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Articles

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Major Vivian C. Shafer

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Thrift Savings Plan Participation a Valuable Option
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The New Military Thrift Savings Plan: Worth Consideration

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Introduction

Who does not want to be a millionaire? People fantasize about how they would spend the money. Each week, record numbers of television viewers watch while the host of a popular game show asks contestants question after question, leading up to “million-dollar questions.”² Imagine you, a military attorney, are a contestant. The host asks you a finance question, “What savings program may soon be available to service members to amass substantial wealth?” Will you falter with your answer? Will you lose your chance to become an instant millionaire? No, you will not fail because you read this article. You will correctly answer the host’s question and win a million dollars!

When your fantasy about appearing on a game show ends, you realize you will probably not be a millionaire. You sigh because you know you must work for a living and try to save for retirement. While disappointed, you may remember reading this discussion about a “savings program” designed to help you save for retirement. The “savings program” is the Thrift Savings Program (TSP) with over two and one half million participants.³ Participants are primarily civilian federal employees, but soon military members may also take advantage of the TSP’s benefits.

Attorneys need to know about the TSP and related issues in order to offer sound advice to their clients. Service members will question whether they should invest in the TSP, individual retirement accounts (IRAs), or unrestricted investment accounts. Members trying to decide which military retirement program to select will want to know how the TSP affects their decision.⁴ Undoubtedly, their primary source of information will be military personnel or finance clerks. Members, however, will turn to their legal assistance attorneys for answers to

complicated questions involving investments, military retirement programs, and estate planning. If attorneys do not educate themselves about these issues, the tragedy will not be the loss of a million dollars. The misfortune will be the absence of sound counsel resulting in the loss of significant financial benefits for clients.

This article informs attorneys about the TSP. The introduction contains a discussion of background issues surrounding the TSP. Those issues include the need for a military savings program and various significant entities’ positions on the TSP. A discussion of the TSP follows the discourse on the background issues. The reader, after familiarization with the issues and the program itself, should understand the application of the TSP to military members. Finally, the author makes several recommendations regarding service members’ retirement investments.

The Military Needs a Savings Program for Service Members

Advocates of the military have long maintained that the services need a retirement savings program⁵ similar to those found in the civilian sector for sound reasons. A savings program would enhance the military’s recruiting efforts in a competitive job market. In January of 1973, the military began to vie for employees when President Nixon adopted the all-volunteer force.⁶ In 1973, recruiters competed successfully because of economic and social conditions. Now, the labor market is extraordinarily tight and competition is stiff.⁷ Fewer young people are available and more of those youths are attending college.⁸ Young adults seeking jobs compare benefits and reject employers with poor benefits packages.⁹ The services find it hard to meet recruiting goals.¹⁰

1. MAJ Richard Rousseau, TJAGSA, provided technical oversight on all tax issues within this article. LTC Thomas K. Emswiler, Armed Forces Tax Council, Office of the Assistant Secretary of Defense Force Management Policy, (Military Personnel Policy), provided technical oversight on the Department of Defense’s position on implementation of the Thrift Savings Plan (TSP) and the political environment surrounding implementation. MAJ David Snyder offered counsel on investment issues regarding the funds available in the TSP.

2. Popular game-show host Regis Philbin asks contestants questions on ABC Network Television’s show “Who Wants to Be a Millionaire.” Johnnie L. Roberts, *How to Use a Lifeline*, NEWSWEEK, Feb. 28, 2000, at 46.

3. See FEDERAL RETIREMENT THRIFT INVESTMENT BOARD, THRIFT SAVINGS PLAN HIGHLIGHTS 1 (2000) [hereinafter TSP HIGHLIGHTS], available at <http://www.tsp.gov/cgi-bin/byteserver.cgi/forms/ochigh0005.pdf>; FEDERAL RETIREMENT THRIFT INVESTMENT BOARD, SUMMARY OF THE THRIFT SAVING PLAN 2 (1997) [hereinafter TSP SUMMARY], available at <http://www.tsp.gov/cgi-bin/byteserver.cgi/forms/tspsumw.pdf>.

4. See Major Vivian C. Shafer, *Choosing Between the High-Three and the Redux Retirement Programs: Thrift Savings Plan Participation a Valuable Option*, ARMY LAW., Sept. 2000, at 18 (providing information on deciding between the two retirement programs).

Military proponents argue that the services need a TSP to help retain members once they join the service. People entering service are better educated¹¹ and older than in years past.¹² In 1997, the RAND Corporation completed a study on enlisted career intentions. The study's authors found a relationship between savings opportunities and retention. Enlisted members overwhelmingly indicated savings opportunities would influence their decisions to reenlist.¹³ Only twenty-eight percent of survey respondents were satisfied with current savings opportunities in the military.¹⁴ While attrition is necessary to shape the force, excessive losses of trained and experienced individuals constitute a readiness issue. The TSP would enhance members' opportunities to save and lead to higher retention rates.¹⁵

It is well accepted that employers who "take care" of their employees retain their employees. Service members (1.4 million) constitute the largest workforce in the United States not

covered by an employer-sponsored, tax-advantaged payroll savings plan.¹⁶ About 182,600 people a year leave service without any employer-sponsored retirement benefits.¹⁷ The only retirement savings they may have are IRAs or private savings. Many military families' financial situations do not allow them to save for retirement. Department of Defense (DOD) surveys reveal fifty percent of members do not have any appreciable levels of savings.¹⁸ Exacerbating their poor financial situations is a low rate of home ownership.¹⁹ Homes often represent significant retirement assets. People who choose to serve their country should not have to compromise their future retirement. Service members deserve better financial benefits. Their sacrifices are too great and a savings plan is relatively inexpensive. A savings plan is a basic benefit this country should provide to service members according to John Dalton, former Secretary of the Navy.²⁰ Legislators should take care of service members by enhancing their savings opportunities with implementation of the TSP as soon as possible.

5. Interestingly, a savings plan existed for the various services from the late 1800s (1872-Army, 1889-Navy, 1906-Marine Corps) until 1966. Unfortunately, the plan had no tax advantages and members earned no more than 4% interest. Because few members participated in the plan, the Department of Defense proposed substitution of the long-term savings plan with a short-term savings plan for overseas members. Congress responded and adopted the recommendation in the 1966 Appropriations Act. Information Paper, Office of the Judge Advocate General, United States Army, Legal Assistance, DAJA-LA, subject: Armed Forces Savings Programs (6 Mar. 1997) (on file with the author) [hereinafter DAJA-LA (6 Mar. 1997)]. The savings plan still exists, but it is limited to members involved in contingency operations or combat zones. Further, deposits are limited to \$10,000, and interest rates are set at 10% per annum. 10 U.S.C. § 1035 (Supp. V 2000); U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 7a, ch. 51 (IO15-99, 12 May 1999).

6. M. Thomas Davis, *Operation Dire Straits: Here's Why the Military is Failing to Attract the Right Recruits*, WASH. POST, Jan. 16, 2000, at B1.

7. *Id.* In 1973, about 13.7% of sixteen to nineteen year-olds were unemployed. Two years later the rate was 20%. Today however, the unemployment rate is 4%, the lowest rate in three decades. Sheri Prasso, *A Shrill Sermon Against U.S. Globalism*, BUS. WK., Mar. 27, 2000, at 19.

8. Michael D. Towle, *Pentagon Seeking Ways to Increase Enlistments*, FORT WORTH STAR-TELEGRAM, Sept. 13, 1999, at News 1. Army and Air Force officials expected to miss recruiting goals for 1999 by 7,000 and 2,500 respectively. Navy officials planned to meet their goals after lowering their educational requirements. Marine Corps officials estimated that they would meet their goals. *Id.* Army officials will try to meet their goals with an enlistment/education program. The program enables dropouts to earn a high school diploma and offers other recruits two years of college education. Roberto Suro, *Army to Recruit Dropouts, Help Them Earn Diploma*, WASH. POST, Feb. 4, 2000, at A2.

9. Office of Assistant Secretary of Defense, Force Management Policy, Assessment of the Costs and Benefits of a Uniformed Services Thrift Savings Plan 9 (May 21, 1998) (undelivered report to Congress) (on file with author) [hereinafter OASD Report (May 21, 1998)].

10. Davis, *supra* note 6.

11. Mr. Davis provided interesting statistics. In 1980, 54% of the Army's recruits had high school diplomas, and 57% scored below average (known as Category IV) on the Armed Forces Qualification Test. In 1986, 91% of the Army's recruits were high school graduates, and the number of Category IVs dropped to 4%. At the end of the 1980s, 89% of Army enlistees had high school diplomas and 11% were Category IVs. Davis, *supra* note 6.

12. Office of Assistant Secretary of Defense, Force Management Policy, A Report to Congress Concerning the Proposal for a Uniformed Services Thrift Savings Plan 9 (Dec. 17, 1997) (undelivered report to Congress) (on file with author) [hereinafter OASD Report (Dec. 17, 1997)]. Only about 17% of service members retire from the service. *Id.* at 11.

13. OASD Report (Dec. 17, 1997), *supra* note 12, at 11.

14. *Id.*

15. OASD Report (May 21, 1998), *supra* note 9, at 11.

16. *Id.* at 3.

17. OASD Report (Dec. 17, 1997), *supra* note 12, at 7.

18. Armed Forces Financial Network, Survey of Armed Forces Financial Needs and Behaviors 16 (1996), *cited in* OASD Report (May 21, 1998), *supra* note 9, at 4. Service members save one half of the amount saved by the average citizen. *Id.*

19. OASD Report (May 21, 1998), *supra* note 9, at 7.

*The Services' and the Military Associations' Positions
Regarding an Employer-Sponsored, Tax-Advantaged
Payroll Savings Plan*

The Navy has long supported an employer-sponsored, tax-advantaged payroll savings plan for sailors. John Dalton, former Secretary of the Navy, stated that a tax-advantaged savings plan was “the minimum thing we could do” for sailors.²¹ The Marine Corps also supports such a plan.²² In contrast, Air Force officials urged Congress to develop a Roth IRA type plan with no tax-deferment.²³ Air Force officials argued that such a plan would be easier for Congress to adopt because legislators already fought the battle for Roth IRAs. Air Force officials maintained that the future loss of tax revenue from a Roth IRA type plan would be more acceptable to Congress than the up-front loss of tax revenue from a TSP. Air Force and Army officials were concerned that Congress would seek compensation for the loss in tax revenues by attacking the current retirement system.²⁴

Members of various military associations and coalitions also disagree on the possible merits of an employer-sponsored, tax-advantaged payroll savings plan. Members of the National Association for the Uniformed Services support an employer-sponsored, tax-advantaged payroll savings plan.²⁵ Members of

The Retired Officers Association originally took an opposing position, sharing the concerns of Air Force and Army officials regarding congressional attacks on the current military retirement system.²⁶ The Retired Officers Association now supports the TSP and is lobbying Congress for prompt implementation of the program for the military.²⁷

Expansion of the Thrift Savings Plan to Service Members

Congress approved the provisions of the National Defense Authorization Act for fiscal year 2000 (hereinafter Act) thereby authorizing service members to participate in the TSP.²⁸ According to the Act, the implementation of the TSP is dependent upon passage of “offsetting” legislation.²⁹ The President must propose an “offset” for the TSP that Congress will approve for fiscal year 2001.³⁰ In other words, the President must propose an acceptable revenue source to make up for tax revenues lost due to military participation in the TSP. Pentagon officials estimate the reduction in tax revenues will be about \$95 million over five years.³¹ After the TSP “ramps up” for military members, DOD officials estimate the reduced tax revenue will be about \$484 million over nine years.³² Other authorities provide higher and lower estimates.³³ While various groups cannot agree on the amount of the offset needed, all

20. Susanne M. Schafer, *Navy Considers Plan for 401(k) Accounts*, AUSTIN AMERICAN-STATESMAN, July 26, 1998, at A20 (quoting John Dalton, former Secretary of the Navy).

21. *Id.*

22. Tom Philpott, *A Military 401(k) Program Up for Study*, COLO. SPRINGS GAZETTE TELEGRAPH, Apr. 11, 1998, at News 6.

23. Tom Philpott, *Pentagon Ponders Options for Members' Payroll Savings*, COLO. SPRINGS GAZETTE TELEGRAPH, May 23, 1998, at News 2.

24. *Id.*

25. Tom Philpott, *Panel Chief Backs Retirement Savings Plan*, COLO. SPRINGS GAZETTE TELEGRAPH, Mar. 7, 1998, at News 5.

26. *Id.*

27. E-mail from Paul Acari, The Retired Officers Association, to author (June 29, 2000) (on file with the author).

28. Specifically, the Act amended 37 U.S.C. § 211 (Supp. IV 1999). The amendment expanded the definition of “member” to include members of uniformed services serving on active duty and members of the Ready Reserve. The Act also amended pertinent sections of 5 U.S.C. §§ 8401-8479 (Supp. V 2000) to accommodate service members. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 661, 113 Stat. 512 (1999).

29. The Act provides for implementing the TSP after the passage of offsetting legislation, or one year after the enactment date of October 5, 1999, whichever occurs later. *Id.*

30. *Id.* § 663.

31. Philpott, *supra* note 25.

32. Fact Sheet, Armed Forces Tax Council, Office of the Assistant Secretary of Defense Force Management Policy, subject: Thrift Savings Facts (14 Oct. 1999) [hereinafter DOD TSP Facts] (on file with the author). Officials assumed participation rates would increase from 12.5% in 2001 to 32.5% in 2009. *Id.*

33. Officials from the Pentagon planned to submit a report to President Clinton's National Security Council indicating that the TSP would cost \$77 million over five years. Tom Philpott, *Report Touts Military Savings Plan*, COLO. SPRINGS GAZETTE TELEGRAPH, June 13, 1998, at News 5. The Retired Officers Association indicated that the TSP would cost \$100 million in one year. Philpott, *supra* note 25. An economist trying to project the loss in tax revenues due to service member TSP participation would have to make many assumptions. He would have to assume how many members would participate in the program and how much money they would contribute. Further, he would have to assume how long the members would participate in the plan. Because there are so many variables, different authorities will have very different cost projections.

would probably agree that legislators will have difficulty selecting the source of the offset.

Finding an offset may not be necessary. Recent developments in Congress indicate the Senate and House Armed Services Committees support military participation in the TSP. Congressmen are pushing for legislation that would eliminate the requirement for an offset. DOD officials expect the National Defense Authorization Act for fiscal year 2001 to contain the necessary language for full implementation of the TSP for military members.

The Thrift Savings Plan

Purpose and Nature of the Thrift Savings Plan

Congress created the TSP for federal civilian employees in 1986³⁴ to supplement employees' retirement programs.³⁵ The TSP, with its 401(k)-like features,³⁶ augments underlying retirement programs by enhancing savings opportunities. Those opportunities complement the retirement programs because TSP is a defined "contribution" plan. The size of a defined contribution plan's benefits or "payouts" correlates directly to the

amount of an employee's contributions.³⁷ In contrast, federal annuity retirement programs are defined "benefit" plans. The magnitude of the benefits or "payouts" depends upon defined criteria such as an employee's years of service and salary.³⁸

Federal employees can participate in both their annuity retirement programs and the TSP.³⁹ Participation in one program does not interfere with participation in the other program.⁴⁰ Participation in TSP is voluntary and only available to civilian federal employees.⁴¹ As discussed previously, however, the TSP may soon be available for military personnel.⁴² As such, the legislation governing the current TSP for federal employees will apply to the future service members' TSP.⁴³

Organization and Administration of the Thrift Savings Plan⁴⁴

The Federal Retirement Thrift Investment Board (hereinafter Board) oversees operations of the TSP.⁴⁵ The Board has two related administrative entities assisting it in carrying out its mission. For advice on administration and investment policies, the Board selected an advisory council.⁴⁶ For day-to-day operations, the Board appointed an Executive Director.⁴⁷ The Director is responsible for the investing and management of

34. The primary implementing and governing legislation for the TSP is found at 5 U.S.C. §§ 8400-8479 (Supp. V 2000). The relevant portions are subchapter III (entitled "Thrift Saving Plan") and subchapter VII (entitled "Federal Retirement Thrift Investment Management System"). Pertinent regulations regarding pay, allowances, and compensations are found at 37 U.S.C. §§ 201-210 (Supp. IV 1999). Finally, 5 C.F.R. §§ 1600-1690 (2000) provide further guidance on the TSP.

35. The federal government provides retirement systems for the majority of civilian employees. The two systems are the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). See The Office of Personnel Management, *Federal Retirement Programs*, at <http://www.opm.gov/retire/index.htm> (last modified July 28, 2000). The TSP serves as an attractive supplement to both retirement programs by providing participants the same type of savings and tax benefits enjoyed by corporate employees with 401(k) plans. See TSP SUMMARY, *supra* note 3, at 2.

36. Retirement plans commonly called "401(k) plans" meet the requirements of section 401(k) of the Internal Revenue Code. These plans allow employees to choose to have their employers pay part of their compensation into a retirement fund. Often employers match employees' contributions. Within limits, there is no tax liability on any contributions during the year the employee or employer contributed the funds. I.R.C. § 401(k) (1999).

37. The payouts directly correlate to the total contributions and any earnings.

38. TSP SUMMARY, *supra* note 3, at 2.

39. For federal employees under the FERS, the TSP is an integral part of their total retirement program. The annuity component, the TSP component, and social security benefits constitute the entire retirement program. TSP Summary, *supra* note 3, at 2.

40. Under current legislation, military members' participation in the TSP will not interfere with their military annuity retirement program.

41. TSP SUMMARY, *supra* note 3, at 2.

42. See *supra* note 28.

43. See *supra* note 34. Civilian employees are divided into two groups for TSP purposes: employees eligible for the CSRS and employees eligible for the FERS. Both groups can participate in TSP, but under different provisions. TSP SUMMARY, *supra* note 3, at 2.

44. See ARMY LAW., Sept. 2000, at app. B. (Operation and Administration of the Thrift Savings Plan), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

45. 5 U.S.C. § 8472(f) (Supp. V 2000).

46. *Id.* § 8473(e).

47. The Board must seek an individual with "substantial experience, training, and expertise in the management of financial investments and pension benefit plans" to serve as the Executive Director. *Id.* § 8472(a)(2). Mr. Roger Mehle is the current Director.

funds. Finally, the Board contracts out record keeping to an independent agency.⁴⁸

Eligibility for the Thrift Savings Plan

The National Defense Authorization Act for fiscal year 2000 authorized service members on active duty and members of the Ready Reserve to participate in the TSP.⁴⁹ The phrase “Ready Reserve” has broad implications. By using the phrase, Congress authorized all Ready Reservists,⁵⁰ regardless of pay statuses, to contribute to TSP. Other language in the Act however, effectively limits participation by referring to basic pay, pay periods, compensations, and special or incentive pay. Most Ready Reservists do not routinely receive these monies.⁵¹ Most likely, only Ready Reservists who are members of the Selected Reserve will participate in any future TSP.⁵² Selected Reserv-

ists commonly train on weekends and during annual two-week periods.

Contributions to the Thrift Savings Plan

If legislators fund the TSP for military participation, active duty service members could contribute up to five percent of their basic pay per pay period.⁵³ For TSP purposes, members cannot include allowances for housing, food, and the like as part of their basic pay.⁵⁴

Ready Reservists could also contribute up to five percent of the compensation they receive per pay period.⁵⁵ Statutory language defines compensation as 1/30 of the basic pay authorized for active members.⁵⁶ Generally, reservists⁵⁷ drill (perform training, administrative duties, and the like) for four periods per month. Reservists receive compensation for each drill or

48. TSP SUMMARY, *supra* note 3, at 3.

49. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 661, 113 Stat. 512 (1999). *See supra* note 28. The Act allows about 1,406,830 active duty service members and 1,353,284 Ready Reservists to participate in the TSP. Department of Defense, *Defense Almanac, Active Forces File*, at <http://www.defenselink.mil/pubs/almanac/almanac.html> (data as of Sept. 30, 1998). *Id.* Of those eligible to participate, 175,853 active duty service members and 88,907 Ready Reservists are expected to contribute to TSP in the first year of the program. Department of Defense officials expect the participation rates to increase from 12.5% in 2001 to 32.5% in 2009 for active duty members. For reservists, officials expect the rates to increase from 10% to 17% over a 7-year period. DOD TSP Facts, *supra* note 32. In June 2000, DOD officials started to rely on a study completed by the RAND Corporation on TSP participation by reservists. The authors of the study estimate 6.8% of selected reservists will participate in the TSP. Beth J. Asch & John T. Warner, *The Thrift Savings Plan: Will Reservists Participate*, Mar. 2000 (unpublished report on file with author). The number of TSP participants could swell by ten percent in the first year with a potential increase of over twenty percent based on the total possible military participants, the estimated participation rates, and the total participants currently in TSP. *See supra* note 3. *See also infra* note 50.

50. The language in the National Defense Authorization Act § 661 does not contain any qualifiers for the phrase “Ready Reserve.” Without qualifiers, the reader should use the common meaning of the phrase. Officials at the DOD plan to use the common and most inclusive meaning of the phrase. Interview with LTC Thomas K. Emswiler, Armed Forces Tax Council, Office of the Assistant Secretary of Defense Force Management Policy, (Military Personnel Policy) in Arlington, Va. (7 June 2000). The common meaning encompasses all types of Ready Reservists.

There are three manpower management categories within the Reserve components: Ready Reserve, Standby Reserve, and Retired Reserve. The Ready Reserve contains three subgroups: the Selected Reserve, the Individual Ready Reserve (IRR), and the Inactive National Guard (ING). The Selected Reserve can be further broken down into Reserve unit members, Individual Mobilization Augmentee members, and Active Guard and Reserve and Training and Administration of Reserve members.

Members of the Selected Reserve are either Category A Reservists (forty-eight four-hour drills plus annual training) or full-time reservists (365 days a year). These members receive regular “paychecks” because they drill or work on established schedules. The other subgroups of the Ready Reserve are not actively performing military service, but may receive compensation. Members of the IRR and ING are subject to involuntary active duty, but members of the Selected Reserve should be recalled before members of the IRR or ING.

As of September 30, 1998, there were 1,353,428 Ready Reservists. Selected Reservists comprised approximately 66% (889,078) of the Ready Reservists. Full time Selected Reservists comprised approximately 7% (64,314) of the Selected Reservists and approximately 5% of the Ready Reservists. Category A Reservists make up 93% (824,764) of the Selected Reservists and approximately 61% of the Ready Reservists. Thus, the majority (66%) of Ready Reservists (the Selected Reservists) receive regular “paychecks,” but only 5% receive compensation as full-time employees. RESERVE FORCES POLICY BOARD, RESERVE COMPONENT PROGRAMS: THE ANNUAL REPORT OF THE RESERVE FORCES POLICY BOARD 50-55 (1999).

51. All Reservists can receive compensation and special pays depending upon their status. *See supra* note 50.

52. *Id.*

53. National Defense Authorization Act § 661. The basic pay scale established by Congress for service members can be found at 37 U.S.C. §§ 201-210 (Supp. IV 1999).

54. The various allowances established by Congress are set out in 37 U.S.C. §§ 400-434.

55. National Defense Authorization Act § 661.

56. 37 U.S.C. § 206.

period. The usual Reservist could contribute approximately 0.67% of a comparable active member's basic monthly pay.⁵⁸ The Executive Director of the Federal Retirement Thrift Investment Board⁵⁹ estimates that the average reservist would contribute about \$200 a year to a TSP account.⁶⁰ The DOD officials estimate the average reservist will contribute about \$228 a year.⁶¹

Active and reserve members could put more funds in their TSP accounts by contributing money from special or incentive pay. Members could also contribute monies received as bonuses for enlistment and reenlistment.⁶² The ability to contribute from these funds enhances the recruiting and retention value of these bonuses and the investment value of the TSP.

Congress provided an additional retention incentive for members serving in critical specialties. Congress authorized Service Secretaries to form contracts with service members who agree to serve for six years on active duty in their critical specialties. In exchange for the members' services, the Secretaries will match the members' contributions to their TSP

accounts, up to certain limits.⁶³ Note however, members cannot contribute, from any pay source or combination of sources, more than the Internal Revenue Code limitation. For calendar year 2000, the limit is \$10,500.⁶⁴

Additional contributions are possible for Redux⁶⁵ participants. Last year Congress responded to complaints about the inadequacy of the Redux retirement program and the need for retention incentives.⁶⁶ The National Defense Authorization Act for fiscal year 2000 authorized a retirement option for service members who entered service after 1 August 1986 (Redux). Military personnel with fifteen years of service may receive a \$30,000 career-status bonus if they agree to serve an additional five-year tour and remain under the Redux retirement system. If members do not take this option, they can elect to retire under the pre-1986 retirement system⁶⁷ (commonly called "High-Three"⁶⁸). An additional benefit may be available to those members choosing the Redux option. If legislators implement the TSP for the military, Redux participants may contribute portions of their bonuses to their TSP accounts within limits established by the Internal Revenue Code.⁶⁹

57. A Selected Reservist will be the most probable Ready Reserve participant in a future TSP. See *supra* notes 50-52 and accompanying text. Thus, any discussion of reserve participation generally refers to participation by Selected Reservists.

58. Four times 1/30 equals approximately 0.133. Five percent of 0.133 equals approximately 0.0067. This result considered as a percentage of basic pay would be 0.67%.

59. See *supra* note 44.

60. Karen Jowers & Rick Maze, *Short of Funding, Thrift Plan Fading to Red*, MARINE CORPS TIMES, Jan. 24, 2000, at 18.

61. DOD TSP Facts, *supra* note 32. The authors of a recent RAND Corporation study estimated that the average contribution by a selected reservist would be \$324. Asch & Warner, *supra* note 49.

62. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 661, 113 Stat. 512 (1999). Various special and incentive payments established by Congress are set out in 37 U.S.C. §§ 301-317 (Supp. IV 1999).

63. *Id.* at § 662. Congress limited this incentive by requiring the service secretaries to make monthly contributions that match members' contributions from their basic pay and not from special pay or incentive payments. *Id.*

64. Practitioners refer to contributions to 401(k) type plans as elective deferrals. See *generally infra* note 74 and accompanying text. Legislation provides limits on the amount of elective deferrals not subject to tax. I.R.C. § 402(g) (1999). Based on underlying legislation, the IRS adjusts those limits for the cost of living. I.R.C. § 402(g)(5). For calendar year 2000, the limit is \$10,500. Tax Notes Today, 1999 TNT 233-9 IRS Announces COLA Adjustments to Pension Plan Limitations for 2000, TAX ANALYSTS, Dec. 6, 1999, LEXIS, All Sources Library, Tax Analysts Tax Notes Today File.

65. See *generally* Shafer, *supra* note 4, at 18.

66. The retirement program commonly termed Redux was created when Congress made major changes to the military retirement program in the Military Retirement Reform Act (MRRRA) of 1986. Supposedly troops bitterly called the new retirement program "Redux." Sydney J. Freedberg Jr., *Smart Salute*, NAT'L J., Jan. 30, 1999, at 265. Legislators apparently did not use the term. A search of the legislative history surrounding the passage of MRRRA failed to find the use of the word. The term probably is not an acronym, although it often appears in capital letters. Further, the meaning of the word, redux, seemingly did not to apply in 1986. Redux means to bring back or restore. THE COMPACT OXFORD ENGLISH DICTIONARY (2nd ed. 1991). The 1986 legislation reduced benefits, so perhaps troops misapplied the word. However, the term is appropriate under current legislation. The latest legislation allowing members to choose to return to the High-Three program makes the term Redux applicable to the choice of programs. Members can "restore" their benefits by choosing the High-Three program. Finally, Ms. Toni Husted used the term "REDUX" on page 8 of an Office of the Actuary report entitled "Valuation of the Military Retirement System" (Sept. 8, 1987). She used the term as follows, "members first entering the Armed services on or after August 1, 1986, are subject to a reduction (REDUX) if they retire with less than 30 years of service." Interestingly, she seemed to have misapplied the word and used capital letters. Perhaps, the word was in common usage before Ms. Husted caused the word to be used in print.

67. National Defense Authorization Act §§ 641-643.

68. See *supra* note 4.

69. See *supra* note 64.

Contributing to TSP accounts would be simple because finance agencies would make monthly withdrawals from participants' pay. Contributors would not have to write checks, address envelopes, or go to the post office. In fact, participants would not need to take many actions at all regarding their accounts.⁷⁰

*Tax Advantage of the Thrift Savings Plan: Deferral*⁷¹

The tax code does not treat contributions that TSP⁷² participants make from their pay as income during the year participants earn the income. The tax code provides that those contributions will be included as income in the year when the contributions are withdrawn or "distributed"⁷³ from the TSP.⁷⁴ Taxes are effectively "deferred" until funds are distributed.

Participants benefit from tax deferral in several ways. The immediate benefit lies in the reduced tax liability for the service member. Consider a service member who contributed \$950 a year⁷⁵ to his TSP account. Assume he has a federal tax liability of sixteen percent.⁷⁶ Because of his contribution, he would owe \$152 less in taxes for that year. Granted, the \$152 in taxes must be paid in the future, but the tax reduction may be important to the member in the year he contributed the money. The member should note another benefit of deferral when considering his contributions only "cost" him \$798 (\$950 minus \$152). In effect, the member expended \$798 of his resources for a \$950 investment.⁷⁷

Participants also benefit from tax deferral combined with inflation, and general reduction in income (lower tax brackets). Consider our service member again. The \$152 he saved in taxes represent current-year dollars. If he incurs the \$152 tax liability in thirty-five years, the purchasing power of that tax liability would be about \$53 in current year dollars.⁷⁸ Additionally, the member's tax liability may be lower because he may have less income during retirement.

Finally, the member also benefits because the tax on his earnings on the contributions is tax-deferred. The tax code imposes tax liability when the TSP distributes the earnings.⁷⁹ A participant does not need to remove funds from his TSP account or his personal savings to pay tax during the years his TSP account accrues the earnings. Thus, the final amount of the participant's overall savings will be greater because no monies were devoted to taxes. As evidence, compare the future value of an investment without tax-deferral and with tax deferral. A \$950 investment, earning 10%, over thirty-five years, taxed at 16% would be worth \$15,986 (assuming the member paid the taxes from his investment).⁸⁰ The same investment would yield \$26,697 if the investor could defer taxes.⁸¹ The difference is \$10,711.

*Thrift Savings Plan Investment Options*⁸²

Participants in the TSP choose how their savings will be invested among various funds. The Federal Retirement Thrift Investment Board⁸³ offers five types of investment funds.

70. Participants do have to choose between various investment options. See *infra* notes 82-87 and accompanying text.

71. The benefits of tax-deferral are magnified if participants' states of domicile also defer state income taxes on contributions and earnings.

72. The TSP is a "qualified" retirement plan pursuant to I.R.C. § 401(a) (1999).

73. The drafters of the Internal Revenue Code use the term "distributed" versus "withdrawn" when referring to funds removed from retirement programs.

74. I.R.C. § 401(k).

75. Assume the member is an E-4 over 6 years. Nine hundred and fifty dollars represents slightly less than 5% (4.97%) of his basic pay.

76. Mr. Saul Pleeter, an economist, indicated he used a tax rate of 16% in his calculations regarding the military and the TSP. He based the 16% on a study done on marginal tax rates in the military. Researchers completed the study as part of the Seventh Quadrennial Review of Military Compensation. Telephone Interview with Saul Pleeter, Assistant Director of Compensation, Office of the Assistant Secretary of Defense Force Management Policy (Jan. 24, 2000). The 16% figure is in keeping with a report done by the Congressional Research Service. Authors of that report reviewed data on individual federal income tax returns for 1995, 1996, and 1997. The average tax rate expressed as a percentage of adjusted gross income was 14.7%, 15.2%, and 15.4% for the three years respectively. *Tax Notes Today*, #22 2000 *TNT 18-22 CRS Report on Individual Tax Returns for 1995-1997*, Jan. 27, 2000, LEXIS, All Sources Library, Tax Analysts Tax Notes Today File.

77. The \$798 represents about 4.2% of the base pay of an E-4 over 6 years.

78. The author used the online services of FinanCenter, Tucson, Arizona, in making various calculations. For more detail, see *ARMY LAW*, Sept. 2000, at app. A, (Assumptions Underlying Comparisons of TSP, Roth, and Taxable Investment Accounts), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

79. I.R.C. § 402(a) (1999).

80. This assumption is only for comparison purposes. Removing monies from a TSP account is not possible without taking out a loan or making a withdrawal. See *infra* notes 139-46 and accompanying text.

81. The author used the online services of FinanCenter, Tucson, Arizona, in making various calculations. See *supra* note 78.

Those fund types are government securities, fixed income, common stock, small capitalization stock, and international stock.⁸⁴ All of the funds, except for the government securities fund, are essentially index mutual funds.⁸⁵ The funds vary in their holdings, risk of investment, and rates of return. Counselors should be able to teach military members the rudiments of the investment funds and basic principals of proper asset allocation with a minimum expenditure of resources.⁸⁶ Given minimal education, most members should be able to tailor their TSP accounts, or portfolios, based on the nature of the funds, their investment goals, their tolerance for risk of loss of savings,⁸⁷ and their other assets.

Government Securities Fund or "G Fund"

The G Fund is comprised of investments in specially issued United States Treasury securities. Given the nature of its investments, the G Fund is comparable to a cash or money market fund in terms of risk. There is virtually no risk of losing

principal with government securities. Market or interest risk is eliminated by the brief maturity periods used by the Executive Director.⁸⁸ Despite the extremely low risk, the G Fund provides a decent rate of return because of statutory provisions. Rates of return, by statute, equal average market rates on Treasury securities with four or more years to maturity.⁸⁹ Thus, the G Fund's rate of return compares to intermediate bond fund rates.⁹⁰ The G Fund's rate will be comparable to the F Fund, but probably lower than the C, S, and I Funds discussed below.⁹¹ The G Fund had a 7.0% compound annual rate of return over the ten-year period encompassing 1990-1999.⁹² People who use G Fund types of mutual funds seek conservative additions to their investment portfolios⁹³ or are "risk averse."⁹⁴

Fixed Income Index Fund or "F Fund"

Congress directed that the F Fund would be composed of insurance contracts, certificates of deposits, or other bond instruments.⁹⁵ To meet Congress' requirement, the Executive

82. A discussion of investment strategies is beyond the scope of this article. Counselors should seek further guidance before advising clients as to asset allocation, estate planning, and similar investment issues.

83. See *supra* note 44.

84. TSP HIGHLIGHTS, *supra* note 3, at 4.

85. Index mutual funds track a particular market index. For an interesting and informative article on the history of mutual funds and a discussion of index mutual funds, see Joseph Nocera, *The Age of Indexing; Indexing has won. But has it won for the right reason? Or are investors merely doing what they've always done – chasing the hot thing?* MONEY, Apr. 1999.

86. The process of educating service members about the TSP and its role in estate planning presents a challenge to administrators. Judge advocates are not normally involved in administration of military finance matters, but they are involved in estate planning. Staff judge advocates should consider how their attorneys will contribute to the educational process within their limited resources.

87. Determining the overall risk of loss, or volatility, of a portfolio, is not a simple calculation. An investor needs to consider not only the risk each entity brings to his portfolio, but also the risk generated by the composition of his portfolio. The composition of an investment portfolio is commonly termed "asset allocation." A thorough discussion of asset allocation is beyond the scope of this article, but counselors should understand one important concept. The risks of investment instruments are not directly correlated, nor are they additive. For example, a mutual fund with a high level of volatility combined with one of low volatility does not necessarily equal a moderate risk level. Investors should seek guidance in allocating their assets among investments.

88. At present, maturities range from one to four days. Federal Retirement Thrift Investment Board, *Thrift Savings Plan Investment Options*, at <http://www.tsp.gov/features/tsp7f.html> (last modified June 28, 2000).

89. 5 U.S.C. § 8438 (b)(1)(A) (Supp. V 2000).

90. Intermediate bond fund rates of return are about 7%, while money market rates are typically 4-5%. Telephone Interview with David M. Snyder, Vice President, Trust Division, Key Bank, Bloomington, Ind. (Jun. 23, 2000).

91. *Thrift Savings Plan Investment Information*, in TSP HIGHLIGHTS, *supra* note 3, at 3.

92. *Id.* Note that administrators calculated the rates of return after removing fund administrative expenses, management fees, and trading costs from the calculations. *Id.* The twelve month yield (June 1999–May 2000) was 6.5%. Federal Retirement Thrift Investment Board, *Thrift Savings Plan Rates of Return* [hereinafter TSP Returns], at <http://www.tsp.gov/rates/index.html> (last modified Aug. 7, 2000).

93. The G Fund serves as a valuable conservative asset in many TSP participants' portfolios. Counselors should encourage clients to consider their entire portfolios when determining how they will invest their TSP contributions. See *supra* note 87.

94. Risk averse individuals are not willing to risk loss of their investment in exchange for possible higher earnings on their money. Such individuals may need their savings in the near future and cannot risk loss due to market declines. Other risk averse individuals may simply be more comfortable with steady, guaranteed rates of return.

95. 5 U.S.C. § 8438 (b)(1)(B) (Supp. V 2000).

Director chose the Barclays U.S. Debt Index Fund.⁹⁶ Managers for the Barclays U.S. Debt Index Fund invest in U.S. government, corporate, and mortgage-backed securities. The managers choose securities representative of items included in the Lehman Brothers Aggregate Index.⁹⁷ As such, the U.S. Debt Index Fund's rate of return reflects the bond market's rate of return. Because the F Fund relies on the U.S. Debt Index Fund, the F Fund reflects the rate of return of the bond market.

Bond funds are more volatile than money market funds because corporate and mortgage-backed securities carry a higher risk of loss of principal than U.S. government backed securities. Bond fund managers affect the level of risk through bond selection. The F Fund does not contain any high-risk or "junk-bonds" because the Lehman Brothers Aggregate Index does not contain such bonds. An additional, greater risk inherent in the F Fund is the risk due to changes in interest rates. As interest rates rise, bond values fall and vice versa. Falling bond values can result in overall negative returns.⁹⁸

Investors should weigh the risks⁹⁹ associated with the F Fund against the probable returns. The F Fund had a 7.7% compound annual rate of return over the ten-year period encompassing 1990-1999.¹⁰⁰ Individuals who choose the F Fund must not be totally risk averse. Generally, bond fund investors seek low to moderate investment risks. They balance investment risks against higher yields and the "cost" of inflation eroding their savings. These investors usually can withstand some risk of loss because they do not need their savings in the near future. Alternatively, these investors may use the F Fund to balance other investment risks as a more conservative aspect of their investment portfolios.¹⁰¹

Common Stock Index Investment Fund or "C Fund"

For the C Fund, Congress directed Board members to choose an index representative of the United States' equity market. Congress further directed that the C Fund would mirror the chosen index in terms of composition and performance.¹⁰² The Executive Director chose the Standard & Poor's 500 stock index (S&P 500) and a corresponding index fund (Barclays Equity Index Fund).¹⁰³

Given that the C Fund is primarily composed of corporate or "equity" stocks, the fund is inherently volatile. The value of an individual company's stock depends on variables relating to the company: product quality, advertising, labor conditions, equipment conditions, cost of raw materials, and the like. Conditions outside of the company, such as economic conditions, also affect stock prices. Given the large number of variables, the inherent risk of equity stocks should be obvious to a potential C Fund investor. However, the risk is lessened because index funds hold stocks of many companies. The C Fund is more volatile than the G or F Fund, but it has yielded greater returns. It had a 18.2% compound annual rate of return over the ten-year period encompassing 1990-1999.¹⁰⁴ Participants should consider volatility and return when building their investment portfolios.

Investors in the C Fund should also plan for possible periods of poor economic conditions and low returns. Investors should invest in the C Fund for long periods and not plan to withdraw C Fund investments in the near future. For example, the C Fund in 1990 decreased in value by 3.15%. In 1991, the fund increased by 30.77%.¹⁰⁵ If an investor withdrew his money in 1990, he would have been disappointed. If that same investor could have waited until 1991, he would have had a much greater yield. The C Fund is for long-term investments; while, the G Fund is more suitable for short-term investing.¹⁰⁶

96. See TSP SUMMARY, *supra* note 3, at 21.

97. *Id.*

98. *Id.* at 24. The F Fund had a negative rate of return of 2.96% in 1994 and 0.85% in 1999. *Id.*

99. For a more thorough discussion of F Fund risks, consult informational materials provided by the TSP. *Id.* at 21-22.

100. *Thrift Savings Plan Investment Information*, in TSP HIGHLIGHTS, *supra* note 3, at 4. Note that administrators calculated the rates of return after removing fund administrative expenses, management fees, and trading costs from the calculations. *Id.* The twelve month yield (June 1999–May 2000) was 2.15%. TSP Returns, *supra* note 92.

101. The F Fund, with its longer maturities, carries a greater risk of loss due to changing interest rates than the G Fund. Investors desiring conservative instruments might find the G Fund more suitable for their needs. See *supra* note 87.

102. 5 U.S.C. § 8438(b)(1) (Supp. V 2000).

103. The Director also invests a portion of the C Fund in S&P 500 index futures contracts and a lending program. TSP SUMMARY, *supra* note 3, at 18-19.

104. *Thrift Savings Plan Investment Information*, in TSP HIGHLIGHTS, *supra* note 3, at 3. Note administrators calculated the rates of return after removing fund administrative expenses, management fees, and trading costs from the calculations. *Id.* The twelve month yield (June 1999 – May 2000) was 10.35%. TSP Returns, *supra* note 92.

105. *Your Investment Options*, in TSP SUMMARY, *supra* note 3, at 21.

*Small Capitalization Stock Index Investment Fund
or "S Fund"*

The Executive Director will offer the S Fund beginning October 2000.¹⁰⁷ The Director will invest in an another index fund managed by Barclays Global Investors,¹⁰⁸ but this fund tracks the Wilshire 4500 index.¹⁰⁹ The Wilshire 4500 index represents approximately twenty-five percent of the stock market's value in the United States. All of the stocks comprising the Wilshire 4500 index are actively traded in the American stock market,¹¹⁰ but are not included in the S&P 500 index.¹¹¹ Thus, an index fund tracking the Wilshire 4500 would not overlap a fund tracking the S&P 500. Consequently, the S Fund's investments do not overlap the C fund's investments.

The base investment in the S Fund, similar to the C Fund, is an index fund comprised of stocks of various companies. The change in value of companies' stocks is the primary source of earnings for these index funds. Dividend income also contributes to earnings. The S Fund, however, is more volatile than the C Fund because the Wilshire 4500 index fluctuates more than the S&P 500 index. The Wilshire 4500 tracks the stocks of smaller companies, which tend to react strongly to economic changes. The Wilshire 4500 index had a 16.2% compound annual rate of return over the ten-year period encompassing 1990-1999.¹¹² The S Fund carries more risk to investments than the G, F, or C funds.¹¹³ Investors need to decide whether the higher level of risk is appropriate and acceptable given their investment portfolios.¹¹⁴

International Stock Index Investment Fund or "I Fund"

The Executive Director chose Barclays EAFE Index Fund tracking the European, Australian, and Far East (EAFE) stock index for the I Fund. The EAFE index represents stocks of companies from twenty countries and forty-six percent of the world stock market's value.¹¹⁵

The I Fund, like the C and S Funds, derives its earnings from the increased value of the underlying foreign companies' stocks and from dividends.¹¹⁶ International investments tend to be more volatile than domestic investments because worldwide conditions affect markets. Everything from droughts, wars, economic embargoes, to the American political scene can affect the international market. The EAFE Index ranged from an annual rate of return of a negative 23.6% in 1990 to a high of 32.7% in 1993. The EAFE Index had a seven-percent compound annual rate of return over the ten-year period encompassing 1990-1999.¹¹⁷ Clearly, the I Fund will be a volatile TSP investment. Investors must decide whether their circumstances will allow them to tolerate the volatility.¹¹⁸

Low Investment Costs

Investment instruments have operating costs usually borne by investors in some manner. Mutual fund administrators often charge investors a "load" or a set percent when investing in funds. Other fund managers charge loads when funds are distributed from accounts.¹¹⁹ Almost all administrators charge investors some percentage of their account balance for management or administration fees (an "expense ratio").¹²⁰ Money market or cash type funds usually have the lowest management

106. Investors need to choose funds based on their future needs among other factors. *See supra* note 87.

107. *Two New Investment Funds*, in TSP HIGHLIGHTS, *supra* note 3, at 4.

108. *Late Breaking News*, in TSP HIGHLIGHTS, *supra* note 3, at 4.

109. For an informative discussion on market indices, see Walter Updegrave, *Ins and Outs of Indexes; First Rule of Tracking the Market: Know thy Benchmarks*, MONEY, Feb. 2000, at 57.

110. *Two New Investment Funds*, in TSP HIGHLIGHTS, *supra* note 3, at 4.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See supra* note 87.

115. *Two New Investment Funds*, in TSP HIGHLIGHTS, *supra* note 3, at 4.

116. *Id.*

117. *Id.*

118. *Id.*

119. The administrators of the TSP do not charge loads of any kind.

costs and the lowest fees. Index mutual funds are also inexpensive to manage and consequently usually have low fees.¹²¹

By their nature, the fund types used by the TSP—four index funds and one fund similar to a money market fund—should have low investment expenses. Participants however, must consider the TSP’s administrative expenses or fees. The operating costs of the servicing office, of the record keeper’s computer system, and of printing and mailing publications are major expenses.¹²² These expenses add to the underlying costs of the funds. Fortunately, the TSP’s Executive Director offsets expenses by using forfeitures of non-vested agency contributions to help pay these administrative expenses.¹²³ Consequently, the TSP funds have competitive administrative fees. Consider the data provided in Chart 1.

Fund Type	TSP’s Fees ^a	Average Fees	Vanguard’s Fees
Money Market	G Fund - 0.146%	0.46% ^b	0.33% ^c
Bond Index	F Fund - 0.16%	1.08% ^d	0.20% ^e
Stock Index	C Fund - 0.149%	1.55% ^f	0.20% ^g

Chart 1

- a. These figures represent the average rates from 1988 to 1996. TSP SUMMARY, *supra* note 3, at 12.
- b. *Mutual Fund Investment Costs Decrease*, LIMRA’s Market Facts, Mar./Apr. 1999, available at LEXIS, All Sources Library, Magazine Stories, Combined File.
- c. The figure represents Vanguard Prime Money Market Fund’s expense ratio as of 30 November 1999. Vanguard, *Vanguard Funds File Library* (1999), at <http://www.vanguard.com>.
- d. Jeffrey M. Laderman & Amy Barrett, *What’s Wrong*, Bus. Wk., Jan. 24, 2000, at 66.
- e. The figure represents Vanguard Total Bond Market Fund’s expense ratio as of 31 December 1999. Vanguard, *Vanguard Funds File Library* (1999), at <http://www.vanguard.com>.
- f. Laderman & Barrett, *supra* note d.

- g. The figure represents Vanguard Total Stock Market Index Fund’s expense ratio as of 31 December 1999. Vanguard, *Vanguard Funds File Library* (1999), at <http://www.vanguard.com>.

Chart 1 presents the fees of the TSP, average mutual funds, and Vanguard mutual funds. Vanguard is a popular, large mutual fund family¹²⁴ known in the industry for its low administrative expenses. A brief review of the chart reveals the very low fees paid by TSP participants. Unsophisticated investors may tend to discount investment costs because the percentage rate seems so low. It is a costly mistake to ignore investment costs. If a participant has \$10,000 invested in the C Fund, the yearly management cost would be about \$15. In contrast, the average cost for the industry would be \$155. The investor could lose the yearly difference of about \$140. The accumulated yearly differences could be quite substantial depending on how many years the investor left his savings in the TSP. The effect of compound interest increases the loss because the money spent on higher administrative fees would have remained invested in the TSP account. The TSP’s low investment costs are a significant benefit for participants.

Loan Program

Participants can borrow funds (contributions and earnings) from their TSP retirement savings accounts,¹²⁵ if they borrow at least \$1000 per loan.¹²⁶ Participants can use the funds for general purposes or for residential purchases.¹²⁷ For both types of loans, TSP managers will charge interest for the life of the loan at the G Fund rate¹²⁸ at the time of loan application.¹²⁹ Repayment is administratively easy because participants make payments through payroll deductions.¹³⁰

The loan feature of the TSP is beneficial for TSP participants for two reasons. First, participants have access to retirement savings without incurring penalties or tax liabilities.¹³¹ In contrast, members with IRAs cannot borrow their own funds from their IRAs.¹³² The tax code however, does allow IRA investors to withdraw money for unreimbursed medical expenses, a first

120. For an informative discussion on expense ratios, see David Harrell, *Mutual Fund Expenses* (June 19, 1998), available at <http://news.morningstar.com/news/MS/Investing101/mfexpenses.html>.

121. *Id.*

122. TSP SUMMARY, *supra* note 3, at 12.

123. Federal civilian employees who qualified for matching agency contributions who left service before their funds vested, forfeited the agency’s contributions. Those forfeitures reduce the overall expense for TSP participants. *Id.*

124. For more information about Vanguard mutual funds, see Vanguard, *Funds Directory*, at <http://majestic.vanguard.com/FP/DA> (last modified Sept. 6, 2000).

125. 5 C.F.R. § 1655.2 (2000). Participants must be in an active pay status. *Id.* The tax code also places various restrictions on the loans. I.R.C. § 72(p) (1999).

126. 5 C.F.R. § 1655.6.

127. *Id.* § 1655.4. Participants can have two loans at once, as long as both loans are not for residential purchases. *Id.* Participants must repay general-purpose loans in one to four years and home purchase loans in one to fifteen years. *Id.* § 1655.5.

home,¹³³ higher education expenses, and other limited circumstances.¹³⁴ But, the code requires the IRS to treat funds withdrawn from traditional IRAs as income. Consequently, the fund manager must withhold money for taxes.¹³⁵

The second advantage enjoyed by TSP borrowers is that they pay the interest on their loans into their own TSP accounts.¹³⁶ The borrower pays himself for the use of his own money. IRA investors cannot return any monies withdrawn from their accounts.

Participants can encounter disadvantages borrowing money from their TSP accounts. The borrower may incur a loss of earnings if the interest rate on the G Fund is lower than the rate of return on the borrower's investment. Consider for example a participant who borrows money at a G Fund rate of six percent. If the participant previously had the money invested in the C fund earning nineteen percent, the participant would lose thirteen percent a year on the remaining loan principal. Borrowers should balance this possible loss against the cost of a commercial loan.

Borrowers may also do themselves a disservice if they fail to pay back their loans. The purpose of TSP accounts is to amass funds for retirement. If borrowers do not pay back their funds, they have fewer resources for retirement, and incur penalties

and tax liabilities.¹³⁷ Members should realistically consider whether they can repay their loans.

