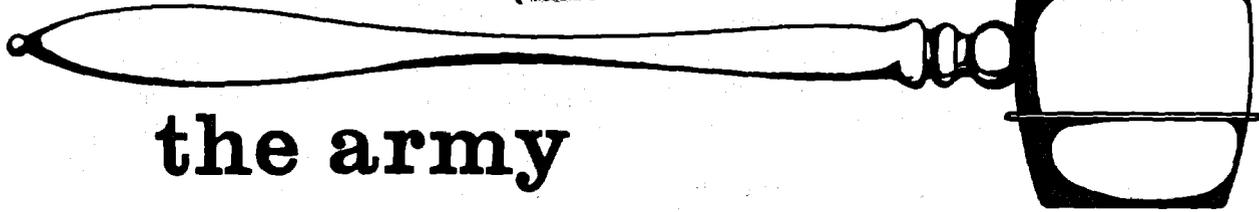


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**The Case of the Unpaid Debt:  
An Overview of the  
Fair Debt Collection Practices Act**

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**Servicemember to Legal Assistance Officer:**

*I paid that bill four months ago, yet the  
debt collection agency continues to harass  
me. They call me up at night. They have  
told our neighbors that we are deadbeats.  
They even wrote my company commander.  
Is there anything I can do?*

A few years ago, the legal assistance officer would respond that, in fact, little could be done. There was no federal statute addressing debt collection practices. Thirty-eight states had laws dealing with debt collection, but only eight had strong laws.<sup>1</sup> The legal assistance officer could contact the debt collection agency and attempt to reach an amicable settlement of the problem. It takes little imagination to conclude how often that was successful. He could complain to the Federal Trade Commission and ask for its assistance. On occasion the Federal Trade Commission would investigate a debt collection agency and issue an order prohibiting

<sup>1</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Honorable Frank Annunzio).*

certain practices.<sup>2</sup> However, it is usually several years from the time of the complaint until the order and civil penalties. This was not the type of solution which would boost a legal assistance officer's ego for having expeditiously satisfied a client.

In 1976 and 1977 Congress conducted hearings on the problems of debt collection. At that time there were more than 5,000 collection agencies collecting more than \$5 billion annually. Congress concluded that collection agencies commit egregious acts such as using obscene or profane language, making threats of violence and telephone calls at unreasonable hours, impersonating public officials and attorneys, and simulating legal process. There are a number of reasons why they use these tactics. Unlike creditors who desire to protect their good will, they have no future contact with the consumer, so are not concerned with the consumers' opinions of them. Secondly, they usually get a split of what is collected, which is an incentive to use any means available to effect collection. Congress responded by passing the Fair Debt Collection Practices Act<sup>3</sup> as a means

<sup>2</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. Lewis H. Goldfarb).*

<sup>3</sup> Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1977).

to protect consumers from unfair, harassing, and deceptive debt collection practices.

This article will discuss the scope of the Act, describe the prohibited practices, and provide the legal assistance officer with a means to assist the client who has a debt collector problem. Since there are very few reported cases dealing with this statute, the legislative history has been used extensively to explain the provisions of the Act. The reader can use this history to get an idea of what Congress intended in enacting specific provisions of the Act.

### Scope of the Act

The initial step in dealing with a debt collection problem is determining whether the individual collecting the consumer debt falls within the purview of the Act. A debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."<sup>4</sup>

The Act is primarily intended to cover inde-

<sup>4</sup> *Id.* § 1692a(6).

<sup>5</sup> *Id.*

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pendent debt collectors; those entities whose sole purpose for being is the collection of debts for third parties. Generally, creditors' in-house collectors are not debt collectors as defined by the statute. For example, if the consumer should fail to make his monthly payments to Sears, Sears would attempt to effect payment. Sears would not be within the scope of the Act since it is attempting to collect monies owed it. This exception will not apply if the creditor collecting its own debts uses a name other than its own. For instance, if Sears sends dunning letters with letterhead indicating it is a collection agency, such as Ace Collection Agency, Sears would fall within the Act with respect to those particular contacts. Why would a creditor do this? Often debtors ignore the original creditor but respond to a collection agency. This is especially true if they previously had an adverse relationship with a collection agency and wish to avoid the same hassle.

There is a second instance in which an establishment may fall within the scope of the Act, even though its principal business is not collecting debts due another. A consumer may owe Bank A a sum of money, move to another city, and not make payments. Bank B, which is located in the consumer's new city of residence, may have a reciprocal agreement with Bank A to attempt to collect debts for each other. If collection efforts are made on a regular basis for each other, the collecting bank will be subject to the Act.<sup>6</sup>

There are a number of other exclusions within the Act.<sup>7</sup> These include government officials, such as, marshalls and sheriffs when attempting to collect any debt in the performance of their duties; process servers; nonprofit consumer credit counseling services which assist consumers by apportioning the consumer's income among his creditors pursuant to a prior arrangement; and attorneys-at-law collecting a debt as an attorney on behalf of and in the name of a client. The statute also excludes a

subsidiary or affiliate which collects for another subsidiary or affiliate, as long as the collection is only for other related entities and its principal business is not debt collection. A final exclusion is "any person collecting or attempting to collect a debt owed or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor."<sup>8</sup>

It is evident that the exclusions are greater than the inclusions. The exclusion of creditors has been the subject of substantial criticism. Although Congress concluded creditors do not abuse customer debtors, experience has shown the opposite to be true. The acting chairman of the Federal Trade Commission, in his 1981 Report to Congress, stated that one-third of the complaints his agency receives involves creditors collecting on their own behalf.<sup>9</sup> Some creditors use the same unscrupulous tactics as debt collectors to obtain payment. As a result, the Federal Trade Commission has recommended to Congress that the Act be amended to include creditors in its coverage.<sup>10</sup>

### Contact with Third Parties

A major portion of the congressional hearings was concerned with the practice of debt collectors communicating with individuals who were not privy to the debt. Many collectors have had no concern for the consequences or potential harm that could be inflicted upon the consumer when his indebtedness problems are exposed to third parties. In fact, debt collectors would disclose a consumer's personal affairs to friends, neighbors and employers with

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* §§ 1692(a)(6)(A) thru (F).

<sup>8</sup> *Id.* § 1692(a)(6)(G).

<sup>9</sup> Federal Trade Commission Annual Report to Congress on the Fair Debt Collection Practices Act (1981).

<sup>10</sup> *Id.* (1980 and 1981).

the intent to embarrass and coerce the debtor to pay. By contacting these third parties, a bad situation becomes worse. This is especially true when an employer becomes involved. It may result in the loss of a promotion or, in the extreme case, the employer may fire the employee. The lack of funds then becomes more pronounced. Debt collectors will go to any extreme to force payment as evidenced by Senator Millicent Fenwick's example given in the Senate hearings of a woman who owed a bill.<sup>11</sup> The debt collector, having gotten nowhere with the woman, threatened to go to her husband's employer. She replied it was futile to try because he is a self-employed lawyer. The collector responded by contacting the attorney's best client who asked the embarrassed husband about the debt.

Congress concluded that individuals not a party to the transaction need not know of the situation or become involved. Section 1692c(b) severely limits who debt collectors may contact to discuss the debt. Generally, it provides that the debt collector may not communicate with individuals who have no direct connection with the debt.<sup>12</sup>

**(b) COMMUNICATION WITH THIRD PARTIES.**—Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

<sup>11</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130, and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977)* (statement by Honorable Millicent Fenwick).

<sup>12</sup> 15 U.S.C. § 1692c.

The company commander often receives letters from debt collectors requesting assistance in effecting payment from a servicemember. During the House hearings, Congressman Frank Annunzio remarked, "It is simply not an employer's responsibility to collect debts for debt collectors. The subcommittee has yet to receive one letter from an employer requesting that debt collectors be able to contact him."<sup>13</sup>

Although there is some validity to Congressman Annunzio's conclusion, he overstated his case. One should not conclude that employers never desire to become involved with employee indebtedness problems, nor that they never should. There are instances when a consumer, debt collector, and employer cooperate and devise repayment plans. The statute and Army regulations allow a debt collector to contact third parties in three instances.<sup>14</sup> The first statutory exclusion is with the prior consent of the consumer. Why would a servicemember ever consent? The soldier may desire the commander's paternalistic assistance and want to draw upon his or her experience and knowledge. There may be instances when the soldier consents even if he does not particularly care for the commander's involvement. It may be the lesser of numerous evils. For instance, the debt collector may explain that he would like to discuss the problem with the company commander to see if the three of them could find a satisfactory solution. He may explain that failure to agree to this will result in court action with its high costs and potential attachment of the soldier's personal property. The servicemember may agree to include the company commander in lieu of court action.

The apparently easy way to obtain consent is for the creditor to place a clause in his sales contract allowing a debt collector to contact

<sup>13</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130, and H.R. 5294 before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977)* (statement by Honorable Frank Annunzio).

<sup>14</sup> 15 U.S.C. § 1692c(b) and Army Regulation 600-15, *Indebtedness of Military Personnel* (15 November 1979).

third parties in case of default. This is not a valid consent. The statute requires that consent be "given directly to the debt collector."<sup>15</sup> Thus, consent must be given after a debt collector is employed, which typically occurs after default by the consumer.

The second statutory exclusion to third party contact is if the debt collector goes to court and obtains court permission to contact third parties. In this case a neutral third party, the judge, has heard the facts and concluded that others should be involved. The consumer is protected by the judicial process.

Finally, third parties may be contacted "as reasonably necessary to effectuate a postjudgment judicial remedy."<sup>16</sup> The debt collector may sue in court and obtain a judgment against the nonpaying consumer. If the judgment appears valid on its face, third parties, to include the commander, may be contacted. Typically, these contacts are made to confirm assets and employment data of the consumer.

Army regulations provide that a letter of indebtedness from a debt collector will not be processed unless there is a court order or consent by the servicemember debtor.<sup>17</sup> "Court order" as used in the regulation, although not defined, logically includes both contacts with "permission of a court" and those "reasonably necessary to effectuate a postjudgment remedy." It should be noted that the Army Regulation requires written and signed consent whereas the statute does not specify the form of consent.<sup>18</sup> If the debt collector does not comply with the regulation, the commander should return the debt collector's letter without taking action.

#### Location Information

Although there is a general prohibition against debt collectors contacting third parties,

<sup>15</sup> *Id.* 15 U.S.C. § 1692c(b).

<sup>16</sup> *Id.*

<sup>17</sup> Army Regulation 600-15, paragraph 1-6.

<sup>18</sup> *Id.* Paragraph 1-6a.

they may contact the debtor himself to seek payment. To do this, the collector initially needs the consumer's telephone number and address. The telephone number is especially crucial since collectors do not have time to contact the consumer in person. They call throughout the day to make a quick hit and move on to the next consumer.<sup>19</sup> One collector explained he was expected to get a firm commitment from the debtor for payment within three minutes or less. He was to make 150 calls each day. This three minute limit left no time for the debtor's explanation of his situation.<sup>20</sup>

This creates problems for the collectors. Often they will lose contact with the debtor and can only determine his whereabouts by contacting third parties. This is known as "skiptracing." For instance, a servicemember with substantial debts may move pursuant to a permanent change of station and fail to leave a forwarding address with his creditors/debt collectors. A debt collector should be allowed to ask the commander where the servicemember now works. The information is readily available and the commander should have no aversion to disclosing the information. He is not being asked to coerce the servicemember to pay and it is a minimal intrusion into the servicemember's privacy.

On the other hand, there is opportunity for abuse. One collector related that she was having no success in locating a "deadbeat." The only contact she had not used was the debtor's personal reference on a lease application. She called this reference, stating she was the consumer's girlfriend. She obtained his location but the reference commented that he thought

<sup>19</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Senator Donald W. Riegle, Jr.).*

<sup>20</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Mr. Hugh Wilson).*

the consumer was a devoted father and husband!<sup>21</sup>

The statute addresses skiptracing and provides a means to obtain this location information<sup>22</sup> with certain restrictions:

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by postcard;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than

that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.<sup>23</sup>

A few of the above provisions warrant further amplification. The concept envisioned by Congress is that skiptracing will be allowed, but it will be regulated. As a general rule, the person contacted should not know that the consumer owes a debt nor that it is a debt collection agency which desires the location information. Thus, the collector will identify himself by his family name. In *Bingham v. Collection Bureau, Inc.*,<sup>24</sup> the court concluded that the use of an alias by a telephonic collector is impermissible because it had the natural consequences to harass, oppress, or abuse the debtor.<sup>25</sup>

The collector is never to communicate by postcard, or use any symbol on correspondence which would indicate a debt is owed or the sender is in the debt collection business. This is to prevent embarrassment resulting from a conspicuous name on the envelope which indicates the contents pertain to debt collection. It also furthers the general policy of noninvolvement by third parties with the collection process.

