelling techniques: counsel should speak in clear active voice to make the opening interesting.³⁰⁰

Defense counsel may not argue during the opening.³⁰¹ Instead, counsel should stick to the facts and tell the members what they anticipate the evidence will show.

Counsel should practice their opening and ensure that it is clear and easy to understand. Counsel should practice in front

of other defense counsel, TDS enlisted personnel, family or friends and ask for critiques. If possible, counsel should use a video-camera to record the practices and review the videotape to see what parts of the opening need clarification.

Defense counsel may want to tell the members what portions of the case the prosecutor neglected to mention during his or her opening statement. For example, a defense counsel may explain what a defense alibi witness will say or describe biases of government witnesses that will be developed on cross-examination. However, counsel should not make promises they cannot keep. Counsel should limit the opening to items they are sure will be introduced at trial.

Some defense counsel choose to defer the opening statement until the beginning of the defense case.³⁰² This may be effective when it is unclear what evidence the government will present. However, in most cases it is not a good idea to wait until the middle of trial to tell the defense story to the members.

Cross-Examination of Government Witnesses

Interviewing government witnesses is the first step in developing an effective cross-examination. Defense counsel should personally interview all of the government witnesses to determine what they will say during trial.³⁰³ Counsel must explore weaknesses in the witnesses’ testimony, such as their inability to observe or bias against the accused. Counsel should also determine if the witnesses have any information that is exculpatory or favorable to the defense. If possible, defense counsel should bring a third party to the interview. This person can later testify about any inconsistencies with the witness’s subsequent testimony at trial.³⁰⁴

The TDS counsel who plan to interview a soldier suspected of an offense may be faced with the dilemma of whether to read the soldier his or her rights under Article 31.³⁰⁵ Article 31

296. MCM, *supra* note 33, R.C.M. 912(f)(4).

297. Major Michael Hargis, *The Art of Trial Advocacy, Voir Dire: Making Your First Impression Count*, ARMY LAW., Nov. 1998, at 54.

298. These numbers are a result of the requirement for a two-thirds vote by the members for a finding of guilty. MCM, *supra* note 33, R.C.M. 921(c)(2)(B).

299. *Cf.* United States v. Newsome, 26 M.J. 719 (A.C.M.R. 1988), *aff’d*, 29 M.J. 17 (C.M.A. 1989) (stating that gamesmanship not encouraged).

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

301. MCM, *supra* note 33, R.C.M. 913(b) discussion.

302. MCM, *supra* note 33, R.C.M. 913(b) (stating that the defense may elect to make its opening statement after the prosecution has rested, but before the presentation of evidence for the defense).

303. Each side is entitled to an equal opportunity to interview witnesses and neither side may unreasonably impede the access of an other to witnesses. *Id.* R.C.M. 701(e).

304. *But see* Major Timothy McDonnell, *The Art of Trial Advocacy, It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

applies to all persons subject to the UCMJ, including defense counsel, who question another service member who is suspected of an offense, when there is a law enforcement purpose for the questioning. Military case law suggests that defense counsel are not required to read suspects their rights because defense counsel's questions do not have a law enforcement purpose.³⁰⁶ However, defense counsel must be careful to comply with the ethical rules relating to communications with witnesses.³⁰⁷

After the interview, defense counsel should determine what areas they want to develop during cross-examination. For example, counsel may want to establish that the witness was unable to observe accurately because his or her vision was impaired and the lighting was poor. Counsel should consolidate these points into written cross-examination questions.³⁰⁸

When developing cross-examination, counsel should avoid the temptation to rehash the direct examination or to ask too many questions. Cross-examination should be a succinct attack in a few areas that will help the defense case.³⁰⁹ Counsel should also avoid the temptation to ask questions they do not know the answer to; this can be disastrous if the witness gives the "wrong" answer.

One of the most fertile areas of cross-examination is prior inconsistent statements. Counsel should carefully examine prior statements the witness made to the military police, CID, or during the Article 32 investigation to see if they contain inconsistencies. Counsel should also question friends and acquaintances of the witness to determine if the witness made prior inconsistent statements to them. Counsel should incorporate these inconsistencies into the cross-examination questions

and, if necessary, be prepared to offer extrinsic evidence of these inconsistencies.³¹⁰

Direct Examination of Defense Witnesses

Proper preparation of defense testimony is critical. Defense counsel should carefully interview each defense witness and prepare direct examination questions prior to trial, to ensure that defense testimony is presented effectively.

Before interviewing defense witnesses, TDS counsel should prepare by reviewing the witnesses' prior statements. During interviews, counsel should try to build rapport with their witnesses.³¹¹ Counsel should explain what questions they are likely to ask and what cross examination questions the prosecutor will ask. If possible, counsel should show witnesses the courtroom and conduct mock examinations. If a witness is critical to the case, another counsel can play the role of trial counsel and ask anticipated cross-examination questions. Defense counsel should explain the importance of a good appearance and stress the importance of telling the truth.³¹²

To ensure that no important testimony is left out during trial, defense counsel should write out all the direct examination questions they want to ask. Counsel should also consider possible objections to the questions and prepare responses.³¹³

Counsel can enhance a witness' testimony by using demonstrative evidence, such as power point slides or overheads.³¹⁴ If counsel use visual aids, they must rehearse their witness on the use of the aids.

305. UCMJ art. 31 (2000).

306. See Lieutenant Colonel Harry L. Williams, *To Read or Not to Read . . . The Defense Counsel's Dilemma Provided by Article 31(b), UCMJ*, ARMY LAW., Sept. 1996, at 50.

307. Defense counsel may not communicate with a person represented by another lawyer without that lawyer's authorization. AR 27-26, *supra* note 1, R. 4.2. When dealing with an unrepresented person, a defense counsel may not imply that he or she is disinterested. *Id.* R. 4.3.

308. Major Martin Sitler, *The Art of Trial Advocacy, An Approach to Cross-Examination, "It's a Commando Raid, not the Invasion of Europe,"* ARMY LAW., July 1998, at 80.

309. See Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

310. MCM, *supra* note 33, MIL. R. EVID. 613. See Major Norman Allen, *The Art of Trial Advocacy, Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35.

311. Major Timothy McDonnell, *The Art of Trial Advocacy, It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

312. Lieutenant Colonel Steven Henley, *The Art of Trial Advocacy, Horse-shedding the Evidence? Twenty Do's and Don'ts of Witness Preparation*, ARMY LAW., Feb. 1998, at 38.

313. Major Norman Allen, *The Art of Trial Advocacy, Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

314. Major Edye Moran, *The Art of Trial Advocacy, Prevention of Juror Ennui? Demonstrative Evidence in the Courtroom*, ARMY LAW., June 1998, at 23.

Well before trial, defense counsel must talk to the accused about his or her right to testify.³¹⁵ The accused must personally decide whether he or she will testify. Counsel should discuss the advantages and disadvantages of such testimony and then let the accused make the final call.³¹⁶ The accused has an obvious reason to lie and any cross-examination on prior inconsistent statements³¹⁷ or misconduct³¹⁸ can be a disaster. If the accused decides to testify, the defense counsel must carefully prepare for that testimony. Counsel should rehearse the testimony and subject the client to sample cross-examination.

Arguments

The closing argument is the defense's opportunity to tie the case together for the panel or judge. It should be the high point of the defense case during which counsel explains why the evidence does not support a conviction.

Defense counsel should write out the argument well before trial. Most counsel write the argument in outline format, although some prefer to write it out verbatim.³¹⁹ Counsel should have a strong introduction that establishes the defense theory of the case. Counsel should then point out the facts and law that support that theory. Counsel should remind the fact-finder of evidence and testimony that is favorable to the defense and educate the members on instructions that the military judge will give. Counsel must finish strong, explaining why the fact-finder should acquit the accused.

The argument should build on the other parts of the trial. For example, counsel might want to remind the members that, dur-

ing voir dire, they promised not to find the accused guilty unless they were convinced of guilt beyond a reasonable doubt.

Defense counsel must develop their own style when presenting argument. Members and judges are looking for counsel who effectively present a case in an orderly fashion, not flamboyance.³²⁰ Counsel should maintain eye contact with the panel; it helps engage the members and keeps them interested.³²¹ Counsel should use strong language during argument; action verbs and simple language are more powerful than jargon and "legalese."

Counsel should rehearse the argument before trial. An unrehearsed argument will seldom be effective. Counsel should ask others to critique these rehearsals and, if possible videotape them.

Defense counsel must be alert during prosecutors' arguments to ensure that they do not make improper comments. It is impermissible for the prosecutor to comment on the accused's right to remain silent,³²² refer to personal beliefs,³²³ mention facts not in evidence,³²⁴ or make inflammatory statements.³²⁵ Defense counsel must be quick to object to such argument.³²⁶

Instructions

Long before trial, defense attorneys should start thinking of what instructions they would like the judge to give. The *Military Judge's Benchbook*³²⁷ contains most of the appropriate instructions.

315. *Rock v. Arkansas*, 483 U.S. 44 (1987); *United States v. Murray*, 52 M.J. 671 (N.M. Ct. Crim. App. 2000).

316. *United States v. Jones*, 14 M.J. 702 (N.M.C.M.R. 1982).

317. MCM, *supra* note 33, MIL. R. EVID. 613.

318. *Id.* MIL. R. EVID. 608 (permitting inquiry on cross examination into prior conduct concerning character for untruthfulness); MIL. R. EVID. 609 (permitting impeachment by evidence of conviction of a crime which is not over ten years old and which is punishable by death, a dishonorable discharge, or imprisonment in excess of one year, or involves dishonesty or false statement).

319. See Major Gregory Coe, *The Art of Trial Advocacy, To Write or Not to Write?: That Should Not Be A Question*, ARMY LAW., Sept. 1998, at 48.

320. See Lieutenant Colonel Thomas C. Lane, *Military Trial Lawyers: Some Observations*, ARMY LAW., Dec. 1986, at 45.

321. Faculty, The Judge Advocate General's School, *The Art of Trial Advocacy, Lawyering Through Your Eyes*, ARMY LAW., Nov. 1997, at 45.

322. *Griffin v. California*, 380 U.S. 609 (1965) (stating that it is improper for prosecutor to comment on accused's failure to testify); MCM, *supra* note 33, MIL. R. EVID. 301(f)(3) (stating that it is improper for prosecutor to introduce evidence of accused's pretrial refusal to answer questions or invocation of rights).

323. *United States v. Young*, 470 U.S. 1, 18 (1985).

324. *United States v. Cook*, 48 M.J. 64 (1998) (stating that the trial counsel erred by commenting on fact that accused yawned during trial; this was a fact not in evidence).

325. See, e.g., *United States v. Causey*, 37 M.J. 308 (C.M.A. 1995) (stating that the trial counsel improperly argued in urinalysis case that if members accepted accused's innocent ingestion defense, they would "hear it a million times again" in their units).

326. See Captain Randy V. Cargill, *Government Appellate Division Note, "Hard Blows" Versus "Foul Ones:" Restrictions on Trial Counsel's Closing Argument*, ARMY LAW., Jan. 1991, at 20.

Counsel should always consider asking for relevant evidentiary instructions contained in the *Benchbook*. The circumstantial evidence instruction is appropriate in most cases.³²⁸ Defense counsel can ask the judge to tailor this instruction by mentioning any justifiable inferences from circumstantial evidence the defense is relying on.³²⁹ The instruction on credibility of witnesses should be requested whenever the defense has assailed the credibility of government witnesses.³³⁰ If eyewitness identification is in issue, the eyewitness identification and interracial identification instruction may be appropriate.³³¹ If evidence of the accused's good character is introduced, the defense counsel should ask for the defense character instruction.³³² The defense should ask for the accomplice instruction whenever a government witness is culpably involved in the charged offenses.³³³ If a government witness testifies under a grant of immunity or promise of leniency, the defense should ask for the immunity instruction.³³⁴ Whenever uncharged misconduct is introduced, the defense should consider asking for the uncharged misconduct instruction.³³⁵ Similarly, whenever two or more similar offenses are charged, the defense should consider asking for the spillover instruction, to ensure the members do not improperly consider one offense as corroborating another.³³⁶

If the accused decides not to testify, the judge can give an instruction telling the members not to draw any adverse inference from this decision.³³⁷ Many defense counsel waive this instruction because it draws the members' attention to the accused's failure to testify.

If the case involves a novel theory of law, counsel may want to draft an instruction and submit it to the military judge.³³⁸ For example, if the accused is charged with a violation of assimilated state law under Article 134,³³⁹ the defense counsel should research the state law and be prepared to offer an appropriate instruction on the elements. This will help the defense counsel rebut instructions proposed by the prosecutor and may help ensure that the judge's final instruction is favorable to the defense.

Sentencing

Because of the high conviction rates in military courts-martial,³⁴⁰ sentencing is a frequent part of every defense counsel's practice. Since there are no sentencing guidelines in the military, the military judge and members have broad discretion in determining a sentence. Therefore, it is critical to present an effective sentencing case.

Defense counsel should know the rules the prosecutor must follow in sentencing. The prosecutor is limited to presenting personnel records of the accused, prior convictions, matters in aggravation directly relating to the offenses, and very limited testimony on the accused's previous duty performance and rehabilitative potential.³⁴¹ The prosecution witnesses may give a brief description of the accused's duty performance, but may not discuss specific instances of bad duty performance.³⁴² They may testify that the accused has "little" or "no" rehabilitative

327. DA PAM. 27-9, *supra* note 280.

328. *Id.* para. 7-3.

329. *Id.* para. 7-3, n.2.

330. *Id.* para. 7-7-1.

331. *Id.* para. 7-7-2.

332. *Id.* para. 7-8-1.

333. *Id.* para. 7-10.

334. *Id.* para. 7-19.

335. *Id.* para. 7-13-1.

336. *Id.* para. 7-17.

337. *Id.* para. 7-12.

338. See Major Victor Hansen, *The Art of Trial Advocacy, Instructions—An Often Overlooked Advocacy Tool*, ARMY LAW., Oct. 1998, at 62.

339. UCMJ art. 134 (2000).

340. In 1997, the Army-wide conviction rate at general courts-martial was 94.6%. The Army-wide conviction rate at special courts-martial empowered to adjudge a bad-conduct discharge was 86.8%. Clerk of Court, U.S. Army Legal Services Agency, *Five Year Military Justice Statistics, FY 1993-1997*, ARMY LAW., June 1998, at 26.

341. MCM, *supra* note 33, R.C.M. 1001(b).

342. *Id.* R.C.M. 1001(b).

potential, but may not elaborate further or suggest that the accused not be returned to the unit or military³⁴³. The prosecutor must follow the rules of evidence; defense counsel should object if the prosecutor fails to follow them.³⁴⁴

The rules of evidence are usually relaxed for the defense during sentencing.³⁴⁵ Defense counsel can offer hearsay statements (for example, from other soldiers, family, and friends), unauthenticated awards, certificates, and similar items. Counsel should be creative in coming up with such evidence. Counsel should send a letter or e-mail to the client's family and ask them to mail or fax letters and statements supporting the client.