Portable Benefits

One of the major reasons Congress approved the TSP for service members was the feature of portability. Advocates successfully argued that the military needed a portable retirement savings program for the eighty-three percent of members who leave service without any retirement benefits.¹³⁸ The TSP will allow service members to take their retirement savings with them when they transition to civilian employment. Contributors leaving federal service may leave their savings in their TSP accounts, or roll their savings into an IRA or other retirement program. By rolling savings into another retirement vehicle, members can continue to defer taxes on their savings.¹³⁹

Withdrawal Options: During and After Federal Service

In accordance with the Internal Revenue Code, the TSP is a qualified retirement program with restrictions on early withdrawals.¹⁴⁰ Current rules, established in the Code of Federal Regulations, allow participants who are in federal service to make age-based and financial hardship withdrawals.¹⁴¹ Pre-

128. The G Fund interest rate on TSP loans is reasonable and competitive because it reflects Treasury securities with four or more years to maturity. 5 U.S.C. § 8438(b)(1)(A) (Supp. V 2000). Bankers also base their mortgage rates on Treasury debt securities. Richard Leong, *U.S. Treasury Moves Keeping Lid on Mortgage Rates*, Reuters, Mar. 24, 2000, available at <http://www.yahoo.com/rf/000324/2t.html>. Real estate loans usually have lower rates than personal loans. Recent rates (23 May 2000) were 8.82% on 30-year fixed-rate mortgages and 9.24% on car loans. *Money Monitor*, MONEY, July 2000, at 143. The TSP loan rate for new loans was 6.0% on 5 September 2000. Federal Retirement Thrift Investment Board, *TSP Current Information*, at <http://www.tsp.gov/curinfo/index.html> (last modified Sept. 5, 2000). Obviously, the interest rate on a TSP loan is very reasonable and competitive. Thus, participants in the TSP can save money on interest by borrowing from themselves.

129. 5 C.F.R. § 1655.7.

130. *Id.* § 1655.11.

131. I.R.C. § 72(p) (1999).

132. Premature distributions or withdrawals from traditional IRAs or Roth IRA are subject to a 10% penalty. *Id.* § 72(t). Further, 20% of the distributions are withheld to ensure sufficient funds are withheld for tax liabilities. *Id.* § 3405(c).

133. A "first-time homebuyer" is an individual, or such individual's spouse, that has no interest in a principal residence for two years prior to the purchase of the home for which IRA moneys are withdrawn. *Id.* § 72(t)(8)(D)(i). Moneys withdrawn from the individual's IRA must be used within 120 days to purchase the individual's principal residence. *Id.* § 72(t)(8)(A).

134. *Id.* § 72(p). Roth IRA investors must also fulfill a five-year holding period. *Id.* § 1.408A(d).

135. *Id.* § 72(t). The IRA investor may have to withdraw more money than desired in order to pay for the increased taxes.

136. 5 C.F.R. § 1655.9 (2000).

137. I.R.C. § 72(q) (2000).

138. DAJA-LA (6 Mar. 1997), *supra* note 5.

139. I.R.C. § 402(c).

140. I.R.C. § 72(t).

141. 5 C.F.R. § 1650. For detailed information, see Federal Retirement Thrift Investment Board, *TSP In-Service Withdrawals* [hereinafter TSP In Service Withdrawals], at <http://www.tsp.gov/features/tsp10Af.html> (last modified June 28, 2000).

sumably, the rules will be the same for service members although few members will make age-based withdrawals.

Age-based withdrawals allow participants who are at least age 59½ to withdraw their savings or to roll them over into another retirement vehicle. They can withdraw all or part of their savings for any reason.¹⁴² Participants however, can only make one age-based withdrawal.¹⁴³ The IRS will consider the money withdrawn as income and subject to mandatory withholding of funds for tax liability.¹⁴⁴ In contrast, if participants rollover entire amounts withdrawn into IRAs or other retirement programs, they avoid tax withholding.¹⁴⁵

Finally, participants can withdraw money from their TSP accounts for financial hardships. They may withdraw all or part of their savings.¹⁴⁶ Medical expenses; sudden property losses due to fire, storm, or other casualties; and legal costs associated with separation or divorce may create qualifying financial hardships.¹⁴⁷

Participants in the TSP should think very carefully before making withdrawals that result in taxes and penalties. The money withheld for taxes (mandatory twenty percent for federal income tax) and the penalties (ten-percent)¹⁴⁸ reduce funds available for intended purposes. If a participant needed \$1000, he would have to withdraw \$1430 to yield \$1000 after taxes and penalties. Depending on the state of domicile, the participant may need to remove more money to pay state income tax. If instead of withdrawing the \$1000, the member borrowed it using the loan program, he would not incur a cost for the use of the money.¹⁴⁹ Granted the member faces some possible disadvantages when borrowing from his TSP account,¹⁵⁰ but the loan

is less costly than withdrawing funds from a TSP account. The participant however, may have no choice if he is ineligible for a loan or he cannot afford loan payments.

Participants leaving federal service will be able to keep their retirement savings in their TSP accounts, or roll them over into IRAs or other eligible retirement vehicles. These options have no adverse tax consequences and savings continue to increase tax-deferred. Rather than rolling their TSP savings over into another retirement program, participants can also remove their savings. For service members, however, withdrawals would be ill advised because of tax consequences due to their relatively young ages.¹⁵¹ The tax code provides a 10% penalty on savings withdrawn by participants who are not fifty-five years old when they separate or retire and who are not age 59½ upon receipt of the monies.¹⁵² Service members should seek tax advice before making withdrawals from their TSP accounts.

Participants who decide to withdraw their money may use one of three options. They can elect to receive a single payment, life annuity payments, or a series of monthly payments.¹⁵³ Annuities are insurance contracts that guarantee payment for life. An annuity can be based upon a participant's life expectancy, the participant and participant's spouse's joint life expectancies, or the participant and another individual's (not the spouse's) joint life expectancies.¹⁵⁴ Members who elect to receive monthly payments can choose the basis for those payments. A member can base payments upon a fixed monthly amount, a fixed number of months, or on his life expectancy. Regardless of the payment basis, the participant will not receive any further monies when his account is depleted.¹⁵⁵

142. The participant must request at least \$1000. If the participant's vested account balance is less than \$1000, he can request the entire amount. *Id.* at 7.

143. 5 C.F.R. § 1650.30 (2000).

144. *See supra* note 132. The participant's state of domicile may also consider the funds withdrawn as income for tax purposes.

145. I.R.C. § 402(c) (1999).

146. The participant's circumstances must qualify him for, and he must withdraw, at least \$1000. If he does not qualify for at least \$1000, administrators will deny his request. TSP In Service Withdrawals, *supra* note 140, at 11.

147. 5 C.F.R. § 1650.31.

148. The TSP is a qualified retirement program. Early withdrawals from such programs may result in 10% penalties and will be subject to 20% withholding. *See supra* note 132. The participant may not be in the 20% income bracket, and could later receive some of the money withheld.

149. *See supra* notes 125-30 and accompanying text.

150. *See supra* notes 136-37 and accompanying text.

151. The average age for non-disability retirements for enlisted and officers was 41.1 and 46.4 years respectively. E-mail from Mike A. Dove, Defense Management Data Center (West), to author (Mar. 27, 2000) (on file with author).

152. I.R.C. § 72(t) (1999).

153. 5 C.F.R. § 1650 (2000). For detailed information see TSP SUMMARY, *supra* note 3, at 28.

154. 5 C.F.R. § 1650. For detailed information see TSP SUMMARY, *supra* note 3, at 32. The TSP administrators will purchase a life annuity for a participant if that option is elected. *Id.*

Should Service Members Use the Thrift Savings Plan?

A service member will have basic questions regarding how to invest for retirement. Which savings instrument or instruments should he use? How does the TSP compare to IRAs and regular savings or investment accounts (hereinafter taxable investment accounts)? If funds are limited, how should he prioritize his investments? How should he use the TSP with an overall estate plan? An attorney offering advice will need a thorough understanding of the benefits and tax implications of TSP¹⁵⁶ and IRA participation. The attorney should prepare to answer the member's bottom-line question: which program yields the greatest amount of money in the future? To assist the attorney, the discussion below compares TSP, Roth IRA,¹⁵⁷ and taxable investment accounts as to future "bottom-line" values and tax implications. Various assumptions underlie the discussion.¹⁵⁸ Presumably, the service member makes regular contributions to a retirement program earning ten percent a year. The member presumably continues investing throughout his military career and has a sixteen-percent tax liability.¹⁵⁹

Tax implications directly affect which investment vehicle yields the greatest future monetary value.¹⁶⁰ Based on the author's assumptions,¹⁶¹ a TSP and a Roth account will yield the same values upon distribution.¹⁶² The values are the same because the participant presumably pays the tax liability on Roth IRA contributions from resources other than those available for investing. If the investor had to use part of his IRA con-

tribution to pay taxes, a TSP account would yield greater values because he would have more funds invested in the TSP.

The effect of lost investment dollars due to taxes is evident when comparing the values of the TSP and Roth accounts to taxable investment accounts.¹⁶³ The values of the TSP and Roth accounts are eight to twenty-two percent greater than the values of taxable investment accounts. Presumably, the tax liability on contributions and earnings was satisfied from funds available to invest in taxable investment accounts. The tax liability is significant as indicated in Chart 2 below. The power of compounding investments magnifies the loss due to taxes.

Taxes due on Contributions and Earnings			
Contribution Rate	Rank	Twenty Years	Thirty Years
3%	Enlisted	\$5,319	\$16,56
3%	Officer	\$11,009	\$32,927
5%	Enlisted	\$5,442	\$16,355
5%	Officer	\$11,137	\$32,954

Chart 2

155. TSP Summary, *supra* note 3, at 28.

156. *See supra* notes 71-81 and accompanying text.

157. For a thorough discussion of the history of IRAs and the Roth IRA, see Jolie Howard, Comment, *The Roth IRA: A Viable Savings Vehicle for Americans?*, 35 HOUS. L. REV. 1269 (1998).

158. For details, see ARMY LAW., Sept. 2000, at app. A (Assumptions Underlying Comparisons of TSP, Roth, and Taxable Investment Accounts), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

159. *See supra* note 76.

160. *See supra* notes 71-81 and accompanying text. This discussion applies to federal income taxes. The author did not consider state income taxes. The general principles, however, apply to both federal and state income tax.

161. *See supra* note 158.

162. *See* ARMY LAW., Sept. 2000, at tbl. 1 (TSP Comparison), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

163. *Id.*

Chart 2 also illustrates the tax advantage of Roth IRAs over TSP accounts.¹⁶⁴ When investors receive distributions from Roth IRAs, they do not incur any tax liability. In contrast, TSP participants must pay tax on distributions.¹⁶⁵ If a service member leaving service withdrew his TSP funds, he would have a tax bill of the magnitude presented in Chart 2. Roth IRA investors would not have any tax bill.¹⁶⁶ If considering tax implications alone, Roth accounts are obviously more advantageous than TSP and taxable investment accounts.¹⁶⁷

Finally, the tax deferral aspect of the TSP combined with inflation provides an additional advantage over taxable investment accounts. The Internal Revenue Code allows tax deferral on the contributions¹⁶⁸ and earnings in the TSP.¹⁶⁹ When the member finally pays taxes, inflation will have eroded the purchasing power of the dollars used to pay the tax liability. The dollars used to pay taxes in the year of distribution will purchase less than the dollars that would have been used if taxes were due in the year contributions and earnings were deposited into the TSP account. In contrast, investors using taxable investment accounts pay taxes in the year they receive the income and pay with dollars at “full-value” for that year. Chart 3 presents the accumulation of deferred taxes on the contributions alone. Chart 4 presents the savings in purchasing power due to inflation on those contributions.¹⁷⁰ The savings in purchasing power are significant, between forty-three to fifty-nine percent.¹⁷¹

Taxes Due on Contributions			
Contribution Rate	Rank	Twenty Years	Thirty Years
3%	Enlisted	\$ 2,084	\$ 3,874
3%	Officer	\$ 4,503	\$ 8,411
5%	Enlisted	\$ 3,473	\$ 6,457
5%	Officer	\$ 7,505	\$14,019

Chart 3

Savings in Purchasing Power			
Contribution Rate	Rank	Twenty Years	Thirty Years
3%	Enlisted	\$1,228	\$1,910
3%	Officer	\$2,407	\$3,592
5%	Enlisted	\$2,406	\$3,187
5%	Officer	\$4,015	\$5,991

Chart 4

164. *Id.* at Table 2.

165. *See supra* note 71-81 and accompanying text.

166. Roth IRA investors do not incur a tax bill if they take distributions after they are age fifty-nine and one-half and their funds have been invested in the Roth IRA for a minimum of five years. I.R.C. §§ 72(t), 408A (1999).

167. An additional ten percent tax penalty for withdrawing funds before age fifty-nine and one-half is not considered because the participant in a Roth account would also incur a penalty upon early distribution of funds. Realize participants will probably not withdraw their funds when they leave service because of early withdrawal penalties. Therefore their TSP accounts will increase in value and consequently their tax liability will increase. Eventually when TSP participants withdraw their funds, they will owe taxes on the distributions.

168. I.R.C. § 401(k).

169. *Id.* § 402(a).

170. *See supra* note 162.

171. Calculations are based upon the assumption that participants will withdraw their funds at age sixty (no early withdrawals) and the inflation rate is 3%.

In summary, the tax implications of the various investment vehicles directly affect their future yields. If accumulation of wealth for retirement is the primary objective, TSP and Roth accounts are superior to taxable investment accounts.¹⁷² A TSP account will yield greater values than a taxable investment account. For accumulating future wealth however, Roth IRAs are more advantageous than TSP accounts.

Advice for Service Members Regarding Retirement Funds

Basic Financial Planning a Prerequisite

Service members should take full advantage of Army Community Service's educational materials and classes regarding financial planning. Members who use these resources may learn the basic principals of financial planning and turn to their attorneys for information on the more difficult topic of saving for retirement.¹⁷³

Maximum Use of Roth IRAs

Service members who have funds available to save for retirement will ask which investment package is best for them. Before answering their questions, counselors should analyze members' financial circumstances. If the member has limited funds to invest for retirement, the member should fully fund a Roth IRA before contributing to a TSP account. While a Roth account will yield the same future value as a TSP account,¹⁷⁴ a Roth account has overwhelming tax benefits. At retirement when the investor receives distributions, he has no tax liability provided he meets certain requirements.¹⁷⁵ Not only is there no tax liability; but the investor is not required to take mandatory distributions from a Roth IRA.¹⁷⁶ Roth account holders can allow their investments to continue to grow for as long as they

wish. This feature is valuable to investors desiring to preserve a larger tax-deferred sum for their heirs.

Granted, Roth IRA contributions cannot reduce current income levels for income tax purposes, and contributors pay tax up-front.¹⁷⁷ A young service member may not have the resources to contribute the maximum amount¹⁷⁸ to a Roth IRA and pay the federal tax liability on that amount. If the member does not have the resources to do both, the member should invest as much as he can afford into a Roth IRA after paying taxes. Roth accounts should be used to the maximum extent possible.

One possible factor for investing in the TSP before investing in a Roth IRA is the loan feature of the TSP. While Roth account holders can remove part of their funds for limited circumstances,¹⁷⁹ they cannot return the funds to their accounts. They cannot in effect "borrow" money from themselves, as can TSP participants. Counselors should discuss the loan and withdrawal aspects of Roth and TSP accounts with service members.¹⁸⁰ Members should consider the loan aspect when deciding whether to contribute to a Roth or a TSP account. Attorneys however, should remember that TSP members can only borrow up to the value of their contributions and earnings.¹⁸¹ Further, attorneys should impress upon members that funds set aside for retirement should be reserved for retirement.

Investing in the Thrift Savings Plan After Investing in Roth IRAs

If a service member has resources available after funding a Roth account, the member should invest in the TSP to the maximum extent possible. The member will enjoy the several benefits of a TSP account. As discussed above, those benefits include an easy method of investing, tax deferment, diversification, low investment costs, a loan option, and portability.

172. A financial counselor should inquire about a member's future need for cash. Consider a member who has a strong possibility that he will need funds and has no source of funds other than his retirement investments. That member should not place his assets in investment vehicles that restrict or penalize withdrawals.

173. This article does not include any discussions of basic principals of financial planning. If clients are not knowledgeable regarding these basic principals, attorneys may recommend: THOMAS STANLEY & WILLIAM DANKO, *THE MILLIONAIRE NEXT DOOR* (1998); ANDREW TOBIAS, *THE ONLY INVESTMENT GUIDE YOU'LL EVER NEED* (1999).

174. See *ARMY LAW.*, Sept. 2000, at tbl. 1 (TSP Comparison), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

175. I.R.C. § 408A(d)(1) (1999).

176. *Id.* § 408A(c)(5).

177. *Id.* § 408A(c)(1).

178. The maximum amount an individual can contribute is the lesser of \$2000 or the individual's compensation for the year. *Id.* § 219. See *supra* notes 133-135.

179. *Id.* §§ 72(t), 408A(d).

180. See *supra* notes 125-37 and accompanying text.

181. 5 C.F.R. § 1655.11 (2000).

Choosing to invest in a TSP is a sound choice for service members.

*Redux Considerations*¹⁸²

Service members who entered service after 1 August 1986 may select between two military retirement plans. They can choose to retire under Redux or the program called the “High-Three.”¹⁸³ Members trying to decide between programs will need to determine which program will provide them with the greatest value. In making that determination, a significant factor is a member’s plans for investing his Redux career-status bonus. The TSP can play an important role in those investment plans.¹⁸⁴ Attorneys should prepare to discuss how the TSP factors into the choice of retirement programs. The companion article entitled *Choosing Between the High-Three and the Redux Retirement Programs: Thrift Savings Plan Participation a Valuable Option* provides information on how investment choices regarding career-status bonuses affect the relative values of the two retirement programs.

Generally, if service members can afford to invest significant portions of their career-status bonuses, the Redux retirement program will yield greater future values.¹⁸⁵ The author bases this generality upon various assumptions which may not apply to some clients. A counselor will have to consider other factors besides a member’s ability to invest his career-status bonus. Counselors should thoroughly review this article and

the companion article, and carefully consider clients’ total circumstances before providing advice.¹⁸⁶

Conclusion

Some readers may become game show millionaires and live happily ever after. The majority of people, however, will have to concern themselves with saving for retirement. The Thrift Savings Plan would serve as a valuable tool for active duty service members saving for retirement because it is a sound investment program. Attorneys should prepare to advise members on how to reap the full benefits of the program. Attorneys need a complete understanding of the relationship between the TSP, the Roth IRA, and taxable investment accounts.

Basic advice includes encouraging the maximum use of Roth accounts. After fully funding Roth accounts, members should take advantage of the TSP. Additionally, for Redux service members, attorneys need an understanding of the role TSP plays in the choice of retirement programs. Attorneys must consider many factors carefully before advising Redux members.

The TSP will benefit military members and thus the military as a whole. Taking care of service members is good business and will enhance retention and recruiting. Legislators served their country well when drafting the program. Service members should urge their legislators to implement the program as soon as possible.

182. See *supra* note 4.

183. The High-Three program is available to members who entered service after 8 September 1980, but before 1 August 1986. See *supra* note 4.

184. The TSP can play an important role in choosing between retirement programs because members can invest significant portions of their bonuses tax-deferred into TSP accounts. See *supra* notes 71-81 and accompanying text.

185. See *supra* note 4.

186. In analyzing a client’s situation, counselors should remember the helpful online calculator provided by the DOD. When using DOD’s calculator however, attorneys need to be fully cognizant of the assumptions built into the program. See *supra* note 4.

Choosing Between the High-Three and the Redux Military Retirement Programs: Thrift Savings Plan Participation a Valuable Option

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Introduction

Service members who entered service after 1 August 1986 may select between two retirement plans¹ commonly called “High-Three” and “Redux.”² The primary differences between the two retirement programs are a “career-status” bonus and pay differentials.³ When comparing the two programs, members should determine which program yields the greatest future economic value. The key factor is a member’s plans for the Redux career status bonus. Future economic values differ significantly depending on whether and how a member invests his bonus. Values also differ greatly for enlisted and officer mem-

bers.⁴ In addition, the availability of the Thrift Savings Plan (TSP)⁵ affects future values. If Congress fully implements the TSP,⁶ members who plan to retire under Redux could invest significant portions of their bonuses into their TSP accounts tax deferred.⁷ This article discusses these factors and compares the future economic values of both retirement plans.

Which Program Produces Greater Future Economic Value: High-Three or Redux?

In general, this article argues that Redux retirees will reap the greatest future economic values. The discussion below

1. In response to concerns regarding recruiting and retention, Congress modified the military retirement system in 1999. The Defense Authorization Act for fiscal year 2000 provided a choice for members eligible for the Redux program. After fifteen years of military service, members can agree to serve an additional five-years, receive a \$30,000 career-status bonus, and retire under Redux. Alternatively, members can continue to serve and retire under High-Three. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 642, 113 Stat. 512 (1999). Members who entered service after 8 September 1980, but before 1 August 1986, are limited to the High-Three retirement program. See *infra* appendix entitled *Retirement Programs Available to Active Duty Service Members*.

2. The retirement program commonly termed Redux was created when Congress made major changes to the military retirement program in the Military Retirement Reform Act (MRRRA) of 1986. Supposedly troops bitterly called the new retirement program “Redux.” Sydney J. Freedberg Jr., *Smart Salute*, NAT’L J., Jan. 30, 1999, at 265. Legislators apparently did not use the term. A search of the legislative history surrounding the passage of MRRRA failed to find the use of the word. The term probably is not an acronym, although it often appears in capital letters. Further, the meaning of the word, *redux*, seemingly did not to apply in 1986. *Redux* means to bring back or restore. THE COMPACT OXFORD ENGLISH DICTIONARY (2nd ed. 1991). The 1986 legislation reduced benefits, so perhaps troops misapplied the word. However, the term is appropriate under current legislation. The latest legislation allowing members to choose to return to the High-Three program makes the term Redux applicable to the choice of programs. Members can “restore” their benefits by choosing the High-Three program. Finally, Ms. Toni Husted used the term “REDUX” on page 8 of an Office of the Actuary report entitled “Valuation of the Military Retirement System” (Sept. 8, 1987). She used the term as follows, “members first entering the Armed services on or after August 1, 1986, are subject to a reduction (REDUX) if they retire with less than 30 years of service.” Interestingly, she seemed to have misapplied the word and used capital letters. Perhaps, the word was in common usage before Ms. Husted caused the word to be used in print.

3. The \$30,000 career status bonus received by Redux participants serves as a tradeoff for their future lower retirement payments. Another significant difference between the programs is the cost of living adjustments. See *infra* appendix entitled *Retirement Programs Available to Active Duty Service Members*.

4. To discern these generalizations, see ARMY LAW., Sept. 2000, at tbl. 1 (Redux Data), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

5. Congress created the Thrift Savings Plan (TSP) in 1986 for federal civilian employees to serve as a supplement for their retirement programs. The TSP, with its 401(k) like features, enhances opportunities to save for retirement and complements underlying retirement programs. Military members may be able to participate in the TSP in the future. See *infra* note 6. Retirement plans commonly called “401(k) plans” meet the requirements of section 401(k) of the Internal Revenue Code. These plans allow employees to choose to have their employers pay part of their compensation into a retirement fund. Often the employer matches an employee’s contribution. Within limits, there is no tax liability on any contributions during the year the employee or employer contributed the funds. I.R.C. § 401(k) (1999).

6. Congress approved the provisions of the National Defense Authorization Act for fiscal year 2000, thereby authorizing service members to participate in the TSP. Specifically, the Act amended 37 U.S.C. § 211. The amendment expanded the definition of “member” to include members of uniformed services serving on active duty and members of the Ready Reserve. The Act also amended pertinent sections of 5 U.S.C. §§ 8401-79 to accommodate service members. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 661, 113 Stat. 512 (1999). Implementing the TSP depends upon “offsetting” legislation. The “offset” is for probable lost tax revenue due to the tax deferral aspect of the program. House and Senate members are nearing agreement on how to fund the program. Recent discussions have the legislators earmarking \$980 million for military participation. Rick Maze, NAVY TIMES, *Military Good to go on Thrift Savings Plan: Lawmakers Come Through with \$980M to Fund Service Members’ Participation*, Apr. 24, 2000, at 18. For a detailed discussion of the TSP, see Major Vivian Shafer, *The New Thrift Savings Plan for the Military: Worth Consideration*, ARMY LAW., Sept. 2000, at 1.

7. For calendar year 2000, members could contribute up to \$10,500. I.R.C. §§ 402(g).

amplifies this generality, and readers should consider carefully the author's underlying assumptions.⁸ These assumptions may not be valid for individual service members. Moreover, service members are encouraged to use the Department of Defense (DOD) software, discussed below, when deciding which retirement plan works best for them.

Enlisted Service Members

If an enlisted service member invests a significant portion of his career status bonus, the Redux retirement plan will result in a greater future economic value than the High-Three plan. Suppose an enlisted Redux participant can afford to invest his entire career status bonus after he pays the appropriate income taxes. From the \$30,000 bonus, suppose that he invests the maximum of \$10,500 in the TSP.⁹ He will achieve greater future economic value from the Redux retirement plan, regardless of when he withdraws his invested money. For instance,

if the investment is withdrawn at age sixty-two, the Redux plan will yield \$142,627 more than the High-Three plan. Upon withdrawal, if the Redux participant pays taxes¹⁰ from his accumulated investments, he still will have greater assets than a comparable High-Three participant.¹¹

If the enlisted Redux participant only invests \$10,500, the maximum amount allowable in a TSP account,¹² he will still achieve greater value from his Redux retirement. This is true regardless of when he withdraws the money and regardless of tax implications.¹³ Suppose the member does not wish to restrict the use of his funds by investing in a TSP account, but instead invests the entire \$30,000 bonus, after taxes, in a taxable investment account.¹⁴ The Redux retirement plan is still the best choice for the member, who will realize an additional \$125,224 if he withdraws the invested money at age sixty-two.¹⁵

8. The author made various assumptions based upon average military career patterns. Presumably, members will retire after twenty-two years of service. For fiscal year 1998, the average length of service for non-disability retirements for enlisted and officers was 21.7 and 24.2 years respectively. E-mail from Mike A. Dove, Defense Management Data Center (West), to author (Mar. 27, 2000) (on file with author).