The collector is to identify his employer if expressly requested by the third party. However, can he do this if the employer's name implies he is in the debt collection business? Section 1692b(5) forbids indicating that the debt collector is in the debt collection business. The Federal Trade Commission has opined that if this situation should arise, the collector should give his true name.<sup>25</sup> Section 1692b(1) takes precedence.

<sup>21</sup> Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130, and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Patricia A. Miller).

<sup>22</sup> Location information is defined as "a consumer's place of abode and his telephone number at such place, or his place of employment." 15 U.S.C. § 1692a(7).

<sup>23</sup> 15 U.S.C. § 1692b.

<sup>24</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

<sup>25</sup> II Staff Interpretives, Letter to Medical and Dental Bureau of Lehigh Valley, June 1978. See also *Federal Regulation of Debt Collection Practices—The Fair Debt Collection Practices Act and Section Five of the Federal Trade Commission Act*, Goldston, Commer-

Once the debt collector knows an attorney, such as the legal assistance officer, represents the debtor, the collector should not obtain location information from any person other than the attorney. If he does not know or cannot readily ascertain the attorney's name and address, or if the attorney fails to respond in a timely manner, the debt collector is permitted to contact third parties to obtain location information. Since actual knowledge is required, the legal assistance officer should consider mailing his name and address to the collector upon his becoming involved.

#### Communication with the Debtor

The preceding discussion has shown that communications with third parties are severely limited. The rationale is that they are not parties to the contract so they should have, at most, minimal involvement. The debt collector's efforts should be directed at the debtor and those who represent him. What may the collector do with the consumer himself? The Act allows contact with the consumer, but restricts what the debt collector may do and say to him. Generally, it does not prohibit his contacting the consumer but does address the quality of the contact. It restricts when contacts may be made and prohibits harassment or abuse, false or misleading representations, and unfair practices. It also goes as far as providing a means for the consumer to prohibit the debt collector from contacting him in the future.

#### Validation of Debts

A recurring problem has been a debt collector dunning the wrong person or attempting to collect debts which have already been paid or are not owed. Mr. James Clark, a debt collector who discussed this during the hearings with the House Subcommittee on Consumer Affairs, stated:

The record and book accounts were perhaps the worst offenders in the collection industry. At the beginning of each month,

we got a computer printout of names, addresses, and dollar amounts of debtors. . . . I would estimate that in at least 50 percent of the record and book club accounts, the debts were not legitimate. . . .

The normal procedure of the record/book clubs was that, if you did not make a purchase within 3 months, your account was then due and payable in full. They never bothered to give you the entire 2 years to which you were entitled. So that on the first of the month we might get a Mr. John Doe at 111 Main Street, who owed \$180 and we never knew whether he actually received \$180 worth of books and/or records, or whether in fact they were just declaring his whole account due and payable in full.

There were slip-ups in the mails and people sometimes never got their books and records. They got books and records that they did not order and that they had returned.<sup>26</sup>

He went on to state that the debt collector would collect these accounts regardless of the fact that a debt may not be owed.

Another witness, Ms. Carolyn Fox, explained that a collection agency attempted to collect from her a debt owed by "Clair" Fox. It repeatedly called her, her babysitter and a neighbor. It continued to do so even after she explained she was not Clair Fox.<sup>27</sup>

To remedy these problems the statute contains certain validation requirements. The debt collector must send within five days of the initial communication with the consumer, a written notice containing (1) the amount of the debt, (2) the name of the creditor to whom the debt is owed, as well as (3) statements: (a) that unless the consumer disputes the validity of the debt within thirty days after receipt of the no-

cial Law and Practice Course Handbook No. 229, PLI (1980).

<sup>26</sup> Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (Statement of Mr. James Clark).

<sup>27</sup> *Id.* (statement of Ms. Carolyn Fox).

tice, it will be assumed to be valid, (b) that if it is disputed the debt collector will verify it, and (c) that upon request the name and address of the original creditor will be provided if it is different from the current creditor.<sup>28</sup> This latter provision was included because many debts are sold and assigned to other institutions. The consumer may not realize this and believe he does not owe the debt, having never dealt with the ultimate assignee.

If the consumer disputes the debt or requests the name of the original creditor, collection efforts must cease until verification of the original creditor's name is sent to the consumer.

The legal assistance officer should carefully scrutinize whether the notice requirements have been met. This could easily be a fruitful venture for debt collectors have frequently failed to comply with the statute. Often form notices are used which are not tailored to the situation. Further, some courts have held the statute requires exact compliance, with no minor deviations being acceptable. For instance, a notice that does not inform the consumer of the right to dispute only a portion of the debt is incomplete. The form is also deficient if it requires disputes to be in writing, the statute not being so restrictive.<sup>29</sup>

The legal assistance officer may even find gross violations of this provision. In *Bingham v. Collection Bureau, Inc.*, five form letters were mailed by the collection agency. None of them contained the validation notice required by the statute. The court stated the first letter should have contained the required notice.<sup>30</sup>

In another case, a written notice form contained a message on the front requesting payment within five days. The required validation notice was on the reverse side. Since the face

of the form did not have a clear reference to the notice on the back, there was no address or other language on the back side to suggest the printing on the back was a message to the debtor, and the print size of the notice was visibly smaller than on the face, the court concluded there was a deliberate policy to abrogate the spirit of the notice statute and to mislead the debtor. Since the form did not comply with the notice requirements, the collector was held liable.<sup>31</sup>

### Prohibited Practices

Ms. Patricia A. Miller, former employee of a debt collection agency, testified in the Senate hearings that she was told that "the pride of a good agency collector is the efficient use of scare tactics."<sup>32</sup> Congress, taking the cue, prohibited certain actions by debt collectors. The statute specifies general prohibitions and, in addition, lists specific acts which are impermissible. When the client discusses actions taken by the debt collector, the legal assistance officer should determine if the act is specifically prohibited by the statute. If not, he should then attempt to pigeonhole it into one of the more general proscriptions.

**Communication with the Consumer Generally.** Section 1692c(a)<sup>33</sup> provides three general restrictions when contacting the consumer. They are not absolute restrictions since each may be waived by the consumer or, secondly, a court may permit them.

First, the debt collector is not to communicate with the consumer at any unusual time or place, or a time or place known to be inconvenient to the consumer. It is assumed contacts after 0800 hours and before 2100 hours, local time at the consumer's location, are conven-

<sup>28</sup> 15 U.S.C. § 1692g.

<sup>29</sup> *Harvey v. United Adjusters, Inc.*, 509 F. Supp. 1218 (D. Or. 1981).

<sup>30</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

<sup>31</sup> *Ost v. Collection Bureau, Inc.* 493 F. Supp. 701 (D.N.D. 1980).

<sup>32</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130, and H.R. 5294, Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Patricia A. Miller).*

<sup>33</sup> 15 U.S.C. § 1692c(a).

ient. Thus calls in the late evening or early morning hours should not be made. Could a call at 1000 hours be inconvenient? The Act prohibits calls at times known to be inconvenient to the consumer. Thus, if the consumer babysits ten children each morning and does not want to be contacted during that time, he should communicate such to the debt collector. The collector would then have actual knowledge that a call at that time is inconvenient.<sup>34</sup>

Secondly, if the debt collector knows the consumer is represented by an attorney with respect to the particular debt and knows or can readily ascertain the attorney's name and address, he should communicate only with that attorney. This is logical, there is no reason for the collector to contact the consumer once he has an attorney to represent him and act as his spokesperson.<sup>35</sup>

This prohibition against contacting a consumer who is represented by an attorney continues even after a judgment is obtained against the consumer. In *Harvey v. United Adjusters, Inc.*,<sup>36</sup> Mrs. Harvey failed to pay on four dishonored checks. The debt collector obtained a judgment against Mrs. Harvey in November 1979. Mrs. Harvey was represented by a legal aid attorney. In December 1979 and January 1980, the debt collector mailed collection notices to Mrs. Harvey at her personal residence. In the subsequent action brought by Mrs. Harvey for violation of the Act, the debt collector admitted that he knew she was represented by an attorney but believed that after entry of judgment against her he could deal directly with her. The court disagreed stating the statute does not draw this distinction and neither Mrs. Harvey, her attorney, nor the court gave permission for him to deal directly with her.

If a servicemember tells the legal assistance officer that he is tired of being contacted by the

debt collector, the legal assistance officer could inform the debt collector that he, as an attorney, represents the servicemember. The debt collector must discontinue contacting the servicemember personally, instead of directing his communications to the legal assistance officer. The legal assistance officer should be aware that if he fails to respond within a reasonable period of time to communications from the debt collector, the debt collector may reinstitute dealing directly with the consumer. Congress recognized that some attorneys are unresponsive, slow to write, or seldom return a call.<sup>37</sup>

A third restriction is that the collector should not contact a consumer at his place of employment if he knows or has reason to know the employer prohibits it.<sup>38</sup> These contacts may be made in person or telephonically. Most commanders restrict or prohibit debt collectors from contacting servicemembers at their place of work. The Department of Army, as an agency, does not prohibit telephonic communications, but numerous states do. The legal assistance officer should determine if such a statute exists in his jurisdiction. In addition, if a commander decides he does not desire a collector to contact the servicemember at work, he need only inform the collector of that fact. Having done so, the collector is no longer free to contact him.

To eliminate doubts as to who is a "consumer" versus a "third party," the statute provides: "For the purpose of this section, the term 'consumer' includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator."<sup>39</sup> The collection industry opposed this narrow definition. It recommended that "consumer" include any "principal household member" because

<sup>34</sup> 15 U.S.C. § 1692c(a)(1).

<sup>35</sup> 15 U.S.C. § 1692c(a)(2).

<sup>36</sup> *Harvey v. United Adjusters, Inc.*, 509 F. Supp. 1218 (D. Or. 1981).

<sup>37</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977)* (statement of Mr. John L. Spafford).

<sup>38</sup> 15 U.S.C. 1692c(a)(3).

<sup>39</sup> 15 U.S.C. § 1692c(d).

others may be living with the consumer. They felt it reasonable for these other individuals to receive calls from collectors and hear what the collectors have to say.<sup>40</sup> Congress disagreed.

**Harassment or Abuse.** There is a general prohibition of harassment, oppression, or abuse, as well as a prohibition of specific acts.<sup>41</sup> The list of specific prohibitions provides guidance without precluding the possibility of other violations. The legal assistance officer should determine if the debt collector's acts are specifically prohibited. If not, the legal assistance attorney can then decide if the conduct has a natural consequence to harass, oppress, or abuse the consumer.

The acts which are specifically prohibited are:

1. *The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.*<sup>42</sup>

A consumer received a postcard from "Tony Capone." It stated, "I am sick and tired of your games. You have run out of time. I would not want to be in your shoes if I do not receive my client's money by Thursday." It was signed, "Your friend, Tony."<sup>43</sup> Although not litigated, this is a classic example of conduct that is prohibited. Another debt collector related during the House subcommittee hearings how he asked a lady, "Ma'am, what size shoes do you wear?" She told him size 7. He responded with, "Fine, ma'am, I am going to have a pair made

out of cement for you and we'll send them over." The lady paid that afternoon.<sup>44</sup>

2. *The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.*<sup>45</sup>

This provision is self-explanatory. What is surprising is the unsubtle way collectors violate it. One particular collection agency began a form letter with, "When we call somebody a son of a bitch, it's a compliment."<sup>46</sup>

Quite frequently a confrontation will result in a heated argument, and the debt collector will use obscene language. Obviously, this is a violation of the Act. A consumer, regardless of the wrong he may have done, should not be verbally assaulted.

3. *The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act.*<sup>47</sup>

Section 603(f) defines the term "consumer reporting agency" as organizations which collect consumer information and sell it to others who use it in determining whether or not to extend credit, to issue insurance coverage, for employment purposes, and other legitimate business purposes.<sup>48</sup> Section 604(3) deals with the consumer reporting agency divulging this consumer information to others.<sup>49</sup>

It was a common practice for debt collectors

<sup>40</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Mr. John L. Spafford).*

<sup>41</sup> 15 U.S.C. § 1692d.

<sup>42</sup> *Id.* § 1692d(1).

<sup>43</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130, and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Karen Berger).*

<sup>44</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11069 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. James Clark).*

<sup>45</sup> 15 U.S.C. § 1692d(2).