Counsel should consider presenting a statement from the accused during sentencing. There are four possibilities: a sworn statement given by the client, an unsworn statement given by the client, an unsworn statement delivered by counsel, or a combination of any of these methods.³⁴⁶ Because the unsworn statement is not subject to cross-examination, it is less dangerous than a sworn statement. It may be more effective for the statement to come directly from the client, rather than from counsel. The exception is when the client was convicted during a contested case in which he or she testified and denied guilt. Judges and members who have already determined that the accused lied during the findings portion of trial may not want to hear from the accused again during sentencing.

Counsel should not present matters that will open the door to damaging government rebuttal.³⁴⁷ If the prosecutor has evidence that the accused missed numerous formations, it may not be a good idea to have the defense witnesses testify that the accused was a dependable duty performer. Defense counsel should also be careful not to elicit facts during the unsworn statement that the prosecutor can rebut, since the prosecutor can refute facts contained in the unsworn statement.³⁴⁸ If the accused testifies that he or she believes that he or she was a good duty performer, this is opinion testimony and will not open the door to rebuttal evidence of bad duty performance. However, if the accused testifies that the commander said that

he or she was the best duty performer in the company, the prosecutor may be able to rebut this with contrary testimony from the commander.

Defense counsel should never waive the opportunity to argue during sentencing. Counsel should explain why the accused should not be punished severely by highlighting evidence in extenuation, such as restitution the accused has made to the victims. Counsel should humanize the accused by describing his background, his family, good duty performance, and any other mitigation evidence that was introduced. Counsel may want to argue that a sentence to confinement should not exceed a specific amount. Members and judges are used to specific recommendations like this. The danger is that if the defense counsel recommends a higher sentence than the members or judge were considering, the argument may harm rather than help the accused. If the defense counsel plans to ask for a bad-conduct discharge³⁴⁹ in lieu of a lengthy jail sentence, counsel must discuss this matter fully with the client before trial.³⁵⁰

Post-trial Representation

Before authenticating the record of trial, the military judge has the authority to remedy certain types of errors. The military judge can conduct proceedings in revision and post-trial Article 39(a) sessions to remedy ambiguous or apparently illegal action by the court-martial, to inquire into the terms of the pretrial agreement, to reconsider a trial ruling, or to examine allegations of misconduct by a counsel, member, or witness.³⁵¹

After the record of trial has been authenticated, the defense can submit two types of matters to the convening authority: clemency matters under Rule for Court-Martial 1105,³⁵² and matters in response to the staff judge advocate's recommendation under Rule for Court-Martial 1106.³⁵³ Defense counsel can, and often do, combine these two submissions into one document asking for clemency. Defense counsel have ten days

343. *Id.* R.C.M. 1001(b)(5).

344. *But see id.* R.C.M. 1001(c)(3) (stating that the rules of evidence may be relaxed with respect to matters in extenuation and mitigation).

345. *Id.*

346. *Id.* R.C.M. 1001(c)(2).

347. *Id.* R.C.M. 1001(d).

348. *Id.* R.C.M. 1001(c)(2)(C).

349. When arguing for a discharge in lieu of confinement, defense counsel are limited to asking for a bad conduct discharge; counsel may not argue for a dishonorable discharge. *See* United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971); United States v. Dresen, 40 M.J. 462 (C.M.A. 1994).

350. United States v. McMillan, 42 C.M.R. 601 (A.C.M.R. 1970). The military judge is required to conduct an inquiry when the defense counsel argues for a punitive discharge. United States v. McNally, 16 M.J. 32 (C.M.A. 1983).

351. *Id.* R.C.M. 1102. *See generally* Major Randy L. Woolf, *Trial Defense Service Notes, The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27.

352. MCM, *supra* note 33, R.C.M. 1105.

Conclusion

from the service of the authenticated record of trial or the staff judge advocate's recommendation, whichever is later, to submit matters. The defense can request a twenty-day extension of this time-period, which is usually approved.³⁵⁴

Counsel should be creative in preparing post-trial submissions. One way to do this is to show the convening authority that circumstances have changed since trial. Counsel may be able to attach additional clemency matters that were not available at trial or show that the accused has made additional restitution. Counsel can also introduce evidence that was not admissible at trial, such as the collateral effects of the sentence or the sentences of a co-accused. Counsel should obtain the support of the accused's chain of command, if possible; convening authorities are used to accepting recommendations of subordinates.

If there is a good chance of obtaining clemency, a personal appearance before the convening authority should be requested. Although the convening authority is not required to grant such a request, this is an excellent way to highlight important parts of your clemency request.³⁵⁵

Trial Defense Service attorneys provide an important service to the Army. By effectively representing soldiers pending adverse action, they give soldiers confidence in the fairness of the military justice system and improve discipline and morale.

To be effective, TDS attorneys must have proper resources and training. The resources primarily come from the local command; TDS attorneys must aggressively seek this support. The training is done internally by TDS. Trial Defense Service attorneys must all strive to make this training effective.

Knowing how to properly represent clients is critical. This article provides a point of departure for new counsel. Experience, guidance from other defense counsel, and regular training are the other tools necessary to become an effective TDS counsel.

353. *Id.* R.C.M. 1106.

354. *Id.* R.C.M. 1105(c)(1), R.C.M. 1106(f)(5).

355. *See* Lieutenant Colonel Kevin Lovejoy, *The Art of Trial Advocacy, The Art of Clemency*, ARMY LAW., Mar. 1998, at 31.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Note

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 ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

CERCLA Remedial Investigations, Feasibility Studies, Proposed Plans and Records of Decision

Cleanup Documents

The Comprehensive Environmental Response, Compensation and Liability Act¹ (CERCLA) addresses the identification, characterization, and the cleanup of releases of hazardous substances into the environment. It is triggered by the release or the substantial threat of a release into the environment of a hazardous substance as defined by the Act, or any pollutant or con-

taminant which presents an imminent and substantial danger to the public health or welfare.² Once triggered, CERCLA requires that the appropriate agency, known as the lead agent,³ assess the situation and take necessary steps to clean up the site.⁴ Whether these site cleanups, known as response actions, take the form of a removal action⁵ or a remedial action,⁶ they must be conducted consistent with the National Contingency Plan⁷ (NCP). This article focuses on the procedures generally applicable to remedial actions.⁸

In a cleanup conducted under CERCLA, after conducting some preliminary assessments of the clean up site,⁹ the lead agent responsible for cleanup will undertake a remedial investigation (RI) to determine the nature and extent of remediation needed at the site.¹⁰ This study is often performed concurrently with a feasibility study (FS),¹¹ which will be discussed in greater detail below. On the basis of the RI/FS, the lead agent can assess the available cleanup alternatives and select a preferred remedy.¹² These conclusions are then summarized in a proposed plan that explains the cleanup alternatives and preferred remedy to the public.¹³ Once the lead agent receives public comment, the conclusions of both studies are incorporated into the CERCLA Record of Decision (ROD).¹⁴ The require-

1. 42 U.S.C. §§ 9601-9675 (2000).

2. *See id.* § 9604(a).

3. The lead agency is the agency responsible for planning and implementing response actions addressing contamination. For releases occurring on or from DOD facilities or vessels, DOD is the lead agency. 40 C.F.R. § 300.5 (1999); *see also*, Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). For most matters concerning Army installations or sites, DOD has further delegated this authority to the Department of the Army.

4. *See* 42 U.S.C. § 9604; 40 C.F.R. pt. 300 (National Contingency Plan).

5. Removal actions address emergency situations and are usually taken in response to releases or contaminations that pose an imminent danger to human health or the environment. *See* 40 C.F.R. § 300.415(b)(1); *see also* ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 234, ENVIRONMENTAL LAW DESKBOOK VI-17 (1998) [hereinafter JA 234], available at <http://www.jagcnet.army.mil> (Civil Law/Environmental Law/Environmental Law).

6. Remedial actions are long-term actions designed to provide a permanent solution for any releases that have occurred. *See generally* 40 C.F.R. § 300.430 (Remedial investigation/feasibility study and selection of remedy); *see also* JA 264, *supra* note 5, at VI-20.

7. 40 C.F.R. pt. 300.

8. For the procedures applicable to removal actions *see id.* § 300.415; *see also* JA 264, *supra* note 5, at VI-17 through VI-20; Environmental Law Division Note, *CERCLA Non-Time Critical Removal Actions*, ARMY LAW., Aug. 1998, at 68.

9. This initial assessment is known as the remedial site evaluation, and consists of a Preliminary Assessment and possibly a Site Inspection. *See* 40 C.F.R. § 300.420; JA 264, *supra* note 5, at VI-20 through VI-22. This process might best be described as an initial reconnaissance of the clean up site.

10. 40 C.F.R. § 300.430(a)(2). The RI is a process undertaken to fully determine the nature and extent of the problem presented by the release and generally involves collecting and analyzing data relating to contamination at a given site. *Id.* §§ 300.430(a)(2), (b), (d).

11. *Id.* §§ 300.5, 300.430(e).

12. *See* 42 U.S.C. § 9621 (2000); 40 C.F.R. § 300.430(e).

13. *See* 42 U.S.C. § 9613(k); 40 C.F.R. § 300.430(f)(2).

14. 40 C.F.R. § 300.430(f)(4).

ments for the RI/FS, the proposed plan, and the ROD are provided for in the NCP.¹⁵

The Components of a Remedial Investigation

The NCP states that the purpose of the remedial investigation is to ensure that decision-makers have sufficient information to determine whether specific remedial action is needed and what form it will take.¹⁶ The information in the RI is then used when developing and weighing remedial alternatives intended to deal with risk.¹⁷ In order to properly and efficiently focus the RI, the lead agent goes through an initial planning phase which typically consists of the collection of existing site data, including data from previous investigations such as the Preliminary Assessment and Site Investigation.¹⁸ This stage of the process is referred to as scoping.¹⁹

RI/FS Scoping

As stated in the NCP, “[d]uring scoping, the lead and support agencies shall confer to identify the optimal set and sequence of actions necessary to address site problems.”²⁰ Steps are taken to gather initial information and conduct initial site management planning to, inter alia: preliminarily identify boundaries of the study area; identify likely remedial action objectives; determine whether removal or interim remedial actions are necessary; preliminarily identify initial data quality objectives and required or appropriate levels of clean up;²¹ and develop a baseline risk assessment (BRA).²²

A critical aspect of the scoping, and ultimately the RI/FS process, is to conduct the risk assessment—an investigation of possible risks posed to human health and the environment.²³ This information is needed when choosing the cleanup remedy.²⁴ To determine the appropriate remedy in response to a release of a hazardous substance, the lead agent must assess the level of contamination at the remediation site. To do so, it must, through the RI/FS process, collect and analyze data and identify specific areas of contamination, as well as likely responses to the situation.²⁵ The RI also identifies data quality objectives, outlining whether and what further work is needed. This data forms the foundation for a BRA, which looks to the release in question, possible migration patterns, and potential threats to human health and the environment.²⁶

Land reuse will be an important aspect of the risk assessment process. For example, cleanups of industrial sites that are intended to remain industrial will involve a different level of cleanup than if the same site was to be developed into a housing complex. Other important risk factors would include the proximity of residents or vulnerable species to the site, as well as the use and overall contamination of surrounding properties. Here, context is important. If your cleanup site is in the middle of an industrial complex, CERCLA would not require the lead agent to pursue the same level of cleanup required of a site surrounded, say, by apartments. All of these risk-related issues are assessed as part of the scoping process.²⁷ Then, the appropriate levels of cleanup are determined, in part, by identifying and analyzing the remediation standards applicable to the site.²⁸

15. *Id.* pt. 300. *See id.* § 300.430 (detailing the requirements of the RI/FS process); *see also* O'REILLY, RCRA AND SUPERFUND, A PRACTICE GUIDE WITH FORMS, ENVIRONMENTAL LAW SERIES §§ 11.12-.15 (2nd ed. 1995) (providing a detailed overview of the process).

16. 40 C.F.R. § 300.430(d).

17. *Id.* §§ 300.5; 300.430(d).

18. *See supra* note 9.

19. *Id.* § 300.430(b).

20. *Id.*

21. *See infra* notes 30-39 and accompanying text discussing Applicable or Relevant and Appropriate Requirements (ARARs).

22. *See* 40 C.F.R. § 300.430(b); JA 264, *supra* note 5, at VI-27.

23. 40 C.F.R. § 300.430(d)(1).

24. *Id.*

25. *Id.* § 300.430(b)-(e).

26. *Id.* § 300.430(b), (d)(1)-(2) (providing additional information on scoping).

27. *See id.* § 300.430(b).

28. The remediation standards are derived principally from applicable federal and state statutory and regulatory standards; the ARARs. *See infra* notes 30-39 and accompanying text.

Community Acceptance

The NCP requires that the cleanup agent also consider, when practicable, community concerns before beginning field work on the RI.²⁹ Community issues and needs should be assessed along with other information relating to remediation.

ARARs

Section 9621 of CERCLA specifies that remedial actions must comply with federal cleanup requirements and standards or, in specific cases, more stringent state environmental laws.³⁰ So, an important part of the RI process is to identify federal and state standards, known as Applicable or Relevant and Appropriate Requirements³¹ (ARARs), to determine what level of cleanup may be required at a given site.³²

Applicable Requirements include “those cleanup standards, standards of control and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location or other circumstance found at a CERCLA site.”³³ Relevant and Appropriate Requirements are the same as Applicable Requirements except that, “while not ‘applicable’ to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, [they] address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.”³⁴

For a standard to rise to the level of an ARAR, it must meet two requirements. First, it must be substantive.³⁵ In other words, the standard in question must pertain directly to the cleanup action.³⁶ Second, the standard must be properly promulgated; draft regulations or proposed standards do not rise to the level of a promulgated requirement.³⁷ If federally or state promulgated standards or regulations do not exist, it is possible that non-promulgated standards, proposed cleanup levels or other forms of guidance may be considered when defining cleanup goals.³⁸

Using the data and standards that have been defined so far, the lead agent develops a site-specific RA, which is incorporated into the RI. This assessment helps the decision-maker develop acceptable exposure levels for remedial alternatives³⁹ generally found in the FS.

The Components of the Feasibility Study

The FS is often performed concurrently with the RI. The purpose of the FS is to develop, screen, and analyze a range of remediation alternatives.⁴⁰ The driver for this document is the NCP's requirement that the decision maker outline the cleanup problems that may be encountered at a site and outline how they will be addressed. First, the FS discusses the specific contaminants at a site, their potential exposure pathways and the remediation goals. Remediation goals may be provided via ARARs⁴¹—such as maximum containment levels (MCL)⁴²—or other cleanup levels that are based on readily available information. Land use controls (LUCs) may be factored into alternatives, particularly among those that require little treatment.⁴³

29. 40 C.F.R. § 300.430(c)(2).

30. 42 U.S.C. § 9621(d)(2)(A)(ii) (2000). Only certain state standards will be considered applicable or relevant and appropriate within the meaning of section 9621. This category is limited to state standards that: (a) are identified by a state in a timely manner, and (b) are more stringent than federal requirements. See 40 C.F.R. § 300.5.