Enlisted members were assumed to be forty-two years old and have achieved the rank of E-7 upon retirement. Officers would be age forty-four and have achieved the rank of O-5. Mr. Max Beilke, stated that the average ages of retirement for enlisted and officers were forty-two and forty-four years old respectively. Telephone Interview with Max Beilke, Department of Defense, Deputy Chief of Staff Personnel (Jan. 24, 2000). His statement however, does not agree with the average ages obtained by analyzing the data for fiscal year 1998. The average age for non-disability retirements for enlisted and officers was 41.1 and 46.4 years respectively. The average ranks upon retirement for enlisted and officers were E6.9 and O4.9 respectively. E-mail from Mike A. Dove, Defense Management Data Center (West), to author (Mar. 27, 2000) (on file with author). The author based calculations on Mr. Beilke's statement, and this difference affects portions of Table 1. See ARMY LAW., Sept. 2000, at tbl. 1 (Redux Data), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information). The effect on the values for enlisted members is minimal. The difference does not affect the basic conclusions for officers, although the statements regarding specific ages are less valid. Regarding rank, therefore, the author "rounded up" the ranks to E7 and O5 for calculations regarding pay.

The author combined the data regarding years of service, age and rank with assumptions regarding economic factors. Those assumptions were an inflation rate of 3.5%, an annual active duty pay raise of 3.5%, a tax rate of 16%, and a rate of return on investments of 10%. Mr. Saul Pleeter, an economist, indicated that he used a tax rate of 16% in his calculations regarding the military and the TSP. He based the 16% on a study done on marginal tax rates in the military. Researchers completed the study as part of the Seventh Quadrennial Review of Military Compensation. Telephone Interview with Saul Pleeter, Assistant Director of Compensation, Office of the Assistant Secretary of Defense Force Management Policy (Jan. 24, 2000). The 16% figure is in keeping with a report done by the Congressional Research Service. Authors of that report reviewed data on individual federal income tax returns for 1995, 1996, and 1997. The average tax rate expressed as a percentage of adjusted gross income was 14.7%, 15.2%, and 15.4% for the three years respectively. Tax Notes Today, #22 2000 TNT 18-22 CRS Report on Individual Tax Returns for 1995-1997, TAX ANALYSTS, Jan. 27, 2000, LEXIS, All Sources Library, Tax Analysts Tax Notes Today File.

Finally, the author made two significant assumptions regarding service members' financial situations. First, Redux retirees can afford to have lower levels of retirement pay, i.e., these members will not need the difference in income between the High-Three and the Redux retirement programs to meet their basic needs. Second, High-Three retirees cannot afford to invest any of their retirement pay.

9. The enlisted member would allocate his bonus as follows: \$3120 for federal income tax, \$10,500 in a TSP account, and \$16,380 in a taxable investment account. The author assumed a 16% tax liability. By investing the maximum amount possible in a TSP account, the service member would enjoy the benefits of tax deferral.

10. The taxes due upon withdrawal or distribution would be the taxes on any income earned from the investment. The income taxes due on the receipt of the bonus would be due before April 15 of the year after the bonus is received.

11. If the Redux participant withdrew his savings at age sixty-two and paid taxes from his accumulated investment, he would have \$119,807 more than a comparable High-Three participant. See ARMY LAW., Sept. 2000, at tbl. 1 (Redux Data), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

12. See *supra* note 7.

13. See ARMY LAW., Sept. 2000, at tbl. 1 (Redux Data), at <http://www.jagcnet.army.mil/TJAGSA> (Publications, 2000, September, Miscellaneous Administrative Information).

14. The enlisted member would allocate his bonus as follows: \$4800 for federal income tax and \$25,200 in a taxable investment account. Presumably, the member has a federal tax liability of 16%.

The Redux retirement plan begins to yield lower future values than the High-Three plan when the enlisted member invests \$8000 or less in a TSP account. With an \$8000 investment, the Redux member would have greater value for the first ten years of retirement. In the eleventh year, the value of his retirement program would be very similar to the accumulated pay difference between High-Three and Redux. From the twelfth year on, however, the High-Three plan has a greater future economic value.¹⁶ The High-Three plan may be advantageous to enlisted members that would not invest significant portions of their career status bonus.

Commissioned Service Members

For officers, the choice between retirement programs is more complex. The member will obtain greater values with Redux, but higher investment amounts and greater time-periods are required. At the extreme, if a Redux participant invests his entire bonus after taxes,¹⁷ he will achieve greater value from his Redux retirement regardless of when he withdraws the money and regardless of his tax liability.¹⁸ Suppose he does not wish to restrict the use of any of his funds by investing in a TSP account and invests the entire bonus, after taxes, in a taxable investment account.¹⁹ He will still achieve greater value in a Redux program, except for the fifteenth to nineteenth years of military retirement (ages fifty-eight to sixty-two). This is the period immediately before the adjustment in pay for Redux members.²⁰

If the officer only invests \$10,500 in a TSP account,²¹ the Redux retirement will not yield greater value until the twenty-fifth year of retirement. At that point, the officer will be about sixty-eight years old. The pivotal point between the retirement programs occurs when an officer invests about \$19,000.²² With

a \$19,000 investment, the Redux program will produce greater economic values for all years of retirement except for the years preceding the Redux pay adjustment at age sixty-two.²³ Therefore, an officer planning for retirement must consider carefully when he will withdraw any funds invested for the future.

Department of Defense Retirement Calculator²⁴

Enlisted members and officers can compare the differences between the High-Three and Redux retirement programs online. Personnel at the DOD developed software to assist service members in comparing the two programs. Programmers designed an online calculator to allow members to make assumptions regarding their particular retirement circumstances. Members can project their ages, years of service, and probable grades at retirement. Members can also plan on how they will invest or use their bonuses. Finally, members can project economic variables such as pay raises, inflation rates, tax rates, and investment return rates. The DOD calculator is simple to use and provides clear explanations. The accompanying text is helpful, and the program provides charts, tables, and examples. Service members should definitely avail themselves of this tool when comparing retirement plans.

Service members should be aware of one assumption built into the software that may not be valid for their circumstances. Programmers based their calculations for the High-Three option on continuous investment of ten percent of the members' basic pay. The designers of the program assumed High-Three retirees would invest the difference between their pay and that of Redux retirees' pay. High-three retirees receive at least fifty percent of their base pay, while Redux retirees receive at least forty percent. In making this assumption, the designers tried to provide similar conditions for

15. If the Redux participant withdrew his savings at age sixty-two and paid taxes from his accumulated investment, he would have \$105,188 more than a comparable High-Three participant. *See supra* note 13.

16. *Id.*

17. The officer would allocate his bonus as follows: \$3120 for federal income tax, \$10,500 in a TSP account, and \$16,380 in a taxable investment account. Presumably, the member has a federal tax liability of 16%. By investing the maximum amount possible in a TSP account, the service member would enjoy various tax benefits.

18. *See supra* note 13.

19. The officer would allocate his bonus as follows: \$4800 for federal income tax and \$25,200 in a taxable investment account. Presumably, the member has a federal tax liability of 16%.

20. At age sixty-two, Redux members' pay increases due to a one-time adjustment. *See infra* appendix entitled *Retirement Programs Available to Active Duty Service Members*.

21. *See supra* note 7.

22. The officer would allocate his bonus as follows: \$3120 for federal income tax, \$10,500 in a TSP account, and \$8500 in a taxable investment account. Presumably, the member has a federal tax liability of 16%. By investing the maximum amount possible in a TSP account, the service member would enjoy various tax benefits.

23. *See supra* note 13.

24. Department of Defense, *Retirement Calculator*, at <http://pay2000.dtic.mil> (last visited Aug. 30, 2000) (Retirement Choice, Personalized Calculator).

both retirement options. The provided both groups of retirees with an investment portion and both groups with forty percent of their base pay for expenses.²⁵

Unfortunately, the programmers did not provide an investment choice for the High-Three option. Users cannot remove the investment portion of the High-Three program as they can with the Redux option. They must accept that they will invest ten percent of their base pay under the High-Three plan. As a result, the software usually calculates greater future economic values for the High-Three retirement plan.

Members using the DOD retirement calculator must be realistic about their savings plans. Upon retirement, many members will not be in financial positions to invest money in a continuous manner. They may be starting new careers, and may have children entering college. In addition, members should continue to fund their Roth IRA accounts. Realistically, members may not be able to afford to invest significant portions of their Redux bonuses or their retirement pay.

Conclusion

The Redux retirement plan should produce higher future economic values for all retirees, provided service members invest significant portions of their career status bonuses.²⁶ Despite that basic truism, the values of service members' retirement plans are very dependent upon individual circumstances. This article relies on a set of assumptions that may not hold true in all cases. Rates of return on investments may be lower for service members unwilling to assume the risks generally accompanying higher rates of return. Officers using Redux must time withdrawals from their investment funds very judiciously to ensure high future economic values. The DOD online calculator is a helpful tool to compare the Redux and High-Three retirement plans. Before choosing a retirement plan, a service member must consider carefully their circumstances, and develop individual assumptions that will enable the member to select the plan that best fits his needs.

25. Telephone Interview with Tom Tower, Assistant Director for Compensation, Undersecretary of Defense for Personnel and Readiness (Jan. 27, 2000).

26. Other authors agree that the Redux retirement program will yield higher future values than the High-Three program provided members invest significant portions of their bonuses. Tom Philpott, *The New World of Retirement Options*, A.F. MAG., Feb. 2000, at 58.

APPENDIX

Retirement Programs Available to Active Duty Service Members

The basic structure of the present retirement system for the military has remained unchanged since the end of World War II.¹ In 1947, Congress authorized a common system for all of the services and for both officers and enlisted members.² The system provides an annuity for members who serve for at least twenty years.³ Members serving less than twenty years do not receive any retirement benefits.⁴ For retirees, the lifetime annuity begins upon discharge from the service and ranges from forty to seventy-five percent of basic pay. Congress provided yearly cost-of-living adjustments (COLAs) for the annuity. Subsequent legislation by Congress created three separate retirement programs within the basic system. The DOD refers to the original program as “Final Pay.” The other two programs are commonly called High-Three and Redux.⁵

Date of Entry Determines Applicable Retirement Program

The date of entry into service determines which retirement program is available to the service member. Members who entered service before 8 September 1980 will use the Final Pay program. Members entering after 8 September 1980, but before 1 August 1986 are under the High-Three program. The newest service members are under the Redux program. Each succeeding program provides lesser economic value for members. The High-Three program provides five to seven percent less value than the Final Pay program.⁶ The Redux program represents roughly a seventeen-percent loss compared to the average High-Three retiree and a twenty-five percent loss compared to the average Final Pay retiree.⁷

Pay Calculations: Multipliers and COLAs

The programs differ in the way the annuities and COLAs are determined. The Final Pay program annuity is determined by taking the multiplier of 2.5% times the years of service,⁸ times the base pay for the member’s rank upon retirement. The High-Three program uses the same formula, but the base pay is the average of the member’s highest three years of base pay. The Redux formula differs from the High-Three formula by using a multiplier of 2% for the first twenty years of service and 3.5% for years twenty-one to thirty.⁹ At age 62, Redux retirees begin to use the same multipliers used by High-Three retirees.

The COLAs overlay the three formulas. The Final Pay and High-Three programs provide yearly COLAs sufficient to offset the prior year’s inflation rate as measured by the government’s Consumer Price Index. The Redux program caps each COLA at one per-

1. While the basic structure of the program has remained unchanged, numerous legislative changes to the program have occurred. Critics of the program maintain that change is still necessary. Critics argue it is unfair for members to leave (versus retire) service without some retirement benefits. Only about 35% of officers and 12.5% of enlisted members will retire from the military. The majority of service members leave with no retirement benefits. Critics maintain that the military should not be exempt from the Employee Retirement Income Security Act which requires private sector employers to vest their employees in a retirement system after about five years of service. Further, critics claim that the system is inefficient, too costly, and too inflexible for the military. BETH J. ASCH, RICHARD JOHNSON & JOHN T. WARNER, *REFORMING THE MILITARY RETIREMENT SYSTEM 2* (1998).

2. *Id.*

3. The annuity program is noncontributory—members do not contribute funds for their retirement program.

4. Critics maintain that the lack of retirement benefits for members leaving service without retiring is a weakness in the military retirement system. *See supra* note 28. Members can “carry forward” a retirement benefit if they become reservists. If members enter the Ready Reserve, they can apply their active military service towards a retirement pension from the reserve programs. A discussion of the retirement program available to reservists is beyond the scope of this appendix. For information on the retirement program for reservists see RESERVE FORCES POLICY BOARD, *RESERVE COMPONENT PROGRAMS: THE ANNUAL REPORT OF THE RESERVE FORCES POLICY BOARD* (1999).

5. Congress made major changes to the military retirement program in the MRRRA of 1986, commonly called Redux.. *See* Sydney J. Freedberge Jr., *Smart Salute*, NAT’L L.J., Jan. 30, 1999, at 265.

6. Tom Philpott, *The New World of Retirement Options*, A.F. MAG., Feb. 2000, at 58.

7. *Department of Defense Authorization for Appropriations for Fiscal Year 2000 and the Future Years Defense Program: Hearings on S. 1059 Before the Committee on Armed Services*, 106th Cong. pt. 5, 189 (1999) (statement of the Military Coalition).

8. The annuity is capped at thirty years of service. Thus, 75% of base pay is the maximum amount that members can receive as an annuity payment.

9. Given the higher multiplier for latter years, members who serve thirty years under the Redux program can receive 75% of their base pay as annuity payments.

centage point below inflation with a one-time adjustment at age sixty-two. At age sixty-two, the member's annuity is adjusted to reflect COLAs received under the other programs. After the adjustment however, the member returns to COLAs at one percentage point below inflation.

Choice Between High-Three and Redux

In response to concerns about recruiting and retention, Congress modified the military retirement system in 1999. The Defense Authorization Act for fiscal year 2000 provided a choice for members eligible for the Redux program.¹⁰ After fifteen years of military service, members can agree to serve an additional five-years, receive a \$30,000 career-status bonus, and retire under Redux. Alternatively, members can continue to serve and retire under High-Three. Members should consider many variables when choosing between High-Three and Redux. In general, members who invest significant portions of their career-status bonuses will achieve greater future values from the Redux retirement program.¹¹

10. National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 641, 113 Stat. 512 (1999).

11. For further information regarding the choice between programs, see Philpott, *supra* note 7, at 58.

To Infinity and Beyond: Expansion of the Army's Commercial Sponsorship Program

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In an era of dwindling resources, commanders at all levels are often faced with a choice between enhancing operational readiness and enhancing unit morale. Budget cuts have limited the Morale, Welfare, and Recreation (MWR) activities that promote morale and help retain quality soldiers. In response to these cuts, the Army initiated a commercial sponsorship program to help fund MWR programs. This article discusses the current commercial sponsorship programs of all the military services. Moreover, this article argues that the Army should expand its commercial sponsorship program within MWR, and expand it even further to non-MWR activities. Finally, this article analyzes the fiscal and ethical obstacles to expansion of the commercial sponsorship program, and proposes ways to negotiate those obstacles.

Background

Resources

“All of the military departments had difficulty meeting their recruiting goals for FY 1999.”¹ If MWR activities promote the tandem goals of recruitment and retention,² it follows that decreased MWR activities will result in fewer recruits and

fewer careerists. Therefore, commanders require increased MWR funding to attract and retain quality personnel.³

Commanders fund MWR programs out of money from their Operations and Maintenance (O&M) budget, or sometimes from their Research, Development, Test, and Evaluation (RDT&E) budget.⁴ Congress appropriated \$17,185,623,000 in fiscal year 1999 for the operation and maintenance of the Army, but it did not specify in its appropriations language how much of that money should be spent for MWR programs.⁵ Likewise, Congress appropriated \$92,384,779,000 in fiscal year 2000 for the operation and maintenance of the Department of Defense (DOD), but it did not specify how much of that money was intended for MWR programs.⁶ By statute, Congress permits DOD to spend O&M money on MWR, but does not specify how much O&M money should go towards MWR.⁷

Though commanders complain about not having enough money to spend on MWR, Congress is concerned that commanders are not using enough of their O&M money to fund MWR programs.⁸ However, from their limited O&M funds, commanders must choose between satisfying operational requirements and enhancing soldier morale. Thus, to accomplish the mission and retain quality people, the armed services

1. Major Mary E. Harney et al., *1999 Contract and Fiscal Law Developments—The Year in Review*, ARMY LAW., Jan. 2000, app. a at 134 (citing Jane McHugh, *Monthly Recruiting Sign-ups Worst in 26 Years*, ARMY TIMES, July 26, 1999, at 8).

2. See generally U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES [sic], para. 1-9(b) (25 Oct. 1998) [hereinafter AR 215-1] (“The MWR program supports recruitment and retention of quality personnel.”); Major Stephen E. Castlen, *Let the Good Times Roll: Morale, Welfare, and Recreation Operations*, ARMY LAW., June 1996, at 5 (“Soldier morale is vital to accomplishment of Army missions. Army morale, welfare, and recreation operations devote tremendous resources to enhance soldier morale”).

3. Captain Eric Drynan wrote:

I truly believe more unit MWR money would improve retention numbers. I don't know about recruitment numbers, but I've seen a lot of soldiers here a lot happier due to the things MWR has given them. For example, at the Super Bowl party I overheard a couple of soldiers saying, “Maybe this assignment won't be too bad” as they chowed down on chicken wings and soda. The MWR committee in the hospital has great ideas, but with such limited money we can hardly do anything. If we had more money and the soldiers had control of what they could do with it, their morale would be much higher. I think this is very important to retention!

E-mail from Captain Eric Drynan, Bravo and Student Company Commander, Eisenhower Army Medical Center, Fort Gordon, Ga., to author (Feb. 7, 2000) (on file with author).

4. AR 215-1, *supra* note 2, at para. 4-3(b) (“[Appropriated funds] are limited to Operations and Maintenance, Army (OMA), O & M Army Reserve (OMAR), and Research, Development, Test, and Evaluation (RDT&E) when the installation base operations support is funded by RDT&E”).

5. H.R. CONF. REP. NO. 105-746, at 4 (1998).

6. H.R. CONF. REP. NO. 106-371, at 111 (1999).

7. 10 U.S.C. § 2241 (Supp. V 2000).

must find creative ways to fund MWR programs from sources other than O&M money.

DOD Response

One DOD response to this funding issue is the commercial sponsorship program. DOD sets out its policy on commercial sponsorship in Enclosure 9 to *DOD Instruction 1015.10*.⁹ DOD defines commercial sponsorship as

the act of providing assistance, funding, goods, equipment (including fixed assets), or services to an MWR program(s) [or] event(s) by an individual, agency, association, company or corporation, or other entity (sponsor) for a specific (limited) period of time in return for public recognition or advertising promotions.¹⁰

In a nutshell, commercial sponsorship is a contractual agreement between the Army and the sponsor. The Army provides access to its advertising market, and the sponsor supports a program or event.

Commercial sponsorship may be solicited or unsolicited, and does not include gifts or donations.¹¹ Sponsorship agreements must be written, and must be for periods of one year or less.¹² The sponsor and the MWR activity may renew the

agreements annually, for a total term not to exceed five years.¹³ All sponsorship agreements require a legal review.¹⁴

Naturally, sponsors will expect something in return for their sponsorship. The more they sponsor, the more they will likely expect in return. Enclosure 9 to *DOD Instruction 1015.10* reflects this anticipation, because it states that “[a]ssistance provided [to the sponsor] is commensurate with the level of sponsorship offered.”¹⁵ MWR activities may not grant special concessions or favored treatment to sponsors, beyond the public recognition described in the sponsorship agreement.¹⁶ “In addition, individuals or entities not providing sponsorship are not treated with disfavor [and should not] suffer any form of reprisal.”¹⁷ The instruction requires a government disclaimer on any public recognition, as “the Department of Defense does not endorse [or] favor any commercial supplier, product, or service.”¹⁸ The instruction also forbids solicitation of tobacco and alcoholic beverage sponsorship, and allows unsolicited sponsorship only under certain conditions.¹⁹

Army Response

The Army recognizes that strong MWR programs help it recruit and retain quality soldiers.²⁰ Commanders fund MWR programs with appropriated funds (APFs), non-appropriated funds (NAFs), or a combination of both.²¹ However, commanders have not always had enough money to fund MWR programs. This was particularly true during the restricted military

8. H.R. REP. NO. 106-162, at 316-17 (1999).

The committee is concerned that ever tightening pressures on the operations and maintenance budgets of the military services are causing the Department of Defense to stray from well established principles of support for Morale, Welfare, and Recreation programsThe committee notes that the military services have not demonstrated a serious commitment to fund Morale, Welfare, and Recreation programs.

Telephone Interview with Tom Hawley, Professional Staff Member, House Armed Services Committee (Jan. 27, 2000).

9. U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MILITARY MORALE, WELFARE, AND RECREATION (3 NOV. 1995) [hereinafter DOD INSTR. 1015.10].

10. *Id.* para. A(1).

11. *Id.*

12. *Id.* para. A(2)(b).

13. *Id.*

14. *Id.*

15. *Id.* para. A(2)(c).

16. *Id.*

17. *Id.*

18. *Id.* para. A(2)(e).

19. *Id.* para. A(2)(h).

20. AR 215-1, *supra* note 2.

21. *Id.* para. 4-1.

budgets of the late 1980s.²² In response to these budget cut-backs, DOD approved the commercial sponsorship program on December 22, 1988.²³ DOD intended the commercial sponsorship program to upgrade the quality of MWR events for soldiers and their families in the “constrained budgetary climate that now exists in the MWR arena.”²⁴

Chapter 7 of *Army Regulation 215-1* establishes the rules for commercial sponsorship²⁵ within the Army, most of which parallel the rules in *DOD Instruction 1015.10*. The regulation limits commercial sponsorship to “MWR programs and events, [and to the] Army Family Team Building and Army Family Action Plan . . . programs that are closely linked to MWR activities.”²⁶ The regulation also mandates an ethics briefing for MWR employees working with commercial sponsors.²⁷ Both the regulation and the instruction require MWR personnel to solicit sponsorship competitively.²⁸

Response of Other Services

Like the Army, the other military services sought ways to increase funding for their MWR programs.²⁹ Pursuant to *DOD*

Instruction 1015.10, Enclosure 9, each service developed a commercial sponsorship program. As with the Army program, commercial sponsorship for the Air Force helps “finance enhancements for MWR elements of [s]ervice events, activities, and programs.”³⁰ The Air Force requires competitive solicitation of sponsorship, but goes further in requiring publication of solicitation announcements in the *Commerce Business Daily*.³¹

The Navy’s implementing regulation for their commercial sponsorship program does little more than adopt *DOD Instruction 1015.10*.³² The Navy’s commercial sponsorship guidebook, however, provides very helpful examples of activities that are appropriate and inappropriate within the limits of the sponsorship program.³³ The Marine Corps MWR regulation³⁴ addresses commercial sponsorship in Chapter 6, and the Marine Corps commercial sponsorship manual provides additional guidance to MWR personnel.³⁵ One distinction of the Marine Corps commercial sponsorship program is the use of regional offices that review proposed sponsorship agreements for the East Coast, West Coast, and overseas regions.³⁶

22. See Major Michael R. McWright, *Ten Years of Commercial Sponsorship: Comparing and Contrasting the Army, Navy, Marine Corps and Air Force Commercial Sponsorship Programs* (1998) at 2 (unpublished LL.M. research paper, The Judge Advocate General’s School, U.S. Army (Charlottesville, Va.)) (on file with author [hereinafter McWright]); Joseph P. Zocchi, *Commercial Sponsorship: Solution for Army Morale, Welfare, and Recreation Programs or Shortsighted Folly?*, *ARMY LAW.*, Sept. 1990, at 10 [hereinafter Zocchi].

23. Zocchi, *supra* note 22 (citing Memorandum, Deputy Assistant Secretary of Defense, Military Manpower and Personnel Policy, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events (22 Dec. 1988)).

24. *Id.*

25. Along with commercial sponsorship, the Army has also sought to increase MWR revenue through its commercial advertising program. *DOD INSTR.* 1015.10, *supra* note 9, at encl. 10; *AR 215-1*, *supra* note 2, at para. 7-44 (“The liberalization of advertising policy is intended to create a source of MWR revenue that complements the commercial sponsorship program.”); Joseph P. Zocchi, *The Brave New World of Morale, Welfare, and Recreation Advertising*, *ARMY LAW.*, Feb. 1996, at 43. Though this article will not focus on the commercial advertising program, it is yet another example in an Army trend to find creative sources of MWR funding.

26. *AR 215-1*, *supra* note 2, para. 7-47(b).

27. *Id.* para. 7-47(c)(1).

28. *Id.* para. 7-47(d); *DOD INSTR.* 1015.10, *supra* note 9, encl. 9, para. B(3). See Major Annamary Sullivan, *Further Adventures in Commercial Sponsorship*, *ARMY LAW.*, Dec. 1991, at 7. (“The key here is that sponsorship must be solicited competitively”).