<sup>46</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11069 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. William Gaines).*

<sup>47</sup> 15 U.S.C. § 1692d(3).

<sup>48</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681a(f) (1970).

<sup>49</sup> *Id.* § 1681b(3).

to threaten or actually publish "deadbeat lists." There was no cause of action for defamation since truth is a defense; the consumer owed the debt.<sup>50</sup> However, this was an underhanded means of coercing payment and is now prohibited by this subsection. Lists of nonpaying consumers may only be disclosed to consumer reporting agencies or their equivalent. The consumer reporting agency may only disclose it for a permissible purpose.<sup>51</sup>

4. *The advertisement for sale of any debt to coerce payment of the debt.*<sup>52</sup>

Collectors advertise or threaten to advertise that a debt is for sale and include the name of the debtor. Frequently, the debtor will pay the debt to avoid the embarrassment of future publications.

5. *Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.*<sup>53</sup>

One of the most common techniques for collecting debts is known as "beating." This is continuous calling of the consumer. A witness in the 1976 House of Representative hearings testified that one particular consumer irritated him so he retaliated by calling him every five minutes throughout the workday. He called him at home, at work, even at his aunt's house. This provision now prohibits conduct such as this.<sup>54</sup>

One court did not consider fourteen tele-

phone calls in twenty-three days to be harassment. In one call, the consumer hung up after both parties identified themselves. The collector immediately recalled the consumer. The court considered this harassment since the collector then knew the consumer did not desire to talk to him.<sup>55</sup>

The operator of a riding stable complained that a collector called up 40 times a day, ringing back as soon as the phone was hung up. Not only was this conduct taxing on the individual, but it tied up the business phone during the day.<sup>56</sup> Although not litigated, this is certainly the type of harassment this subsection prohibits.

6. *Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.*<sup>57</sup>

This requires the caller to use his actual name rather than an alias. The court reasoned that a telephone call is an impersonal contact and the lack of visible contact invites the caller to overreach. An alias inserts an additional shield between the collector and the consumer.<sup>58</sup>

In addition to the above specific prohibitions, the Act prohibits in general terms, harassing conduct. This provides protection from improper conduct which is not specifically prohibited. The general prohibition reads:

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person

<sup>50</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Honorable Joseph R. Biden, Jr.).*

<sup>51</sup> Fair Credit Reporting Act. 15 U.S.C. § 1681b (1970).

<sup>52</sup> 15 U.S.C. § 1692d(4).

<sup>53</sup> *Id.* § 1692d(5).

<sup>54</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. James Clark).*

<sup>55</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

<sup>56</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Sherry Chenoweth).*

<sup>57</sup> 15 U.S.C. § 1692d(6).

<sup>58</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

in connection with the collection of a debt.<sup>59</sup>

It is impossible to define what is harassing, oppressive, or abusive conduct. The legal assistance officer must gather the facts and draw his own conclusions. Some examples may provide guidance in conceptualizing what is prohibited.

A collector who telephonically asks about the assets of a consumer including jewelry such as wedding rings, is harassing the consumer. The court considered these items highly personal. It is also harassment to tell a consumer she should not have children if she cannot afford them.<sup>60</sup>

A 60-year-old widow, receiving Social Security benefits, allegedly failed to pay a \$56.00 hospital bill. The debt collector sent a letter which read in part:

You have shown that you are unwilling to work out a friendly settlement with us to clear the above debt.

Our field investigator has now been instructed to make an investigation in your neighborhood and to personally call on your employer.

The immediate payment of the full amount, or a personal visit to this office, will spare you this embarrassment.

The letter had the natural consequence of harassing, oppressing, and abusing the recipient. The tone of the letter was one of intimidation and the threat of an investigation was meant to embarrass the consumer.<sup>61</sup>

A debt collector sent a letter to the consumer soliciting payment of an indebtedness. The letter implied the consumer ignored her mail and bills, and lacked the common sense to handle

her financial matters properly. The court held this had a natural consequence to harass, oppress, or abuse.<sup>62</sup>

A particularly egregious practice was discussed in the Senate hearings. A pregnant mother of three was financially strapped because her husband could not find steady employment for over two years. She received threatening phone calls at the rate of one an hour for about one week. She became very tense and finally began hemorrhaging. While waiting for an ambulance she received a call from the collector. She told him that she was pregnant, hemorrhaging, and waiting for an ambulance. He called back three more times. The medics found her in a state of shock. She lost the baby.<sup>63</sup>

**False or Misleading Representations.** The Act prohibits certain specific false, deceptive, or misleading statements or means in connection with the collection of a debt, as well as, prohibiting them in general terms.<sup>64</sup> Again, the legal assistance officer should determine if the collector's conduct is specifically prohibited and, if not, determine the conduct is arguably prohibited in general terms.

The following are the specific prohibitions of section 1692e:

(1) *The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.*<sup>65</sup>

A debt collector should not use any trade name, emblem or other means which creates a false impression that it is affiliated with a gov-

<sup>59</sup> 15 U.S.C. § 1692d.

<sup>60</sup> Bingham v. Collection Bureau, Inc. 505 F. Supp. 864 (D.N.D. 1981).

<sup>61</sup> Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979).

<sup>62</sup> Harvey v. United Adjusters, Inc., 509 F. Supp. 1218 (D. Or. Mar. 20, 1981).

<sup>63</sup> Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Karen Berger).

<sup>64</sup> 15 U.S.C. § 1692e.

<sup>65</sup> 15 U.S.C. § 1692e(1).

ernment agency. Senator Joseph R. Biden cited the picture of a judge in a robe with the notation "You are hereby ordered to pay." It implied the judge was personally involved when, in fact, there was no judgment.<sup>66</sup>

Writing paper with "US Constable's Office" on it has been used to imply the Federal Government is involved, when, in fact, it is not.<sup>67</sup>

Another practice is for a debt collector to send a postcard to the consumer requesting him to call a certain telephone number. When the consumer does so, the collector impersonates a government official taking an employment census. The consumer divulges his employer's name and telephone number which the collector uses to contact his employer.<sup>68</sup>

Another collector admitted that police uniforms with badges were commonly used. The collectors represent themselves as law enforcement officials and tell consumers they are going to jail unless they pay.<sup>69</sup>

(2) *The false representation of—*

(A) *the character, amount, or legal status of any debt; or*

(B) *any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.*<sup>70</sup>

(3) *The false representation or implication that any individual is an attorney or*

<sup>66</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Honorable Joseph R. Biden, Jr.).*

<sup>67</sup> *Id.* (statement of Honorable Millicent Fenwick).

<sup>68</sup> Needham and Pollack, *Collecting Claims and Enforcing Judgments*, Practice Handbook No. 1, Practising Law Institute (1960).

<sup>69</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. James Clark).*

<sup>70</sup> 15 U.S.C. § 1692e(2).

*that any communication is from an attorney.*<sup>71</sup>

One witness in the House hearings testified that a judge, for compensation, sold memoranda to a collector which read:

State of \_\_\_\_\_, County of \_\_\_\_\_, Plaintiff \_\_\_\_\_ versus Defendant\_\_\_\_\_. You are hereby notified that the above captioned claim has been placed in my hands to issue legal process thereon. This notice is a courtesy extended to you to afford you the opportunity to settle the claim and thus save yourself the costs, embarrassment, and notoriety connected with a suit. Unless a settlement is received in full within ten days from the date thereon, a summons will be issued.

It was signed by the judge, sealed and dated. In fact, the claim's legal status was misrepresented since it was not issued in furtherance of "legal process."<sup>72</sup>

Many consumers become motivated to pay once an attorney becomes involved. It is a common practice for collectors to impersonate attorneys or to use them in a devious manner. For instance, an attorney was paid \$75 per month to set up an office within the collection agency's office. Although the attorney never used this office, his name was on the door. It also had a separate telephone line which the collector would ask the consumer to call. When done, a recording would answer with "Attorney Jones' Office." The collector would then represent himself as the attorney.<sup>73</sup> This is now prohibited by law.

Reporters for the Chicago Tribune uncovered a tactic which is a violation of this section. A consumer received correspondence with the letterhead of "Bennett, Brady, Collins and

<sup>71</sup> *Id.* § 1692e(3).

<sup>72</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11696 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. James Clark).*

<sup>73</sup> *Id.*

Klein" printed in old English script. He thought it was from a prestigious law firm. Although he did not owe the bill, he paid it rather than risk being sued and possibly losing his job. In fact, the firm was not a law firm but was merely a debt collection agency.<sup>74</sup>

*(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.*<sup>75</sup>

One of the best scare tactics is the threat of legal action, even though legal action is rarely used. The Federal Trade Commission's 1980 and 1981 Reports to Congress indicated one of the "most important" violations of the Act was the threat of suit and legal process to coerce payment, when there was no authority to take the action or no intent to do so.<sup>76</sup> For instance, when a consumer asked if he would be imprisoned, the collector responded "[to] let his imagination run wild."<sup>77</sup> Collectors have told consumers that they had "better nail their possessions to the floor before the law came and removed everything they owned."<sup>78</sup> In one case the collector sent, at prearranged intervals, five or six form letters, stating that legal action will be initiated immediately unless payment is remitted. The Federal Trade Commission found the letters misrepresented the imminence of legal action. The time period from the first to the last letter was over 90 days and

<sup>74</sup> *Id.* (Statement of Mr. William Crawford).

<sup>75</sup> 15 U.S.C. § 1692e(4).

<sup>76</sup> Federal Trade Commission, Annual Reports to Congress on the Fair Debt Collection Practices Act (1980) and (1981).

<sup>77</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Patricia A. Miller).*

<sup>78</sup> *Id.*

it was not until after the consumer failed to respond to the last letter that a decision to sue was made.<sup>79</sup>

Another common practice is for debt collectors to threaten arrest when a consumer's check is returned for insufficient funds. In fact, law enforcement officials rarely arrest individuals for this offense.<sup>80</sup>

Ms. Karen Berger, Queens Legal Services Corporation, New York City, related the following story to the Senate Subcommittee. A 75-year-old recent widow was left with numerous bills and only her social security pension as income. A collector told her to pay for her husband's funeral or he would obtain a court order, dig up her husband's body, and repossess the casket. Obviously no court would issue such an order.<sup>81</sup> This is the type of overreaching which is now impermissible.

*(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.*<sup>82</sup>

This subsection is similar to the previous subsection, being a "catchall" provision. Whereas the previous subsection addresses only certain specified legal actions, this one deals with any action. In one case the debt collector stated in a letter that an investigator had been "instructed to make an investigation in your neighborhood and personally call on your employer."<sup>83</sup> As has been previously discussed, neither of those third party contacts is legal and to state such is a violation of this subsection.

<sup>79</sup> *Trans World Accounts, Inc. v. Federal Trade Commission*, 594 F.2d 212 (9th Cir. 1979).

<sup>80</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.918, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Mr. Lewis H. Goldfarb).*

<sup>81</sup> *Id.* (statement of Ms. Karen Berger).

<sup>82</sup> 15 U.S.C. § 1692e(5).

<sup>83</sup> *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980 (N.D. Ill. 1979).

A consumer was working at her job as a maid in an airport motel when she received a call from a collector. He stated, "We're getting ready to go into Family Court. We'll get your kids taken away from you. You're setting a bad example for the kids because you don't pay your bills. When the judge hears about it he's going to say you're unfit and take them away from you. He can do it, you know." The likelihood of a court taking children from parents merely for nonpayment of bills is remote and for the collector to allege such is improper.<sup>84</sup>

(6) *The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—*

(A) *lose any claim or defense to payment of the debt; or*

(B) *become subject to any practice prohibited by this title.*<sup>85</sup>

(7) *The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.*<sup>86</sup>

For instance a debt collector should not tell a consumer on welfare that she should not have dogs, implying that it is illegal or an act of disgraceful conduct for a welfare recipient to have pets.<sup>87</sup>

(8) *Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.*<sup>88</sup>

<sup>84</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.919, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Karen Berger).*

<sup>85</sup> 15 U.S.C. § 1692e(6).

<sup>86</sup> *Id.* § 1692e(7).

<sup>87</sup> Brief for Plaintiff, *Coleman v. National Credit Bureau, Inc.*, case settled (D. Or. 1981).

<sup>88</sup> 15 U.S.C. § 1692e(8).

Debt collectors frequently give credit information to consumer reporting agencies. It is illegal for the debt collector to pass on credit information which is known or should be known to be false. In addition under section 1692g of the Act, a consumer may dispute the validity of a debt. If such is done, it would be illegal for the debt collector to inform a consumer reporting agency that the debt is overdue but fail to report that it is disputed.