31. 42 U.S.C. § 9621(d). Section 9621 states that potential ARARs include any standard, requirement, criteria, or limitation under any federal environmental law and any promulgated standard, requirement, criteria, or limitation under a state environmental or facility siting law that is timely identified and more stringent than any federal standard. *Id.* § 9621(d)(2)(A).

32. 40 C.F.R. § 300.430(d)(3).

33. *Id.* § 300.5.

34. *Id.*

35. *Id.*; see also 40 C.F.R. § 300.400(g)(2)(I)-(viii).

36. 40 C.F.R. § 300.400(g)(2). See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, RCRA, SUPERFUND AND EPCRA HOTLINE TRAINING MODULE: INTRODUCTION TO APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS 6-7 (Updated ed. 1998) (OSWER9205.5-10A) [hereinafter OSWER9205.5-10A], available at <http://www.epa.gov/superfund/contacts/sfhotline/arar.pdf>.

37. *Id.*

38. 40 C.F.R. § 300.400(g)(4); OSWER9205.5-10A, *supra* note 36, at 8.

39. *Id.* § 300.430(d)(4).

40. *Id.* § 300.430(e). This would include a no-action alternative. *Id.* § 300.430(e)(6).

The LUCs are legal, technical, or administrative restrictions relating to access or use of property.⁴⁴

Once this process is complete, the FS identifies potential forms of treatment, including innovative technologies, if appropriate.⁴⁵ On the basis of all this data, the lead agent forms remedial alternatives⁴⁶ for consideration in accordance with the identified ARARs. These alternatives must be protective of human health and the environment.⁴⁷ Protectiveness is determined by assessing the likelihood that containment or treatment will be effective in eliminating, reducing, or controlling the risks posed by a given contaminant.⁴⁸ When developing alternatives, the FS is guided by three criteria: effectiveness, implementability, and cost.⁴⁹

Effectiveness

This is the degree to which a particular remedial alternative will reduce risk and offer long-term protection. The decision maker focuses on whether each alternative is likely to reduce toxicity, mobility, or volume of potential contamination while minimizing risk and maximizing compliance with ARARs.⁵⁰ Though active treatment is preferred, LUCs may be considered.⁵¹

41. *Id.* § 300.430(e)(2)(i).

42. The MCLs and MCL goals are established under the Safe Drinking Water Act, 42 U.S.C. §§ 300f, 300g-1 (2000). *See* 40 C.F.R. § 300.430(e)(2)(i)(B)-(C).

43. 40 C.F.R. § 300.430(e)(3)(ii).

44. Policy Letter, Department of Defense, subject: Policy on Land Use Controls Associated With Environmental Resotration Activities (17 Jan. 2001) (issued to the Secretary of the Army) [hereinafter DOD Policy Letter].

45. 40 C.F.R. § 300.430(e)(2)(ii).

46. *See Id.* §§ 300.430(e)(3)-(7).

47. The NCP requires that remediation goals shall establish acceptable exposure levels that are protective of human health and the environment. *Id.* § 300.430(e)(2)(I). Remedy alternatives must also be protective. *Id.* § 300.430(e)(9)(iii)(A)-(B).

48. *Id.* §§ 300.430(e)(2), (5). *See* 40 C.F.R. §§ 300.430(e)(2)(i)(A)(1) (systemic toxicants), 300.430(e)(2)(i)(A)(2) (known or suspected carcinogens), 300.430(e)(2)(i)(A)(3)(4) technical limitations and uncertainty, 300.430(e)(2)(F) (alternatives to MCLs or MCL goals)

49. 40 C.F.R. §§ 300.430(e)(7)(i)-(iii).

50. *Id.* § 300.430(e)(7)(i).

51. DOD Policy Letter, *supra* note 44.

52. *Id.* § 300.430(e)(7)(ii).

53. *Id.* § 300.430(e)(7)(iii).

54. *Id.* § 300.430(e)(9)(iii).

55. *Id.* § 300.430(e)(9)(iii)(A).

56. *Id.* § 300.430(e)(9)(iii)(B). Note that it is possible for an ARAR to be waived. *See id.* § 300.430(f)(1)(ii)(C).

Implementability

At this point, the decision-maker looks at the types of technologies that are available to deal with a problem and whether they are appropriate. If a remedial alternative requires equipment or specialists that are not likely to be available, it may be removed from consideration.⁵²

Cost

Both construction costs and long-term operations and maintenance costs are considered. Those alternatives that have an unreasonable price tag will be dropped from consideration.⁵³

Remedy Selection

Once alternatives have been identified, they are assessed against nine criteria established in the NCP.⁵⁴ These are: (1) *Overall Protection of Human Health and the Environment*: the lead agent considers each alternative to see whether it will adequately address risks to human health and the environment, assessing both short and long term risks;⁵⁵ (2) *Compliance with ARARs*: alternatives are assessed to determine whether they comply with ARARs;⁵⁶ (3) *Long Term Effectiveness and Permanence*: the decision-maker looks at effectiveness and permanence of a proposed remedy to see if each alternative can be

successful, assessing the magnitude of the residual risk from contamination that may remain onsite as well as the adequacy and reliability of controls;⁵⁷ (4) *Reduction in Toxicity, Mobility and Volume Through Treatment*: this step considers the degree to which the alternatives reduce contamination at the site;⁵⁸ (5) *Short-Term Effectiveness*: this criterion looks to the risks that may be posed during cleanup and a general estimate of when protection may be achieved;⁵⁹ (6) *Implementability*: this step looks at the technical and administrative feasibility of an approach, as well as the availability of services and materials;⁶⁰ (7) *Cost*: this criterion considers both the direct and indirect costs of a given alternative; the main question being whether it is practical given the expense;⁶¹ (8) *State Acceptance*: the decision maker assesses state concerns regarding cleanup issues and examines state comments on ARARs;⁶² (9) *Community Acceptance*: finally, the decision maker considers the public reaction to alternatives, outlining reservations or support for different cleanup approaches.⁶³ Also, after the RI/FS is completed, the documents are made available for public comment in accordance with the process described below.

After this weighing process is over, the alternatives are compared to one another. The same criteria outlined above will be used to assess each remedy. However, the terms of the NCP's nine criteria are broken out into specific phases. Criteria one and two (protection of human health and the environment and compliance with ARARs) are threshold considerations. If a proposed remedy does not meet these requirements, it cannot receive further consideration.⁶⁴ Then, the practical consider-

ations outlined in criteria three through seven are the balancing criteria; these examine the practical and technical aspects of a remedial alternative.⁶⁵ By balancing these first seven factors, the decision-maker begins to identify the most effective alternatives. Among these, the lead agent selects the preferred alternative: the remedy that is expected to be the most protective of human health and the environment, meets ARAR requirements, and is the most practical.⁶⁶ When confirming the preferred alternative, the last two modifying criteria—state and community acceptance—are considered.⁶⁷ After the positives and negatives of all alternatives have been assessed, the preferred alternative can be formalized as the preferred remedy.⁶⁸

Proposed Plan

At this point, the lead agent prepares a Proposed Plan, the purpose of which is to present the preferred alternative to the public.⁶⁹ The Proposed Plan should explain the steps taken by the lead agent to reach specific conclusions. The public is then given at least thirty days to comment.⁷⁰ Once public comment is received, a Responsiveness Summary is prepared. This document brings together comments, criticisms, and any new information that may have arisen during the comment period. The lead agent is also expected to provide its responses to the issues raised by the community. The Proposed Plan becomes part of the administrative record and is to be made available along with the final ROD.⁷¹

57. *Id.* § 300.430(e)(9)(C).

58. *Id.* § 300.430(e)(9)(D).

59. *Id.* § 300.430(e)(9)(E).

60. *Id.* § 300.430(e)(9)(F).

61. *Id.* § 300.430(e)(9)(G).

62. *Id.* § 300.430(e)(9)(H).

63. *Id.* § 300.430(e)(9)(I).

64. *Id.* § 300.430(f)(i)(1)(A).

65. *Id.* § 300.430(f)(i)(1)(B).

66. Note that the level of EPA involvement in the final remedy determination will be higher when a cleanup site is on the EPA's National Priorities List (NPL). *Id.* § 300.430(f). When a federal facility is on the NPL and parties fail to agree, the remedy may be selected by the EPA Administrator. *See id.* § 300.420(f)(4)(iii). Federal facilities that are not on the NPL must comply with state laws regarding a remedial action. 42 U.S.C. § 9620(a)(4) (2000).

67. 40 C.F.R. § 300.430(f)(1)(ii)(C). This does not mean that state or community acceptance to proposals cannot be considered earlier. When they become known, these factors can be considered as part of the decision making process.

68. *Id.* §§ 300.430(f)(1)(ii), (f)(4).

69. *Id.* §§ 300.430(f)(1)(B)(2), (f)(2).

70. *Id.* § 300.430(f)(3)(C).

71. *Id.* § 300.430(f)(3)(F).

The selected remedial action is documented in a CERCLA ROD.⁷² On a non-NPL site, the CERCLA lead agent may choose a final remedy with the assistance of the state and other regulators.⁷³ At an NPL site, final remedy selection authority rests with the EPA.⁷⁴ Either way, the requirements of the ROD are fundamentally the same. The document should explain what the lead agent plans to do and the logic behind its decision.

The ROD describes the site and the types of contamination at issue, outlining the risks being addressed. The document then outlines the alternatives considered, detailing why the selected alternative was chosen.⁷⁵ Specifically, the ROD explains why the selected remedy is expected to be protective of human health and the environment and how it will meet listed ARARs.⁷⁶ Then, the technical aspects of the remedy should be described. The ROD describes the technical aspects of how treatment will address or mitigate a given level or type of contamination.⁷⁷ In addition, the ROD will outline LUCs imposed at the site and list post remedy commitments, such as inspection requirements or conducting five-year reviews.⁷⁸ Finally, the ROD should also discuss public comments and the Army's responses. Once finalized, the ROD should be made available for public inspection.⁷⁹

When faced with the release or the substantial threat of a release into the environment of a hazardous substance as defined by CERCLA, the Army, when acting as a lead agent, must follow the requirements of the Act and the NCP. Doing so will help to ensure the proper response action that will protect the environment, public health and safety, and the interests of the Army. Ms. Barfield.

Procurement Fraud Division Note

The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies

Recently, the Boeing Company and the Department of Justice (DOJ) settled two False Claims Act (FCA)⁸⁰ *qui tam* lawsuits,⁸¹ which alleged Boeing subcontractors provided the Army with defective transmission gear systems for the Chinook helicopter.⁸² As part of the settlement, Boeing agreed to pay approximately \$54 million in damages in addition to \$7.5 million in legal fees.⁸³ Significantly, a substantial portion of the settlement amount will be returned directly to open Army contracts at the affected command. As part of the settlement agreement, the Army will receive both goods and services at no additional cost to the government, to include: (1) a \$23.9 million contract modification that permitted the affected command to receive replacement transmission gears, (2) the waiver of

72. *Id.* §§ 300.430(f)(4)(i), (5)(ii).

73. 42 U.S.C. § 9604(c)(4) (2000); *see also* Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1967).

74. 40 C.F.R. § 300.430(f)(4)(iii). Additional requirements relating to cleanup documentation may be found in a Federal Facilities Agreement negotiated between the Army and the EPA.

75. *Id.* § 300.430(f)(5)(ii)(A)-(F).

76. If the proposed alternatives cannot meet ARARs or if ARAR requirements are expected to be waived, the ROD should outline these factors as well.

77. 40 C.F.R. § 300.430(f)(5).

78. *Id.* § 300.430(f)(5)(iii)(A)-(D).

79. *Id.* § 300.430(f)(6). Typically, RODs and other relevant documents are made available at local public libraries.

80. 31 U.S.C. §§ 3729-3733 (2000).

81. “[*Qui tam pro domino rege quam pro se ipso in hac parte sequitur* ‘who as well for the king as for himself sues in this matter.’” BLACK’S LAW DICTIONARY 1262 (Bryan A. Garner et al., eds., 7th ed. 1999). A *qui tam* action is one brought under a statute that allows a private person to sue for a penalty, part of which the government will receive. *Id.* In the case of the FCA, the statute authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States and gives the government sixty days to decide whether to join the action. If the government joins the suit, it conducts the action. 31 U.S.C. § 3730. If the government decides not to join, the individual, known as the “relator,” conducts the action. *See id.*

82. *Miscellany*, 42 GOV’T CONTRACTOR 18, ¶ 319 (Aug. 9, 2000); *Boeing Moves To Have Judge Removed In Helicopter Whistleblower Case*, SEATTLE TIMES, July 7, 1997, at D.1, available at <http://archives.seattletimes.nwsource.com/cgi-bin/taxis/web/vortex/display?slug=boe&date=19970707>. The DOJ assumed control of a *qui tam* lawsuit filed by Brett Roby, alleging Speco, a Boeing subcontractor, made hundreds of faulty transmission gears that were installed in helicopters delivered by Boeing to the Army. *Id.*

83. *Miscellany*, *supra* note 82, at 18. A portion of the settlement amount was made contingent on unsuccessful appeals by Boeing of several district court rulings. Boeing made no admissions of liability. *United States ex rel. Brett Roby v. The Boeing Co.*, No. C-1-95-375 (S.D. Ohio Aug. 3, 2000) (Settlement Agreement).

\$3.4 million of reinspection costs, and (3) a warranty on over 400 such gears.

To anyone generally familiar with the Miscellaneous Receipts Statute⁸⁴ (MRS), the settlement structure described above might seem problematical in that the settlement award will not be deposited directly to the U.S. Treasury. This note will review the restrictions of the MRS and discuss several potential exceptions to the statute that allow an agency to retain funds recovered as a result of criminal, civil, and administrative procurement fraud related actions.

The Miscellaneous Receipts Statute

As a general rule, the MRS requires that all funds received on behalf of the United States be deposited in the general fund of the U.S. Treasury. Specifically, the law provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”⁸⁵ The general mandate of the MRS applies to “money for the Government *from any source* The original source of the money—whether from private parties or the government—is thus irrelevant.”⁸⁶ The United States Court of Appeals for the District of Columbia Circuit described the MRS as “deriv[ing] from and safeguard[ing] a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that ‘[n]o Money shall

be drawn from the Treasury, but in Consequence of Appropriations made by law.’”⁸⁷ The MRS precludes the Executive Branch from using these miscellaneous funds without the benefit of the proper exercise of Congress’s appropriations authority.⁸⁸ Improper obligation and expenditure of such moneys constitutes an “illegal ‘augmentation’” of an agency’s appropriated funds.⁸⁹

Significantly, the MRS only applies to the receipt of money. The Act is not applicable when an agency receives goods or services,⁹⁰ as was the case in the Boeing settlement mentioned above. Further, agency receipt of goods or services does not require an “offsetting transfer from current appropriations to miscellaneous receipts.”⁹¹ The nonapplicability of the MRS holds even if the agency could have received money in lieu of the goods or services and such funds would have been required to be deposited in the U.S. Treasury.⁹²

There are two established exceptions to the MRS mandate that moneys received on behalf of the United States be deposited in the Treasury: “(1) where an agency is specifically authorized to retain moneys it collects, and (2) where the moneys received qualify as refunds to appropriations.”⁹³ For example, “when a program is funded out of a revolving fund, the enabling legislation ordinarily expressly authorizes the agency to deposit program income into the revolving fund.”⁹⁴ However, the mere existence of a revolving fund, by itself, does not permit the agency to retain the funds; express statutory authority must still exist.⁹⁵ Additionally, in *Security and Exchange Commission –*

84. 31 U.S.C. § 3302(b).