29. This article does not attempt to survey extensively the commercial sponsorship programs of all the services. For an excellent history and survey of these various programs, see McWright, *supra* note 22.

30. U.S. DEP’T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 34-407, AIR FORCE COMMERCIAL SPONSORSHIP PROGRAM, para. 1.1 (17 Feb. 1999).

31. U.S. DEP’T OF AIR FORCE, MANUAL 34-216, AIR FORCE COMMERCIAL SPONSORSHIP PROCEDURES, para. 2 (4 Nov. 1994).

32. U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 1700.12, MORALE, WELFARE, AND RECREATION (18 Sept. 1997).

33. BUREAU OF NAVAL PERSONNEL, A PRACTICAL GUIDEBOOK FOR NAVY CORPORATE SPONSOR AND PARTNERSHIP OPPORTUNITIES (Sept. 1998).

34. HEADQUARTERS, U.S. MARINE CORPS, MARINE CORPS MORALE, WELFARE AND RECREATION POLICY MANUAL (5 Sept. 1990).

35. HEADQUARTERS, U.S. MARINE CORPS, COMMERCIAL SPONSORSHIP PROGRAM AND POLICY MANUAL (1998).

36. Telephone Interview with Mary Wiles, Sponsorship Coordinator, Marine Corps Air Station, Beaufort, S.C. (Jan. 28, 2000).

Putting the Policies Into Practice

The commercial sponsorship programs of the military services are alive and well in practice. For example, flashing at the bottom of the Army's MWR web page are the words, "This space could be your ad!"³⁷ The Army's commercial sponsorship web page is chock-full of aggressive marketing aimed at locking in lucrative sponsorship agreements. Before entering the web page, potential sponsors are greeted with the following message, displayed next to a picture of a group of enthusiastic soldiers: "**YOUR MISSION: CAPTURE THEIR BUYING POWER. YOUR STRATEGY: BE ALL YOU CAN BE WITH ARMY SPONSORSHIP.**"³⁸ Next on the web page, the program promises, "If you can dream it, we can create it! Our creative, knowledgeable sponsorship team can make your ideas a reality. We can develop new avenues to maximize your advertising investment. If reaching the Army market is your goal, let us customize a sponsorship package that's right for your company."³⁹

The commercial sponsorship web page clearly states the Army's corporate sponsorship mission: "The MISSION of the Army Sponsorship Program is to support vital military MWR programs by obtaining private sector funding, services, or supplies in exchange for advertising and promotional opportunities within the Army community."⁴⁰ The web page goes on to list sponsorship opportunities for businesses. These include the Army Soldier Show, Better Opportunities for Single Soldiers (BOSS), the Army Recreation Machine Program, Restaurants, Resort Hotels, Youth Sports, World Class Athlete programs,

golf and bowling tournaments, photography contests, and arts and crafts events.⁴¹ The web page also tells how soldiers and their families benefit from the "Miller Time Dog Days of Summer" concert series. This event, sponsored by Miller Beer, has brought artists like Toby Keith, Clay Walker, Peter Frampton, and The Commodores to Army posts throughout the United States.⁴² The web page also encourages businesses to "add your company to our list of successful sponsors" that includes AT&T, Gillette, 7-Up, Gatorade, Anheuser-Busch, Visa, the Association of the United States Army, Kodak, Pepsi, and Coke.⁴³

Though not as aggressive as the Army's sponsorship marketing,⁴⁴ the other services⁴⁵ also actively pursue corporate sponsorship agreements. Running across the Air Force commercial sponsorship web page are the words, "Don't let this opportunity fly by!"⁴⁶ The Navy welcomes potential sponsors to its web page with, "JOIN THE NAVY, SEE THE WORLD, AND WATCH YOUR SHIP COME IN."⁴⁷ The Navy web page promises access to a market of two million potential customers and offers "a unique opportunity to showcase your products or services while demonstrating support to the military community stationed at home and abroad."⁴⁸ The Marine Corps commercial sponsorship web page advertises its program as a "win-win" partnership that gives "sponsors many opportunities to select the best venues and promotional outlets to showcase products and services."⁴⁹

37. The U.S. Army Community and Family Support Center Corporate Sponsorship Office, *Army Morale, Welfare and Recreation*, at <http://trol.redstone.army.mil/mwr> (last visited Aug. 18, 2000).

38. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship/display.html>.

39. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship>.

40. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship/mission.html>.

41. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship/home.html>. This portion of the web page adds, "and of course, anything is possible."

42. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship/ddos.html>.

43. *Id.* at <http://trol.redstone.army.mil/mwr/sponsorship/home.html>.

44. The Army runs its commercial sponsorship program from its Community and Family Support Center (CFSC) in Alexandria, Virginia. The CFSC provides its commercial sponsorship employees with an extensive sponsorship guidebook. U.S. ARMY COMMUNITY AND FAMILY SUPPORT CENTER, *ARMY SPONSORSHIP DESK REFERENCE* (2d ed. 1999).

45. The Air Force runs its program out of a similar, centralized, office in San Antonio, Texas. Neither the Navy nor the Marine Corps have centralized sponsorship offices. Interview with Jennifer L. Wicks, Field Assistance Manager, Army Corporate Sponsorship and Advertising Team, in Alexandria, Va. (Feb. 7, 2000); telephone interview with George Holz, MWR Legal Counsel, MWR Division, Bureau of Navy Personnel Command (Mar. 28, 2000) (confirming that Navy Commercial Sponsorship does not have a centralized office).

46. Headquarters, Air Forces Services Agency Sponsorship Program, *Marketing/Sponsorship*, at <http://www.afsv.af.mil/Sponsorship/SponsorshipPublic2.htm> (last visited Aug. 18, 2000).

47. U.S. Navy Morale, Welfare and Recreation Corporate Sponsor and Partnership Program, *Corporate Sponsorship*, at <http://www.mwr.navy.mil/mwrprgms/comspon2.htm> (last visited Aug. 18, 2000).

48. *Id.*

Approaching Infinity: Expansion of the Commercial Sponsorship Program

The following scenarios illustrate the current sponsorship program, and the possibilities for enhanced corporate sponsorship under an expanded program.

Scenario 1:

SPC Austin: Are you going to the Coca-Cola country music festival on post this Saturday?

SPC Travis: Yee-hah! You bet your boots I am. I reckon I normally couldn't afford something like this, but since Coke is sponsoring it, and it's on post, I can go!

Scenario 2:

COL Willie: Sir, do you want to work out at Gym 5 this afternoon?

BG Nelson: You mean the 'Foot Locker' gym? Absolutely. I used to hate going there when it was a real dump. But now that Foot-Locker has refurbished it, I love going there. It really keeps me in shape!

Scenario 3:

PVT Waylon: Boy, these PT uniforms they gave us at Basic sure are ugly.

PVT Jennings: Yeah, but at least we don't have to pay for them, and neither does the Army. With this cool Nike swoosh on the sleeve, I heard they don't cost Uncle Sam a penny.

Scenario 1 exemplifies the services' existing sponsorship programs. Rather than the "Coca Cola Music Festival" described in our fictional scenario, Miller Beer and 7-Up have sponsored the Army's summer concert tours.⁵⁰ If current law and policy allow corporate sponsorship of MWR events, why not expand such sponsorship to include MWR facilities and even non-MWR activities. In other words, if current practice permits the Miller Beer "Dog Days of Summer" concert series, why not extend the program to allow sponsorship of a "Foot-Locker Gym 5" or of "Nike PT uniforms"? Expanding commercial sponsorship could only improve the quality of these MWR and non-MWR activities.

Restrictions on Expansion of Commercial Sponsorship

DOD divides MWR activities into three categories, based upon the amount of appropriated funds they receive and their abilities to generate revenue.⁵¹ Traditionally, the Army has limited commercial sponsorship to Category C MWR activities.⁵² The policy justification for this limitation is found in *Army Regulation 215-1*, paragraph 7-47(a). This section limits commercial sponsorship to "MWR program(s) or event(s) . . . for a specific (limited) period of time . . ." Paragraph 7-47(b) also restricts commercial sponsorship to "MWR programs and events . . ." One could argue that a gym or pool is not a "program" or "event" and therefore does not qualify for sponsorship. One could also argue that sponsorship of a fixed facility like a gym would not be—unlike a concert—for a "specific (limited) period of time," as envisioned by the regulation's drafters. Finally, the regulation provides that the Army funds Category A and B MWR activities primarily through appropriated funds.⁵³ Opponents of expansion of sponsorship could argue that supplementing these activities with private funds is an improper "augmentation" of appropriated funded activities.⁵⁴

49. U.S. Marine Corps Commercial Sponsorship Program, *How to Do Business*, at <http://www.usmc-mccs.org/howto/htm> (last visited Aug. 18, 2000). One interesting example of Marine Corps sponsorship is "Team Marines Racing." NASCAR driver Hank Parker, Jr. drives a racecar promoting the Marines. Though the Marines buy advertising space on the car, owner Rick Rathburn actually owns the sponsorship program. Brian Hilderbrand, *Marine Sponsorship Pays Dividends for Car Owner*, THE LAS VEGAS SUN, Mar. 2, 2000, available at <http://www.lasvegassun.com/sunbin/stories/text/2000/mar/02/509930945.html>.

50. COMMUNITY & FAMILY SUPPORT CENTER, ARMY COMMERCIAL SPONSORSHIP AND ADVERTISING, A WORLD OF SPONSORSHIP OPPORTUNITIES WITH TODAY'S ARMY (n.d.).

51. DOD INSTR. 1015.10, *supra* note 9, encl. 4; AR 215-1, *supra* note 2, para. 4-1. Category A activities are mission-sustaining activities that generate little or no revenue and receive most of their funding from appropriated funds. Category A activities include gyms, pools, libraries, and sports events. Category B, community support activities, are closely related to Category A activities in that they make military installations temporary home towns for a mobile military population. They receive substantial appropriated fund support, but not as much as Category A, because they may generate limited revenue. Category B activities include arts and crafts centers, automotive centers, bowling centers, child development services, and outdoor recreation programs. Category C, revenue-generating activities, have less impact on readiness but offer desirable social and recreational opportunities. Because they generate revenue, they receive limited appropriated fund support. Category C activities include armed forces recreation centers, bingo, golf courses, clubs, stables, rod and gun activities, and skating rinks. See also Castlen, *supra* note 2, at 17-19.

52. Wicks Interview, *supra* note 45.

53. AR 215-1, *supra* note 2, para. 4-1.

Arguments for Expansion from Scenario 1 to Scenario 2

Despite these arguments against expansion, there is nothing in either *DOD Instruction 1015.10*, enclosure 9, or *Army Regulation 215-1*, paragraph 7-47, that expressly prohibits the expansion of commercial sponsorship to Category A and B activities. For this reason and those that follow, objections to expansion from scenario 1 to scenario 2 are policy-based rather than law-based.⁵⁵

Although the regulation limits sponsorship to programs or events, maintaining a high level of physical fitness is a “program” within the regulation’s language. If a gym is not important to a physical fitness “program,” then what is? Moreover, the regulation allows sponsors to provide “equipment (including fixed assets), or services”⁵⁶ A gym is arguably a “fixed asset” and, if not the gym itself, then the exercise devices (weights, treadmills, stairmasters, bikes, etc.) in the gym certainly qualify as “equipment (including fixed assets).” It is therefore logical that FootLocker, The Athlete’s Foot, Adidas, or any business could sponsor an on-post gym or at least the exercise equipment in the gym.

The “specific (limited) period of time” restriction in *Army Regulation 215-1* is not an insurmountable obstacle. The definition of “program” found in *DOD Instruction 1015.10* does not specify a time limit,⁵⁷ nor does the definition of “program” in *Army Regulation 215-1*.⁵⁸ In practice, programs lasting for indefinite time periods qualify for sponsorship. For example, a bowling center typically exists for an unlimited period, yet still qualifies for sponsorship as a Category C activity.⁵⁹ Thus, only the commercial sponsorship—not the program itself—need be for a limited time. The regulation clearly permits sponsorship agreements for one year or less, with renewals available up to

five years.⁶⁰ While not indefinite, the one year agreement period coupled with the five year renewal period seem to swallow the “specific (limited) period of time” rule.⁶¹ Therefore, one could reasonably conclude that the regulation would permit sponsorship of Gym 5 as the “The Foot Locker Gym” for one year (up to five years), followed by a year (up to five years) as “The Adidas Gym.”

Appropriated and non-appropriated funds can be spent on Category A and B activities.⁶² Through the use of non-appropriated funds, these Category A and B activities become, at least partially, non-appropriated fund activities. Likewise, although non-appropriated funds and limited appropriated funds are available for Category C activities, they still remain non-appropriated fund activities. Thus, a non-appropriated fund activity should not lose its status simply because it receives appropriated funds. The key to viewing non-appropriated fund activities is to equate them to the commercial enterprises with which the military conducts business. When the Army spends appropriated funds to buy supplies from commercial sources like Staples or Office Depot, these purchases do not transform those entities into appropriated fund activities. Likewise, spending appropriated funds on non-appropriated fund MWR activities should not make them appropriated fund activities.

Expansion of commercial sponsorship to Category A and B MWR activities would not violate the augmentation prohibition of *Army Regulation 215-1* either. Augmentation occurs only when a command augments congressionally appropriated funds. However, “[non-appropriated fund] expenditures for valid MWR purposes are not an augmentation of appropriations.”⁶³ Therefore, commands cannot “augment” non-appropriated fund activities because commanders cannot logically

54. Augmentation is an action that increases the amount of funds available in an agency’s appropriation. This usually results in the agency spending more money than originally appropriated by Congress. Augmentation may violate U.S. CONST. art. I, § 9, cl. 7 (providing that only Congress has the power of the purse), 31 U.S.C. § 3302(b) (Supp. IV 1999) (requiring agencies to deposit any money received from miscellaneous sources into the general treasury), and 31 U.S.C. § 1301(a) (requiring agencies to apply appropriations only to those objects for which Congress made them). See generally discussion *infra* under Fiscal Law Objections heading.

55. In practice, installations may use sponsorship primarily for Category C activities because many of the Category A and B activities may not have the visibility that Category C MWR events have. This does not necessarily mean, however, that installations are not pursuing sponsorship of Category A and B activities, because they are. Installations could entertain additional sponsorship of components of A and B programs, or A and B events. E-mail from Steven Rosso, Attorney, U.S. Army Community & Family Support Center, Alexandria, Va., to author (Mar. 1, 2000) (on file with author). Nonetheless, there may be practitioners in the field who believe that there are legal objections to expansion of sponsorship to A and B programs and A and B events. This section of the article attempts to articulate some of those potential legal objections and then dispel them. The reader should be left understanding that the objections are policy ones rather than legal ones.

56. AR 215-1, *supra* note 2, para. 7-47(a); DOD INSTR. 1015.10, *supra* note 9, encl. 9, para. A(1). Fixed assets are assets “with productive or service lives longer than 2 years and unit costs of \$1,000 or more that are used for the production or sale of other assets or services.” AR 215-1, *supra* note 2, glossary.

57. DOD INSTR. 1015.10, *supra* note 9, encl. 2.

58. AR 215-1, *supra* note 2, glossary.

59. *Id.* fig. 4-1.

60. *Id.* para. 7-47(c)(2); DOD INSTR. 1015.10, *supra* note 9, encl. 9, para. A(2)(b).

61. Zocchi, *supra* note 23, at 12.

62. AR 215-1, *supra* note 2, para. 4-1.

augment something not funded by Congress. Thus, this type of expenditure would not violate the augmentation prohibition.

Objections to expansion of sponsorship to Category A and B activities would therefore be policy, rather than legal, objections. However, the military has already addressed several of these policy concerns in its other business-like programs.

Expansion of sponsorship to Category A and B activities would follow the trend set by other Army programs that are conducted more like businesses. As mentioned earlier in this article, DOD authorizes MWR advertising.⁶⁴ Unlike commercial sponsorship, however, the advertising program contains no “program or events” or “specific limited period of time” restrictions.⁶⁵ As a practical matter, this means that a MWR activity could call its sponsorship program an advertisement to circumvent the “program or events” sponsorship requirement. For instance, rather than calling a swimming pool the “Speedo Aquatic Center,” MWR could still call it “north pool” but hang Speedo advertising banners in the swimming area. This would keep the agreement in compliance with the advertising regulations. Interestingly, the Command Judge Advocate at the Army Community and Family Support Center once recommended disapproval of a proposed agreement for advertising banners inside an on-post gym when he was the Deputy Staff Judge Advocate for the Military District of Washington.⁶⁶ The rationale was that a post gym’s walls are APF-produced media rather than NAF-produced media.⁶⁷ The obstacle, therefore, appeared to be the prohibition of *Army Regulation 215-1*, para. 7-44g(3)⁶⁸ rather than an augmentation problem. It would not be an augmentation problem because mixing appropriated funds with non-appropriated funds in a MWR activity does not change the primary non-appropriated fund nature of that activ-

ity.⁶⁹ Moreover, forbidding advertising in gyms would apply inconsistent logic to the advertising analysis. If advertisements are permissible on installation ball fields (and they are common on many installations), then why are they not permissible in installation gyms? How is a ball field different from a gym?⁷⁰ Putting aside the fiscal law analysis, how does one explain this inconsistency to the average soldier, average commander, or even the average citizen?

Contracting is another way that the military already partners with private industry to deliver MWR services to service members and their families in a business-like manner. For instance, *DOD Instruction 1015.10*, Enclosure 8, authorizes the use of appropriated funds to contract with private fitness facilities when military fitness facilities are not available.⁷¹ If these regulations allow the military to contract with off-post athletic facilities, why not allow the off-post athletic facilities to run on-post programs, either through a contract or even through sponsorship? To the average soldier, commander, or citizen, how different is going to Gold’s Gym off-post than going to Gold’s Gym across post?

Another example of the privatization of the Army’s business is the A-76 outsourcing initiative.⁷² This program requires the military to conduct studies to determine whether it would be cheaper to contract out the work currently being done by government workers. If it is cheaper to contract out the work, then a private contractor is allowed to perform the government operation. In this way, control is retained over inherently governmental functions, but the agency achieves economy and enhances productivity through the use of cost comparisons.

63. *Id.* app. D.

64. DOD INSTR. 1015.10, *supra* note 9, encl. 10, Advertising Policy; AR 215-1, *supra* note 2, para. 7-44.

65. It does, however, restrict commercial advertising by prohibiting it on appropriated fund electronic media. AR 215-1, *supra* note 2, para. 7-44g(3).

66. Interview with Lieutenant Colonel Daniel P. Shaver, Command Judge Advocate, Ronald K. Heuer, Deputy Counsel, and Joseph P. Zocchi, Contract Attorney, U.S. Army Community & Family Support Center, in Alexandria, Va. (Feb. 7, 2000); E-mail from Lieutenant Colonel Daniel P. Shaver, Command Judge Advocate, U.S. Army Community & Family Support Center, Alexandria, Va., to author (Feb. 29, 2000) (on file with author).

67. E-mail from Lieutenant Colonel Daniel P. Shaver, Command Judge Advocate, U.S. Army Community & Family Support Center, Alexandria, Va., to author (Feb. 29, 2000) (on file with author).

68. AR 215-1, *supra* note 2, at para. 7-44g(3). However, this prohibition applies only to electronic media. It would seem that gymnasium walls would not fit a definition of “electronic” media. Because the prohibition specifically mentions command channels and AFRTS, one could argue that the prohibition applies only to radio and television advertising. On the other hand, the first sentence of paragraph 7-44g may imply that the regulation only permits advertising for NAFIs, rather than APF-built facilities. But why would paragraph 7-44g(3) only mention *electronic* APF media if it did not permit paid commercial advertising on non-electronic APF media? In other words, paragraph 7-44g(3) may broaden the NAFI limit established by 7-44g.

69. See generally discussion *supra* under the heading Arguments for Expansion from Scenario 1 to Scenario 2.

70. Ball fields may be different because the Department of the Army apparently approved advertising on NAF-built ball fields in an 18 June 1992 memorandum. E-mail from Lieutenant Colonel Daniel P. Shaver, Command Judge Advocate, U.S. Army Community & Family Support Center, Alexandria, Va., to author (Mar. 24, 2000) (on file with author). To the average soldier or commander, though, how different is a ball field from a gym?

71. DOD INSTR. 1015.10, *supra* note 9, encl. 8, Physical Fitness Services; AR 215-1, *supra* note 2, para. 8-14b(2)(a).

72. FEDERAL OFFICE OF MANAGEMENT & BUDGET, CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1983).

Further evidence of the Army's privatization trend is the move at some Army installations toward privatizing on-post housing. In this system, a private contractor operates the government housing office as a private property management company.⁷³

Fort Gordon, Georgia has taken an interesting approach to partnering with private industry in order to earn more revenue for installation MWR programs. The Directorate of Community Activities negotiated a contract with a local Century 21 real estate broker for housing sales services on-post. Century 21 gives the installation MWR fund 32% of the commissions it earns through the on-post office.⁷⁴

One cutting-edge privatization venture is DOD's Public-Private Venture (PPV) program.⁷⁵

PPV projects are private sector built and/or operated facilities or services on Government-owned real estate in exchange for discounted fees and/or service and an equitable return to the installation's MWR fund. PPV projects are another means of providing MWR facilities that are unattainable through traditional funding sources. They deliver morale-enhancing activities while avoiding capital investment costs, simultaneously producing cash dividends accruing to the installation MWR fund.⁷⁶

An example of a PPV in the Army is an operation at Fort Carson, Colorado, where a private company runs an on-post car wash in exchange for a percentage of their profits going to the installation MWR fund.⁷⁷ The real purpose and benefit of these

PPV projects is the service provided to the military community. Private companies can often provide better services than their military counterparts.

Finally, in one case, the Army has expanded commercial sponsorship beyond MWR activities. In a July 21, 1999 memo, the Acting Assistant Secretary of the Army authorized an exception to policy to authorize the use of commercial sponsorship for Army Community Services (ACS) activities.⁷⁸ The memo, however, limits commercial sponsorship to the non-appropriated fund components of ACS.⁷⁹ Despite this limit, however, the exception to policy may begin to break the ice for sponsorship expansion beyond MWR.

These examples illustrate the trend to operate many parts of the military like a private business. There is a tacit recognition that private industry can operate more efficiently than the military in certain areas.⁸⁰ There is also a timid⁸¹ acceptance that public-private partnerships are necessary to provide certain services that the military can no longer afford.

Consistent with this trend, the Army should expand commercial sponsorship beyond Category C MWR activities to Category A and B activities. As discussed, regulatory or fiscal law objections do not prevent such sponsorship. There are no regulatory objections because Category A and B activities can be considered MWR "programs or events." There are no fiscal law objections because one cannot logically augment non-appropriated fund activities. Without viable regulatory or fiscal law objections, expansion of commercial sponsorship to Category A and B activities makes good sense. Soldiers and their families deserve quality recreation centers, child development services, swimming pools, libraries, and gyms. Expansion of

73. 10 U.S.C. § 2872 (Supp. V 2000). Although this program's goal is better housing services for soldiers, some are concerned that the contractors may not take good care of the soldiers. Telephone Interview with Colonel Kevin E. O'Brien, Office of the Chief Attorney, Headquarters Services, Washington, D.C. (Jan. 27, 2000); Telephone Interview with Captain Laura J. Calese, Office of the Staff Judge Advocate, Fort Carson, Colo. (Jan. 31, 2000). Captain Calese reports that even Fort Carson's commercial sponsorship program is being turned over to contractors.

74. Letter from Terence Cleary, Chief, Administrative and Civil Law, Office of the Staff Judge Advocate, Fort Gordon, Ga. to author (Feb. 2, 2000) (including accompanying materials on Century 21 real estate contract) (on file with author). Although the legal analysis involved issues of government endorsement, monopoly, solicitation, commission disclosures, and commission splitting, this revenue-generating program has encountered less than five disgruntled customers since its inception in 1997. E-mail from Terence Cleary, Chief, Administrative and Civil Law, Office of the Staff Judge Advocate, Fort Gordon, Ga., to author (Mar. 1, 2000). See also Larry Miller, *Century 21 Larry Miller Realty*, at <http://www.c21larrymiller.com> (last visited Aug. 18, 2000) (detailing the Century 21 program).

75. U.S. DEP'T OF DEFENSE, INSTR. 1015.13, DEPARTMENT OF DEFENSE PROCEDURES FOR IMPLEMENTING PUBLIC-PRIVATE VENTURES (PPVs) FOR MORALE, WELFARE AND RECREATION (MWR) CATEGORY C REVENUE-GENERATING ACTIVITIES (17 June 1998) [hereinafter DOD INSTR. 1015.13].

76. AR 215-1, *supra* note 2, para. 10-12a.

77. Calese Interview, *supra* note 73.

78. Memorandum, Office of the Assistant Secretary of Defense, to Assistant Secretary of the Army, Manpower and Reserve Affairs, subject: Request for Exception to Policy: Army Reinvention Laboratory Waiver Request 98-13, Commercial Sponsorship of Army Community Services (21 July 1999).

79. *Id.*

80. Like private businesses, MWR activities usually establish benchmarks and operating standards.

81. This acceptance should increase considering that many of these business-like programs are growing rapidly.

commercial sponsorship to Category A and B activities is one way to accomplish this.

To Infinity and Beyond: Expansion of Sponsorship to Scenario 3

If the Army can expand commercial sponsorship beyond MWR Category C activities, why not expand it beyond MWR activities all together?⁸² If the military trend is towards increased public-private partnerships, why not develop public-private partnerships outside the MWR arena? As described in our third fictional scenario, why not put the Nike swoosh on the PT uniform in exchange for Nike underwriting the cost of distributing the uniforms to new recruits? Why not have “Corcoran” displayed prominently on combat boots in exchange for Corcoran paying for initial issue boots to recruits? How about, “When the Army needed a new voice mail system at the home of the Signal Corps, it turned to AT&T” in exchange for free installation and maintenance of office telephones on Fort Gordon?