(9) *The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.*<sup>89</sup>

Letters made to look like Western Union Telegrams or Mailgrams would violate this section.<sup>90</sup> Why would a debt collector use such a format? A telegram or mailgram is more expensive than first class mail and thus has a greater impact on the consumer. The consumer is more impressed with its significance.

A debt collector sent a "pre-summons" to a consumer with a notary like seal on it to make it look like a legal document. The nonlawyer recipient did not know the difference between a "pre-summons" and a "summons."<sup>91</sup>

(10) *The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.*<sup>92</sup>

This subsection has often been violated by collectors who are attempting to obtain personal information from the debtor himself. An il-

<sup>89</sup> *Id.* § 1692e(9).

<sup>90</sup> *Trans World Accounts, Inc. v. Federal Trade Commission*, 594 F.2d 212 (9th Cir. 1979).

<sup>91</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on S.656, S.919, S.1130 and H.R. 5294 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Ms. Karen Berger).*

<sup>92</sup> 15 U.S.C. 1692e(10).

lustration is the "parcel post gag," used to obtain the consumer's phone number. The collector sends a postcard to the consumer explaining a package cannot be delivered because the consumer is not home. The consumer is asked to call a given number. Unknown to the consumer, that particular number is the collector's "parcel post" number. Upon answering, the collector puts the consumer on hold and returns in a few minutes responding that the package cannot be found. He then asks for the consumer's phone number with the promise he will call back when the package is found.<sup>93</sup>

There are numerous other "gags" used to obtain information from the consumer, such as the extremely effective "IRS" gag. The collector calls the debtor stating he is with the Internal Revenue Service. He states the debtor's tax return has been randomly selected for audit, but there is no return filed. He explains that the computer sometimes is in error and rather than have the debtor come to the office, they may be able to resolve this over the telephone. He then asks for personal information such as his social security number, present home address, place of employment with phone number, his bank and whether he has a checking and savings account with it, and what property he owns. After the consumer has divulged this highly personal information, the collector places the debtor on hold and returns a few minutes later to explain that the computer had the wrong social security number and the problem has been corrected. Now the collector has the information he needs to contact the consumer at home, at work, to contact his employer, and even to seek an attachment order.<sup>94</sup>

*(11) Except as otherwise provided for communications to acquire location infor-*

<sup>93</sup>Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11696 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. William Crawford).

<sup>94</sup>Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Hugh Wilson).

*mation under section 804, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.*<sup>95</sup>

There are circumstances when a debt collector may legally contact a third party about the payment of a debt. For instance, the debt collector may obtain the consumer's consent, may obtain court permission to contact a third party, or may take reasonable steps to effect a postjudgment award. If so, he must inform the party contacted that he is a debt collector and that he will use information given to collect the debt.

*(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.*<sup>96</sup>

The debt collector may assert that the debt has been sold by the creditor to a local bank and the bank and not the original creditor will now be denied its just returns. This argument is used effectively when the consumer is not paying because he has a complaint against the merchant/creditor. Perhaps the merchandise was defective or the merchant did not perform as promised. The debt collector would make the above assertion to make the consumer feel guilty for not paying these innocent assignees.

*(13) The false representation or implication that documents are legal process.*<sup>97</sup>

Debt collectors use legal sounding terms and headings on their correspondence to give the impression of legal documents. The consumer believes law enforcement agencies or the courts are involved and, fearing the consequences of those agencies, give the particular debt priority of payment over others. For instance, a form which states, "The within named

<sup>95</sup> 15 U.S.C. § 1692e(11).

<sup>96</sup> *Id.* § 1692e(12).

<sup>97</sup> *Id.* § 1692e(13).

creditor, under STATE STATUTES AND PROVISIONS THEREIN hereby makes FINAL DEMAND for payment of alleged indebtedness," gives the false impression that it is a legal document.<sup>98</sup>

(14) *The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.*<sup>99</sup>

Debt collectors use names other than their actual ones to give the false impression that innocent third parties are involved in collecting the debt. The consumer, under this false impression, feels compelled to pay.<sup>100</sup>

(15) *The false representation or implication that documents are not legal process forms or do not require action by the consumer.*<sup>101</sup>

Just as the collector is not to imply that documents are legal process, he should not do the opposite and disguise actual legal process forms. The collector is not to do anything to confuse a consumer as to the true nature of the legal status of a debt.

(16) *The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.*<sup>102</sup>

It has been somewhat common for collectors to imply they are affiliated with a consumer reporting agency. This leads the consumer to believe that the consequences of nonpayment automatically results in a poor credit rating. It gives the impression that the debt collector is

more powerful than he really was. Names such as "National Debtors Rating Bureau," "Credit Converters, Inc.," and "Credit Bureau Collection Agency" are impermissible.<sup>103</sup> It should be noted that if the debt collector is, in fact, also a consumer reporting agency, it may legitimately use a name indicating such.<sup>104</sup>

**Unfair Practices.** A debt collector may not engage in any unfair practices. This covers the gap of conduct which may not be harassing and may not involve any misrepresentations, but are not fair. Again, there is a general prohibition against unfair practices, as well as, specific unfair practices.<sup>105</sup> The general prohibition reads:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.<sup>106</sup>

An example of an unfair practice occurred when a collector, who was upset with a consumer, told her over the telephone that he was a local police officer, her son had lost both his legs in an automobile accident, and she should come to the hospital immediately. She arrived at the emergency entrance where the collector explained that her son had not really been injured, but he wanted payment of the overdue debt. She paid.<sup>107</sup>

There are eight specific prohibited unfair practices. The first is:

(1) *The collection of any amount (including any interest, fee, charge, or*

<sup>98</sup>Koppel, *Fair Credit Practices and Fair Debt Collection Practices: FTC Developments*, Commercial Law and Practice Handbook No. 202 (1979).

<sup>99</sup>15 U.S.C. § 1692e(14).

<sup>100</sup>See II State Interpretives, Letter to Benjamin Ward, May 30, 1978. See also Goldsten, *Federal Regulation of Debt Collection Practices*, Commercial Law and Practice Course Handbook No. 229, PLI (1980).

<sup>101</sup>15 U.S.C. § 1692e(15).

<sup>102</sup>*Id.* § 1692e(16).

<sup>103</sup>Koppel, *Fair Credit Practices and Fair Debt Collection Practices: FTC Developments*, Commercial Law and Practice Handbook No. 202 (1979).

<sup>104</sup>Goldston, *Federal Regulation of Debt Collection Practices*, Commercial Law and Practice Course Handbook, No. 229, PLI (1980).

<sup>105</sup>15 U.S.C. § 1692f.

<sup>106</sup>*Id.* § 1692f.

<sup>107</sup>*Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. James Clark).*

*expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.*<sup>108</sup>

The staff of the Federal Trade Commission has found instances of collectors imposing unlawful charges to pay the costs of the debt collection agency and to pad their profits. In some instances, the underlying agreement between the creditor and the consumer does not provide for such. In other cases, the agreement allows for a charge but either limits the amount of the surcharge or state law limits it. The charges actually imposed disregard these limitations, but are the amounts the collector believes is adequate compensation for his services.<sup>109</sup> These unauthorized charges are a violation of the Act.

Sections 1692(2), (3) and (4) address the use of postdated checks.

*(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten or less than three business days prior to such deposit.*<sup>110</sup>

House Bill Number 29 prohibited the use of postdated checks in all instances.<sup>111</sup> The collection industry opposed this as being too restrictive and a hardship on both the collection industry and consumers.<sup>112</sup> For instance, a consumer may realize he does not have the dis-

cipline to provide monthly payments if he must prepare a check and mail it to the collector each month. He may prefer to make twelve postdated checks to be retained by the collector and deposited each month. He has no choice but to automatically deduct the amount from his checking account each month. The House Subcommittee accepted this argument and amended the bill to provide for postdated checks but gave the consumer an added protection. Since there often is a substantial period of time between the making of the check and the depositing of it, intervening circumstances may result in there being insufficient funds in the checking account to cover the check. If a check is postdated by more than five days, the consumer must be provided written notification within the time restrictions above of the collector's intent to deposit it. Then if the account has insufficient funds, the consumer can ask the collector not to cash it or can stop payment on it.

*(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.*<sup>113</sup>

A debt collector's procedure may be to solicit a postdated check from the consumer, knowing there are insufficient funds in the checking account. Once the check is in the collector's hands, the collector advises the consumer that it is a crime to write a check without sufficient funds in the account. An ultimatum is provided: pay or the collector informs the law enforcement authorities.<sup>114</sup> This is now specifically prohibited.

*(4) Depositing or threatening to deposit any postdated check or other postdated*

<sup>108</sup> 15 U.S.C. § 1692f(1).

<sup>109</sup> Federal Trade Commission Annual Report to Congress on the Fair Debt Collection Practices Act (1980).

<sup>110</sup> 15 U.S.C. § 1692f(2).

<sup>111</sup> See H.R. 29, Section 807(2).

<sup>112</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977)* (statements of Mr. John Spafford and Mr. John W. Johnson).

<sup>113</sup> 15 U.S.C. § 1692f(3).

<sup>114</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976)* (statements of Honorable Frank Annunzio and Ms. Sherry Chenoweth).

<sup>115</sup> 15 U.S.C. § 1692f(4).

*payment instrument prior to the date on such check or instrument.*<sup>115</sup>

In one case, a collection agency convinced a sergeant in the U.S. Army to provide him with two postdated checks to close a Texaco account. One check, dated 3 October 1973, was deposited on 26 September 1973 at a time when the sergeant had insufficient funds. The agency then sent him a copy of the bad check law with its criminal sanctions.<sup>116</sup> This type of tactic is now prohibited.

*(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.*<sup>117</sup>

Some collection agencies make a practice of having the debtor pay the communication costs by concealing the true purpose of the call or telegram and the identity of the caller or sender. For instance, one collection agency used as a standard procedure a "reference service" in which one telephone operator was given 50 to 100 debtors' names and telephone numbers. The operator would be instructed that each debtor would be called collect and given the collector's alias. Once the collector had agreed to pay for the call, the collector identified himself and gave his pitch. The financially hard pressed consumer had paid for a call which he did not desire and probably could not afford. Upon completion of the call the collector would flash the operator who would automatically call the next debtor on the list.<sup>118</sup> Now collect calls may be made, but only after the purpose of the call is made known to the consumer.

*(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—*

<sup>115</sup> See note 114. (statement of MSG Frank Ennis).

<sup>117</sup> 15 U.S.C. § 1692f(5).

<sup>118</sup> Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Mr. Hugh Wilson).

*(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;*

*(B) there is no present intention to take possession of the property; or*

*(C) the property is exempt by law from such dispossession or disablement.*<sup>119</sup>

Many jurisdictions prohibit self-help repossession or severely restrict it. For instance, they may allow it only if the repossession does not cause a breach of the peace. The debt collector must comply with these laws and cannot threaten to engage in an impermissible act of repossession. Thus, a debt collector cannot threaten to break into the consumer's home to repossess goods if the law does not permit such.

The Federal bankruptcy statute and most state bankruptcy laws exempt certain property from being sold pursuant to bankruptcy. Exempt property is that which is considered necessary for the survival of the consumer and his family. Such items as clothing, an automobile, household furnishings and health aids are exempt under the Federal bankruptcy statute.<sup>120</sup> As such, the collector is not to make a statement such as, "We will file an involuntary bankruptcy petition and sell all your property."

*(7) Communicating with a consumer regarding a debt by postcard.*<sup>121</sup>

Postcards are prohibited if there is any reference to a debt on them. This is to prevent third parties from knowing of the indebtedness situation. As a result, postcards are rarely used.

*(8) Using any language or symbol, other than the debt collector's address, or any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indi-*

<sup>119</sup> 15 U.S.C. § 1692f(6).

<sup>120</sup> Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1978).

<sup>121</sup> 15 U.S.C. 1692f(7).

cate that he is in the debt collection business.<sup>122</sup>

The purpose of this section is to prevent embarrassment to the consumer. An envelope with a return address of "COLLECTION ACCOUNTS TERMINAL, INC." is prohibited.<sup>123</sup> Debt collection agencies may have to change their trade names to avoid violating this section.