85. *Id.*

86. *Scheduled Airlines Traffic Office, Inc. v. Department of Defense*, 87 F.3d 1356, 1362 (D.C. Cir. 1996) (emphasis in original).

87. *Id.* at 1361 (citations omitted).

88. *Id.* at 1362 (“By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes.”).

89. *Securities and Exchange Commission – Retention of Rebate Resulting From Participation In Energy Savings Program*, B-265734, 1996 U.S. Comp. Gen. LEXIS 82, at * 8 (Feb. 13, 1996).

90. *Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties*, B-226004, 1988 U.S. Comp. Gen. LEXIS 770, at *3 (July 12, 1988) (“The miscellaneous receipts statute is applicable only when money, as opposed to goods or services, has been provided to the agency.”).

91. *Id.*

92. *Id.*

93. *Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 U.S. Comp. Gen. LEXIS 98, at * 4-5 (Feb. 14, 2000). For purposes of the second exception, the General Accounting Office (GAO) has defined a refund as “returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts.” *Id.* at *5-6 (citing 7 GAO POLICY AND PROCEDURES MANUAL FOR THE GUIDANCE OF FEDERAL AGENCIES § 5.4.A.1 (n.d.)).

94. *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *4 (Feb. 16, 1990); see also *TVA*, 2000 U.S. Comp. Gen. LEXIS 98, at *5. A revolving fund is a “fund established to finance a cycle of operations through amounts received by the fund. Within the Department of Defense, such funds include the Defense Working Capital Fund, as well as other working capital funds.” U.S. DEP’T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010107.49 (Jan. 22, 2001), available at <http://www.dtic.mil/comptroller/fmr/02a/Chapter01.pdf>.

Retention of Rebate Resulting from Participation in Energy Savings Program,⁹⁶ the SEC was permitted to credit part of a rebate received from a utility company directly to that agency as a result of their energy efficiency efforts because the Energy Policy Act of 1992,⁹⁷ coupled with the relevant appropriations act, specifically permitted retention of fifty percent of energy efficiency rebates.⁹⁸ In the area of affirmative medical recovery, The Federal Medical Care Recovery Act⁹⁹ permits military medical treatment facilities to retain recoveries from third-party payers rather than return the money to the Treasury.¹⁰⁰

Criminal Restitution

A statutory exception to the MRS exists for criminal restitution ordered by federal courts directly to agencies. In 1982, Congress passed the Victim and Witness Protection Act (VWPA)¹⁰¹ in order to “provide restitution to as many victims and in as many cases as possible.”¹⁰² Significantly, governmen-

tal entities, including federal agencies, are considered victims entitled to restitution under the VWPA.¹⁰³ Congress amended the VWPA in 1996 with the passage of the Mandatory Victim Restitution Act (MVRA),¹⁰⁴ which provided for mandatory restitution for certain crimes,¹⁰⁵ “regardless of a defendant’s anticipated ability to pay.”¹⁰⁶ Governmental agencies remain victims entitled to restitution despite the amendments,¹⁰⁷ but in multiple victim cases the government is the last to be made whole.¹⁰⁸

Agency Recovery in Civil False Claims Act Litigation

The Civil False Claims Act¹⁰⁹ imposes pecuniary liability for false or fraudulent claims.¹¹⁰ Additionally, one unique feature of the FCA is its *qui tam* provision, which permits a private party to bring a FCA action on behalf of the United States.¹¹¹ The FCA provides for double damages and costs in the case of

95. *FEMA*, 1990 U.S. Comp. Gen. LEXIS 426, at *4 (“Our Office has held that if the legislation establishing a revolving fund does not expressly authorize an agency to deposit receipts of a particular type into the revolving fund and there is no other basis for doing so, those receipts—even if related in some way to the programs the revolving fund supports—must be deposited in the Treasury as miscellaneous receipts.”); *accord TVA*, 2000 U.S. Comp. Gen. LEXIS 98, at *5.

96. B-265734, 1996 U.S. Comp. Gen. LEXIS 82, at *1 (Feb. 13, 1996).

97. 42 U.S.C. § 8256(c) (2000).

98. *SEC*, 1996 U.S. Comp. Gen. LEXIS 82, at *5-7.

99. 10 U.S.C. § 1095 (2000).

100. *Id.* § 1095(g)(1) (“Amounts collected under this section from a third-party payer or under any other provision of law from any other payer for health care services provided at or through a facility of the uniformed services shall be credited to the appropriation supporting the maintenance and operation of the facility and shall not be taken into consideration in establishing the operating budget of the facility.”).

101. 18 U.S.C. § 3663 (2000).

102. *United States v. Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997). The VWPA provided federal courts with the authority to order restitution without making the order a condition of probation. *Id.*

103. *Id.* (“federal courts have consistently held that governmental entities can be ‘victims’ under the VWPA.”). According to the Seventh Circuit, agencies or entities entitled to restitution include the Postal Service, the Small Business Administration, Medicare and the Department of Labor. *Id.* at 1190-91 (citations omitted). The court also noted cases in other circuits authorizing restitution to such agencies as the Department of Labor, Social Security Administration, Federal Bureau of Investigation, Department of Housing and Urban Development, Department of Agriculture and the Department of Defense. *Id.* at 1191 (citations omitted).

104. 18 U.S.C. § 3663A (codification of Pub. L. No. 104-132, § 204(a), 112 Stat. 1227). The MVRA “governs actions dating from April 2, 1996.” *United States v. Malpeso*, 126 F.3d 92, 94 n.1 (2nd Cir. 1997).

105. Mandatory restitution must be ordered in cases where the defendant has been convicted or plead guilty to crimes of violence, pro perjury crimes including those “committed by fraud or deceit,” and certain offenses involving “tampering with consumer products.” 18 U.S.C. § 3663A(c)(1)(a).

106. *Weinberger v. United States*, 71 F. Supp. 2d 803, 809 (S.D. Ohio 1999).

107. *Martin*, 128 F.3d at 1192.

108. 18 U.S.C. § 3664(i) (“In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.”).

109. 31 U.S.C. §§ 3729-3733 (2000).

110. *Id.* § 3729(a).

111. *Id.* § 3730(b).

voluntary disclosures, treble damages otherwise, and a civil penalty of \$5,500 to \$11,000 per claim.¹¹²

Significantly, the Comptroller General has characterized certain types of recoveries under the FCA as refunds for purposes of the MRS. In a 1990 opinion involving the Federal Emergency Management Agency (FEMA), the Comptroller General posited that FEMA could retain single damages, interest on that amount, and the administrative costs of investigating the false claims as a result of any FCA award or settlement.¹¹³ These funds were a direct consequence of the fraud and would serve to make the agency whole.¹¹⁴ In contrast, the Comptroller General refused FEMA's request to retain the treble damages, determining that any amount collected from a FCA lawsuit which exceeded the agency's actual losses were more in the nature of a civil penalty and must be returned to the Treasury as miscellaneous receipts.¹¹⁵

Last year, the Comptroller General again addressed the issue. In *Tennessee Valley Authority—False Claims Act Recoveries*,¹¹⁶ the TVA was permitted to retain from a FCA recovery, as a refund, "moneys erroneously disbursed on the basis of the false claim" and "investigative costs . . . directly related to the false claim."¹¹⁷ Once again, the Comptroller General denied the agency request to retain double and treble damages because

they were "exemplary damages, not actual losses" and TVA did not possess statutory authority to retain damages in the nature of a penalty.¹¹⁸

A significant limitation on agency retention of recovered money is the time required to receive the funds. Oftentimes it will take years to resolve a FCA lawsuit. In *Appropriation Accounting—Refunds And Collectibles*,¹¹⁹ the Comptroller General determined that refunds may be credited to the appropriation account charged with paying the original obligation, even if it has "expired," and those funds would then be "available for recording or adjusting obligations properly incurred before the appropriation expired."¹²⁰ However, if the appropriation account is "closed," any refund must be returned to the Treasury's general fund as a miscellaneous receipt.¹²¹

No Agency Recovery for PFCRA Actions

The Program Fraud Civil Remedies Act of 1986 (PFCRA)¹²² was enacted to provide agencies with an administrative mechanism to take action against any person who submits a false, fictitious or fraudulent claim for payment,¹²³ usually after the Department of Justice has declined to litigate it.¹²⁴ The Act subjects a contractor to a penalty of up to \$5,500 per false claim or

112. *Id.* § 3729(a) (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(9) (2000)).

113. Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *2 (Feb. 16, 1990).

114. *Id.* at *9.

115. *Id.* at *10.

116. B-281064, 2000 U.S. Comp. Gen. LEXIS 98, at *1 (Feb. 14, 2000).

117. *Id.* at *6.

118. *Id.* at *7 ("In the absence of statutory authority, agencies must deposit into the Treasury amounts recovered that are in the nature of penalties."); *see also*, Public Int. Research Group of N.J. v. Powell Duffryn Term., Inc., 913 F.2d 64, 82 (3rd Cir. 1990) (stating that civil penalties in Clean Water Act cases must be paid to the U.S. Treasury); *accord* United States v. Smithfield Foods, Inc., 982 F. Supp. 373 (E.D. Va. 1997). As a general rule, any "penalty which is imposed pursuant to a federal statute, in a suit brought by the federal government . . . constitutes 'public money' . . . [and] [a]s such, it must be deposited with the Treasury, in accordance with the Miscellaneous Receipts Act, unless otherwise specified by Congress." *Id.* at 374.

119. B-257905, 1995 U.S. Comp. Gen. LEXIS 821, at *1 (Dec. 26, 1995).

120. *Id.* at *6.

121. *Id.* To illustrate, Operation & Maintenance appropriations expire after one fiscal year (FY), but are closed five years after the end of the original FY. In FY 1 the Army contracts for widgets, but is overcharged and receives defective widgets. The Army, or a *qui tam* relator, files a FCA suit against the contractor, who settles in FY 5. Money recovered pursuant to a FCA award or settlement that represents the Army's actual losses as a result of the fraud may be returned to the expired OMA account. However, if the case is resolved when the OMA account has closed, the entire recovery must be deposited in the general fund of the U.S. Treasury.

122. 31 U.S.C. §§ 3801-3811 (2000).

123. *Orfanos v. Department of Health And Human Serv.*, 896 F. Supp. 23, 24-25 (D.D.C. 1995) (citing 31 U.S.C. § 3802 and stating that the PFCRA was "enacted in 1986 to allow federal departments and agencies . . . to pursue administrative actions against individuals for false, fictitious or fraudulent claims for benefits or payments under a federal agency program.").

124. S. REP. NO. 99-212, at 8, 10 (1985); *see also* Major Uldric L. Fiore, *Program Fraud Civil Remedies Act—The "Niche" Remedy*, ARMY LAW., Sept. 1990, at 58 (stating that "PFCRA cases must not be subject to DOJ/U.S. Attorney civil action. PFCRA does not require criminal declination, but an ongoing criminal investigation usually indicates PFCRA is at least premature.").

statement and an assessment of up to double the amount falsely claimed.¹²⁵

Because the legislative history indicates that PFCRA was designed to target “small-dollar fraud cases”¹²⁶ and because the jurisdictional cap for PFCRA actions is \$150,000 per claim (or group of related claims),¹²⁷ the Act has been characterized as a “mini False Claims Act.”¹²⁸ Unlike the FCA, which does not specifically address the disposition of money collected as a result of an award or settlement, PFCRA is not silent on the issue.¹²⁹ Section 3806(g) specifically states that, with the exception of certain penalties or assessments imposed by the United States Postal Service or the Secretary of Health and Human Services, “any amount of penalty or assessment collected . . . shall be deposited as miscellaneous receipts in the Treasury of the United States.”¹³⁰ Further, money collected by administrative offset¹³¹ must be treated as miscellaneous receipts and deposited in the U.S. Treasury.¹³² As such, in contrast to the FCA, recovery under the PFCRA may not be

retained by the agency, even if the amount recovered would be used to make the agency whole. There is, therefore, little incentive for agencies to use it.¹³³ If the statute could be amended to allow agencies to keep recoveries, however, PFCRA could become a valuable weapon in the arsenal of recovery mechanisms that steer clear of the MRS.

Replacement Contracts

Federal acquisition law provides a number of grounds for default terminations of a contract.¹³⁴ In some circumstances, contract fraud may provide grounds to terminate the contract.¹³⁵ In *Daft v. United States*,¹³⁶ the U.S. Court of Federal Claims stated: “Fraud taints everything it touches[;] . . . [c]onsequently, proof of fraud by clear and convincing evidence is a ground for default termination.”¹³⁷ Further, in *Morton v. United States*,¹³⁸ the court sustained a default termination of a “large,

125. 31 U.S.C. § 3802 (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(10) (2000)); *see also* S. REP. NO. 99-212, at 19 (“The sponsors of [the bill] always intended . . . that the assessment would be calculated only on the false portion of the claim.”). In March 1991, the Army achieved its first successful PFCRA recovery when a subcontractor agreed to pay double damages of \$5,000 plus \$10,000 in penalties. Procurement Fraud Division Note, *Army Procurement Fraud Program—Recent Developments*, ARMY LAW., Aug. 1991, at 22, 23 (*Army Obtains First DOD Recovery Under The Program Fraud Civil Remedies Act*).

126. S. REP. NO. 99-212, at 5, 8, 10.

127. 31 U.S.C. § 3803(c)(1)(A) & (B).

128. S. REP. NO. 99-212, at 24; *see also id.* at 34 (“[T]he Program Fraud bill is based on the civil False Claims Act—serving as the administrative alternative for small-dollar false claims . . .”).

129. Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *9 n.2 (Feb. 16, 1990) (holding that the FCA is silent on the issue, while the PFCRA is not).

130. 31 U.S.C. § 3806(g)(1) & (2); *see also* S. REP. NO. 99-212, at 50 (“[A]ny penalty and assessment collected shall be deposited as miscellaneous receipts in the U.S. Treasury.”).

131. Offset authority permits “an agency to deduct the amount of any sum owed by a person under a Program [sic] Fraud proceeding from amounts otherwise owed to that person from the United States.” S. REP. NO. 99-212, at 30.

132. 38 U.S.C. § 3807(b); *see also* S. REP. NO. 99-212, at 50 (“All amounts retained through setoff . . . shall be deposited as miscellaneous receipts in the U.S. Treasury.”).

133. The PFCRA in fact acts as a disincentive because the agency must bear the costs of litigation in an administrative hearing. The Army Procurement Fraud Division is currently pursuing its first PFCRA case in almost a decade.