The military advantage in these scenarios is getting more products and services for less money. The military, of course, must be careful not to appear to endorse the sponsors. This should not be a problem, however, if the military competitively solicits the sponsorships. If Nike pays for the PT uniforms, then that should free up a pot of money which the military can spend elsewhere. If AT&T installs a voice mail system, then maybe clients can more easily contact their attorneys at SJA offices. Along with freeing up money, this type of sponsorship could also improve the efficiency and professionalism of Army operations, as viewed by both Army and civilian communities.⁸³

This type of expansion, however, clearly goes beyond current regulations because it takes corporate sponsorship beyond MWR. Here, the military is clearly venturing into the ethical and fiscal “twilight zone.”⁸⁴ Such a twilight zone venture presents several legal and policy problems.

Fiscal Law Objections

Power of the Purse

Expansion of sponsorship beyond MWR presents several fiscal law problems. The first problem is that such expansion would interfere with Congress’s power to control the military. Only Congress has the power of the purse.⁸⁵ Expansion of sponsorship beyond MWR would infringe on Congress’s power of the purse because the military would be taking in additional money in order to expand its operations, all without the required congressional approval.⁸⁶ An attempt by the military to expand sponsorship beyond MWR would therefore involve an effort to expand the contours of our military operations. Per the Constitution, only Congress has this power.⁸⁷

Miscellaneous Receipts

Expansion of sponsorship beyond MWR also presents an augmentation problem. Though augmentation is not an obstacle with non-appropriated fund activities, there is a clear prohibition on augmenting appropriated fund activities.⁸⁸ The Miscellaneous Receipts Statute, 31 U.S.C.A. § 3302(b), mandates that any money received from miscellaneous sources must be deposited in the general treasury.⁸⁹ Scenario 3 would violate the Miscellaneous Receipts Statute because Nike’s

82. The Joint Ethics Regulation allows the Army to “fund” appropriated-fund conferences through co-sponsorship agreements. U.S. DEP’T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 3-206 (30 Aug. 1993, as amended to Aug. 1999) [hereinafter JER]. These conferences are usually not MWR activities. If the military can fund these non-MWR conferences, why not expand sponsorship beyond MWR all together?

83. Mindful of the inherent limitations in military practice compared to private practice, the Army could nonetheless use sponsorship dollars to improve the professional appearance and efficiency of its operations.

84. E-mail from Alfred Novotne, Attorney, Army Standards of Conduct Office, to author (Oct. 12, 1999) (on file with author).

85. U.S. CONST. art. I, § 9, cl. 7. See Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 111 (1998) (“The federal courts have consistently interpreted the appropriations clause as conferring on Congress—and on Congress alone—the power of the purse”).

86. The Constitution presupposes a distinction between the public sphere and the private sphere and permits expansion of the public sphere only with legislative approval. See generally U.S. CONST. art. I. The appropriations requirement both reflects and implements these fundamental constitutional choices. In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government.

87. Kate Stith, *Congress’s Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

88. See generally *supra* note 54 and accompanying text; discussion *supra* under the heading Arguments for Expansion of Commercial Sponsorship Program.

89. 31 U.S.C. § 3302(b) (Supp. IV 1999). The Comptroller General has opined that money received from miscellaneous sources must be deposited in the general treasury. Interest Earned on Unauthorized Loans of Federal Grant Funds, 71 Comp. Gen. 387 (1992) (ruling that interest earned by grantees on unauthorized loans belongs to the United States and must be deposited in the treasury as miscellaneous receipts); Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, 67 Comp. Gen. 443 (1988) (ruling that payments received by the Air Force for its capital improvement expenditures for its child care centers must be deposited in the treasury as miscellaneous receipts).

underwriting the distribution of PT uniforms to recruits would constitute an augmentation of the Army's uniform budget. In other words, funds received from Nike would have to be considered money received from a miscellaneous (non-congressional) source, and would have to be deposited in the general treasury.⁹⁰ This requirement defeats the whole purpose of Nike freeing up more money for the Army to spend because only Congress has access to the general treasury.

The Miscellaneous Receipts Statute is not hollow. In the most recent reported federal court case addressing the Miscellaneous Receipts Statute,⁹¹ a court found that DOD violated the provisions of the Statute. In *Scheduled Airline Traffic Offices v. Dep't of Defense*,⁹² the Defense Construction Supply Center issued a solicitation seeking official and unofficial travel services. The solicitation required deposit of official travel proceeds into the general treasury, and deposit of unofficial travel proceeds into the local MWR fund.⁹³ The court held that unofficial travel proceeds constituted "money for the Government" within the meaning of the Miscellaneous Receipts Statute and thus had to be deposited in the general treasury.⁹⁴

The court, however, was faulty in its analysis of the Miscellaneous Receipts Statute. *Scheduled Airline Traffic Offices* focused solely on the source of the revenue, ignoring the recipient of the revenue.⁹⁵ Although private money is "money from

any source," it is not being received by a purely government agency. NAF activities are at best quasi-government entities.⁹⁶ Because nonappropriated funds are not public moneys, Congress should not be concerned with agencies adding to them.⁹⁷ Taking the court's decision to a logical conclusion, not only is the Army forbidden from funding MWR activities with sponsorships, advertising, and PPVs, it could not even fund MWR activities with user fees. Given the court's reasoning, user fees would constitute "money from any source" that must be deposited into the general treasury rather than into the MWR fund.⁹⁸ Clearly, this could not be Congress's intent. In fact, in response to the court's decision, Congress gave DOD specific statutory authority to craft exactly the type of fee arrangement that the court criticized.⁹⁹

Another interesting Miscellaneous Receipts case is *Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties*.¹⁰⁰ In that case, the Comptroller General held that an agency may receive in-kind replacement of vehicles from negligent third parties without violating the Miscellaneous Receipts Statute. This in-kind replacement was not an improper augmentation even though the agency had a specific authorization of appropriated funds to replace vehicles.¹⁰¹

90. This is true unless the military could somehow view the money as a "gift" rather than a bargained-for exchange. The DOD may accept gifts under 10 U.S.C. §§ 2601, 2608 (Supp. V. 2000). See generally discussion *infra* under the heading Existing Legal Ways to Overcome Objections.

91. Two other federal cases discuss violations of the Miscellaneous Receipts Statute. In *Reeve Aleutian Airways, Inc. v. Rice*, 789 F.Supp. 417 (D.D.C. 1992), Elmendorf Air Force Base in Alaska solicited bids for a travel contract wherein the successful bidder would pay a concession fee to the MWR fund at a remote Alaskan Air Force base. Finding that the concession fees were somehow a loan from U.S. taxpayers to the government, the court ruled that the concession fees were "public monies" that had to be deposited in the general treasury. In its decision, the court focused solely on the source of the revenue, ignoring the recipient of the revenue. In *Motor Coach Industries v. Dole*, 725 F.2d 958 (4th Cir. 1984), the Federal Aviation Administration (FAA) agreed with several airlines serving Dulles Airport to establish a trust funded by airline user fees to purchase additional ground transport busses for the airport. Ruling that such an agreement violated the Miscellaneous Receipts Statute, the court reasoned that "the [trust] was an attempt by the FAA to divert funds from their intended destination—the United States Treasury. Although the purpose for which the FAA sought the funds was laudable, its methods certainly cannot be praised." *Id.* at 968. This is a good Miscellaneous Receipts decision because, unlike MWR programs, a Dulles Airport bus fund is not a congressionally recognized non-appropriated fund activity.

92. *Scheduled Airline Traffic Offices v. Dep't of Defense*, 87 F.3d 1356, 1357 (D.C. Cir. 1996).

93. *Id.*

94. *Id.* at 1362.

95. This is relevant because the Miscellaneous Receipts Statute applies only to government recipients. By definition, there is no violation if a private entity receives private money. The Statute only applies when government agencies receive "money from any source." 31 U.S.C. § 3302(b) (Supp. IV 1999).

96. Lieutenant Colonel Terry L. Elling, *Litigation Division Notes: Scheduled Airlines Traffic Offices, Inc., v. Department of Defense*, ARMY LAW., Oct. 1996, at 46 ("Nonappropriated funds are, by definition, 'separate and apart from funds that are recorded on the books of the Treasurer of the United States'") (citing AR 215-1, *supra* note 2, glossary).

97. *Id.* ("By definition, then, the [Miscellaneous Receipts] Statute should have no application to nonappropriated fund revenue generating activities").

98. *Id.* ("As a practical matter, no revenue generated by activities (e.g., concession contracts, user fees, club membership dues) that enjoy any level of government support could be applied to local or departmental MWR programs").

99. 10 U.S.C. § 2646 (Supp. V 2000).

100. *Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties*, 67 Comp. Gen. 510 (1988).

101. *Id.*

The *Bureau of Alcohol, Tobacco, and Firearms* opinion is especially interesting because the Comptroller General expressly allowed an in-kind augmentation of an appropriated fund activity. Using this reasoning, could the military allow private companies to make in-kind replacements of buildings, facilities, or fixed items, even in the absence of some tort liability? The opinion seems to allow that, because the government does not receive any *money*. The Comptroller General specifically stated that the Miscellaneous Receipts Statute applies only “when money, as opposed to goods or services, has been provided to the agency.”¹⁰² If this strict reading of the Statute is correct, then it means that the military can accept in-kind sponsorship of goods or services. To go back to earlier examples, this means that the Army can accept PT uniforms from Nike and a voice mail system from AT&T. The difference, of course, is that Nike and AT&T are not liable to the Army in tort. Nonetheless, the language of this opinion is very broad.

The big picture painted by these decisions and opinions is that the military may not augment appropriated fund activities unless Congress provides the authority to do so. Notwithstanding the rulings in *Scheduled Airline Traffic Offices* and *Reeve Aleutian Airways*,¹⁰³ the prohibition on augmenting appears to apply only to appropriated fund activities, not to non-appropriated fund activities.

A basic principle of fiscal law is that augmentation of *appropriations* is not permitted.

An augmentation of an *appropriation* occurs when an agency takes an action which increases the amount of funds available in an *appropriation*. This can result in the agency spending more money than was originally *appropriated* by Congress.¹⁰⁴

In terms of our scenarios, this means that the Miscellaneous Receipts Statute does not prohibit expansion of commercial sponsorship to Category A and B activities, but probably prohibits expansion of sponsorship beyond MWR activities.¹⁰⁵

Ethical Objections

Expansion of commercial sponsorship within MWR and beyond MWR contains several ethical minefields. The Joint Ethics Regulation¹⁰⁶ contains several provisions that those involved in sponsorship, in its current or in an expanded form, must be aware of. One JER section prohibits preferential treatment to or endorsement of any private organization.¹⁰⁷ This prohibition seems to fly in the face of the sponsorship program, though the sponsorship regulations themselves prohibit any special treatment of sponsors beyond that in the agreement itself.¹⁰⁸ In this sense, this prohibition is no more of a concern in sponsorship than it is in contracting where special treatment of contractors is prohibited beyond the terms of the contract itself.¹⁰⁹ Another JER section forbids government employees

102. *Id.*

103. *See supra* notes 91-92 and accompanying text.

104. Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sep. 1997, at 32 (emphasis added).

105. Such a proposed expansion implicates two other fiscal statutes. Under the Anti-Deficiency Act (ADA), 31 U.S.C. § 1341 (Supp. IV 1999), the government is prohibited from spending money that it does not have. *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996). In light of this prohibition, commercial sponsorship seems like an ADA problem, because the Army is spending money (corporate money) not appropriated to it. The ADA prohibits over-obligation of government funds. Would augmenting funds with corporate money constitute an over-obligation? Probably, because the statute says that the government cannot “make an expenditure” exceeding an amount appropriated. If the Army makes an expenditure with non-appropriated funds, then the Army may be making an over-obligation. On the other hand, under commercial sponsorship, is not the company “making the expenditure” rather than the government? If the company is making the expenditure, then the Anti-Deficiency Act would not apply. This makes sense given that no one has yet raised an ADA objection to the commercial sponsorship program. If augmentation of funds with corporate money (or any non-appropriated money) constituted an over-obligation, then the entire MWR revenue-generating scheme would violate the ADA. By this analysis, it does not seem that expansion of sponsorship within MWR or beyond MWR would violate the ADA, because it is the sponsor rather than the government that is “making the expenditure.” Under the Purpose Statute, 31 U.S.C. § 1301(a), the government may spend money only for those purposes authorized by Congress. There is a three-part test for determining an appropriation’s proper purpose: (1) the expenditure must be for a particular statutory purpose, or necessary and incident to the proper execution of the general purpose of the appropriation, (2) the expenditure must not be prohibited by law, and (3) The expenditure must not otherwise be provided for. *Secretary of Interior*, 34 Comp. Gen. 195 (1954). It seems that the Purpose Statute would not be an impediment to expansion of commercial sponsorship, because there is no statute or specific appropriation addressing commercial sponsorship. There is therefore no need to determine whether expansion of commercial sponsorship fits a proper statutory purpose, as there is no statute on point. Looking at the purposes in military commercial sponsorship and MWR regulations, however, it seems clear that MWR funds are intended to support MWR activities. Thus, the military should be able to expand sponsorship into Category A and B MWR activities, although expansion beyond MWR may not be possible because the sponsorship regulations apparently require that the sponsorship benefit MWR activities.

106. JER, *supra* note 82.

107. JER, *supra* note 82, para. 3-209. *See* 5 C.F.R. § 2635.101 (2000).

108. Because the DOD has approved the commercial sponsorship program, the DOD has made a policy decision that commercial sponsorship is per se not endorsement.

109. Like contracting, commercial sponsorship also involves a bargained-for exchange.

from accepting bribes or graft.¹¹⁰ While this prohibition is also important for those involved in sponsorship, it is no more important than for those involved in accepting gifts or involved in contracting.

The JER also forbids receiving additional pay or allowances from non-government sources.¹¹¹ This section does not particularly impact commercial sponsorship because there are no provisions under the program which allow for additional pay and allowances for government employees. Like the other provisions, this one applies no more to sponsorship employees than it does to other government employees. Finally, parts of the JER along with federal statutes prohibit conflicts of interest in seeking post-government employment.¹¹² Like the other JER prohibitions, sponsorship employees must be careful not to award or administer sponsorship agreements with companies when they are negotiating employment with those companies. However, this section applies no more specifically to sponsorship employees than to any other group of government employees.

The upshot of all these ethical warnings and prohibitions is that government employees involved in sponsorship, as it exists or in an expanded form, must not use their government position for the personal benefit of themselves or the benefit of a sponsor. In this sense, sponsorship employees are no different than any other government employee. Of course, sponsors may not be aware of our ethical restrictions, or may not feel bound by them.¹¹³ If sponsors conduct other business, such as contracting, with the military, however, they will likely understand the restrictions and abide by them for their own self-interests. The bottom line is that those involved in sponsorship are no more likely to skirt the ethical rules than those involved in contracting or in other government-industry activities.

Perception and Practical Objections

Even if the military overcomes the fiscal law and ethical objections to expansion of commercial sponsorship, it must still overcome several perception and practical problems.

A primary perception problem is the lack of public accountability for how the military raises and spends its sponsorship money. In other words, Congress should decide how much money the military receives for MWR and non-MWR activities. For purposes of public accountability, Congress can raise taxes if it thinks the military needs more money.

A more practical problem is if Congress turns sponsorship into a zero-sum game. Congress may cut DOD budgets if it believes that sponsorship obviates the need for continued budgeted resources in certain areas. Commanders could also begin to believe that sponsorship obviates the need for continued budgeted resources in certain areas. For example, if concert sponsorship becomes a budgeted item, commanders may allocate less O&M money for these types of MWR events.¹¹⁴ This could pose problems if a sponsor suddenly pulls its sponsorship and leaves the command holding the bag without funds to continue the program.

Another perception problem is that the Army may no longer appear disinterested, but will become an instrument of commercial will. This perception problem became a real issue during the 1996 Army Ten Miler road race. Several large defense contractors sponsored that race, albeit through a conduit. Many in the press saw such sponsorship as improper influence peddling.¹¹⁵ On the other hand, the fact that the Army realized its mistakes and corrected them proves that the military can police its own sponsorship activities.

Taken to its extreme, some worry that an Army laden with corporate sponsorship would become like the Chinese army, economically self-sufficient and answerable to no one. The Chinese army "has built itself into a corporate empire, raising substantial revenue from more than 20,000 companies ranging from transport and real estate to coal mines, hotels, restaurants, night clubs and even satellite launches. Economic analysts say it constitutes a parallel mini-economy answerable to no one . . ." ¹¹⁶ For these reasons, China's president has ordered the military to give up its business holdings.¹¹⁷

Perhaps the perception problem that would face an expansion of commercial sponsorship is the perception that it would

110. JER, *supra* note 82, para. 5-400. See 18 U.S.C. § 201 (Supp. IV 1999).

111. JER, *supra* note 82, para. 5-405. See 18 U.S.C. § 209.

112. 18 U.S.C. §§ 207, 208; 41 U.S.C. § 423 (Supp. IV 1999); 5 C.F.R. §§ 2637, 2641; JER, *supra* note 83, chs. 8, 9.

113. Calese Interview, *supra* note 73.

114. Wicks Interview, *supra* note 45.

115. Steve Nearman, *Army Ten-Miler May Have Violated Policy*, WASH. TIMES, Apr. 5, 1996, at B1 ("This open display of sponsorship gives the appearance that prominent firms . . . who battle for billion-dollar defense contracts are helping their cause by providing as much as \$10,000 to support the annual Army race."). See Steve Nearman, *Army Race Bars Defense Sponsorship*, WASH. TIMES, Oct. 8, 1996, at B1.

116. *Jiang Orders Military to Give Up Business Deals in China*, BORNEO BULL., July 24, 1998.

117. *Id.*

dilute the value of the military by somehow making the military less unique. Perhaps the biggest concern is one of integrity. How can the military pledge complete loyalty to the nation's taxpayers if it is also beholden to corporate America? The military must remain disinterested regarding commercial ventures, and must appear that way to the American public.

The Army's job is to fight and win wars.¹¹⁸ This usually involves some level of death and destruction. Because the public entrusts the Army with this responsibility, the Army should conduct its business free of market forces and public pressure.

These thoughts were on the minds of certain members of the Senate Armed Services Committee when they toured the service academies. They viewed certain advertisements as permissible, but were not willing to expand sponsorship to fixed athletic facilities.¹¹⁹ Their idea was that the nation has an obligation to fund these types of facilities.¹²⁰ As a unique institution, the issue boils down to whether the military should raise money itself, or rely strictly on Congress.¹²¹ In other words, should the military become partially self-supporting, or should it remain content with money appropriated to it by Congress? Being a unique institution, the military should remain accountable to the American people. If the public wants the military to have more funding, then it should lobby Congress for additional service dollars. If the people do not want the military to have more money, then the military should not try to circumvent public will by appealing to corporate America.

Existing Ways to Overcome Legal and Policy Objections

Practical Ways to Overcome Objections

There are several practical ways to overcome the legal and policy objections to expansion of commercial sponsorship. Most of them involve using common sense arguments to counter these objections.

The most expedient way to overcome these hurdles is to use good judgment in the expansion of commercial sponsorship. The military does not want the NASCAR image of pervasive sponsorship, nor is it moving towards that reputation.¹²² Allowing advertisements in gyms is a far cry from plastering corporate decals all over a BDU uniform.¹²³ Although individuals' ideas of "appropriate" sponsorship will vary, there is a general consensus in the military of what is not appropriate. There have been few complaints, if any, of inappropriate sponsorship or advertisement agreements under the current programs.¹²⁴ Even if sponsorship expands beyond MWR, the military should trust its sponsorship employees to choose appropriate sponsors just as it now trusts contracting personnel to select suitable contractors.¹²⁵ If they make mistakes, as may have happened with the Army Ten Miler, then the Army should correct the problems without necessarily discarding the entire program.¹²⁶

For those who make sponsorship budgets a zero-sum game, let them get caught holding the bag just once and then watch them budget more carefully the next time around. Just as the market teaches those lessons in the civilian business world, so too can the market guide those in the military business world.

In terms of public accountability, it is unlikely that the military will become beholden to corporate America. It is difficult to imagine a corporate American army along the lines of the Chinese Army. American military culture and a history of civilian control would not allow that. More importantly, Congress can rein in the military if it thinks it is going too far with sponsorship. Just as Congress can control and change the way the military practices military justice,¹²⁷ so too can it control and change the way the military practices commercial sponsorship.

An example of this tension between expanding sponsorship yet retaining the unique quality of the military would be putting a company's logo on the uniforms of West Point's football team.¹²⁸ Some might argue that doing so would dilute the uniqueness of West Point and even of the Army as a whole. To

118. See generally U. S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, introduction and ch. 1 (14 June 1993).

119. Telephone Interview with Charles Abell, Majority Counsel, Senate Armed Services Committee (Jan. 24, 2000).

120. *Id.*

121. Shaver Interview, *supra* note 66.

122. Wicks Interview, *supra* note 45.

123. One might argue that allowing advertisements in gyms would place the military on a slippery slope leading eventually to the plastering of corporate decals all over BDUs. This is no more of a worry in sponsorship, however, than it is in advertising, public-private ventures, or A-76 outsourcing. The military is capable of using discretion in sponsorship just as it is capable of using discretion in these other business-like ventures.

124. As with sponsorship in the civilian world, customer complaints about sponsorship in the military are a sure-fire way to rein in inappropriate sponsorship. "Ultimately consumers are not stupid . . . They will be annoyed, not at the medium[,] but at the company pitching the ad." Caroline E. Mayer, *Ads Showing Up Almost Everywhere*, WASH. POST, Feb. 5, 2000, at A1.

125. The military should also trust its installation commanders in sponsorship matters, as it trusts them in so many other matters.

126. The Army eventually forbade defense contractor sponsorship of Army events. See Nearman, *Army Race Bars Defense Sponsorship*, *supra* note 115, at B1.

argue, however, that accepting such sponsorship at West Point somehow weakens the uniqueness of the institution and of the Army would be an insult to other quality institutions that accept sponsorship. For example, the University of Virginia athletic department has two commercial sponsorship programs.¹²⁹ The University of Maryland has reached a \$20 million deal with Comcast Corporation that will put Comcast's logo on the Terrapin's new arena for the next 25 years.¹³⁰ Does such sponsorship cheapen the value of a degree from that institution?¹³¹ That hardly seems likely,¹³² because the American public's view of sponsorship has changed over the past 20 years. Americans now readily accept the "Southwestern Bell Cotton Bowl" instead of the Cotton Bowl, the "USAirways Arena" instead of the Capital Center, and the "Dockers Halftime Show" instead of the CBS Halftime Show. Though the military remains a bastion of immutable values,¹³³ expanding commercial sponsorship will not somehow dilute those values. The public's acceptance of uniform sponsorship would not necessarily lead to national approval of the abolition of the Honor Code. Moreover, the military must at least partially reflect the public that it serves. Holding the military out as a particularly unique institution runs the risk of causing the public to view the military as an elitist

organization that is out of touch with the society it is sworn to protect.¹³⁴

Existing Legal Ways to Overcome Objections

The best existing legal way to overcome objections to expansion of commercial sponsorship within MWR is to use the current sponsorship regulations themselves. As discussed earlier, the language of the regulations themselves permits growth of sponsorship, at least within MWR.¹³⁵

The current regulations, however, do not appear to permit movement beyond MWR. Gift statutes may provide a means to justify legally expanding sponsorship outside of MWR. Several gift statutes permit the government to accept gifts in certain circumstances.¹³⁶ The Army could argue plausibly that Nike's underwriting of the PT uniforms is a gift to the military that satisfies one of the gift statutes. Even if the Nike sponsorship fit into one of these gift statutes, however, that argument would likely fail. A gift, by its nature, is a donation with nothing expected in return. Sponsorship, by definition, is a giving of

127. For example, in 1998, "Congress ordered the Secretary of Defense to submit alternatives to the current method for selecting members of the armed forces to serve on courts-martial. The only alternative specifically mentioned by Congress was a random selection method." Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 92 (2000) (citing Pub. L. No. 105-261, § 552, 112 Stat. 1920 (1998)). Also, in 1993, Congress blocked President Clinton's attempt to amend the Uniform Code of Military Justice regarding homosexual acts and declarations of homosexuality. *Gore's Litmus Test a Clumsy Promise on Gays in the Military*, SACRAMENTO BEE, Jan. 12, 2000, at B8.

128. The author noticed the Reebok logo on the West Point football uniforms during the Army-Navy football game. This is probably just an "off the shelf" label rather than part of a sponsorship agreement. The West Point Staff Judge Advocate office knows of no sponsorship agreements with Reebok. E-mail from Ronald Salvatore, Academy Counsel/Special Assistant to the Staff Judge Advocate, Office of the Staff Judge Advocate, United States Military Academy, to author (Mar. 22, 2000) (on file with author).

129. First Union, State Farm, and Hardees are part of the University of Virginia's "Team Virginia." University of Virginia, *Team Virginia*, at <http://www.virginiasports.com/splash/splash.html> (last visited Aug. 18, 2000). ALLTEL, Sprint, Reebok, and Coca Cola sponsor the "Cavalier Partners" program. *Id.* ("The preceding list of companies have made a substantial contribution to support Virginia Athletics. We are very proud to be long-term partners with these industry leaders and hope our loyal fans will visit their website to check out their products and services").