**Furnishing Deceptive Forms.** Flat-rating is prohibited. This is a practice in which a business sells dunning letters with a collection agency's letterhead. The consumer is led to believe that a collection agency is involved when, in fact, this is not the case. The flat-rater is in the business of selling dunning letters and is not in the debt collection business. The flat-rater, even though not a debt collection agency as defined by the statute, can be held civilly liable.<sup>124</sup>

**Ceasing of Communications.** We have seen how the Act limits contact with third parties and restricts what can be done when the debt collector contacts the consumer himself. It gives an additional protection to the consumer by providing a procedure which, if followed, prohibits further contacts by the collector with the consumer.

A consumer who does not desire the debt collector to communicate with him should notify the debt collector, in writing, either that he refuses to pay the debt or that he wishes the debt collector to cease further communications with him. If done, the debt collector must discontinue communicating with the consumer except to advise the consumer that collection efforts are being terminated, or to notify him that he may or he intends to invoke a specified remedy, such as a lawsuit.<sup>125</sup> The intent is to get the

collector "of the consumer's back" and to force the collector to invoke the assistance of a neutral third party, such as a judge, when it is clear the consumer does not want to deal with the debt collector.

The original House bill did not require the notice to be in writing. The collection industry opposed this because proof of an oral notice would be difficult.<sup>126</sup> It would be the consumer's word versus the collector's that oral notice was given. The Congress agreed with the collectors and required written notice.

Notice given to the agency is deemed to be imparted to all employees of the agency. In *Carrigan v. Central Adjustment Bureau, Inc.*,<sup>127</sup> the consumer owed a debt to the University of Florida for tuition. After repeated failures to pay, Central Adjustment Bureau was employed to collect the debt. The consumer sent a letter to the collection agency directing it to cease further telephone communications with him. An employee, who later asserted he had not seen the letter, phoned the consumer in an attempt to collect the debt. The collection agency was held liable. The agency has a duty to ensure its employees are advised to discontinue contacting a consumer who has taken advantage of this section.

As discussed previously, for the consumer to accrue the protections of the "Validation of Debts" provisions of the statute, he must request validation within 30 days of notice of his rights. If done, the collector will discontinue contacts until validation. This section provides greater protection for it has no 30-day time limit. The consumer can force discontinuance of contacts by giving notice at any time. Secondly, the collector cannot resume contacts at a later time without court permission or the consumer's consent.

<sup>122</sup>*Id.* § 1692f(8).

<sup>123</sup>*Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980 (N.D. Ill. 1979).

<sup>124</sup>15 U.S.C. § 1692j.

<sup>125</sup>*Id.* § 1692c(c).

<sup>126</sup>*Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 29 Before the Subcommittee on Consumer Affairs, 95th Congress, 1st Session (1977) (statement of Mr. John L. Spafford).*

<sup>127</sup>*Carrigan v. Central Adjustment Bureau*, 502 F. Supp. 468 (N.D. Ga. 1980).

Experience has shown that creditors will attempt to circumvent this rule by employing a second collection agency once the consumer directs a particular collection agency to cease communications. The consumer's course of action is to send each new collector a letter requesting him to cease communications.

**Venue.** There was substantial forum abuse prior to the enactment of the statute. Debt collectors would sue a defaulting consumer in a court which was so distant or inconvenient that consumers were unable to appear. The debt collector would obtain a default judgment and the consumer would not have his day in court.

To remedy this, venue is restricted. It is now a function of the underlying obligation. An action for the enforcement of an interest in real property securing the debtor's obligation may only be brought in a judicial district where the real property is located. In the case of other actions, suit may be brought in the judicial district where either the consumer signed the contract or where the consumer resides at the commencement of the action.<sup>128</sup> The original bill proposed allowing an action to be brought where the credit agreement is made rather than where the consumer signs the contract.<sup>129</sup> For instance, if a consumer purchases an item by mail order from a catalog, the agreement is made where the mail-order company is located, possibly a great distance from the consumer. This would make it difficult for the consumer to appear in court.

#### Enforcement of the Statute

The enforcement provisions of the statute give the consumer the "club" needed to be effective. The statute is self-enforcing, the consumer himself being able to sue and seek damages for violation of it. Without giving the cause of action to the consumer, the Federal Trade Commission (FTC) would have been required to prosecute violators. The Federal Trade Commission is already overburdened and the expenditure of tax monies to supplement

its staff is unacceptable. Secondly, experience has shown that when the FTC investigates and prosecutes a debt collector, it has little deterrent effect on other collectors. Each collection agency is so small that it does not believe the FTC will become aware of its practices and pursue actions against it.<sup>130</sup> Finally, without the consumer's statutory cause of action the consumer would have had to use the traditional tort remedies such as defamation, invasion of privacy, and emotional distress. These are difficult to prove and, if proven, difficult to access damages.<sup>131</sup>

**Jurisdiction and Statute of Limitations.** The action may be brought in Federal district court without regard to the amount in controversy or any other court of competent jurisdiction. The statute of limitations is one year from the date of the violation.<sup>132</sup>

**Civil Liability.** A debt collector who fails to comply with any provision of the statute may be held liable for the sum of actual damages, statutory damages up to \$1000, reasonable attorney's fees, and court costs.<sup>133</sup> Class actions are also allowed. Each plaintiff may recover up to \$1000 statutory damages plus all other class members may recover an amount the court feels is appropriate so long as the total aggregate amount does not exceed the lesser of \$500,000 or 1% of the net worth of the debt collector.<sup>134</sup>

Statutory damages may be awarded regardless of the amount, if any, of actual damages. The maximum statutory damages for a single award is \$1000. The plaintiff in *Harvey v.*

<sup>128</sup> 15 U.S.C. § 1692i.

<sup>129</sup> *Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 11969 Before the Subcommittee on Consumer Affairs, 94th Congress, 2nd Session (1976) (statement of Mr. Lewis H. Goldfarb).*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 15 U.S.C. § 1692k(d).

<sup>133</sup> 15 U.S.C. §§ 1692k(a)(1), 1692(a)2(A) and (B).

<sup>134</sup> *Id.* § 1692k(a)(2)(B).

*United Adjusters, Inc.*,<sup>135</sup> argued for a statutory award of \$1000 for each illegal communication or transaction. The court rejected this, holding that it was the intent of Congress to allow the award of the full \$1000 in an aggravated case of persistent and repeated illegal practices.

Actual damages have been awarded for actual injury and loss of consortium.<sup>136</sup>

It should be noted that the defendant debt collector may be awarded reasonable attorney's fees for actions brought by consumers in bad faith.<sup>137</sup>

**Defenses.** The Act contains the "clerical error" defense,<sup>138</sup> which is also found in the Truth in Lending Act.<sup>139</sup> The debt collector is not liable if he can show that the violation is unintentional and results from a bona fide error notwithstanding procedures designed to avoid it.

Court interpretation of the defense in the Fair Debt Collection Practices Act has been similar to that of the Truth in Lending Act. The defense is not available for errors of law or legal interpretation, even if made in good faith. The defendant who used his business name on an envelope which indicated it was in the debt collection business argued the clerical error defense, stating he was "unaware that the return address could be considered a violation of any statute." The Court rejected this stating that the defendant intended the conduct. Ignorance of the law does not establish the defense.<sup>140</sup>

In addition, even if it was a clerical error, the business must have maintained reasonable

procedures to avoid such errors. No Fair Debt Collection Practices Act cases address this issue, but a Truth in Lending Act Case provides an excellent example. The defendant violated the Truth in Lending Act when a salesman misread the interest rate on a car loan. He argued it was a clerical error, which it was, and that procedures had been maintained to avoid this because the salesman had undergone training. The Court discounted the latter argument stating that compliance requires more than a well-trained clerk. It suggested that a second clerk to check the first clerk's calculations might have been sufficient. The business did not have reasonable procedures to avoid the error.<sup>141</sup>

### Conclusion

The Fair Debt Collection Practices Act is a tool which the legal assistance officer can use to aid a harassed client. It restricts the debt collector's course of action and provides the consumer a legal remedy when the debt collector refuses to adhere to the law. The Act's Achilles heel is its application only to debt collectors. A creditor, generally, does not fall within its scope. The legal assistance officer must look elsewhere to aid the client who is being treated poorly by a creditor.

A significant protection of the Act is its restrictions of debt collectors in contacting third parties. It does allow them to make limited contacts of third parties to obtain location information. A debt collector who desires to contact a third party for a reason other than to obtain location information may do so only with the consumer's consent, pursuant to a court order, or as is reasonably necessary to effectuate a post judgement remedy. The result is third parties should rarely be assisting the debt collector in effecting payment of the debt.

The debt collector may contact the consumer himself, with certain limitations. First, the consumer has a means to require the collector to validate the debt by merely disputing it. All

<sup>135</sup> *Harvey v. United Adjusters, Inc.*, No. 79-1349 (D. Or. 1981).

<sup>136</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

<sup>137</sup> 15 U.S.C. § 1692k(a)(3).

<sup>138</sup> 15 U.S.C. § 1692k(c).

<sup>139</sup> Consumer Credit Protection Act, § 1649c, 15 U.S.C. § 1601 (1968).

<sup>140</sup> *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980 (N.D. Ill. 1979).

<sup>141</sup> *Mirabel v. GMAC*, 537 F.2d 871 (7th Cir. 1976).

collection efforts must cease until validation is made. In addition, the collector must inform the consumer of this validation right within a few days of the initial contact. Secondly, many of the collector's traditional tactics are now prohibited. He cannot engage in any conduct which harasses, oppresses, or abuses a person; any false, deceptive or misleading representations; and any unfair or unconscionable means to collect a debt. The statute lists specific prohibitions for each of these. In addition, each is prohibited generally. Often there is an overlap between the three prohibitions. For example, an unfair practice may also be reasonably interpreted as harassment, or a misrepresentation could also be an unfair practice. As a consequence, attorneys will allege a particular act as violating several sections of the statute.

Finally, the consumer can prohibit the collector from contacting him in the future by merely

sending to the collector written notice that he does not desire the collector to communicate with him or that he does not owe the debt. This forces the collector out of the picture or to use judicial remedies.

The statute is self-enforcing, the consumer having a cause of action against the collector who violates it. Liability includes actual damages, additional damages, court costs and attorney's fees. The latter provision should make referrals from a legal assistance officer to a civilian attorney attractive.

The legal assistance officer should welcome the opportunity to use this statute. It can be used with a minimum of research, being concise with little case law to research. Secondly, it provides a means to assist a beleaguered servicemember.

### Post-Trial Processing

*"All is well that ends well."\**

*by Captain Joseph E. Ross, Instructor,  
Criminal Law Division, TJAGSA*

Picture yourself as the staff judge advocate of that world famous, strategic and important installation, Fort Blank, Missouri. The summer sun is bright, the air is warm, and the world is a wonderful place. At least you feel this to be so, because today marked the conclusion of the trial in the case of *United States v. Oxnard*. The trial of Private Oxnard, or "King Pusher" as his friends affectionately call him, was three weeks of all-out courtroom warfare. The accused now sits in the post stockade, having received an appropriate and well-deserved sentence. Bluebirds are singing sweetly outside your window when Captain Sylvester Sly strides into your office. Captain Sly is the detailed defense counsel for Private Oxnard. He states that after speaking with the accused and consulting with Steve Shy, civilian counsel in

the case, he is submitting a request for deferment of confinement on behalf of Oxnard.

While tempted to throw Captain Sly out of your office, you must suppress those violent urges. Deferment will be only the first of many hurdles you will have to clear in the post-trial processing of courts-martial. This article will examine those hurdles, or post-trial steps. Specifically, deferment of confinement, authentication of the record of trial, and service of the post-trial review will be viewed in light of recent treatment of these areas by military appellate courts. Time constraints for post-trial processing will also be examined to discover how much time you have to clear these hurdles.

#### Deferment of Confinement

Article 57 of the Uniform Code of Military Justice provides that a sentence to confinement begins to run from the date the sentence is ad-

\*John Heywood, *Gesta Romanorum*, Tale 67 (1472).

judged.<sup>1</sup> It further provides that an accused under a sentence to confinement may apply to the convening authority to have the service of the confinement deferred.<sup>2</sup> While the convening authority has sole discretion in considering the application for deferment, the statute provides no guidance for handling such applications. The Manual for Courts-Martial does provide some guidelines for the exercise of this discretion.<sup>3</sup> The convening authority should consider all the relevant factors in the case and take action based upon the best interest of the accused and the service. Examples of when deferment should be denied are when the accused may be a danger to the community, when it is likely he may repeat the offense, or he may flee to avoid prosecution.

In *United States v. Brownd*,<sup>4</sup> the Court of Military Appeals indicated that convening authorities' sole discretion in this area was sub-

<sup>1</sup> U.C.M.J. art. 57(b); 10 U.S.C. § 857(b): "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement."