134. “The standard default clauses identify three different grounds for termination: (1) failure to deliver the product or complete the work or service within the stated time, (2) failure to make progress in prosecuting the work and thereby endangering completion, and (3) breach of ‘other provisions’ of the contract.” JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 908 (3rd ed. 1995). Two nonenumerated grounds include the failure to proceed and anticipatory repudiation. *Id.*

135. *Id.* at 938 (*citing in part* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.203-3 (June 1997) (anti-gratuities clause) [hereinafter FAR]); 41 U.S.C. §§ 51-54 (2000) (Anti-kickback Act, prohibiting any subcontractor from making a gift to a contractor or higher-tier subcontractor as inducement for the award of a subcontract).

136. 31 Fed. Cl. 682 (1994), *aff’d*, *Daft v. United States*, 78 F.3d 1566 (Fed. Cir. 1996).

137. *Id.* at 688. The court also held that a termination for default based on fraud can be supported by additional fraud discovered after the initial termination decision. *Id.* Affirming the decision, the United States Court of Appeals for the Federal Circuit found a valid reason to default the contract or in addition to fraud, “defective contract performance,” but declined to address the issue of whether a contracting officer could terminate for default based *solely* on fraud. *Daft*, 78 F.3d at 1572 n.9.

138. 757 F.2d 1273 (Fed. Cir. 1985).

sophisticated contract” for fraud involving a single change order.¹³⁹

As a remedy for default terminations, the government is entitled to reprocurement or completion costs.¹⁴⁰ Rather than requiring that reprocurement costs be placed in the U.S. Treasury, an agency may use these funds for replacement contracts.¹⁴¹ The agency may retain all funds received that are necessary to pay for the replacement contract, even if the reprocurement costs exceed the cost of the original contract.¹⁴² Similarly, money received as liquidated damages, including performance bond money, may be retained by an agency if used to fund a replacement contract.¹⁴³ The funds received by the agency are in the nature of “refunds.”¹⁴⁴ The rationale for allowing the agency to retain excess costs of reprocurement is “that the money should be used ‘to make good the appropriation which will be damaged’ by having to incur costs in excess of the original contract price to receive the goods or services that would have been received under the original contract but for the default.”¹⁴⁵ This reasoning applies regardless of the type of appropriation.¹⁴⁶

However, the agency is limited in how it uses these funds. The Comptroller General has held that “an agency may only credit the funds to the appropriation charged with the contract that resulted in the liquidated damages. As such, the funds are only available to fund contracts properly chargeable to the original appropriation.”¹⁴⁷ A bona fide need must still exist for the goods or services contemplated in the original contract. The replacement contract “must be of substantially the same size and scope as the original contract and should be executed ‘without undue delay’ after the original contract is terminated.”¹⁴⁸

Negotiated Contractual Resolutions

Whenever the Contracting Officer (CO) suspects that a contract has been tainted by fraud, the CO must refer the matter for investigation.¹⁴⁹ The CO may not settle, pay, compromise, or adjust any claim involving fraud.¹⁵⁰ By statute, authority for all fraud-related litigation rests with the DOJ¹⁵¹ and inherent to that authority is the ability to settle.¹⁵² However, in cases where allegations of fraud are “founded” by criminal investigators, but DOJ has declined criminal and civil action, the CO may

139. In *Morton*, the contractor “point[ed] out there were approximately 950 alterations and change orders by the government.” *Id.* at 1277.

140. CIBINIC & NASH, *supra* note 134, at 998 (“Excess costs of reprocurement or completion are the unique remedies given to the Government upon a valid default termination.”).

141. Major Timothy D. Matheny, *Go On, Take te Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW. Sept. 1997, at 31, 39 (citations omitted) (“The GAO recognizes an exception allowing an agency ‘to retain recovered excess reprocurement coststo fund replacement contracts.’”).

142. *Id.*

143. National Park Service—Disposition of Performance Bond Forfeited To Government by Defaulting Contractor, B-216688, 64 Comp. Gen. LEXIS 625, at *6 (June 20, 1985). Excess reprocurement costs reflect the government’s actual costs and are “based on the difference in price between the defaulted contract and the reprocurement contract as adjusted for all increases in the original contract price to which the defaulted contractor is entitled, and for any cost increases resulting from changes in the work or Government misconduct under the reprocurement contract.” CIBINIC & NASH, *supra* note 134, at 1042. Liquidated damages reflect the parties’ reasonable estimate of the government’s damages in the event of breach or termination. *Id.* at 1050-51. The government may recover both excess reprocurement costs and liquidated damages. *Id.* at 1049. Despite the distinction between the two, the Comptroller General has opined that when liquidated damages are used to fund a replacement contract, any legal distinction between liquidated damages and reprocurement costs “is not pertinent.” *National Park Service*, 64 Comp. Gen. LEXIS 625, at *6.

144. Department of Interior—Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 U.S. Comp. Gen. LEXIS 1072, at *2-3 (Aug. 27, 1991) (“An agency may, however, deposit receipts that constitute refunds, including amounts collected as liquidated damages, to the credit of the appropriation or fund charged with the original expenditure.”).

145. Army Corps of Engineers – Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 at*4-7 (Sept. 8, 1986). In this case, the Comptroller General stated further that “[i]f the agency could not retain the funds for the purpose and to the extent indicated, it could find itself effectively paying twice for the same thing, or possibly, if it lacked sufficient unobligated money for the reprocurement, having to defer o r forego a needed procurement, with the result in many cases that much if not all of the original expenditure would be wasted.” *Id.* at *6.

146. *Id.* at *9 (holding that the type of appropriation, to include a multi-year appropriation, would make no difference).

147. *Department of Interior*, 1985 Comp. Gen. LEXIS 625, at *3.

148. *Id.* at *4.

149. FAR, *supra* note 135, at 33.209. The Army Procurement Fraud Division is authorized to receive such referrals directly from the CO and a Procurement Fraud Advisor should be contacted in the event of a fraud investigation. U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION, para. 8.3(a)(2) (19 Sept. 1994).

150. FAR, *supra* note 135, at 33.210. Additionally, the Contract Disputes Act, 41 U.S.C. § 605(a) (2000), precludes the agency, and the CO as an agent of the agency, from resolving disputes involving fraud. TDC Management Corp., DOT BCA No. 1802, 90-1 BCA ¶ 22,627, at 113, 492.

151. 28 U.S.C. § 516 (2000).

desire to resolve the contractual dispute—subject to DOJ approval—rather than allow the dispute to languish or terminate for default and force the contractor to appeal.

Under such circumstances, the CO will want to structure the contractual resolution in such a manner as to maximize the monetary return directly to the agency. The CO may legitimately obtain goods and services as a replacement-in-kind for nonconforming items or work without triggering the MRS. Further, any monetary relief obtained which is properly characterized as a refund¹⁵³ of an erroneous payment or an overpayment,¹⁵⁴ may also be retained by the agency without running afoul of the MRS.

Conclusion

As the Boeing case illustrates, proactive involvement in the resolution of contractual disputes, particularly those involving allegations of fraud, can pay hefty dividends to agency coffers. Judge Advocates should be aware that, despite the fiscal law restrictions contained in the Miscellaneous Receipts Statute, certain procurement fraud-related recoveries may be retained by the agency rather than being deposited in the U.S. Treasury. This note has attempted to identify several avenues for the retention of such recoveries. Lieutenant Colonel Davidson.

Litigation Division Note

Renting a Car While TDY: Let the Renter Beware

Introduction

A service member has temporary duty (TDY) orders that authorize use of a rental car. Could this be his chance to tool through the streets of San Diego in a Mercedes convertible the weekend after his conference ends? And what about this document called U.S. Rental Car Agreement Number 2? What is it and how will it affect him? What does he

need to know before renting a car using government orders, what are authorized uses of the rental car, and will he be considered to be within the scope of his employment for all rental car uses while on TDY?

This article tells you all you ever wanted to know about U.S. Government Car Rental Agreement Number 2 (*Rental Agreement Number 2*), and why anyone renting a car while on TDY should be familiar with its terms. It also discusses factors to consider before renting a car with government orders, and provides guidance on determining the authorized uses of a rental car. The article next addresses the liability implications of using a rental car for official and non-official travel. Lastly, the article describes what judge advocates should do if their office receives a request for representation dealing with an accident involving a rented vehicle, and what the judge advocate should consider when making a recommendation as to whether a service member or federal employee was acting within the scope of his employment.

U.S. Rental Car Agreement Number 2

The Military Traffic Management Command (MTMC) negotiated *Rental Agreement Number 2*¹⁵⁵ with many car rental agencies for use by government employees. When renting a car with government orders from one of the participating rental franchises, the terms of the MTMC negotiated car rental agreement apply.

Rental Agreement Number 2 covers “rentals of cars and passenger vans by employees of the Federal Government” when the employee rents the vehicle with government orders.¹⁵⁶ Participating rental companies submit a list of participating outlets annually to MTMC.¹⁵⁷ Generally, the agreement specifies the rental terms with participating rental companies. The terms include specifics about reservations, rental car quality, location of participating outlets, and liability insurance.

Federal employees making reservations with a participating rental company outlet do not need a credit card.¹⁵⁸ The reserva-

152. United Technologies Corp., ASBCA No. 46880, 95-2 BCA ¶ 27, 698; *see also* 4 C.F.R. § 101.3 (2000) (“Only the Department of Justice has authority to compromise, suspend, or terminate collection action on [false claims or those where there is an indication of fraud].”).

153. “In situations where we treated a contract adjustment or price renegotiation as a refund that could be credited to an [originally charged] appropriation . . . the ‘refund’ reflected a change in the amount the government owed its contractor based on the contractor’s performance or a change in the government’s requirements.” Securities and Exchange Commission-Reduction of Obligation of Appropriated Funds Due To a Sublease, B-265727, 1996 Comp. Gen. LE XIS 374, at *1 (July 19, 1996).

154. Matheny, *supra* note 141, at 40 (citations omitted). The return of these types of payments may also be characterized as a refund. Rebates from Travel Management Center Contractors, B-217913, 65 Comp. Gen. LEXIS 600, at *4 (May 30, 1986).

155. MILITARY TRAFFIC MANAGEMENT COMMAND, U.S. GOVERNMENT CAR RENTAL AGREEMENT NUMBER 2 (Feb. 26, 1996) [hereinafter CAR RENTAL AGREEMENT], at <http://dcsop.mtmc.army.mil/travel/car/agree.PDF>.

156. *Id.* ¶ 1.

157. Not all franchises of rental companies participate in the program. A list of all program participants is available at <http://dcsop.mtmc.army.mil/travel/car/list.pdf>.

tion agency will provide a confirmation number.¹⁵⁹ If a car is not available, the rental company agent must offer to rent a larger car at the same price, or, with the renter's consent, provide a smaller car at a reduced rate.¹⁶⁰ Rental companies must hold reservations at least two hours after a scheduled pick-up time.¹⁶¹

Federal employees renting vehicles must show travel orders or a government credit card to verify their travel status.¹⁶² Acceptance of a government credit card is mandatory.¹⁶³ Employees without a credit card are required to provide a cash deposit up to the estimated amount of the rental charge.¹⁶⁴ Rental companies are "strictly prohibited" from pre-charging a renter's credit card.¹⁶⁵ If the rental contract contains provisions that are contrary to *Rental Agreement Number 2*, the provisions of the agreement control and the contrary provisions of the rental contract will not bind the renter.¹⁶⁶

If more than one federal employee is traveling to the same destination, all drivers need not be listed on the rental contract. Authorized drivers of the rental vehicle include the renter and fellow employees acting within the scope of their employment duties.¹⁶⁷ Federal employees who are eighteen years of age or

older may rent and operate a vehicle when on official business.¹⁶⁸

Participating rental companies agree to provide vehicles that are less than two years old and have fewer than 40,000 miles on the odometer.¹⁶⁹ The vehicles must be clean, properly licensed, and have a full tank of gas.¹⁷⁰ If the car is disabled, the renter should notify the rental company.¹⁷¹ If the car is damaged, the renter must request a copy of the accident report for the rental company, if applicable.¹⁷² If a renter needs a new car, the rental company franchise will deduct time spent waiting for a replacement from the total amount of rental time.¹⁷³

Rental companies participating in the program must have either in-terminal outlet locations or off-terminal outlet locations within the vicinity of the airport.¹⁷⁴ If a renter has a reservation and no vehicle is available, the agency must arrange for another vehicle through another participating rental agency.¹⁷⁵

Participating rental franchises must carry insurance "which will protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicle."¹⁷⁶ *Rental Agreement Number 2* requires the rental companies to provide personal injury

158. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 6.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.* ¶ 7.

163. *Id.* *See generally* General Services Administration, Federal Travel Regulations; Mandatory Use of the Travel Charge Card, Part III, 65 Fed. Reg. 3054 (2000), *as amended by* 65 Fed. Reg. 16,828 (2000) (codified in scattered sections of 41 C.F.R. ch. 301). All government travelers must use their government travel charge card for official travel after 1 May 2000. 65 Fed. Reg. 16,828.

164. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 7.

165. *Id.* If the rental company pre-charges a credit card, it is grounds for immediate nonuse of the rental company. *Id.*

166. *Id.* ¶ 1.

167. *Id.* ¶ 8.

168. *Id.* The employee must be eligible to rent a car. For example, the employee must have a valid license.

169. *Id.* ¶ 10.

170. *Id.* The renter is expected to return the vehicle with a full tank of gas unless he agrees to pay the refueling fee and will use the full tank and return the tank empty. The renter should consider what option is most economical for the government, not just what is most convenient.

171. *Id.* ¶ 11.

172. *Id.*

173. *Id.*

174. *See id.* ¶ 3a. Any off-terminal locations "must be accessible by timely and clearly marked shuttle bus service or other such service, from clearly defined locations in the airport . . . [and] elapsed time to the rental office [may] not exceed 25 minutes from the time the traveler requested pick up service." *Id.*

175. *Id.* ¶ 5.

and wrongful death limits of “at least \$100,000 for each person for each accident or event, \$300,000 for all persons in each such accident or event, and property damage limits of \$25,000 for each such occurrence.”¹⁷⁷ If state or host nation law requires more favorable insurance, “such terms will apply to the rental.”¹⁷⁸

The United States is not liable for loss or damage to the rented vehicles. The participating rental company must bear the risk of damage or loss from all causes,¹⁷⁹ except for loss or damage caused by the following:

- (1) Willful or wanton negligence on the part of the driver;
- (2) Obtaining the vehicle through fraud or misrepresentation;
- (3) Operation of the vehicle by a driver who is under the influence of intoxicants or any prohibited drugs;
- (4) Use of the vehicle for any illegal purpose;
- (5) Use of the vehicle in pushing or towing another vehicle;
- (6) Use of or permitting the vehicle to carry passengers or property for hire;
- (7) Operation of the vehicle in live artillery fire exercises, or use in training for tactical maneuvers;
- (8) Operation of the vehicle in a test, race, or contest;
- (9) Operation of the vehicle by a person other than an authorized driver;

(10) Operation across international boundaries unless specifically authorized at time of rental;

(11) The vehicle is stolen and the renter cannot produce vehicle keys, unless a filed Police report indicates keys were stolen through theft or robbery; [or]

(12) Operation of the vehicle off paved, graded, state or professionally maintained roads, or driveways, except when the Company has agreed to this in writing beforehand.¹⁸⁰

If a federal employee damages or destroys a vehicle by one of the listed exceptions, the rental company will bill the renter’s agency, not the employee. However, if the renter’s agency determines the employee was not acting within the scope of his employment¹⁸¹ and declines reimbursement, the rental company may deal directly with the employee.¹⁸²

If a rental company violates the terms of *Rental Agreement Number 2*, MTMC may place the rental company off limits.¹⁸³ *Rental Agreement Number 2* does not state how long a rental company will be placed off limits. The MTMC will look to the nature of the violation, whether this is the first reported violation, and whether the company has had numerous violations. Employees aware of violations or problems with rental cars may report them to MTMC.¹⁸⁴

Rental Agreement Number 2 governs rental car contracts for federal employees renting cars from participating outlets when such rentals are “authorized by the Government.”¹⁸⁵ It is a comprehensive document that contains the terms and conditions of

176. *Id.* ¶ 9a.