130. Manuel Perez-Rivas, *The Latest Advertising Arena*, WASH. POST, June 18, 2000, at C-1. The Montgomery County, Maryland, council is also hoping to obtain \$15 million for the naming rights to its new concert hall. *Id.* Not everyone is on this bandwagon, however. One Maryland state senator finds the sale of naming rights at universities an alarming trend, stating, "It's putting the state university's educational imprimatur on a product." *Id.* In California, the president of Stanford University recently forbade ads in school arenas, though he will still permit corporate logos on sports uniforms. INVESTOR'S BUS. DAILY, June 17, 2000, at 2. Stanford's president worries that school athletics are becoming "part of a vast entertainment industry." *Id.*

131. Wicks interview, *supra* note 45.

132. The average fan may not even notice a corporate logo on a uniform. If noticed, the observer may not know if the logo was there pursuant to a sponsorship agreement or just as part of the uniform. Moreover, the observer may not care.

133. The Army issues its soldiers a wallet-sized card with the "Soldier's Code" on one side and "Army Values" on the other. The Army Values are Loyalty, Duty, Respect, Selfless-Service, Honor, Integrity, and Personal Courage.

134. See, e.g., Dick Cady, *Readers Offer Their Takes on Marine Corps, Blues Society*, INDIANAPOLIS STAR, Dec. 9, 1997, at C1 (discussing Assistant Secretary of the Army Sara Lister's description of Marines as extremists who are out of touch with reality); Stephanie Gutmann, *The Great Umbrella Debate*, N.Y. TIMES, Oct. 9, 1997, at A31 (discussing the suggestion that the "Army is a wacky institution out of touch with reality" because it does not allow male soldiers to carry umbrellas); Richard J. Newman, *Human Relations Offensive*, U.S. NEWS & WORLD REPORT, Sep. 22, 1997, at 29 (discussing whether Army leaders are out of touch with the rank and file on gender issues).

135. See generally discussion *supra* under the heading Arguments for Expansion from Scenario 1 to Scenario 2. Although no statute specifically creates and governs MWR, the military's authority to run MWR programs is implicit in several statutes: 10 U.S.C. § 2241 (Supp. V 2000) (permitting DOD to spend O&M money on MWR); 10 U.S.C. § 2246 (prohibiting use of appropriated funds for DOD golf courses); 10 U.S.C. § 2247 (prohibiting use of appropriated funds for Armed Forces Recreation Centers-Europe); 10 U.S.C. § 2482(a) (permitting MWR agencies to contract with other federal agencies to support MWR); 10 U.S.C. § 2783 (detailing financial management and use of non-appropriated funds).

something with an expectation of publicity or sales in return. Thus, without even the gift statutes to rely upon, there does not seem to be a legal way to expand sponsorship beyond MWR under current law.

The military may use sponsorship models developed by other federal agencies to expand its own sponsorship program. There are several federal agencies that not only participate actively in commercial sponsorship, but also conduct their own fundraising. The U.S. Postal Service sponsored the winner of last year's Tour de France, and placed its logo all over his riding jersey.¹³⁷ The Corporation for Public Broadcasting holds telethons to raise money for its member stations.¹³⁸ Perhaps the military could follow their example.

Many federal agencies have their own specific, organic legislation that authorizes fundraising, acceptance of gifts, and public-private ventures.¹³⁹ The nature of these agencies, however, lends itself to fundraising. The American public accepts donations and sponsorship of public broadcasting and the arts because the American public accepts fundraising in those activities as commonplace.¹⁴⁰

This type of specific, organic legislation would be hard to justify for the Army. The Army is a larger, more permanent organization, and the American public does not view the Army as a typical fundraising organization.¹⁴¹ The Army faces a larger perception problem because of its mission and because of the American public's fear of the Military-Industrial Complex.¹⁴² In other words, Chuckie Cheese sponsoring Sesame Street¹⁴³ would probably not bother the public as much as

"Desert Storm, brought to you by General Electric." Congress is therefore not likely to grant the military similar broad-based, open-ended fundraising legislation.

Best Way to Expand Commercial Sponsorship is to Propose Legislation

DOD should expand sponsorship by clarifying *DOD Instruction 1015.10* and its implementing regulations.¹⁴⁴ Though *DODI: 1015.10* already permits such expansion, there may be those who still believe that such expansion is not a good policy idea. DOD should therefore amend those regulations to expressly permit commercial sponsorship of all MWR activities, regardless of category. This would not run afoul of any fiscal law or ethical prohibitions.

Although the American public would not support "This war funded by Lockheed," they would probably back "The Fort Bliss track and field stadium, brought to you by Gatorade." They would probably favor specific legislation authorizing sponsorship for all categories of MWR programs. Moreover, they would probably support legislation authorizing the service secretaries to approve certain non-MWR sponsorships. The taxpayers might accept the Nike swoosh on the PT uniforms, if, in exchange, the Army has more money to buy spare helicopter parts.

To expand sponsorship beyond MWR, however, DOD would need to propose legislation.¹⁴⁵ One such type of legislation could create a "super NAFI" or MWR Agency, or a "Military Commercial Sponsorship Agency," similar to the National

136. See, e.g., 10 U.S.C. § 178 (permitting gifts to the Jackson Foundation for the Advancement of Military Medicine); 10 U.S.C. § 1353 (permitting acceptance of travel benefits); 10 U.S.C. § 1588b (permitting acceptance of voluntary services); 10 U.S.C. § 2601 (permitting gifts for schools, hospitals, etc.); 10 U.S.C. § 2608 (permitting gifts from "persons, foreign governments, or international organizations."); 10 U.S.C. § 4356 (Authorizing the Superintendent of U.S. Military Academy to accept gifts on behalf of the Academy).

137. The author observed this while watching the Tour de France on television.

138. The author observed this several times while watching public television.

139. See, e.g., 5 U.S.C. § 3107 (Supp. IV 2000), 22 U.S.C. § 2455(f) (Supp. IV 1999) (United States Information Agency); 16 U.S.C. § 9(g) (Supp. IV 1999) (National Park Foundation); 20 U.S.C. § 959(a)(2) (Supp. IV 1999) (National Endowment for the Arts); 42 U.S.C. § 300aaa(a) (Supp. IV 1999) (Public Health Service); 42 U.S.C.A. § 12651g(a)(2)(A) (AmeriCorps); 47 U.S.C.A. § 399a (Supp. IV 1999) (Corporation for Public Broadcasting); Pub. L. No. 96-388, 94 Stat. 1547 (1980) (Holocaust Memorial Council).

140. By analogy, the American public may be receptive to donations and sponsorship of Category A and B MWR activities because, like these other federal agencies, the government would be spending private money on the activities rather than taxpayer dollars.

141. On the other hand, the American public probably does not view the Public Health Service as a typical fundraising organization either.

142. There are two possible solutions to this concern. First, an expanded military sponsorship program could limit agreements to corporations whose government business is below a certain dollar threshold. In that way, there would only be a de minimus concern with government partiality. Second, the military could limit sponsorship agreements to those companies that supply consumer products and services. See AR 215-1, *supra* note 2, para. 7-47d(2). This would also ameliorate the partiality concern.

143. Sesame Street accepted corporate sponsorship for the first time in 1998 after 30 years of commercial-free broadcasting. Sesame Street felt that its agreement with the Discovery Zone was necessary because of budget cutbacks in the Corporation for Public Broadcasting. Consumer advocate Ralph Nader criticized Sesame Street's decision to accept sponsorship. ST. LOUIS POST-DISPATCH, Oct. 7, 1998, at A8.

144. Even though the regulations do not prohibit expansion within MWR, compare discussion *supra* under the heading Arguments for Expansion of Commercial Sponsorship Program (arguing that some may interpret the regulations as prohibiting such expansion).

Endowment for the Arts and the Corporation for Public Broadcasting.¹⁴⁶ This agency could parallel the Jackson Foundation for the Advancement of Military Medicine, which receives and solicits private moneys for distribution to military medical facilities.¹⁴⁷ Such legislation could read:

There is created a Military Commercial Sponsorship Agency to further private enterprise sponsorship of military activities. The Agency may solicit and receive money and other property from a non-government entity in exchange for public recognition or opportunities for advertising and other promotions. Sponsors may designate money and property for distribution to specific components of the Armed Forces. If not specifically designated, the Agency shall deposit such money and property with the Department of Defense for distribution as the Department of Defense sees fit.¹⁴⁸

The benefit of this type of agency would be the centralization of DOD's commercial sponsorship activities. Unlike the current system where sponsorship varies between services, a super sponsorship agency would standardize sponsorship policy and practice. On the other hand, creation of yet another federal agency could require additional money,¹⁴⁹ personnel, office space, and equipment necessary for running yet another element of the DOD bureaucracy.

Preferably, future legislation would give the service secretaries approval authority for all types of sponsorship, within MWR and beyond MWR. The service secretaries could delegate the approval authority down to major activity commanders and installation commanders based on the dollar values of the sponsorship agreements. Such legislation could read:

The service secretaries may receive and solicit money and other property from a non-government entity in exchange for public recognition or opportunities for advertising and other promotions. Sponsors may designate money and property for distribution to specific components of the services. If not

specifically designated, the service secretaries shall distribute such money and property as they see fit. The service secretaries may delegate this approval and distribution authority as follows: \$1 million or greater – service secretary approval only; \$1 million to \$500,000 – major command approval; Below \$500,000 – installation commander approval. Installation commanders may further delegate this approval as they see fit.

Although this statutory scheme does not centralize DOD's sponsorship program, it has the advantage of not creating an additional bureaucracy. Moreover, it allows each service, and even each installation, to tailor its sponsorship program to its individual needs and its individual philosophy. Finally, it ensures greater accountability by placing responsibility for the program on the service secretaries rather than on a new DOD agency.

Conclusion

In an era of dwindling resources, budget cuts have eroded MWR opportunities for service members. In response to these cuts, DOD initiated a commercial sponsorship program to help fund MWR activities, but this program has limitations. An on-post Coca-Cola music festival is possible under current law and policy. An on-post FootLocker Gym is permissible under current law, but does not conform to current policy. The services should therefore change their policy to allow such sponsorship per a careful reading of *DOD Instruction 1015.10* and its implementing regulations. To make authority for such sponsorship crystal clear, DOD should amend *DOD Instruction 1015.10* to expressly allow sponsorship of all MWR activities. A Nike PT uniform agreement, however, is not feasible under current law because it would violate the Miscellaneous Receipts Statute. To allow this, DOD should propose legislation permitting an exception to the Miscellaneous Receipts Statute. Such legislation could create a Military Commercial Sponsorship Agency, or grant commercial sponsorship approval authority to the service secretaries.

145. As explained earlier, under current law, accepting sponsorship beyond MWR would violate the Miscellaneous Receipts Statute. See discussion *supra* at heading Miscellaneous Receipts.

146. It could also be similar to the United States Olympic Committee (USOC). 36 U.S.C. §§ 220501-220529 (Supp. IV 1999). The USOC has the specific power to "accept gifts, legacies, and devises in furtherance of its corporate purposes . . ." *Id.* at § 220505(b)(4). Trying to model a military sponsorship agency after the USOC, however, would open up a whole different can of worms in terms of potential scandals. Expanded military sponsorship would not want to succeed at the expense of its integrity. The military should not "bring in millions in sponsorships while working under the still-dissipating cloud of scandal hanging over the Olympic movement." Paula Parrish, *Dave Ogreaan to Resign as USOC Head of Fund-Raising*, THE GAZETTE (Colo. Springs, Colo.) Mar. 22, 2000, at Sports.

147. 10 U.S.C. § 178 (Supp. V 2000).

148. Perhaps the statute could also create a "Military Sponsorship Account" for deposit of sponsorship money, similar to the account in one of the DOD gift statutes. 10 U.S.C. § 2608.

149. Commercial sponsorship of such an agency is unlikely, given the necessity to remain impartial.

In a rapidly changing world, the military must constantly seek innovative ways to continue to provide a high quality of life to service members, retirees, and their families. Expansion

of commercial sponsorship is an excellent means to achieve that goal.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, United States Army

First Steps Toward Effective Direct Examination: Planning and Preparation¹

[E]ffective direct examinations that clearly, forcefully, and efficiently present the facts of the case will usually have a decisive effect on the outcome of the trial.²

Anyone who as a teenager was subjected to questioning by a parent about a minor indiscretion has experienced effective direct examination. The withering series of questions—short, focused, with little room to evade—produced more than enough information for the parent (a.k.a. judge) to enter findings of fact. There was no need for cross-examination or the testimony of other witnesses. Our experience shows that the direct examination questions and responses are key to establishing the facts. The direct examination is just as critical to the trial advocate as it is to the parent.³

To be successful, counsel must prepare to conduct direct examination effectively and completely. An effective direct examination is much more than simply avoiding leading questions. It is the presentation of relevant, material, and competent evidence in a manner that allows the panel to “relive reality from your side’s perspective.”⁴ Through effective direct examination, counsel can accomplish the goals of introducing undisputed facts, enhancing the likelihood of disputed facts, laying foundations for the introduction of exhibits, reflecting upon the credibility of witnesses, and holding the attention of the panel.⁵ This process begins with preparation and planning. More specifically, counsel must plan out the content, organization, and techniques to be employed in the direct examination of witnesses.⁶

Planning for direct examination is simply one of many tasks that must be accomplished in preparation for trial, and it must

be done within the framework of planning to present your entire case. Determining the content, organization, and techniques to be employed is a matter of determining what facts must be presented to the fact finder, which witnesses can present those facts, and what is the most logical sequence for presenting those witnesses.

Start by conducting a proof analysis. The proof analysis will identify the elements that must be proved, the evidence to prove each element, the theory of admissibility, and the foundational requirements. Second, prepare your closing argument. This will identify those important facts that do not show up on the proof analysis.⁷ From this you can determine the content of the testimony of each witness. The analysis at this stage, however, should focus on more than what you expect the witness to say. Professor Mauet describes the good direct examiner as being much like a film director. The film director can, through the use of different techniques, portray the facts in a certain way, minimizing the unimportant, while emphasizing the important.⁸ Analyze your reason for calling a certain witness, identify every fact that the witness can present to the court, both favorable and unfavorable, and focus on those facts that are most important to your case. Since the attention and interest of the panel is always at a premium, you must exclude clutter, unprovables, implausibles, impeachables, and door openers.⁹ In other words, avoid details that are not helpful to your theory, and testimony that can be challenged by effective cross-examination.

In determining the sequence of testimony and witnesses, your goal should be to present your case in a manner that is easy for the panel to follow. The panel members are not as familiar with the facts as you are. Consequently, you must tell the entire story in a clear and coherent way. Panel members remember information as part of a story, or based on relationships. One simple technique is to follow chronological order—both within a witness’s testimony and in the sequence of witnesses. The proverbial “story line” is familiar and effective. Another tech-

1. See generally STEVEN LUBET, MODERN TRIAL ADVOCACY (2d ed. 1997); THOMAS A. MAUET, TRIAL TECHNIQUES (4th ed. 1996); THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, tab B, module 1 (1997).

2. MAUET, *supra* note 1, at 73.

3. LUBET, *supra* note 1, at 45.

4. MAUET, *supra* note 1, at 73.

5. LUBET, *supra* note 1, at 45-47.

6. *Id.* at 50.

7. Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear, March!*, ARMY LAW., June 1998, at 21.

8. MAUET, *supra* note 1, at 74.

9. LUBET, *supra* note 1, at 53-55.

nique is to take advantage of the effect of primacy-recency. The gist of this theory is that panel members remember most details that are presented at the beginning and end of a witness's testimony. By presenting the most important or dramatic facts first and last, you will increase the odds that the panel will remember the facts you think are important. Apposition, or "the placement of important facts in a manner that emphasizes their relationship,"¹⁰ is another organizational approach. Also consider duration, or the "amount of time that you spend on certain facts."¹¹ Obviously you spend the most time on those facts that are most important to your theory of the case. In all cases, analyze the facts, determine which organizational approach will be most effective, and always start strong and end strong.

There are many tried and true techniques for conducting direct examination. At the most basic level, the goal is to get the witness to tell the story by using short, single-fact, non-leading questions. Scripting questions well in advance of trial is one method of ensuring that you do not omit important points. Be aware, though, that there are pitfalls to scripting questions. Counsel must avoid the temptation to go "back to the pad" as the witness is answering the last question. If your witness says something different than what you were expecting, there is a good chance that you will miss a significant change in the story. In addition, when you don't listen to your witness's answers, you send a message to the panel: this answer is not important. Why would the panel listen to an answer when you do not?¹² A good direct examiner is a good listener, and has the ability to follow up on the witness's last statement, thereby insuring that the point is made before moving on to the next area for questioning. This is a good start, but additional techniques can make your direct examination even more effective.

An effective direct examiner asks clear questions that highlight important information. Use plain, simple, everyday language; avoid legalese as much as possible. Highlight important testimony by having the witness explain testimony that may be confusing to the panel.¹³ One method of emphasizing important testimony is to begin with a broad overview, then lead the wit-

ness back through the testimony in more detail. Use a diagram or photograph, if appropriate. This technique allows the witness to grab the panel's attention and set the stage for the important details that follow. It also provides an identifiable structure to your direct examination. These techniques will enhance your chances of convincing the panel that your theory is the correct theory.

The effective direct examiner also uses directive, transitional, and headline questions¹⁴ to ensure that the witness and the panel recognize when there is a change in the subject area or focus. The technique of looping, or incorporating the witness's last answer into the body of the next question, is an effective way to emphasize the important points in a witness's testimony and transition to the next important point.¹⁵ Looping and transitional questions focus the members on what's important.

A good direct examiner makes the testimony memorable. Ask questions as if the event is happening right now. Using the present tense reaches the members' visual memory. If the members see a mental image of the story, they are more likely to remember it. Another way to reach visual memory is to use diagrams or photographs.

Finally, and maybe most importantly, focus the panel's attention on the witness. Your goal is to have the panel watch the witness, not you. Position yourself in the courtroom so that the witness is facing the panel and so that you are out of their view. On direct examination the witness is the information giver, not the attorney. As the members are watching the witness, they are evaluating the witness's credibility.

This brief discussion barely scratches the surface of how to conduct an effective direct examination. Certainly, there are many other techniques that counsel can use to ensure that his case is viewed in the most favorable light. But it all starts with planning. Direct examination is critical to effective advocacy and counsel cannot afford to take it for granted. LTC Burrell.

10. *Id.* at 56-57.

11. *Id.*

12. Major Charles Pede, *The Art of Trial Advocacy: Lawyering Through Your Eyes*, ARMY LAW., Nov. 1997, at 45.

13. *Id.* at 86.

14. LUBET, *supra* note 1, at 68.

15. ADVOCACY TRAINER, *supra* note 1.

CLAMO Report

*Center for Law and Military Operations (CLAMO)
The Judge Advocate General's School*

Introductory Note

The Center for Law and Military Operations encourages the submission of training materials, after action reviews, and legal products. The Center also welcomes the submission of articles for publication, such as this one, which concern training in an operational environment. Articles may be submitted to the Center or to *The Army Lawyer* for consideration.

Law of War and Rules of Engagement Training for the Objective Force: A Proposed Methodology for Training Role-Players

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Introduction

As the U.S. Army found itself increasingly involved in missions across the entire spectrum of military operations after the successful conclusion of Operation Desert Storm, the need for

increased performance-based training on law of war issues was identified.¹ By 1993, the Joint Readiness Training Center (JRTC) at Fort Chaffee² provided enhanced scenario training to units rotating through the JRTC. These scenarios featured permanent role-players, including Army augmentees and contracted employees, who portrayed local national civilians, diplomats, and media representatives.³ Today, the JRTC employs over 100 role-players for typical combat scenarios, and over 700 role-players for Bosnian Mission Readiness Exercises.⁴

Training the role-players is vital to presenting realistic training scenarios to units undergoing law of war training. At JRTC, for example, the U.S. Army augmentees receive two to three days of training by observer-controllers (OCs) and contracted employees.⁵ The contracted role-players receive initial training when hired, and refresher training annually.⁶ While limited information regarding role-player training is available on the internet,⁷ the subject is rarely addressed in scholarly or doctrinal literature.⁸

The U.S. Army has begun its transformation⁹ to the projected Objective Force, which will include five to eight medium-weight brigade combat teams.¹⁰ These brigade combat teams will be fully deployed and ready to conduct their missions within ninety-six hours of liftoff.¹¹ By implication, any substantive law of war or rules of engagement training must therefore be completed before mission alert. Further, much of

1. See Major Mark S. Martins, *Rules of Engagement For Land Forces: A Matter Of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).
2. The JRTC is now located at Fort Polk, Louisiana.
3. See Memorandum, JRTC Operations Group, subject: JRTC Client Update (1 Apr. 1993), available at <http://leav-150-44.army.mil/calldb.html> (Center for Army Lessons Learned Database, restricted access document RWP-11-252728).
4. E-mail from MAJ David Heckert, Civil Affairs Planner, JRTC Operations Group, to LTC Jody Prescott, subject: Training Roleplayers (7 Mar. 2000) (on file with authors).
5. *Id.*
6. *Id.*
7. See, e.g., *supra* note 2.
8. See, e.g., U.S. DEP'T OF ARMY, FIELD MANUAL 25-101, TRAINING THE FORCE – BATTLE FOCUSED TRAINING (30 Sept. 1990); U.S. DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE (15 Nov. 1988); U.S. DEP'T OF ARMY, FIELD MANUAL 25-4, HOW TO CONDUCT TRAINING EXERCISES (10 Sep. 1984).
9. *Army Officially Creates Brigade Combat Teams*, NATIONAL GUARD, May 2000, at 18.
10. See *Army Chief of Staff Discusses Vision, Transformation*, OFFICER, May 2000, at 15.
11. Major General B. B. Bell, *Getting There from Here: The Mechanized Force Modernization Plan*, ARMOR, Jul.-Aug. 2000, at 6, Major General Joseph M. Cosumano Jr., *Transforming the Army to a Full Spectrum Force*, para. 7 (Mar. 9, 2000), available at http://www.tradoc.army.mil/transformation/data%20.../transforming_the_army_to_a_full_.html.

this training must be accomplished at home station, without the benefit of the well-developed training infrastructures of the various Combat Training Center (CTCs), like JRTC. By way of a case study which describes the manner in which role-players were trained for the permissive noncombatant evacuation operation (NEO) exercise conducted by U.S. Army Alaska units as part of Northern Edge (NE) 99, this note suggests a role-player training methodology that might prove useful in such home station training as the U.S. Army transitions to the Objective Force. Northern Edge 99 was part of a continuing series of exercises designed to validate U.S. Army Alaska's ability to meet the requirements of its new Initial Entry Force (IEF) mission.

IEF Mission

On 1 July 1998, U.S. Army Alaska's 172d Infantry Brigade (Separate) (172d SIB) took on the role of U.S. Pacific Command's (USPACOM's) IEF. The IEF—designed for Force XXI missions that require battalion-sized or smaller forces—responds rapidly to three types of crises: humanitarian assistance, disaster relief, and permissive NEOs. The three light infantry battalions of the 172d SIB share the IEF mission on a three-month rotational basis.¹² The IEF provides the USPA-COM commander with an efficient, flexible force that can be deployed rapidly throughout the USPACOM area of operations. The IEF accomplishes small contingency missions, making it unnecessary to reorganize the Division Ready Brigade (DRB) of the 25th Infantry Division (Light), in Hawaii. The DRB mission remains an ongoing requirement in U.S. Army Pacific, which mobilizes in brigade-sized elements for larger operations and sustained combat operations.¹³

The 172d SIB is uniquely qualified for the IEF mission. The 172d SIB has its own airborne infantry battalion in addition to two light infantry battalions. Furthermore, it has a field artillery battalion and a support battalion. The 172d SIB is also supported by an aviation battalion (4th Battalion, 123d Aviation Regiment, Fort Wainwright, Alaska). This unique pool of assets allows the IEF to tailor the force package to fit in a specified number of airframes and to accomplish the mission at hand.¹⁴

Northern Edge is Alaska's largest annual military training exercise. More than 10,000 soldiers, sailors, airmen, Marines, coast guardsmen, and Alaska national guardsmen ordinarily take part in the joint training exercise. The major units involved include Alaskan Command, United States Army, Alaska (USARAK), U.S. Army Forces Command, Pacific Air Forces, Air Combat Command, Air Mobility Command, Air Forces Special Operations Command, 1st Marine Division, U.S. Pacific Fleet, U.S. Navy Alaska, U.S. Coast Guard Division 17, and the Alaska Army and Air National Guard.¹⁵ The exercise takes advantage of Alaska's rugged and varied training environment, which includes 1.5 million acres of terrain that varies from high mountains to forests to flat and rolling tundra, in temperatures that often dip below minus thirty-five degrees Fahrenheit. NE 99 was designed to employ selected component forces in a regional crisis response scenario. The scenario was based on a peace enforcement mission on the fictional island of Aragon, which was to be carried out under the terms of a United Nations mandate. NE 99 included a permissive NEO exercise to train the 172d SIB soldiers for the IEF mission. Soldiers from 1st Battalion, 17th Infantry Regiment, conducted the NEO exercise. The 1-17 soldiers' understanding of the applicable rules of engagement (ROE) was tested by presenting the soldiers with various scenarios at each marshaling point, where purported evacuees were to be gathered.

Because of real world operational constraints, to include a lack of combat arms soldiers to act as OCs and role-players, USARAK OSJA and AG were tasked to prepare and conduct the NEO scenarios. The Special Troops Battalion at Fort Richardson provided soldiers to act as role-players. Using the eight-step training model,¹⁶ these combat service support (CSS) soldiers were quickly trained to be effective OCs and role-players in a training scenario with which they had little experience.