<sup>2</sup> U.C.M.J. art. 57(d); 10 U.S.C. § 857(d): "On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned."

<sup>3</sup> Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 88f.

<sup>4</sup> 6 M.J. 338 (C.M.A. 1979). Brownd was an air force doctor convicted of violations of Articles 92 and 134. Sentenced to five months confinement (among other punishments) he applied for deferment because there was no evidence he was inclined to flee, he possessed substantial personalty, his offenses were not violent, his profession made recidivism unlikely and he had responsibility for his six-year old daughter.

ject to judicial review. The court went further in *Brownd* and provided criteria for judging future determinations on deferment applications. These criteria came from the American Bar Association's Standards for Criminal Appeals,<sup>5</sup> which state:

Release should not be granted unless there is no substantial risk the applicant will flee and he is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere in the administration of justice.

The standards are similar to examples mentioned in paragraph 88f, Manual for Courts-Martial. Additional emphasis is placed on the likelihood that the accused will flee the jurisdiction. The court also states in *Brownd* that the burden of demonstrating that deferment should be granted lies with the accused. So in your case, as Fort Blank staff judge advocate, you should initially examine the request to see if the defense has carried this burden. Cases subsequent to *Brownd* have indicated a request must be adequate in order to trigger a response that will be reviewed for abuse of discretion.<sup>6</sup> Assuming an adequate request in the case of the King Pusher of Fort Blank, what should you do?

*Beck v. Kuyk*<sup>7</sup> sets out an appropriate response to adequate deferment applications. The

<sup>5</sup> ABA Standards, Criminal Appeals, Section 2.5(b) (1970).

<sup>6</sup> *United States v. Alicea-Baez*, 7 M.J. 989 (A.C.M.R. 1979). The Army Court of Review indicated that a summary denial of a request for deferment which amounts to a clemency request is not an abuse of discretion. The request stated the accused had twenty-six months of creditable service, was being considered for promotion to E-5, was the distinguished graduate of his advanced training cycle, and indicated that his superiors and peers thought he was reliable. The court held that since these matters went to clemency rather than deferment, the defense had failed to carry its burden demonstrating deferment was appropriate.

<sup>7</sup> 9 M.J. 714 (A.F.C.M.R. 1980). The accused was convicted of carnal knowledge and sentenced to a bad conduct discharge and confinement for eighteen months. His request for deferment stated that the confinement facility where he was held was inadequate, there was no

convening authority should consider all relevant factors, indicate any disagreement with the defense position, and indicate in writing the reasons for such disagreement. This suggested response seems to be governed by a rule of reasonableness. If the application is to be denied, the denial should be grounded in reasons that can be articulated.

Your convening authority may want to place conditions on the grant of deferment. A recent deferment case indicates that this is permitted. In *Pearson v. Cox*,<sup>8</sup> the Court of Military Appeals viewed the convening authority as performing the same function as a federal magistrate. Chief Judge Everett pointed out that the Military Justice Act of 1968 was a product of the same Senate subcommittee that helped enact the Bail Reform Act of 1966.<sup>9</sup> Because Congress in the Bail Reform Act gave federal magistrates the power to place conditions on post-conviction release of individuals, the Chief Judge reasoned that the same broad discretion should apply to convening authorities. He went on to state that an inability to place restrictions on post-trial release would have a "chilling effect" upon the granting of applications for deferment.<sup>10</sup>

Now you know how to handle Private Oxnard's request for deferment. The Fort

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probability of flight in his case, no likelihood of other crimes being committed or of interference in the administration of justice and finally, that his record was good.

<sup>8</sup> 10 M.J. 317 (C.M.A. 1981). The accused was not in pretrial confinement although charged with unpremeditated murder. Convicted of negligent homicide, he was sentenced to one year in confinement and a bad conduct discharge. The request for deferment was denied because of the incorrect analysis that paragraph 88f of the Manual for Courts-Martial precluded the convening authority from restricting the accused from the Enlisted Club where the homicide took place.

<sup>9</sup> Bail Reform Act (18 U.S.C. §§ 3141-3152).

<sup>10</sup> A convening authority who could not place conditions on post-conviction release might be reticent to grant deferment. In *United States v. Porter*, 12 M.J. 546 (A.C.M.R. 1981), the Army Court of Review approved a deferment grant that included a condition prohibiting the accused from returning to the state where the crime was committed during the period of deferment.

Blank commanding general should be advised that he may deny it; if he does, he must state his reasons for doing so in writing, after considering all relevant factors. If the general decides to grant the application for deferment, he may place conditions upon the release of Oxnard.

### Authentication

You have settled the deferment issue and it is now several weeks later. The legal clerk has finished the record of trial and it is ready to be authenticated<sup>11</sup> by the military judge. The judge has left the trial judiciary and is now assigned as staff judge advocate at Fort TJAGSA, Virginia. Should the trial counsel authenticate the record? *United States v. Cruz-Rijos*<sup>12</sup> sheds light on this issue. In this case the Court of Military Appeals expressed its preference for authentication by the most neutral party at trial, the military judge. The circumstances in *Cruz-Rijos* arose out of the pressure to accomplish post-trial processing within ninety days or risk dismissal of the charges.<sup>13</sup> The court used this case to narrowly interpret Article 54 of the Uniform Code of Military Justice, which states in part: "If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel. . . ."<sup>14</sup> The court equated absence with the two terms that pre-

<sup>11</sup> Authentication is the act of verifying the accuracy of the record of trial. Trial Judge Memorandum Number 98, Preparation and Authentication of Records of Trial (1 June 1976).

<sup>12</sup> 1 M.J. 429 (C.M.A. 1975). The trial judge was riding a circuit in Virginia between Ft Eustis and Ft Lee, the place of trial. As he was not available to authenticate the record within forty-eight hours of completion, the trial counsel did so in his "absence". The trial counsel then made over eight hundred corrections in a record that was one hundred fifty-six pages long.

<sup>13</sup> *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974). The *Dunlap* rule required the government, in a case where the accused was continuously under restraint, to take action within ninety days after trial or face a presumption of denial of speedy disposition.

<sup>14</sup> U.C.M.J. art. 54(a); 10 U.S.C. 854(a).

cede it, indicating something more than a brief and temporary absence.<sup>15</sup> A later case indicated that the permanent absence of the military judge, pursuant to orders, is the type of extraordinary circumstance envisioned by Article 54.<sup>16</sup>

It should be remembered that the holding in *Cruz-Rijos* grew out of the post-trial time constraints imposed on staff judge advocates. There is no longer an overriding consideration to accomplish processing within a set time period. What effect does that have on processing Private Oxnard's case? While the artificial time limit has been removed, and the absence of this judge seems to be permanent within the meaning of Article 54 justifying authentication by the trial counsel, one further factor should be recalled. The court in *Cruz-Rijos* placed a great deal of emphasis on the trial record and its authentication by a neutral party.<sup>17</sup> With this in mind, the best course of action would be to send the record to the former military judge for authentication.

Once authenticated, the record should be served on the accused as soon as possible. The court, in reaffirming Article 54(c),<sup>18</sup> suggested the service requirement could be satisfied by serving the defense counsel when the accused is transferred from the trial situs. There is no independent right on the part of the defense to be served with the record of trial. The Court of Military Appeals has recognized the need for

defense access to the record of trial.<sup>19</sup> Considering the post-trial duties imposed on defense counsel,<sup>20</sup> it would be good policy to give a copy of the authenticated record to the defense counsel for Private Oxnard, in addition to serving the accused with a copy. This will eliminate one more appellate issue.

#### Service of the Review

By this time you have had the authenticated record served on the accused. The post-trial review has been drafted<sup>21</sup> and is ready for your signature. After you sign on the dotted line, adopting this document as your own, it should be served on counsel for the accused.<sup>22</sup> This sounds like a simple task; it has proven to be complicated. *United States v. Iverson*<sup>23</sup> initiated the complications in this portion of the post-trial process. In *Iverson*, the Court of Military Appeals held that counsel for the accused, in a post-trial framework, means counsel accepted by the accused.<sup>24</sup> From the time of *Iverson* the accused has been in control of post-trial representation.

The law has been particularly uncertain when a civilian counsel has been involved in a court-martial. The Court of Military Appeals

<sup>15</sup>The court wanted to restrict trial counsel's exercise of this judicial function to only emergency situations. *United States v. Cruz-Rijos*, 1 M.J. at 431.

<sup>16</sup>*United States v. Lott*, 9 M.J. 70 (C.M.A. 1980). In this case a military judge in Okinawa was permanently transferred to Quantico, Virginia, prior to authentication of the record of trial. The court held this was an emergency which justified substitute authentication.

<sup>17</sup>The court spoke about the importance of having a neutral part authenticate the record, and characterized the record as "... the heart of a criminal proceeding. ..." (*United States v. Cruz-Rijos*, 1 M.J. at 431.)

<sup>18</sup>U.C.M.J. art. 54(c); 10 U.S.C. § 854(c): "A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated."

<sup>19</sup>*United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978). The defense counsel was reassigned to Germany from the United States after trial. Though served with the post-trial review, he was not provided a copy of the record. The court determined this lack of opportunity to utilize the record required a new review and action.

<sup>20</sup>*United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977). These duties include responding to the post-trial review and continuing representation through all stages of appellate processing of the case.

<sup>21</sup>U.C.M.J. art. 6(c); 10 U.S.C. 806(c).

<sup>22</sup>*United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). This case created the requirement to serve the post-trial review on counsel for the accused.

<sup>23</sup>5 M.J. 440 (C.M.A. 1975). In *Iverson*, because the convening authority at Ft. Carson was disqualified, the case was sent to Ft. Riley for review and action. The post-trial review was served on a Ft. Riley defense counsel who did not contact the accused or the trial defense counsel, and who submitted nothing in rebuttal.

<sup>24</sup>*Id.* at 443.

and the Courts of Review were split as to which counsel should be served with the post-trial review.<sup>25</sup> Much of the uncertainty in this area has been removed by three recent cases from the Court of Military Appeals.

*United States v. Elliot*<sup>26</sup> involved a civilian counsel who represented a soldier in Germany. This counsel was served with the initial post-trial review. The Army Court of Review sent the case for a new review and action. This second review was done at Fort Leavenworth, Kansas, where the accused had served his sentence. There was no evidence in the record to show severance of the original attorney-client relationship. Characterizing the failure to serve the civilian counsel with the second review as a circumvention that derogated the attorney-client relationship,<sup>27</sup> the court returned the case for a review and action.

Similar action by the government was met with disapproval in *United States v. Clark*.<sup>28</sup> In *Clark*, the detailed defense counsel served as associate counsel to the civilian attorney who represented the accused. Active representation at all trial stages was performed by the civilian counsel. Service of the review on the detailed defense counsel was described as an improper interruption in the attorney-client relationship, and the failure to serve the review on the civilian counsel could not be dismissed as nonprejudicial.<sup>29</sup> The case was returned for a

new action after compliance with the mandate of *United States v. Goode*<sup>30</sup>—service on counsel for the accused.

*United States v. Robinson*<sup>31</sup> is the latest expression of discontent over service of the post-trial review. Here the detailed defense counsel was excused and the accused was represented at trial solely by civilian counsel. The review was served on detailed counsel, described in the opinion as an interloper having no familiarity with the case. The court was particularly disturbed with the battle of affidavits that attempted to resolve the issue during the appellate process.

Resisting the temptation to retreat from the requirements set out in *Goode*,<sup>32</sup> the court chose instead to suggest some procedures to reduce problems in serving post-trial reviews. These suggestions involve for the first time the trial judge in the post-trial review process. The judge should establish on the record, in multiple-counsel cases, which counsel has primary responsibility for responding to the post-trial review. Where civilian counsel are involved in the case, the judge should also discuss post-trial responsibilities with the counsel. A final suggestion was directed to the staff judge advocate. In multiple-counsel cases, where allocation of post-trial duties is not apparent from the record, the review should reflect reasons for service on any counsel other than appointed counsel. The court included an escape clause as well—if responsibility for post-trial duties cannot be determined, all counsel should be served.<sup>33</sup>

<sup>25</sup> Gravelle, "Some Goode News And Some Bad News", *The Army Lawyer*, February 1979, where, at footnote 64, the author states: "Three views are apparent: Judge Cook would serve either military or defense counsel; Judge Perry would serve both counsel, but service upon one presumes coordination of all defense counsel in the rebuttal effort; and, Chief Judge Fletcher would require service on civilian counsel as prime counsel."