177. *Id.* Because the rental company provides insurance, claims for damages involving federal employees in a rental car are referred to the rental company. The United States Army Claims Service (USARCS) will usually only participate in settling claims that exceed the limits of the required insurance. *See infra* notes 201-206 and accompanying text.

178. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9a.

179. *Id.* ¶ 9b. The rental company also bears the “costs of towing, administrative costs, loss of use, and replacements.” *Id.* *Rental Agreement Number 2* states that the rental company “assumes and shall bear the entire risk of loss of or damage to the rental vehicles . . . from any and every cause whatsoever, including without limitation, casualty, collision, fire, upset, malicious mischief, vandalism, tire damage, falling objects, overhead damage, glass breakage, strike, civil commotion, theft, mysterious disappearance.” *Id.* *See* Matter of: Americar Rental System, Inc.—Damage to Rental Cars, B-261274, 1996 U.S. Comp. Gen. LEXIS 8, at *1 (Jan. 16, 1996).

180. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9b. The enumerated exceptions are not valid if prohibited by state law. *Id.*

181. *See infra* notes 211-220 and accompanying text.

182. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9c.

183. *See id.* ¶ 12.

184. The MTMC asks that the renter bring the complaint initially to the manager of the renting location. If the problem cannot be resolved there, the renter should contact his agency’s transportation office, or the government representative of the rental car company. If those steps do not work, complaints should be sent to HQ MTMC, Hoffman II, ATTN: MTPP-AQ (Christine Braswell), 200 Stovall Street, Alexandria, VA 22332-5000. *See* Military Traffic Management Command, *Car Rental*, at <http://dcsop.mtmc.army.mil/travel/car/default.htm> (last modified Dec. 5, 2000).

185. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 1.

participating outlets and enumerates when and to what extent rental car companies are liable for damages arising out of accidents involving their rentals as well as when they will bear the cost of damages to their vehicles. Knowledge of the contents of the agreement is helpful to federal employees renting cars for official travel if there are problems with the car or if they are involved in an accident.

Authorized Uses of Rental Cars

Generally, federal employees must use government property only for government purposes.¹⁸⁶ Use of government owned or leased vehicles while on TDY is authorized under limited circumstances,¹⁸⁷ but strictly restricted to official use.¹⁸⁸ The question remains, however, whether a car rented with official travel orders is government property subject to certain use limitations.¹⁸⁹

In *Chufo v. Department of the Interior*,¹⁹⁰ the Court of Appeals for the Federal Circuit held that a car rented by a government employee using his government charge card was not a “government leased” vehicle for purposes of 31 U.S.C. § 1349(b).¹⁹¹ Although the government ultimately reimburses a traveler for the cost of his official travel, the court held that the government is not a party to the rental contract between the rental company and the traveler.¹⁹² This is true even though the

government establishes the terms of the rental through *Rental Agreement Number 2*.¹⁹³

At issue in *Chufo* was whether the plaintiff violated 31 U.S.C. § 1349(b) when he used his rental car for personal travel over the weekend before his government conference began on a Monday. Mr. Chufo requested permission to rent a car over the weekend to visit a work-related establishment. He did not, however, visit the establishment; instead he used the car to travel 300 miles on personal business.¹⁹⁴ The court held that Mr. Chufo, not the government, had rented the car. Mr. Chufo was responsible for paying the debt on his government-issued credit card, even though the government would reimburse him for his official travel expenses.¹⁹⁵ According to the court, since the government was not party to the contract, the rental car could not be considered a vehicle “owned or leased by the United States Government,” as those terms are used in section 1349(b).

Consistent with *Chufo*, the Department of Army General Counsel has opined that “[i]f the cost of renting a vehicle for a period during which the vehicle is used for both official and non-official travel does not exceed the cost of renting the vehicle for the period required to accomplish official travel, there is no requirement to prorate the rental fee in computing authorized reimbursement.”¹⁹⁶ Of course, renters using rental cars for both official and non-official travel may seek reimbursement for the expenses resulting from official travel only.¹⁹⁷

186. U.S. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION, para. 2-301 (Aug. 30, 1993) (C2, 25 Mar. 1996) [hereinafter JER]. The regulation provides that federal government resources, including “personnel, equipment, and property, shall be used by DOD employees for official purposes only,” subject to limited exceptions. *Id.* para. 2-301b.

187. See 1 Joint Fed. Travel Regs. ¶ U3200 (1 Mar. 2001) (military members) [hereinafter JFTR]; 2 Joint Travel Regs. ¶ C2001.A.3 (1 Mar. 2001) (civilian employees) [hereinafter JTR].

188. JER, *supra* note 32, para. 2-301; JFTR, *supra* note 33, ¶ U3200; JTR, *supra* note 32, ¶ C2050.C.2. Official use while on TDY is limited to transportation between places where the member’s presence is required for official business and between such places and temporary lodging. When public transportation is unavailable or its use is impracticable, travel to restaurants, drugstores, places of worship, barbershops, cleaning establishments, and similar places required for the subsistence, comfort or health of the member is also considered authorized official use. See JFTR, *supra* note 187, ¶ U3200.A.; JTR, *supra* note 187, ¶ C2050.C.2. Use of a government vehicle for anything other than these authorized uses could subject the user to disciplinary and possibly criminal sanctions, and, in the case of an accident, a finding that he was acting outside the scope of his employment. See, e.g., 31 U.S.C. § 1349(b) (2000); 18 U.S.C. § 641 (2000); UCMJ art. 121a(2) (2000); U.S. DEP’T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES, para. 1 (10 June 1999) (C1, 28 Jan. 2001) [hereinafter AR 58-1]; see also *infra* notes 211-220 and accompanying text.

189. This article addresses only situations where the TDY traveler rents a vehicle directly from the rental company. Vehicles leased directly by the government are considered government property. See JFTR, *supra* note 187, app. A; JTR, *supra* note 187, app. A; AR 58-1, *supra* note 188, paras. 1, 3-10, 3-11.

190. 45 F. 3d 419 (Fed. Cir. 1995).

191. *Id.* at 420.

192. *Id.* at 422.

193. *Id.* at 422. *But cf.* *Abrams v. Trunzo*, 129 F.3d 1174, 1176-78 (11th Cir. 1997) (government employee who rented car pursuant to TDY orders through *Rental Agreement Number 2* found to have acted as an agent of the government; government therefore “hired” the rental car).

194. *Id.* The Department of Interior charged plaintiff with misusing a government vehicle in violation of § 1349(b). The Department did not charge plaintiff “with insubordination, nor with submission of a false vehicle or reimbursement request.” *Id.*

195. *Id.* at 421.

Therefore, if the traveler receives a weekly rate for the car, and he wishes to use the car after his official business is over, he may continue to use the vehicle if the non-official use will not exceed the cost of the official travel.¹⁹⁸ For example, if an employee is going to The Judge Advocate General's School, U.S. Army, to attend a five-day course, and the most economical rental car rate is a weekly rate, the employee may use the car for the full week. He does not need to prorate the cost of his non-official travel.¹⁹⁹

What then is official travel? Official travel would generally include travel to and from the airport, to and from your lodging location to your place of temporary duty, travel to and from your place of worship, and travel to and from places to eat. Other official travel will include trips to the doctor, drug store, laundry or dry cleaning establishments, barbershops, and "similar places required for the traveler's subsistence, comfort or health."²⁰⁰ Federal employees will be reimbursed for official travel only. While use of the rental vehicle for non-official travel is not expressly prohibited, it does raise liability questions for the government and more importantly, the renter.

Fender-Benders: Who Pays?

Liability Coverage

Unfortunately, accidents do happen while service members or government employees on TDY are driving rented vehicles. While many of these accidents cause only property damage, sometimes only to the rental vehicle itself, some accidents involve significant personal injury to third parties. This note next addresses the issue of liability costs for these accidents.

Who bears the liability: the individual renter, the rental car company, or the United States? The answer to this question may turn on whether the renter was engaged in official or non-official travel at the time of the accident.

Official Travel

As a general matter, any service member or government employee who has an accident while engaged in official travel will not be held personally liable for resulting damages. As noted above, under the provisions of *Rental Agreement Number 2*, it is the car rental company that will be responsible for damages both to the rental vehicle and to any injured third parties. For damages in excess of the liability limits under the rental contract, the federal government will be responsible.²⁰¹

Rental Agreement Number 2 requires participating rental companies to maintain liability insurance for personal injury, wrongful death, and property damage caused while renting to federal employees. Under this coverage, the rental company assumes responsibility for all collision damage to its vehicle, regardless of fault,²⁰² and up to the required minimum policy limits for personal injury and third party property damages resulting from an accident.²⁰³ In such cases, claims filed against the Army are usually denied and the claimant is directed back to the rental company.²⁰⁴

Some cases will involve damages in excess of the required insurance limits provided in the rental contract or, with regard to damages to the rental vehicle, will fall within one of the exceptions to vehicle damage coverage listed in *Rental Agreement Number 2*. In such cases, third-party personal injury and

196. See Memorandum from Mr. Matt Reres, Deputy General Counsel, Ethics and Fiscal, Department of the Army, Office of the General Counsel, to Office of the Inspector General (ATTN: SAIG-ZXL), subject: Reimbursement for Rental Cars Used for Both Official and Non-official Travel (17 Apr. 1997) (on file with author) [hereinafter Reres Memo].

197. *Id.* For example, the traveler must bear any additional costs, such as gas, mileage charges, and liability, associated with non-official travel. *Id.*

198. *Id.* But cf. JFTR, *supra* note 187, ¶ U3415G ("Use of a [rental vehicle] is limited to official purposes."); JTR, *supra* note 187, ¶ C2102F (same). Litigation Division believes travelers can use a rental vehicle for personal use. First, *Rental Agreement Number 2* does not prohibit personal use of rental vehicles. Second, while some may argue that ¶ U3415G and ¶ C2102F restrict use of the rental car to official business, we believe the JFTR and JTR only address what is reimbursable, and does not restrict other uses that incur no additional cost to the government. Prior Comptroller General determinations, to the extent they have decided that use had to be for official purposes, were premised on a system of reimbursement that has been primarily replaced by *Rental Agreement Number 2*. Before *Rental Agreement Number 2*, a federal employee who incurred damage to a rental vehicle was required to pay the deductible amount for the damage and then had to seek reimbursement for the deductible on his travel voucher. Before the amount could be reimbursed, ¶ U3415G and ¶ C2102F required a determination that the damage occurred while the claimant was conducting official business. Now, *Rental Agreement Number 2* eliminates the need for this official use determination because it covers all costs for property damages to the rented vehicle.

199. Reres Memo, *supra* note 196.

200. JFTR, *supra* note 187, ¶ U3415G; JTR, *supra* note 187, ¶ C2102F; see also *In re Captain Kenneth R. Peterson, USA*, B-217921, 1986 U.S. Comp. Gen. LEXIS 1595, *1 (Jan. 29, 1986); Decision of Comptroller General, B-156536, 1965 U.S. Comp. Gen. LEXIS 2713, *1 (May 6, 1965).

201. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS PROCEDURES, paras. 2-82e(2), 2-100k (1 Apr. 1998) [hereinafter DA PAM 27-162].

202. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9b.

203. *Id.* ¶ 9a. See *supra* notes 176-182 and accompanying text.

204. See DA PAM 27-162, *supra* note 201, paras. 2-32e(3), 2-82e(1)(d)-(e).

FTCA and Scope of Employment

damage claims should be processed under the appropriate tort claims statute. So long as the employee or service member is found to have been operating the vehicle while in the scope of his federal employment, as discussed below, the federal government will bear any liability.²⁰⁵ Claims for damage to the rental car should be processed under the *JFTR* or *JTR* as appropriate.²⁰⁶

Non-Official Travel

By the terms of *Rental Agreement Number 2*, coverage is not limited to times when the renter is engaged in official travel, or within the scope of his employment.²⁰⁷ *Rental Agreement Number 2* requires the rental company to maintain insurance that will “protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicles.”²⁰⁸ With regard to this coverage, “[t]he conditions, restrictions and exclusions of the applicable insurance for any rental shall not be less favorable to the Government and its employees than the coverage afforded under standard automobile liability policies.”²⁰⁹ The insurance provisions of *Rental Agreement Number 2* may therefore apply even if an accident occurs while the renter is engaged in non-official travel.²¹⁰ If the damages exceed the required insurance limits provided in the rental contract, or if the rental company correctly denies coverage under *Rental Agreement Number 2*, who will be held liable, the federal government or the individual renter? The answer to this question will turn on whether the driver was operating the vehicle within the scope of his employment.

The Federal Tort Claims Act (FTCA)²¹¹ provides an exclusive remedy against any employee of the government, for “injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission” of the employee “while acting within the scope of his office or employment.”²¹² A finding that a federal employee was acting within the scope of his duties may therefore serve to immunize him from personal liability,²¹³ and the United States may be “substituted as the party defendant.”²¹⁴

Under the FTCA, the law of the state where the incident occurred governs the question of whether a federal employee was acting within the scope of his employment at the time of an accident.²¹⁵ The state law standards will be applied to the particular facts of each incident. Generally, the more the facts indicate that a federal employee was using a rental vehicle for personal, as opposed to official travel, the less appropriate an in-scope finding becomes. This is highlighted by *Clamor v. United States*,²¹⁶ a recent decision out of the Ninth Circuit. Applying Hawaii law, the court found that a civilian employee of the Navy was not acting within scope at the time he had an accident driving a rented car. The accident occurred on the naval base where the civilian employee was performing TDY, while he was on his way back to his hotel at the end of the duty day.²¹⁷ In reaching its holding, the court noted that the employee “was not engaged in any errand for his employer, but was leaving work and free to do whatever he wished.”²¹⁸ The government derived no benefit from his activities once he stopped working and left for the day, “any more than it does

205. *Id.* paras. 2-32e(3)(b), 2-82e(2).

206. *Id.*

207. *See supra* notes 176-182 and accompanying text.

208. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9a.