Eight-Step Training Model

Plan the Training

The planning for the role-player training actually began almost a year before NE 99, when the 1-501 Parachute Infantry

12. See Heike Hasenauer, *A New Response to Crisis*, SOLDIERS, Dec. 1998, at 10.

13. *Id.*; see UNITED STATES ARMY ALASKA, USARAK BATTLE BOOK ch. 1, at 3 (1998).

14. The IEF is designed to deploy in four possible air packages: light airborne, light, medium, and heavy. The two light packages fit on fourteen C141s and two C5s. The medium package adds a military police squad and a military intelligence team, and fits on sixteen C141s and two C5s. The heavy package adds a field artillery battery, an 81 mm mortar platoon, and an air defense artillery section, which fits on twenty-three C141s and two C5s. Each package includes an infantry battalion and five UH-60s with support.

15. See Specialist Joel C. Davis, *Alaska's Premier Joint Training Exercise Kicks Off*, ARMY LINKNEWS, ¶ 5 (Mar. 4 1999), available at <http://www.dtic.mil/armylink/news/Mar1999/a19990304ne'99.html>.

16. The eight-step training model is designed to produce realistic, challenging, and well-executed training. The eight steps are: (1) plan the training; (2) train and certify leaders; (3) reconnoiter the training site; (4) issue the plan; (5) rehearse; (6) execute; (7) conduct after action reviews; and (8) retrain. See Memorandum, Commander, United States Army Alaska, APVR-RPTM-TN, subject: U.S. Army Alaska (USARAK) Eight Step Training Model (5 Jan. 1999).

Regiment (PIR), one of the 172d SIB's light infantry battalions, conducted a NEO exercise, *Arctic Gold*, in April 1998. OSJA personnel helped devise the scenarios that tested the ability of soldiers to deal with civilians on the field of operations, and also served as OCs. In August 1998, the 1-501 PIR conducted a similar NEO exercise, *Black Tiger/Geronimo Strike*, which was an airborne insertion exercise conducted in Thailand with Thai paratroopers. The 1-501 PIR participated in the exercise after having flown non-stop from Elmendorf AFB, Alaska,¹⁷ and OSJA personnel served as scenario planners and OCs during the exercise.

Through these exercises, the 1-501 PIR and OSJA personnel built a significant knowledge base to develop effective training methods for conducting a NEO in the IEF context. OSJA personnel interviewed 1-501 soldiers and officers to identify training deficiencies and areas for improvement in previous exercises. Four junior enlisted soldiers from each company, all of whom participated in both NEO exercises, were interviewed together as a group. Company commanders, executive officers, and first sergeants from two of the 1-501 PIR companies were interviewed separately. The interviews identified two primary training deficiencies. First, the soldiers wanted more practice in situations calling for the use of less-than-lethal force and determining hostile intent. Second, to provide more realistic scenarios, role-players needed to have a better understanding of the "big picture" of the operation, and how their respective scenarios fit into the overall concept of the operation so that they did not overplay their roles.

With these two training objectives in mind, the OSJA scenario planners contacted CLAMO and U.S. Southern European Task Force,¹⁸ which has a mission similar to IEF, for NEO scenario materials and advice. With this information, the scenarios from exercises *Arctic Gold* and *Black Tiger/Geronimo Strike* were refined to incorporate more elements of "friction"¹⁹ that would allow IEF soldiers to refine their NEO skills. A draft master scenario event list (MSEL) was compiled and approved by the NE 99 exercise director.²⁰ Once approved, the MSEL served as a touchstone to develop an effective training schedule and corresponding training products for the role-players.

17. See Hasenauer, *supra* note 10.

18. U.S. Southern European Task Force (SETAF) is based in Vicenza, Italy. For an overview of SETAF's mission, see Kevin Stringer, *Interview with MG E.P. Smith*, 28 JANE'S DEFENSE WEEKLY INTERVIEWS 19 (Nov. 12, 1997), available at <http://www.janes.com/defense/interviews/971112.html>.

19. See CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds. and trans., 1976).

Peacetime maneuvers are a feeble substitute for the real thing, but even they can give an army an advantage over others whose training is confined to routine, mechanical drill. To plan maneuvers so that some of the elements of friction are involved, which will train officers' judgment, common sense and resolution is far more worthwhile than inexperienced people might think.

Id. at 122.

20. The Appendix to this note provides the final MSEL. See Center for Law and Military Operations, *CLAMO Databases*, at <http://www.jagcnet.army.mil/CLAMO> (last modified Aug. 30, 2000) (Training, Training Programs, Role Player Training-Northern Edge 99, DunlapPrescottappendix.doc).

Train and Certify Trainers and Leaders

USARAK OSJA and AG personnel served as the primary trainers for the role players. These trainers relied upon their past training, career experiences, relevant doctrine, and information gathered from the two previous exercises to establish a base level of competence that role-players had to attain. This was necessary given the novel IEF mission and the lack of an established cadre of OCs and role-players within U.S. Army Alaska. Because the primary focus of the NEO exercise would be scenarios emphasizing the use of non-lethal force rather than combat techniques, the lack of formal training for the primary leaders and trainers was not a significant drawback. Formal training in cold weather operations, however, was a necessity for all exercise participants. Because temperatures could reach -35 degrees Fahrenheit during the exercise, all OCs and role-players were required to undergo cold weather training.

Reconnoiter the Training Site

The NE 99 NEO was to take place in the cantonment area at Fort Greely, Alaska, which is over three hundred miles north of Fort Richardson. Although the distance prohibited most OCs from reconnoitering the training site prior to the training, the primary trainers flew to Fort Greely to determine which sites and what resources were available at the different training locations. The trainers selected primary marshaling points based on the factors of landing zone access, shelter for role-players, and distance from other marshaling points. These factors could only be assessed by an on-site inspection.

Issue Training Plans

Two months prior to NE 99, the OCs and role-players were briefed on the NE 99 NEO concept by the primary trainers. Training packets issued to the OCs and role-players contained the individual OC and role-player assignments. Scripts for each scenario were prepared to identify marshaling point locations, provide an overview of each scenario, and outline the role-players' anticipated actions. These scripts were based on the draft MSEL. The OCs and role-players were also given a draft exercise ROE that had been tailored for a NEO in a per-

missive environment. Finally, the OCs and role-players were briefed on the two primary training themes for the operation: providing 172d SIB soldiers challenging and realistic training scenarios which could be successfully resolved through the use of non-lethal force; and providing realistic scenarios by ensuring that OCs and role-players understood how the entire NEO exercise would work, and how their individual pieces of the NEO fit into the whole exercise.²¹

Conduct Rehearsals

After the initial briefing by the primary trainers, the OCs and role-players began a series of weekly rehearsals. Role-players were briefed on the content of each of the scenarios, and emphasis was placed on a thorough understanding of the underlying Law of War and ROE principles that were being probed in each scenario. To provide more training scenarios requiring the use of non-lethal force, the training concept allowed the role-players to push the soldiers into responding, but without those role players demonstrating hostile acts or hostile intent. This would force the soldiers to think about necessary force and non-lethal measures that could resolve the situation.²² The weekly rehearsals taught the role-players to be prepared for the various responses they might encounter. The ROE training also gave them greater ability to improvise and adapt if the scenario took an unexpected turn. No textbook answers were given. The role-players were told that a variety of responses might be acceptable under the ROE.

To enhance training, the role-players performed as soldiers executing the NEO, while the primary trainers played the role-players' parts. This allowed the role-players to see an example of how the primary leaders expected the scenarios to be played out. As in the initial ROE training, emphasis was placed on flexibility in the role-players' responses. Each of the scenarios was rehearsed in front of all OCs and role-players. This allowed for accelerated training as role-players observed other role-players encounter differing reactions by the trainers. This phase of training also gave the CSS soldiers an opportunity to experience the difficulties faced by infantry soldiers that perform NEO missions. The role-players developed an appreciation for the difficulty of balancing security and mission requirements with ROE use-of-force considerations in MOOTW situations.

In the next phase of rehearsals, the role-players performed their roles while the primary trainers and OCs acted as soldiers performing the NEO mission. This was the first time that the role-players performed their roles; the previous rehearsals simply familiarized the role-players with the scenarios, and prepared them to play their roles effectively. The phases of

rehearsal progressed in a way that made the role-players less anxious about playing their parts, since they had already seen others play the parts. This encouraged the role-players to give motivated and confident performances. Further, training products and props were used during all rehearsal phases. This allowed the role-players to feel comfortable with the props during the actual NEO. Following the rehearsals, the group critiqued each other's performance and asked questions to clarify lessons learned.

The final briefings and rehearsals were conducted on-site at Fort Greely. In the briefings, all participants were reminded of cold weather and helicopter safety rules, and given the final coordinating instructions to ensure their safe return to the exercise control center upon completion of the exercise. Everyone also received the final MESL and an annotated map of the exercise area. The OC and role-player teams then conducted their final rehearsals at their respective scenario sites during the morning and afternoon before the NEO exercise.

Execute the Training

After the final rehearsals, OCs and role-players reassembled at the exercise control center for a final safety briefing and risk assessment.²³ The NE 99 exercise director approved the safety measures taken and the scenario director's determination that risk was moderate. The OC-role-player teams then moved out to their respective NEO scenario marshaling sites. Each of the five marshaling points had access to either defense signal network communication or a radio, which allowed them to contact the exercise control center. Furthermore, five vehicles were prepositioned at the different marshaling points for use as emergency transportation.

Beginning at 2100 5 March 1999, units of the 1-17 Infantry Regiment began an air assault insertion into the Fort Greely cantonment area from the Initial Staging Base (ISB) at Donnelly Drop Zone. As the 1-17 soldiers proceeded to each of the marshaling points, they encountered both "passive" role-players portraying U.S. citizens awaiting evacuation and the "active" role-players presenting ROE scenarios. The 1-17 soldiers successfully identified all of the role-players to be evacuated and moved them to the landing zones. The passive role-players were evacuated back to the Donnelly Drop Zone ISB by helicopter, and then transported the next morning by C-130s to the evacuee control center (ECC) at Fort Wainwright, Alaska. The 1-17 soldiers handled each of their ROE scenarios successfully.²⁴ When practicable during execution, OCs questioned 1-17 soldiers about their understanding of the ROE as they applied to the scenario. This allowed the OCs to not only

21. See Major James Larsen, *Achieving Unity of Purpose: Cascading and Nesting Concepts*, INFANTRY, Sept.-Dec. 1998, at 27-28.

22. See Sergeant First Class John Williams, *A Graduated Response in Military Operations Other Than War*, NEWS FROM THE FRONT, Mar.-Apr. 1999, at 3-6.

23. See U.S. ARMY ALASKA, PAM. 385-4, RISK MANAGEMENT GUIDE FOR COLD WEATHER OPERATIONS (31 July 1996).

observe the soldiers' reactions, but also to understand why the soldiers reacted as they did.

Conduct After Action Reviews

OCs and role-players were debriefed immediately upon return to the exercise control center for safety purposes. A detailed after action review (AAR) was not conducted until the OCs and role-players had arrived at the ECC at Fort Wainwright the next morning. The lead OCs led a discussion with the other OCs and role-players which addressed the following questions for each scenario:

1. How did the scenario play out?
2. Did the soldiers act according to the ROE?
3. Did the soldiers employ particular tactics or methods to keep situations from escalating toward the use of lethal force?
4. What could be done to improve the scenario for the next exercise?

The lead OCs then compiled a written report based on the AAR for their respective scenarios. These reports were combined into a single report for the U.S. Army Alaska AAR for the entire NE 99 exercise.

The lessons learned from NE 99 were immediately incorporated for future training. NE 00, conducted during 28 February through 10 March 2000, increased the realism of the training by having the marshalling sites scattered across the breadth of

Alaska. Two of 172d SIB's battalions, 1-501 PIR and 2d Battalion, 1st Infantry Regiment, conducted two separate NEO missions in an environment that ranged from uncertain to hostile. Further, the number of role-players was increased to 450. Lessons learned from NE 99 were incorporated into the training of role-players and OCs for NE 00, and returning primary trainers enhanced continuity in the training program.

Conclusion

The U.S. Army has concluded that the best way to train for military missions across the spectrum of operations is to continue to focus on high-intensity conflict.²⁵ In large part, it is the discipline, confidence, and expertise instilled through this kind of training that allows soldiers to deal effectively with the wide range of situations encountered in these sorts of military operations.²⁶ As evidenced recently by the experiences of the ground forces in Kosovo,²⁷ however, U.S. Army soldiers can expect to be deployed in situations where they must be able to deal with civilians on the field of operations across the entire use-of-force spectrum. Home station training using role-players portraying civilians can provide effective training in a timely manner, and can provide it at a relatively low cost. However, installations which lack the robust training infrastructure associated with the CTCs may find that role-players trained on an ad hoc basis do not provide the realism and depth necessary for challenging training that simulates civilians on the battlefield. The steps described in this note, based on the eight-step training model, suggest a methodology for training home station role-players quickly and effectively.

24. Prior to NE 99, the unit conducted home station training on the law of war and the legal aspects of NEOs. This training contributed greatly to the soldiers' successful handling of the NEO scenarios.

25. See Louis Caldera & General Dennis J. Reimer, *A Statement on the Posture of The United States Army Fiscal Year 2000*, 22-28 (Feb. 1999), available at <http://www.dtic.mil/jcs/nms/index.html>; see also General John Shalikashvili, *National Military Strategy: Shape, Respond, Prepare Now—A Military Strategy For A New Era*, 5 (Aug. 1999), available at <http://www.dtic.mil/jcs/nms/index.html>.

26. See Major General S. L. Arnold & Major David T. Stahl, *A Power Projection Army in Operations Other Than War*, PARAMETERS 4 (Winter 1993-94).

27. See, e.g., *Ethnic Albanians, Peacekeepers Exchange Gunfire*, WASHINGTON POST, Aug. 13, 1999, at A20; Matthew Kaminski, *GIs Act As Mayors Of Towns, Plan Trash Pickups In Kosovo*, WALL STREET JOURNAL, Aug. 13, 1999, at A9.

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

September 2000

6-8 September	1st Court Reporting Symposium (512-71DC6).
6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).

11-22 September	14th Criminal Law Advocacy Course (5F-F34).
18-22 September	47th Legal Assistance Course (5F-F23).
19 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
25-26 September	31st Methods of Instruction Course (Phase II) (5F-F70).

October 2000

2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
2 October-21 November	3d Court Reporter Course (512-71DC5).
13 October-22 December	153d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

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

December 2000

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

	2001	26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).
January 2001		April 2001	
2-5 January	2001 USAREUR Tax CLE (5F-F28E).	2-6 April	25th Admin Law for Military Installations Course (5F-F24).
8-12 January	2001 PACOM Tax CLE (5F-F28P).	16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).	16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
8 January-27 February	4th Court Reporter Course (512-71DC5).	23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
9 January-2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	30 April-11 May	146th Contract Attorneys Course (5F-F10).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).	May 2001	
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).	7 - 25 May	44th Military Judge Course (5F-F33).
21 January-2 February	2001 JOAC (Phase II) (5F-F55).	14-18 May	48th Legal Assistance Course (5F-F23).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).	June 2001	
February 2001		4-7 June	4th Intelligence Law Workshop (5F-F41).
2 February-6 April	154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
5-9 February	75th Law of War Workshop (5F-F42).	4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).	4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
26 February-2 March	59th Fiscal Law Course (5F-F12).	5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
26 February-9 March	35th Operational Law Seminar (5F-F47).	6-8 June	Professional Recruiting Training Seminar
March 2001		11-15 June	31st Staff Judge Advocate Course (5F-F52).
5-9 March	60th Fiscal Law Course (5F-F12).	18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).	18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
26-30 March	3d Advanced Contract Law Course (5F-F103).		

18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	17-21 September	49th Legal Assistance Course (5F-F23).
25-27 June	Career Services Directors Conference.	18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).
July 2001		October 2001	
8-13 July	12th Legal Administrators Course (7A-550A1).	1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).	1 October-20 November	6th Court Reporter Course (512-71DC5).
16-20 July	76th Law of War Workshop (5F-F42).	12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).	15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
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).
5-7 September	2d Court Reporting Symposium (512-71DC6).	3-7 December	2001 Government Contract Law Symposium (5F-F11).
5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23E).	10-14 December	5th Tax Law for Attorneys Course (5F-F28).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).	2002	
10-21 September	16th Criminal Law Advocacy Course (5F-F34).	January 2002	
		2-5 January	2002 Hawaii Tax CLE (5F-F28H).

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).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).		
April 2002		July 2002	
1-5 April	26th Admin Law for Military Installations Course (5F-F24).	8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).

8-12 July	13th Legal Administrators Course (7A-550A1).	8 Sept. ICLE	Medicine for Lawyers Marriott Gwinnett Place Hotel Atlanta, Georgia
15 July- 9 August	3d JA Warrant Officer Advanced Course (7A-550A2).	22 Sept. ICLE	Administrative Law Cobb Galleria Centre Atlanta, Georgia
15-19 July	78th Law of War Workshop (5F-F42).		

15 July-
30 August

8th Court Reporter Course (512-71DC5).

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

29 July-
9 August

149th Contract Attorneys Course (5F-F10).

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

August 2002

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).

19-30 August

38th Operational Law Seminar (5F-F47).

September 2002

4-6 September

2002 USAREUR Legal Assistance CLE (5F-F23E).

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

9-13 September

2002 USAREUR Administrative Law CLE (5F-F24E).

9-20 September

18th Criminal Law Advocacy Course (5F-F34).

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

11-13 September

3d Court Reporting Symposium (512-71DC6).

16-20 September

51st Legal Assistance Course (5F-F23).

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

23-24 September

33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

8 Sept.
ICLE U.S. Supreme Court Update
Sheraton Colony Square Hotel
Atlanta, Georgia

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

<p>CLESN: CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662</p>	<p>MICLE: Michigan Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516</p>
<p>ESI: Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900</p>	<p>MLI: Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100</p>
<p>FBA: Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252</p>	<p>NCDA: National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA</p>
<p>FB: Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300</p>	<p>NITA: National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482</p>
<p>GICLE: The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664</p>	<p>NJC: National Judicial College Judicial College Building University of Nevada Reno, NV 89557</p>
<p>GII: Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250</p>	<p>NMTLA: New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003</p>
<p>GWU: Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272</p>	<p>PBI: Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637</p>
<p>IICLE: Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080</p>	<p>PLI: Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700</p>
<p>LRP: LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227</p>	<p>TBA: Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421</p>
<p>LSU: Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837</p>	<p>TLS: Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900</p>

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://www.calbar.org/pub250/mcclerr1.htm	-Twenty-five hours of which four hours required in ethics, one hour required in substance abuse and emotional distress (not more than six hours in emotional distress), one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 98-31 Jan 01) Group 2 (Last Name H-M) 1 Feb 97-31 Jan 00 Group 3 (Last Name N-Z) 1 Feb 99-31 Jan 02 1 February.
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) 340-7322 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 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 Board Supreme Court of AR 2400 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerkules/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, 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. 2 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) within biennial registration 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 State Bar 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, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA 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 Suite 715, Tenney Bldg. 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. -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 2000**, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

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

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

who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

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

6. Tax Training Schedule

Tax Training Schedule

Tax time is almost here again. Several tax training courses are available around the world to prepare Legal Assistance personnel for the upcoming tax season. The tax training courses present basic overviews of federal income taxation for individuals, with special attention devoted to provisions of the Internal Revenue Code which directly affect military personnel. The courses provide an introduction to federal income taxation principles, an overview of the tax forms, and instruction on filing status, gross income, adjusted gross income, itemized deductions, rental property, real estate taxation, individual retirement arrangements, credits, and tax on capital gains. In addition to basic income tax law, the instruction in the courses includes tax program management, professional responsibility relating to military tax assistance, foreign tax issues, divorce taxation, and general instruction in state taxation of income and property.

The courses follow a lecture format with practical exercises (tax form preparation for common military tax scenarios) and discussions of the practical exercises. The tax courses generally follow the flow of the federal tax forms, but with instruction geared to the legal basis of tax law and form preparation.

The tax courses are primarily designed for attorneys that will serve as installation tax officers or legal assistance attorneys that will assist with the filing of federal or state income tax returns. The tax course locations and dates are:

- Air Force Federal Income Tax Course (Maxwell AFB, Alabama) 4-8 December
- Tax Law for Attorneys Course (TJAGSA) 11-15 Dec 2000
- USAREUR Tax Course 2-5 Jan 2001
- PACOM (Korea) Tax Course 8-12 Jan 2001
- Hawaii Tax Course 16-19 Jan 2001

Army attorneys in CONUS seeking to attend a tax training course should endeavor to attend the TJAGSA Tax Law for Attorneys Course. All tax courses are for attorneys, except for the Air Force Tax Course (attorneys, paralegals, or legal specialist can attend the Air Force Tax Course). For more information on tax training contact MAJ Rick Rousseau (Richard.Rousseau@hqda.army.mil or DSN 934-7115, extension 351, (804) 972-6351). Major Rousseau.

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>
9-10 Sep	Pittsburgh, PA 99th RSC		Administrative Law; Contract Law; Community Support Activities; Updates in Legal Assistance and demonstration of DL Wills; DOD Fraternization	POC: 1LT Ivor Jorgensen (724) 693-2151, 99th RSC ALT: LTC Don Taylor (724) 693-2152 Donald.Taylor2@usarc-emh2.army.mil
16-17 Sep	Park City, UT UTARNG		Western States JAGC Senior Leadership Workshop	POC: COL Mike Christensen (801) 366-6861
28-29 Oct	West Point, NY NYARNG		Eastern States JAGC Senior Leadership Workshop	POC: COL Randall Eng (718) 520-2846
11-12 Nov	Bloomington, MN 214th LSO (88th RSC)		Administrative Law; Contract Law	POC: Todd Corbo (612) 596-4753 todd.corbo@us.pwcglobal.com
18-19 Nov	Kings Point, NY 77th RSC/4th LSO		Criminal Law; Operational Law	POC: MAJ Terri O'Brien and CPT Sietz, 77th RSC ObrienT@usarc-emh2.army.mil POC: LTC Ralph M.C. Sabatino (718) 222-2301, 4th LSO
20-21 Nov	San Diego, CA 78th LSO		LSO Commander's Workshop	POC: COL Daniel Allemeier drallemeier@hrl.com
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO		Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU		Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO		Criminal Law; International Law	POC: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com ALT: MAJ James Schaefer (513) 946-3018 jschaefer@prosecutor.hamilton-co.org
10-11 Jan	Seattle, WA 70th RSC, 6th MSO		Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG		Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORDD/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		RC JAG Readiness (SRP, SSCRA, Operations Law	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com

24-25 Mar	Charleston, SC 12th LSO		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		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		Administrative and Civil Law; Environmental Law; Contract Law	POC: CPT Lance W. VonAh (205) 795-1511 Lance.VonAh@usarc-emh2.army.mil ALT: MAJ John Gavin (205) 795-1512 John.Gavin@usarc-emh2.army.mil
19-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO		Legal Assistance; Military Justice	POC: MAJ J. T. Parker (800) 892-7266, ext. 1397

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 parameters. 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 borders@dtic.mil.

	Contract Law	AD A327379	Military Personnel Law, JA 215-97.
AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.	AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92.
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.	AD A347157	Environmental Law Deskbook, JA-234-98.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.	*AD A377491	Government Information Practices, JA-235-2000.
	Legal Assistance	*AD A377563	Federal Tort Claims Act, JA 241-2000.
AD A345826	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98.	AD A332865	AR 15-6 Investigations, JA-281-97.
AD A333321	Real Property Guide—Legal Assistance, JA-261-97.		
AD A326002	Wills Guide, JA-262-97.		Labor Law
AD A346757	Family Law Guide, JA 263-98.	AD A360707	The Law of Federal Employment, JA-210-98.
AD A366526	Consumer Law Guide, JA 265-99.	AD A360707	The Law of Federal Labor-Management Relations, JA-211-99.
AD A372624	Uniformed Services Worldwide Legal Assistance Directory, JA-267-99.		
AD A360700	Tax Information Series, JA 269-99.		Legal Research and Communications
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, June 1998.	AD A332958	Military Citation, Sixth Edition, JAGS-DD-97.
AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II, June 1998.	AD A302672	Unauthorized Absences Programmed Text, JA-301-95.
AD A329216	Legal Assistance Office Administration Guide, JA 271-97.	AD A303842	Trial Counsel and Defense Counsel Handbook, JA-310-95.
AD A276984	Deployment Guide, JA-272-94.	AD A302445	Nonjudicial Punishment, JA-330-95
AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274-99.	AD A302674	Crimes and Defenses Deskbook, JA-337-94.
AD A326316	Model Income Tax Assistance Guide, JA 275-97.	AD A274413	United States Attorney Prosecutions, JA-338-93.
AD A282033	Preventive Law, JA-276-94.		International and Operational Law
	Administrative and Civil Law	*AD A377522	Operational Law Handbook, JA-422-2000.
AD A351829	Defensive Federal Litigation, JA-200-98.		

Reserve Affairs

AD A345797 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98.

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
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(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 USAPDC, 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, USAPDC, 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. Articles

The following information may be useful to judge advocates:

Chad Baruch, *Through the Looking Glass: A Brief Comment on the Short Life and Unhappy Demise of the Singleton Rule*, 27 N. KY. L. REV. (2000).

Jack Wade Nowlin, *The Constitutional Limits of Judicial Review: A Structural Interpretive Approach*, 52 OKLA. L. REV. 521 (1999).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new 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.arm.mil/tagjsa>. Click on directory for the listings.

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 Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

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

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