<sup>26</sup> 11 M.J. 1 (C.M.A. 1981).

<sup>27</sup> *Id.* at 3. The court presumed this action was taken for administrative convenience.

<sup>28</sup> 11 M.J. 70 (C.M.A. 1981).

<sup>29</sup> *Id.* at 71. As in *Elliott*, the court viewed the government as taking this action for its administrative convenience.

<sup>30</sup> See note 22, *supra*.

<sup>31</sup> 11 M.J. 218 (C.M.A. 1981).

<sup>32</sup> *Id.* at 224. The court stated: "The proliferation of problems involving service of the staff judge advocate's review on the wrong attorney has reduced the anticipated benefits to be derived from the response procedure prescribed in *Goode*. However, rather than retreat from *Goode* itself, we prefer now to suggest some procedures which may reduce the problems."

<sup>33</sup> This escape clause seems similar to the position of Judge Perry in *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978).

As Fort Blank staff judge advocate, you must determine who has primary responsibility for post-trial duties. This should be evidenced in the record of trial, if the military judge in the case of Private Oxnard followed the *Robinson* suggestions. Your determination on service of the post-trial review should be reflected in the review. Finally, the escape clause—if all else fails, all counsel should get a copy of the review along with access to the record for performing post-trial responsibilities.

#### Time Constraints

You have cleared all the hurdles; the question is, have you done so in a timely fashion? Or, have delays in post-trial processing given rise to appellate relief for Oxnard, up to the ultimate remedy of dismissal of the charges? The artificial limits imposed by *Dunlap v. Convening Authority*<sup>34</sup> are no longer controlling. In place of these limits is a requirement to proceed reasonably in post-trial processing. *United States v. Banks*<sup>35</sup> removed the *Dunlap* constraints.

The Army Court of Review had dismissed the charges against Banks. In doing so, the court followed the *Dunlap* rule. The Judge Advocate General of the Army certified this issue to the Court of Military Appeals, questioning the correctness of the Court of Review action. In responding, the court decided the inflexible rule of *Dunlap* was no longer required. The

### Military Justice Amendments of 1981

On 20 November 1981, President Reagan signed "The Military Justice Amendments of 1981." The amendments, effective 20 January 1982, changed a number of aspects of military practice.

The amendments allow general court-martial convening authorities to place an accused who has received an unsuspended dismissal or an unsuspended dishonorable or bad conduct dis-

standard for post-trial timeliness now is as follows: There must be some error in the proceedings which requires a rehearing and because of the delay the accused would be prejudiced at the rehearing.<sup>36</sup>

While the legal requirement to process a case within ninety days after conviction is gone, ninety days should still be the goal for completion of post-trial processing. The Judge Advocate General strongly encouraged this in a letter to Army staff judge advocates in May of 1980.<sup>37</sup> The post-trial hurdles in *United States v. Oxnard* must be cleared in a reasonable time. From an administrative standpoint, processing should be complete and action taken within ninety days of the conclusion of the trial.

#### Conclusion

The post-trial processing of cases in the military is truly fraught with peril for the unwary staff judge advocate. Your post-trial actions will be scrutinized by appellate counsel, Court of Review judges, and possibly the Court of Military Appeals. This article has outlined some of the problem areas in the post-trial process. Actions must be completed reasonably and expeditiously. The record, as cornerstone of the appellate process, is of great importance. Only when post-trial actions are accomplished expeditiously, can you be assured that convictions will stand on appeal.

charge on involuntary excess leave. The accused may be placed on excess leave for any period of time from the date of sentence until action in the case is completed.

The amendments eliminate the need for dis-

<sup>34</sup> See note 14 *supra*.

<sup>35</sup> 7 M.J. 92 (C.M.A. 1979).

<sup>36</sup> *United States v. Gray*, 22 C.M.A. 443, 47 C.M.R. 484 (1973). (This is a return to the test in effect prior to *Dunlap*).

<sup>37</sup> DAJA-CL 1980/4959, 29 May 1980. In this letter Major General Clausen expressed concern over an Army-wide increase in processing time in the ten months following *Banks*.

parate treatment between preaction and postaction prisoners. This ends the prohibition against commingling adjudged and sentenced prisoners.

The amendments also provide that an accused is not entitled to representation by more than one military counsel. The convening authority *may* detail additional military counsel. The amendments further provided that the various service secretaries shall define "reasonably available" for purposes of requests for individually requested military counsel and establish procedures for determining whether such counsel are reasonably available.

With regard to petitions to the Court of Military Appeals, the amendments increase from 30 to 60 days the period during which an ac-

cused may petition the Court of Military Appeals after notification of the decision of the Court of Military Review. The amendments permit constructive service of decisions of the Courts of Review following service on appellate defense counsel. This constructive service is by certified mail to an address provided by the accused, or if no such address has been provided, to the accused's home of record.

The amendments provide a time limitation for filing Article 69, UCMJ, applications to The Judge Advocate General. An application must be filed by the later of either the last day of a two-year period from the date sentence was approved or 1 October 1983. An accused may still have an untimely application considered, if good cause for late filing can be established.

## FROM THE DESK OF THE SERGEANT MAJOR

*by Sergeant Major John Nolan*



**1. Force Alignment Plan:** Recently I have received an increased number of telephone calls and letters regarding promotion, reclassification, and assignment from personnel in CONUS and overseas commands. At present, the US Army Military Personnel Center (MILPERCEN) and the Deputy Chief of Staff for Personnel (ODCSPER) are making a vast number of changes (Force Alignment Plan) in all three areas. The Force Alignment Plan has been designed to improve skill match, eliminate poor performers, retain good performers, and support modernization of the Army. The following publications address the Force Alignment Plan in detail: The December issue of FOCUS, MILPERCEN Newsletter #4-81, dated 14 December 1981, DAPC-EP Message DTG 1819302 Nov 81, and the Army Personnel Letter, Issue #12-81. I encourage all legal clerks to obtain copies for current update.

**2. Court Reporting Equipment:** The procurement of 272 SONY AN/THN-23 Recorder-Reproducer sets is almost complete. The sets should be at CONUS depots by 1 March 1982. After "full provisioning" (i.e., repair parts are

stocked) is achieved, the set should be available for distribution pursuant to valid requisitions in September 1982. An additional 65 sets are being procured and should be available for distribution by January 1983. Ninety of the sets will be earmarked for distribution to JAG Reserve detachments, with the remainder being distributed to active SJA Offices. Appropriate changes to TO&E's have been initiated; however, MACOM and installation staff judge advocates should insure tht MTO&E's and TDA's are changed to authorize the new equipment in lieu of the older equipment. HQDA (DAMO-FDP) Message, DTG 122100Z Nov 81, Subject: Submission of Unauthorized Requisitions for End Items of Equipment Not Reflected in TAADS, precludes requisitioning the new equipment until authorization changes have been approved and formally updated in TAADS. Requisitions must be forwarded through channels to CERCOM (DRSEL-MMG-T), Fort Monmouth, NJ 07703. The OTJAG point of contact is Major John Burton, DAJA-PT, AUTOVON: 225-1353.

**3. Designation of the Proper Promotion**

**Point Value for Military Education:** Current promotion policy precludes awarding promotion points for completion of PNCOC or Primary Leadership Course (PLC) to soldiers who are subsequently reclassified to a new MOS that is not appropriate to the course they attended. FORSCOM/TRADOC has recommended to HQDA that previous attendance at either PNCOC or PLC meet the criteria for award of promotion points regardless of current MOS. The same recommendation was submitted by the MACOM CSMs at their conference. It appears that the recommendation will be approved.

**4. Noncommissioned Officer (NCO) Education System:** The FY 83 NCOES Selection Board is to convene at Fort Benjamin Harrison, Indiana, on 6 April 1982. An individual in grade E6 with a date of rank of 1 April 1977 through 31 March 1980 who has not been previously selected will be considered by this board. Completion of the record Enlisted Evaluation Report, if applicable, may be submitted. However, reports must arrive at Fort Benjamin Harrison through MILPO channels not later than 1 March 1982. No record packets are required because the packets being used by the E7 Selection Board will be utilized.

**5. SQT:** The 1981 SQT end of cycle test results have been received and have been analyzed.

The 1982 test *will not* be tracked for MOS 71D or 71E.

Regarding rumors of changes to the SQT, a conference was held 26-28 January 1982 to provide formal guidance to Training Development Directorates. As soon as I receive specific information regarding any changes, I will send that information to the field.

In the hands-on portion of the 1981 test, we have again noted a problem in the Assembling Correspondence test. Results showed that over

55% of soldiers tested received a NO-GO, with the exception of skill level 3 soldiers in track 3, which showed 28% of those soldiers received a NO-GO for this task. Validation results for this task have shown that it is extremely important for the soldier to *READ* the correspondence contained in this test in order to insure proper assembly. The 1982 SQT Notice will include a practice component test for this and other hands-on tests.

In the Skill Component portion of the test on validation, many soldiers who are assigned at the battalion level had problems with non-judicial punishment actions, particularly appeals. The test includes extracts of portions of applicable regulations which assist the soldier in responding correctly to the test questions. Again, it is important that the soldier *READ* all test material. End-of-cycle results in this area for 1981 reveal that soldiers did have problems in this area; however, the information does not specify where those soldiers were assigned. Individual SJA offices should place increased emphasis in this area.

No other problem areas have been revealed on the end-of-cycle test results.

The 1981 71D and 71E Soldiers' Manuals have been printed and should be available for initial distribution. If you have problems in procuring the new SM, contact US Army Soldier Support Center, Fort Benjamin Harrison, IN; POC: SFC Bill Thoma.

The SQT Development Team will be visiting Fort Bragg, Gordon, Knox, and Campbell in May or June of 1982 for validation testing for the 1983 SQT.

Inquiries about SQT are encouraged. Contact the Test Design personnel at AUTOVON 699-3378, or write to US Army Soldier Support Center, ATTN: ATZI-TD-SQT(71D/71E), Fort Benjamin Harrison, IN 46216.

## Judiciary Notes

*U.S. Army Legal Services Agency*

### Records of Trial

If for any reason the commander exercising court-martial jurisdiction is changed during some portion of the court-martial process and such change calls for an assumption of command document as required or authorized by paragraphs 3-1b, 3-3b, and 3-4a, AR 27-10, a copy of that document should be included in the record of trial or its allied papers. Staff judge advocates should establish procedures to insure that applicable assumption of command documents are furnished to their office and to the persons responsible for the assembly of the record.

### Initial Court-Martial Orders

Initial general and special court-martial orders must reflect the specifications as amended during the course of trial in accordance with the rulings of the military judge. In this connection, attention is invited to paragraph 12-4b(3)(f), AR 27-10. According to paragraph 82a, MCM 1969 (Rev.), trial counsel is responsible for the preparation of the record of trial. Therefore, when a specification has been amended during the course of trial, the trial counsel should advise, preferably in writing, the individuals responsible for drafting and publishing the court-martial orders.

## A Matter of Record

*Notes from Government Appellate Division, USALSA*

### Multiplicity

Multiplicious pleading is permitted to meet expected exigencies of proof; however, trial counsel should insure that such charges are properly construed during sentencing. If the court is with members (even a special court-martial), the military judge should instruct the members that the multiplicious charges are to be considered as one offense for sentencing. See p. 2-114, Draft Military Judges' Benchbook. If the trial is by military judge alone, trial counsel should request that the military judge state that he will consider the affected charges to be multiplicious for sentencing.

### Trial Preparation

Trial counsel are encouraged to prepare and use a trial notebook or a trial outline in all cases. In guilty plea cases trial counsel should prepare a checklist which includes the counsel rights advisement and the forum advice, the elements of the offenses, the factual basis for the plea, and the elements of the *Green-King* inquiry. During the plea inquiry, trial counsel should check off each item as it is covered by

the military judge. Be sure to include as the last item of the list, the announcement of findings.

In contested cases, the trial notebook can help counsel organize the presentation of the case and serve as a checklist during trial. If properly prepared, the trial notebook will assist the trial counsel in laying the foundation for the admission of evidence, because it will list the theories of admissibility and the necessary predicate questions for each piece of evidence at the point in the notebook that the evidence will be offered. Further, the notebook should list the order in which witnesses will be called and their expected testimony, highlighting the crucial portions of their testimony. The notebook should be used as a checklist to insure that all exhibits have been offered and admitted, expert witnesses have been offered and accepted as experts, and each element of the charged offenses has been proven. These examples are not hypotheticals; they are actual situations in which a well-prepared trial notebook would have helped counsel perfect the case.