209. *Id.*

210. *Editors Note:* The MTMC takes the position that the required coverages would apply to both official and non-official use of the rented vehicle, but acknowledges that some of the participating rental companies do not concur in this interpretation. Telephone Interview with William J. Merrigan, Attorney, Headquarters, Military Traffic Management Command (Mar. 23, 2001) (Mr. Merrigan is the MTMC attorney responsible for *Rental Agreement Number 2*). This interpretation may also conflict with the language of paragraph one of *Rental Agreement Number 2*, which limits the agreement’s applicability to rentals “authorized by the Government.” CAR RENTAL AGREEMENT, *supra* note 155, ¶ 1. *See* USALSA Report, Litigation Division Note, *Liability of the United States for Accidents Involving Vehicles Rented Under the United States Government Car Rental Agreement*, ARMY LAW., July 1995, at 43 (stating that the insurance provisions of *Rental Agreement Number 2* may not apply if the rental vehicle is operated for personal use) [hereinafter USALSA Report].

211. 28 U.S.C. §§ 1346, 2671-2680 (2000). The FTCA is implemented by U.S. DEP’T OF ARMY, REG. 27-20, chs. 2, 4 (1 Apr. 1998) [hereinafter AR 27-20].

212. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679.

213. *See Flohr v. Mackovjak*, 84 F.3d 386, 389 (11th Cir. 1996).

214. 28 U.S.C. § 2679(d)(1).

215. *Id.* § 1346(b); *see, e.g., Clamor v. United States*, 2001 U.S. App. LEXIS 3114, *4 (9th Cir. 2001) (to be published at 240 F.3d 1215); *Flohr*, 84 F.3d at 390; DA PAM 27-162, *supra* note 201, para. 2-67f.

216. 2001 U.S. App. LEXIS 3114, *1.

when any other employee departs for the evening.”²¹⁹ Although *Clamor* may be viewed as an extreme holding, it highlights that federal employees may not benefit from the immunity conferred by the FTCA if they are using a rental car for non-official purposes.²²⁰

What to Consider When Recommending Whether a Government Employee Was Acting Within the Scope of His Employment While Driving a Rented Vehicle?

Plaintiffs periodically sue government employees in their individual capacity alleging various causes of action arising from a tort.²²¹ When a plaintiff sues a federal employee in his individual capacity, the individual may seek representation by the Department of Justice.²²² *Army Regulation 27-40*²²³ outlines the procedures judge advocates should follow when they receive such requests.²²⁴

Judge advocates should immediately notify Army Litigation Division of a request for representation and then begin to investigate the claim. This usually entails doing a mini-litigation report on the facts and circumstances surrounding the incident that forms the basis of the suit.²²⁵ The staff judge advocate (SJA) or legal adviser should make conclusions as to whether

the employee was acting within the scope of employment. The SJA or legal adviser should also recommend whether the Attorney General should certify that the employee was acting in the scope of employment or whether the DOJ should grant representation.²²⁶ If the U.S. Attorney certifies the employee was acting within the scope of his office or employment, the U.S. Attorney will move to substitute the United States as the defendant and to have the case removed from state to federal court if necessary.²²⁷

When determining whether an employee was acting in the scope of his employment at the time of the incident that is the subject of a lawsuit, the decision will depend on the facts of the individual case and the state law to be applied. Factors to consider include: the time of the accident, how far the employee was from the duty or lodging site, the purpose of the trip, the length of the TDY, and the law of scope of employment in the state where the accident took place. If the driver was involved in official and non-official travel, the judge advocate should also determine the point on the trip where the purpose changed from official to non-official, and whether the trip re-converted at any time to official travel.²²⁸ In close cases, the judge advocate may want to consider including a map of the TDY area and the accident location. These factors are by no means exhaustive, but are illustrative of many seen in the various cases the

217. *Id.* at *3-6.

218. *Id.* at *6.

219. *Id.*

220. For a list of additional cases finding federal employees out of scope at the time of a car accident, see U.S. ARMY CLAIMS SERVICE, OTJAG, FEDERAL TORT CLAIMS ACT HANDBOOK 115 (1998) [hereinafter FTCA HANDBOOK]. For an extreme example of a finding that an employee was within scope at the time of a car accident, see *Prince v. Creel*, 358 F. Supp. 234 (E.D. Tenn. 1972). In *Prince* the Federal District Court for the Eastern District of Tennessee found that an employee of the Federal Trade Commission was acting within the scope of his employment when he had an accident driving his own car to a TDY site. The court reached its holding even though the driver began TDY travel a day early, the day of the accident, to visit relatives. *Id.* at 237-38. For a list of additional cases finding federal employees within scope at the time of a car accident see FTCA HANDBOOK, *supra*, at 114.

221. This article does not discuss suits for medical malpractice or constitutional torts, only torts arising out of use of a rental vehicle while on official travel.

222. 28 U.S.C. § 2679(c) (2000).

223. U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, ch. 4 (19 Sept. 1994) [hereinafter AR 27-40].

224. Paragraph 4.4 addresses the actions SJAs or legal advisors should take when they learn “of a lawsuit alleging individual liability against [Department of the Army] personnel as a result of performance of official duties” *Id.* para. 4.4a. Judge advocates might also learn of an accident involving potential government liability before any lawsuits are filed, in which case they should open a potential claim file and initiate an investigation. AR 27-20, *supra* note 211, para. 2-2c.(1). In the case of an accident involving a rental car, the judge advocate should also notify the rental company, as failure to do so in a timely fashion may relieve the company of its contractual liability under some state laws.

225. AR 27-40, *supra* note 223, para. 4.4a(5) requires the servicing judge advocate to provide “facts surrounding the incident for which defendant is being sued and those relating to scope of employment; the SJA’s or legal adviser’s conclusions concerning scope of employment; and, a recommendation whether certification by the Attorney General or representation by a Department of Justice (DOJ) attorney should be granted.” *Id.*

226. *Id.*

227. 28 U.S.C. § 2679(d)(1) (2000).

228. The judge advocate or legal adviser should interview the employee and provide a memorandum of her notes instead of asking the witness to write a statement. Formal statements must be disclosed in discovery while notes of personal interviews are attorney work-product. If the memorandum paraphrases everything the driver says, some Assistant U.S. Attorneys may disclose the paraphrased portions. If the traveler was a civilian employee and a labor case ensued from the accident, include a copy of the proceedings. The proceedings may contain admissions or statements of government officials that may be relevant to scope of employment issues.

Army Litigation Division Tort Branch has considered in making scope of employment recommendations to DOJ.

What To Consider Before Renting a Car While on TDY

If a government employee is going to use a rental vehicle while on authorized TDY, he should ensure that the rental company franchise is a party to *Rental Agreement Number 2*, and that the company applies the agreement to the vehicle he will rent.²²⁹ Renters should also be advised to ensure that the rental contract itself states that *Rental Agreement Number 2* applies.

The employee should also check his insurance policy and with his insurance agent to review the terms of his policy. If he might use the rental car for personal travel, he must determine whether his policy will cover him while driving a rental car rented with government orders. Some insurance companies will cover such damages; others may require a separate rider on the insurance policy.²³⁰

If traveling overseas, or stationed overseas with plans to travel in the United States, he should check his insurance policy to see whether it covers him if involved in an accident while conducting personal travel. Service members and federal employees do not want to learn that they have no coverage after an accident. If the insurance policy will not cover personal

travel, the employee should consider buying additional insurance from the rental company²³¹ or foregoing personal travel.

If using a rental car for non-official purposes, the employee should keep track of the costs for the non-official travel. One suggestion is to fill the tank before beginning the non-official travel and again at completion. This is easy if the traveler is using the car for a longer trip, but it is slightly more difficult to do when he decides to use the car for personal errands. If the traveler decides not to keep track of the individual mileage for personal errands, he should consider foregoing reimbursement for a reasonable portion of his gas costs. If the car rental does not provide for unlimited mileage, the traveler should keep track of all mileage attributable to personal use.

Conclusion

Judge advocates and legal advisers can provide a service to federal employees by alerting them to potential problems when using a rental car while on temporary duty. Because not all travel in a rental vehicle may be for official business, we need to educate employees about what travel will be considered for official business. Federal employees may face personal liability for damages that exceed the insurance limits of *Rental Agreement Number 2*, especially if their personal car insurance does not cover them while using a vehicle rented under government orders. Major Amrein.

229. The terms of paragraph 2 of *Rental Agreement Number 2* should make the agreement applicable to substitute vehicles provided by the rental company. However, some companies assert claims for damages to vehicles not specifically listed in the agreement. See USALSA Report, *supra* note 210, at 42 n.16.

230. See, e.g., *Abrams v. Trunzo*, 129 F.3d 1174 (11th Cir. 1997) (examining applicability of private insurance contract provision excluding coverage for vehicles "hired" by the government).

231. This is a non-reimbursable expense. See *supra* note 197 and accompanying text.

Claims Report

United States Army Claims Service

Tort Claims Notes

Use of Annuities for Claims Arising in Foreign Countries

For individuals seeking compensation for injuries or damage incurred in foreign countries and caused by U.S. employees, they generally must pursue their remedy under the Military Claims Act (MCA),¹ or the Foreign Claims Act (FCA).² Both statutes give the Secretary of the Army authority to prescribe regulations to implement their terms.³ Under the implementing regulations, the Commander, United States Army Claims Service (USARCS), may require future periodic payments⁴ of damages.⁵ The Commander, USARCS may require such payments when:

- (1) It is necessary to ensure adequate care and compensation for a minor or other incompetent claimant or unemployed survivor over a period of years[;]
- (2) A medical trust is necessary to ensure the long-term availability of funds for anticipated future medical care, the cost of which is difficult to predict[; or]
- (3) The injured party's life expectancy cannot be reasonably determined or is likely to be shortened.⁶

Normally, such settlements involve sums that require USARCS action or approval.⁷ However, field offices may encounter instances within their settlement authority that will

involve future periodic payments to minors at the time they reach the age of majority. In some foreign countries it may be difficult or even impossible to obtain court approval of a minor's claim. If the claim is settled with the parents and the settlement is challenged when the minor reaches the age of majority, particularly where the parents have benefited and not the minor, the settlement may not be considered valid. Whether court approval is required or not, it is especially important that the settlement be structured to ensure that the minor actually receives the proceeds of the settlement after reaching the age of majority.⁸ One way of handling the problem is to purchase an annuity payable at the time the child attains the age of majority or later. Another way is to pay the settlement amount to a trust account.⁹

In the case of annuities, an annuity is purchased from an insurance company that will guarantee the future periodic payment of a sum of money. Often, the future periodic payments are for life. A life annuity is one that guarantees a stream of income until the beneficiary's death. Because the cost of an annuity for life is very sensitive to the beneficiary's date of birth, carriers will not provide a life quote until proof of age is established.

It is USARCS policy¹⁰ to use only insurance carriers that meet the qualifications of the Uniform Periodic Payments of Judgments Act.¹¹ The company must have a minimum of \$100,000,000 capital and surplus exclusive of any mandatory security valuation and reserve.¹² In addition, the company must

1. 10 U.S.C. § 2733 (2000).

2. *Id.* § 2734.

3. *Id.* §§ 2733(a) (MCA), 2734(a) (FCA). The MCA is implemented by U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, chs. 2-3 (31 Dec. 1997) [hereinafter AR 27-20]. The FCA is implemented by AR 27-20, *supra*, chs. 2, 10.

4. A structured settlement that calls for specific amounts to be paid to the claimant at specified future dates or events, such as hospitalization or reaching designated ages. See generally U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS PROCEDURES, para. 2-83 (1 Apr. 1998) [hereinafter DA PAM. 27-162].

5. AR 27-20, *supra* note 3, para. 2-46. In contrast, the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (2000), is implemented by Department of Justice (DOJ) regulations—Administrative Claims Under the Federal Tort Claims Act, 28 C.F.R. §§ 14.1-.11 (1999)—that do not require or even mention the use of annuities as a mode of settlement even though it is widely used by USARCS and other agencies. See AR 27-20, *supra* note 3, para. 2-46a.

6. AR 27-20, *supra* note 3, para. 2-46a(1)-(3); DA PAM. 27-162, *supra* note 4, para. 2-83b(1)-(3).

7. See AR 27-20, *supra* note 3, paras. 3-6 (settlement authority under the MCA), 10-9 (settlement authority under the FCA).

8. For guidance on claims involving minors and the requirement to obtain court approval, see AR 27-20, *supra* note 3, para. 2-56b. Generally, whether court approval is required depends on the local law of the domicile of the minor. See *id.* At a minimum, parents should be appointed as guardians or have such authority under local law.

9. See DA PAM. 27-162, *supra* note 4, para. 2-83a.

10. See Standard Operating Procedure, Torts Division, United States Army Claims Service, subject: SOP Governing the Use of Structured Settlements (18 May 2000) (on file with the Torts Division, USARCS).

have a qualifying rating from at least two of four listed rating organizations.¹³

Certain problems arise in claims under the FCA when the injured party and beneficiary of the annuity are inhabitants of a foreign country. Life insurance companies will not write life annuities if the beneficiary resides in a foreign country because they feel they cannot validate the beneficiary's date of birth through a birth certificate or social security number. Similarly, they may also be unable to validate the death of the beneficiary. Whether such beliefs are founded or not, carriers are skeptical of proof of age and death outside the United States. The problem, however, does not apply to claims under the MCA where a family member or civilian employee is temporarily residing in a foreign country. One method of avoiding the uncertainties of verification is to structure the periodic payments for a term of years or periodic lump-sum payments.

Problems may also be encountered with banks in foreign countries. Carriers will not allow direct deposits of annuity payments to a claimant's bank in a foreign country unless the bank is a member of the American Banking Association (ABA) and it has a listed ABA number. If direct deposit is not an option, ensure that the claimant has a post office box number or other qualified address to assure receipt of checks. If that is not feasible, checks can be mailed directly to the claimant's bank. Mr. Dolan.

Denials Under Both the FTCA and the MCA

In the United States, the Federal Tort Claims Act (FTCA)¹⁴ provides an exclusive negligence remedy unless judicially determined to be inapplicable.¹⁵ If a claim arises in the United States that only alleges negligence, the denial of such claim should be based upon the FTCA.¹⁶ The denial letter should

include a paragraph giving the claimant the right to request reconsideration. Because the office that is denying the claim is supposed to reconsider its decision to deny upon a request from the claimant, the reconsideration paragraph should specifically advise the claimant to send the request for reconsideration to that office. The field office's address should be given in the letter, not the U.S. Army Claims Service's (USARCS) address. That will prevent the claimant from sending his reconsideration directly to USARCS and bypassing the field offices. Claimants will be advised in the letter acknowledging receipt of the reconsideration request that, if the field office does not change its decision, then reconsideration will be forwarded to higher authority for final administrative action.

For claims arising outside the United States, the FTCA is inapplicable. For negligence claims arising outside the United States by family members of soldiers and U.S. civilian employees, as well as U.S. civilians, tourists, or citizens not permanently residing in a foreign country, a denial must cite the Military Claims Act (MCA)¹⁷ unless a current Status of Forces Agreement applies.¹⁸ The MCA denial letter must have an appeal paragraph giving the claimant an opportunity to appeal within sixty days of receipt of the denial letter.¹⁹ As with the FTCA reconsideration provisions, the appeal paragraph should clearly state which office is to receive the appeal to avoid delay in processing the appeal.²⁰

Claims arising out of noncombat activities of the armed forces worldwide should be considered under the MCA. While such claims may be paid under the MCA, denials should be under both the FTCA and MCA.²¹ Consider the example of a claim alleging property damage from blasting activities from an adjacent military installation. Whether negligence was actually involved is something that may never be ascertained. When the property damage is shown to have been caused by the blasting activities, the resolution of such claims should not be delayed

11. UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT §§ 1-24, 14 U.L.A. 10-42 (Supp. 1998), *reprinted in* DANIEL W. HINDERT ET AL., STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT OF JUDGMENTS app. B (2000).

12. *Id.* § 18(b)(3).

13. *Id.* § 18(b)(4). The ratings and organizations are as follows: from A.M. Best Company, an Unqualified A+, A+, or A; from Moody's a AAA, AA1, AA2, or AA3; from Standard and Poors a AAA, AA+, or AA; from Duff and Phelps a AAA, AA+, AA, or AA-.

14. 28 U.S.C. §§ 1346, 2671-2680 (2000); *see* AR 27-20, *supra* note 3, chs. 2, 4.

15. *See* AR 27-20, *supra* note 3, para. 3-2b.

16. *See* DA PAM. 27-162, *supra* note 4, fig. 261-A (sample FTCA denial letter).

17. 10 U.S.C. § 2733 (2000); AR 27-20, *supra* note 3, ch. 3. The Military Claims Act applies worldwide and allows recovery for damage caused by the negligent or wrongful conduct of service members and civilian employees. It also allows recovery for damage caused by the noncombat activities of the armed forces.

18. *See* DA PAM. 27-162, *supra* note 4, para. 3-4a (1).

19. *Id.* fig. 2-60 (sample MCA denial letter).

20. *Id.*

21. *Id.* fig. 2-61B (sample FTCA/MCA combination denial letter).

by trying to investigate whether negligence existed. For example, it will be time-consuming to determine whether a range was located too close to an adjacent town or whether a unit continued firing when they knew that a neighboring landowner's land was on fire. If the National Guard conducts noncombat activities, such as blasting activities, the claim would be considered under the National Guard Claims Act (NGCA),²² not the MCA. Denials of the National Guard claims should be under both the FTCA and the NGCA.²³

When there are multiple claimants whose claims all arise out of a single disaster, such as a chemical spill or a major explosion caused by noncombat activities in their state capacity, the question always arises about paying the smaller claims immediately. Because the FTCA does not allow advance payments as does the MCA, the MCA should be used to pay these claims. If such claims are denied, deny under both the FTCA and the MCA. Ms. Haffey.

22. AR 27-20, *supra* note 3, ch. 6.

23. 32 U.S.C. § 715 (2000); AR 27-20, *supra* note 3, ch. 6 (implementing the NGCA).

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, 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

2001

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
23-27 April	FY 2001 USAREUR Legal Assistance CLE (5F-F23E).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
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).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Judge Advocate Recruiting Conference (JARC-181).
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).	17-21 September	49th Legal Assistance Course (5F-F23).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
25-27 June	Career Services Directors Conference.	24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	October 2001	
July 2001		1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
8-13 July	12th Legal Administrators Course (7A-550A1).	1 October-20 November	6th Court Reporter Course (512-71DC5).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).	12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
16-20 July	76th Law of War Workshop (5F-F42).	15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).	23-26 October	FY 2002 USAREUR Legal Assistance CLE (5F-F23E).
16 July-31 August	5th Court Reporter Course (512-71DC5).	29 October-2 November	61st Fiscal Law Course (5F-F12).
30 July-10 August	147th Contract Attorneys Course (5F-F10).	November 2001	
August 2001		12-16 November	25th Criminal Law New Developments Course (5F-F35).
6-10 August	19th Federal Litigation Course (5F-F29).	26-30 November	55th Federal Labor Relations Course (5F-F22).
13 August-23 May 02	50th Graduate Course (5-27-C22).	26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
20-24 August	7th Military Justice Managers Course (5F-F31).	26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).
20-31 August	36th Operational Law Seminar (5F-F47).	December 2001	
September 2001		3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 September	2d Court Reporting Symposium (512-71DC6).	3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).	10-14 December	5th Tax Law for Attorneys Course (5F-F28)
10-21 September	16th Criminal Law Advocacy Course (5F-F34).		

	2002	25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).
January 2002		April 2002	
2-5 January	2002 Hawaii Tax CLE (5F-F28H).	1-5 April	26th Admin Law for Military Installations Course (5F-F24).
7-11 January	2002 PACOM Tax CLE (5F-F28P).	15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).	15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
7 January-26 February	7th Court Reporter Course (512-71DC5).	22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	29 April-10 May	148th Contract Attorneys Course (5F-F10).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).	29 April-17 May	45th Military Judge Course (5F-F33).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).	May 2002	
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).	13-17 May	50th Legal Assistance Course (5F-F23).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).	June 2002	
February 2002		3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
4-8 February	77th Law of War Workshop (5F-F42).	3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).	4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
25 February-1 March	62d Fiscal Law Course (5F-F12).	10-14 June	32d Staff Judge Advocate Course (5F-F52).
25 February-8 March	37th Operational Law Seminar (5F-F47).	17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
March 2002		17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
4-8 March	63d Fiscal Law Course (5F-F12).	17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).	24-26 June	Career Services Directors Conference.
25-29 March	4th Contract Litigation Course (5F-F103).		

28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	3. Civilian-Sponsored CLE Courses
July 2002		6 April ICLE Criminal Law Clayton State College Atlanta, Georgia
8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).	12 April ICLE Appellate Practice Ritz Carlton Downtown Atlanta, Georgia
8-12 July	13th Legal Administrators Course (7A-550A1).	19 April ICLE Practical Discovery Atlanta, Georgia
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).	15-19 Oct Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia
15-19 July	78th Law of War Workshop (5F-F42).	
15 July-30 August	8th Court Reporter Course (512-71DC5).	
29 July-9 August	149th Contract Attorneys Course (5F-F10).	For further information on civilian courses in your area, please contact one of the institutions listed below:
August 2002		AAJE: American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
5-9 August	20th Federal Litigation Course (5F-F29).	ABA: American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
12 August-May 2003	51st Graduate Course (5-27-C22).	AGACL: Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
19-23 August	8th Military Justice Managers Course (5F-F31).	ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
19-30 August	38th Operational Law Seminar (5F-F47).	ASLM: American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990CCEB:
September 2002		Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue
4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).	
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).	
9-20 September	18th Criminal Law Advocacy Course (5F-F34).	
11-13 September	3d Court Reporting Symposium (512-71DC6).	
16-20 September	51st Legal Assistance Course (5F-F23).	
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).	

	Berkeley, CA 94704 (510) 642-3973	LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747		
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662	MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900

UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762	California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years of which four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 007-31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 99-31 Jan 02 and every thirty-six months thereafter)
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968			
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905.			

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>			
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.	Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.	Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.
Arkansas	Secretary Arkansas CLE Bd Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.	Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
			Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January

Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.	Maine	Asst. Bar Counsel Bar of Overseers of the Bar P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Rule recommends twelve hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Report date: July
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.	Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076 No web site available	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.	Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.	Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobaracle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.	Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montanabar.org/	-Fifteen hours per year. -Reporting date: 1 March
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.	Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org/	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.

New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.	North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.	Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.	Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.	Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
			Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
			Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.

South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/profession- al responsibility. -Active duty military at- torneys are exempt. -Reporting date: 15 January.	West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311- 2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal eth- ics, office management, and/or substance abuse. -Active members not prac- ticing in West Virginia are exempt. -Reporting date: Report- ing period ends on 30 June every two years. Report must be filed by 31 July.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in le- gal ethics/profession- alism. -Nonresidents, not practic- ing in the state, are ex- empt. -Reporting date: 1 March.	Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http:// www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not prac- ticing in Wisconsin are ex- empt. -Reporting date: Report- ing period ends 31 Decem- ber every two years. Report must be received by 1 February.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http:// www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in le- gal ethics. -Full-time law school fac- ulty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.	Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http://www.wyoming bar.org	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 Janu- ary.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111- 3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not prac- ticing in state. -Reporting date: 31 Janu- ary.			
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/ courts/	-Twenty hours over two year period, two hours in ethics each reporting peri- od. -Reporting date: 2 July.			
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 30 June.			
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, includ- ing six hours ethics. -Reporting date: 31 January.			

* Military exempt (exemption must be declared with state)
**Must declare exemption

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

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2001**, 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 2001**. 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 Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil. Lieutenant Colonel Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

<u>DATE</u>	<u>TRAINING SITE AND HOST UNIT</u>	<u>AC GO/RC GO</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Francisco, CA 63rd RSC, 75th LSO	MG Huffman COL(P) Pietsch	RC JAG Readiness (SRP, SSCRA, Operations Law)	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
10-11 Mar	Washington, D.C. 10th LSO			POC: MAJ Silas Deroma (202) 305-0427
24-25 Mar	Charleston, SC 12th LSO	BG Barnes COL(P) Walker	Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsibility	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC	MG Huffman COL (P) Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

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

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the

requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile param-

eters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at (703) 767-9052, (DSN) 427-9052 or www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The Defense Technical Information Center also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, Vol. 1, JA 501-1-1995.

AD A301095 Government Contract Law Deskbook, Vol. 2, JA 501-2-1995.

AD A265777 Fiscal Law Course Deskbook, JA 506-1993.

Legal Assistance

AD A384333 Soldiers' and Sailors' Civil Relief Act Guide, JA 260-2000.

AD A333321 Real Property Guide, JA 261-1997.

AD A326002 Wills Guide, JA 262-1997.

AD A346757 Family Law Guide, JA 263-1998.

AD A384376 Consumer Law Guide, JA 265-2000.

AD A372624 Uniformed Services Worldwide Legal Assistance & Reserve Component Directory, JA 267-1999.

AD A374147 Tax Information Series, JA 269-2000.

AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), Vol. I, JA 270-1998.

AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), Vol. II, JA 270-1998.

AD A329216 Legal Assistance Office Administration Guide, JA 271-1997.

AD A276984 Deployment Guide, JA 272-1994.

AD A360704 Uniformed Services Former Spouses' Protection Act Guide, JA 274-1999.

AD A326316 Model Income Tax Assistance Guide, JA 275-1997.

AD A282033 Preventive Law Series, JA 276-1994.

Administrative and Civil Law

AD A380147 Defensive Federal Litigation, JA 200-2000.

AD A327379 Military Personnel Law, JA 215-1997.

AD A255346 Reports of Survey and Line of Duty Determinations, JA 231-1992.

AD A347157 Environmental Law Deskbook, JA 234-1998.

*AD A377491 Government Information Practices, JA 235-2000.

AD A377563 Federal Tort Claims Act, JA 241-2000.

AD A332865 AR 15-6 Investigations, JA 281-1998.

Labor Law

AD A350510 Law of Federal Employment, JA 210-2000.

AD A360707 The Law of Federal Labor-Management Relations, JA 211-1999.

Legal Research and Communications

U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

AD A332958 Military Citation, Sixth Edition,
JAGS-DD-1997.

Criminal Law

AD A302672 Unauthorized Absences Programmed
Text, JA 301-1995.

AD A303842 Trial Counsel and Defense Counsel
Handbook, JA 310-1995.

AD A302445 Nonjudicial Punishment, JA 330-1995.

AD A302674 Crimes and Defenses Deskbook,
JA 337-1994.

AD A274413 United States Attorney Prosecutions,
JA 338-1993.

International and Operational Law

*AD A377522 Operational Law Handbook,
JA 422-2000.

Reserve Affairs

AD A345797 Reserve Component JAGC Personnel
Policies Handbook, JAGS-GRA-1998.

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966 Criminal Investigations, Violation of the
U.S.C. in Economic Crime
Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*).

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a

DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis US-APDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

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

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), or the World Wide Web (WWW).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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

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

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OT-JAG staff.

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

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

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

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

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

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

(f) Once granted access to JAGCNet, follow step (b), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The following is a current list of TJAGSA publications available in various file formats for downloading from the LAAWS XXI JAGCNet at www.jagcnet.army.mil. These publications are available also on the LAAWS XXI CD-ROM set in PDF, only.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>			
			JA 263	August 2000	Family Law Guide, May 1998.
			JA 265	October 2000	Consumer Law Guides, September 2000.
			JA 267	May 2000	Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory, November 1999.
			JA 269	December 2000	Tax Information Series, December 2000.
JA 200	August 2000	Defensive Federal Litigation, January 2000.	JA 270	August 2000	The Uniformed Services Employment and Reemployment Rights Act Guide, June 1998.
JA 210	October 2000	Law of Federal Employment, September 2000.	JA 271	August 2000	Legal Assistance Office Administration Guide, August 1997.
JA 211	October 2000	The Law of Federal Labor-Management Relations, September 2000.	JA 275	August 2000	Model Income Tax Assistance Guide, June 1998.
JA 215	August 2000	Military Personnel Law, June 1997.	JA 280	September 2000	Administrative & Civil Law Basic Course Deskbook, (Vols. I & II), July 2000
JA 221	August 2000	Law of Military Installations Deskbook, September 1996.	JA 281	August 2000	AR 15-6 Investigations, December 1998.
JA 230	August 2000	Morale, Welfare, Recreation Operations, January 1998.	JA 301	May 2000	Unauthorized Absences, August 1995.
JA 231	August 2000	Reports of Survey and Line of Duty Determinations Guide, September 1992.	JA 330	October 2000	Nonjudicial Punishment Programmed Text, August 1995.
JA 234	September 2000	Environmental Law Deskbook, May 1998.	JA 337	May 2000	Crimes and Defenses Deskbook, July 1994.
JA 235	May 2000	Government Information Practices, March 2000.	JA 422	August 2000	Operational Law Handbook 2001, May 2000.
JA 241	October 2000	Federal Tort Claims Act, May 2000.	JA 501	August 2000	Contract Attorneys Course Deskbook, Aug. 2000
JA 250	September 2000	Readings in Hospital Law, May 1998.	JA 506	March 2001	Fiscal Law Course Deskbook,
JA 260	August 2000	Soldiers' and Sailors' Civil Relief Act Guide, July 2000.			
JA 261	August 2000	Real Property Guide, December 1997.			

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at <http://www.jagcnet.army.mil/tjagsa>. Click on directory for the listings.

All students that wish to access their office e-mail, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal <http://ako.us.army.mil> and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technol-

ogy Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

8. 2000 Edition of the *Manual for Courts-Martial (MCM)*

The 2000 edition of the *MCM* commemorating the 50th Anniversary of the Uniform Code of Military Justice was published in Fiscal Year 2000. The *MCM* is available in hardcopy from the Government Printing Office at their website <http://www.gpo.gov> or by telephone at (202) 512-1800; fax at (202) 512-2250. The 2000 edition of the *MCM* is also available electronically at <http://www.usapa.army.mil> (Army Administrative Electronic Publications, EPubs, Search for a Publication). Ms. Lull can be contacted at The Judge Advocate General's

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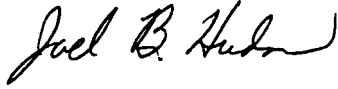
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