## Legal Assistance Items

Major Joel R. Alvarey, Major Walter B. Huffman, Major John F. Joyce, Captain Timothy J. Grendell, and Major Harlan M. Heffelfinger  
Administrative and Civil Law Division, TJAGSA

### Truth-in-Lending Act—Effective Date of Truth-in-Lending Simplification and Reform Act Delayed

The effective date of the Truth-in-Lending Simplification and Reform Act has been delayed to 1 October 1982. Previously, it was to be effective on 1 April 1982. Creditors have had the option to use the old Act or the amended Act since 1 April 1981. Public Law 97-110 (1981).

### Truth-in-Lending Act—Material Disclosures

The amended Truth-in-Lending Act requires disclosure violations to be "material" before statutory damages of twice the finance charge are awarded. Actual damages, attorney's fees, and court costs may be awarded regardless of the "materiality" of the disclosure violation. Material disclosures are defined as those dealing with the amount financed; the finance charge; the total of payments; the number, amount, and due date of payments; and security interests. Upon enactment of the amendments, there were many who argued that violations of material disclosures would not be found by the courts so creditors would escape liability. This has not been the case.

A creditor failed to disclose the cost of credit life insurance with a mortgage loan. This resulted in an understatement of the undisclosed finance charge, which was material. *Wright v. Credithrift of America, Inc.*, Consumer Credit Guide ¶ 97,055 (U.S. Bankruptcy Court, S.D. Miss. 1981).

In a second case, the disclosure statement did not contain a car as part of the collateral. Even though the debtors knew the car was part of the security interest on the loan, the failure to disclose it was considered material. *Baker Bank and Trust Company v. Matthews*, Consumer Credit Guide ¶ 97,058 (La. Ct. of App. 1981).

### Fair Credit Reporting Act—Consumer report should not have been released to a private investigator. *Boothe v. TRW Credit Data* (D.N.Y. 1981), Consumer Credit Guide ¶ 97,068

Quality Mail Order House, managed by plaintiff Mr. Boothe, offered to sell Johnny Walker Red Label Scotch to a Swiss distributor. The Swiss distributor contacted the British producer of the whiskey to determine if Quality Mail Order House was a legitimate business. The British producer hired a private investigator to investigate Quality Mail Order House and Mr. Boothe. The private investigator obtained a consumer report on Mr. Boothe from the defendant.

The Fair Credit Reporting Act restricts the disclosure of information in a consumer report to one of its "permissible purposes" (15 U.S.C. § 1681b). Disclosure is permitted only for consumer credit, consumer insurance, employment, government license, and for other legitimate business purposes. The defendant argued that the private investigator obtained the information pursuant to a legitimate business purpose.

The court disagreed. It interpreted this justification as referring only to those transactions in which there is a "consumer relationship" between the requesting party (British producer) and the subject of the report (Mr. Boothe). There was no evidence Mr. Boothe had ever had any business dealings with the British producer.

### Survivor Benefits—Summary of Recent Statutory Changes in Military Survivor Benefits

Congress has recently enacted several changes to military survivor benefits. The major changes are:

a. Dependency and Indemnity Compensation (DIC), 38 U.S.C. § 401, *et seq.* Congress has

increased DIC payments by 11.2 percent. The new DIC rates, effective 1 October 1981, are:

E-1—\$415	0-1 —\$525
E-2—\$428	0-2 —\$542
E-3—\$438	0-3 —\$580
E-4—\$466	0-4 —\$613
E-5—\$479	0-5 —\$676
E-6—\$490	0-6 —\$761
E-7—\$514	0-7 —\$824
E-8—\$542	0-8 —\$903
E-9—\$567	0-9 —\$970
W01—\$525	0-10—\$1061
CW2—\$546	
CW3—\$562	
CW4—\$595	

b. Servicemen's Group Life Insurance (SGLI), 38 U.S.C. § 765, *et seq.* Congress has increased maximum SGLI coverage from \$20,000 to \$35,000 effective 1 December 1981 for active duty, ready reserve, and retired reserve members.

c. Veteran's Administration Burial Benefits. The \$300 Veteran's Administration burial allowance, formerly available to all veterans who served "in time of war", was limited, effective 1 October 1981, to veterans receiving VA pensions, VA compensation, or service disability retirement benefits at the time of their death.

**Survivor Benefits—Open Enrollment Period for Survivor Benefit Plan (SBP)**

In the past few years, Congress has made many improvements to the SBP. For example, the offset made against the SBP annuity when a surviving spouse becomes entitled to old-age social security payments is now limited to a maximum of 40% of the annuity. Under prior law, it was possible for social security payments to eliminate the entire SBP annuity. Be-

cause these improvements have made the SBP a more attractive plan than it was when many prior retirees made their irrevocable decision to decline SBP coverage, Congress has established an open enrollment period for eligible members to elect participation or increase participation in the SBP. The open enrollment period began on 1 Oct 81 and ends on 30 Sep 82.

There are two categories of members to whom the open enrollment period applies: (1) any eligible member who on the date of enactment (13 Aug 81) is not a participant in the SBP; and (2) any eligible member who on the date of enactment is a participant in the SBP but elected not to participate at the maximum level, or in the case of an eligible member who is married, elected to provide an annuity under the SBP for a dependent child and not for the spouse. An eligible member is a member or former member of the uniformed services who is entitled to retired or retainer pay on or before 13 Aug 81.

Eligible members in category (1) may now elect to participate in the SBP in the same manner as an election under 10 U.S.C. § 1448. Eligible members in category (2) may now elect to participate in the SBP at a higher level and/or to expand existing coverage for the eligible member's spouse at a level not less than the level provided for the dependent child. There is a two-year "penalty period" for those members who elect or increase SBP coverage during the open enrollment period. The "penalty" is that if a member dies before the end of the two-year period beginning on the date of election, the designated beneficiary will receive only the amounts withheld from retired pay that are attributable to the election.

### Computerized Legal Research FLITE

During the past year, Federal Legal Information Through Electronics (FLITE) has continued to make additional source material available for computerized information retrieval. FLITE's original data base contained only the United States Code. Comptroller General Decisions, Court-Martial Reports, Federal Case Law, JURIS and many more have been added,

giving FLITE access to over 30 different data bases. With the addition of the JURIS data bases, the headnotes of all state cases became available for searching. On a test basis, FLITE has access to LEXIS and WESTLAW data bases, which both include the full text of state cases.

LEGI-SLATE and REG-ULATE data bases have been added to the permanent research sources. LEGI-SLATE allows access to the congressional record, beginning with the 96th Congress, January 15, 1979. LEGI-SLATE is updated daily. Research done after noon EST is up-to-date through the previous business day. Congressional legislative activity including bill numbers, sponsors, short title, official title, committee agenda, committee referrals, citations of law being amended and references to similar or related bills can be searched.

REG-ULATE keeps track of information announced in the Federal Register. It contains the date and issue in which the text of an announcement can be found, the CFR reference, caption, issuing agency, contact points for fur-

ther information, and the law on which the rule or regulation is based. It includes executive orders or proclamations, proposed rules, notices and Sunshine Act meetings. FLITE can provide you with the information to refer to the Federal Register. REG-ULATE contains data from January 1, 1981 and is kept up-to-date with the most recent issue of the Federal Register.

FLITE, a DOD activity, has a staff of research attorneys experienced in computerized research. Services are available free to all levels of the military services to aid in the performance of official duties. To obtain FLITE research assistance or additional information simply call Autovon 926-7531, FTS or Commercial (303) 370-7531.

### TJAGSA Activities—Important Changes

#### Worldwide JAG Conference

The Worldwide JAG Conference originally scheduled for 12-15 October 1982, will be held during the period 5-8 October 1982 at TJAGSA.

#### 99th Judge Advocate Officer Basic Course

The 99th Judge Advocate Officer Basic Course, originally scheduled for 26 July-1 October 1982, will be conducted 18 October-17 December 1982.

### CLE News

#### 1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. **Fourth Military Lawyer's Assistant Course.** The 4th Military Lawyer's Assistant Course (512-71D/20/30) will be conducted at The Judge Advocate General's School during the period 12-16 July 1982. The course is open only to enlisted servicemembers in grades E-3 through E-6 and civilian employees who are serving as paraprofessionals in a military legal office, or whose immediate future assignment entails providing professional assistance to an attorney. Attendees must have served a minimum of one year in a legal clerk/legal paraprofessional position and must have satisfactorily completed the Law for Legal Clerks Correspondence Course NLT 12 May 1982. (No waivers will be granted.) Offices planning to send personnel must insure individuals are eligible before submitting names for attendance.

3. **Contract Attorneys Workshop. We Need Your Help.** The 4th Contract Attorneys Work-

shop will be held at TJAGSA on 12-14 May 1982. This workshop is for you, the contracting attorney working at the nitty-gritty level of government acquisition. It is your chance to share with other contract lawyers those knotty problems that you have faced locally and that are likely to be encountered again elsewhere. You and your staff judge advocate or command counsel are encouraged to begin thinking about problems you might want to present at the workshop. A problem submission format will accompany letters to the field in the near future. The workshop structure is designed to address problems faced at all stages of the acquisition process from formation to contract close-out. To make this workshop a success we need you *and* your ideas.

#### 4. TJAGSA CLE Course Schedule

March 8-12: 10th Legal Assistance (5F-F23).

March 22-26: 21st Federal Labor Relations (5F-F22).

March 29-April 9: 92nd Contract Attorneys (5F-F10).

April 5-9: 65th Senior Officer Legal Orientation (5F-F1).

April 20-23: 14th Fiscal Law (5F-F12).

April 26-30: 12th Staff Judge Advocate (5F-F52).

May 3-14: 3d Administrative Law for Military Installations (5F-F24).

May 12-14: 4th Contract Attorneys Workshop (5F-F15).

May 17-20: 10th Methods of Instruction.

May 17-June 4: 24th Military Judge (5F-F33).

May 24-28: 19th Law of War Workshop (5F-F42).

June 7-11: 67th Senior Officer Legal Orientation (5F-F1).

June 21-July 2: JAGSO Team Training.

June 21-July 2: BOAC (Phase VI-Contract Law).

July 12-16: 4th Military Lawyer's Assistant (512-71D/20/30).

July 19-August 6: 25th Military Judge (5F-F33).

August 2-6: 11th Law Office Management (7A-713A).

August 9-20: 93rd Contract Attorneys (5F-F10).

August 16-May 20, 1983: 31st Graduate Course (5-27-C22).

August 23-27: 6th Criminal Trial Advocacy (NA).

September 1-3: 6th Criminal Law New Developments (5F-F35).

September 13-17: 20th Law of War Workshop (5F-F42).

September 20-24: 68th Senior Officer Legal Orientation (5F-F1).

October 5-8: 1982 Worldwide JAGC Conference.

October 18-December 17: 99th Basic Course (5-27-C20).

#### 5. Civilian Sponsored CLE Courses

##### May

2-7: NJC, Civil Litigation—Graduate, Reno, NV.

6: ABICLE, Alabama Business Corporation Law, Montgomery, AL.

7: ABICLE, Alabama Business Corporation Law, Mobile, AL.

7: NYSBA, Trial of a Personal Injury Case, Rochester, NY.

7: GICLE, Will Drafting, Albany, GA.

9-14: NJC, Criminal Evidence—Graduate, Reno, NV.

13: ABICLE, Alabama Business Corporation Law, Huntsville, AL.

13: VACLE, Civil Litigation, Richmond, VA.

13-14: PLI, Tax, SEC & Accounting Aspects, New York City, NY.

14: ABICLE, Alabama Business Corporation Law, Birmingham, AL.

14: VACLE, Civil Litigation, Roanoke, VA.

14: NYSBA, Estate Litigation, Rochester, NY.

14: NYSBA, Tax Aspects of Divorce & Separation, New York City, NY.

14: NYSBA, Trial of a Personal Injury Case, Albany, NY.

14: GICLE, Will Drafting, Atlanta, GA.

20: VACLE, Civil Litigation, McLean, VA.

20-22: ABA, How to Market a Law Practice, Washington, DC.

21: VACLE, Civil Litigation, Norfolk, VA.

21: NYSBA, Estate Litigation, Binghamton, NY.

21: ABICLE, Gulf Shores Seminar, Sandestin, AL.

21: NYSBA, Trial of a Personal Injury Case, Long Island, NY.

21-22: GICLE, Bankruptcy Practice, Augusta, GA.

26-28: PLI, EEOC, New York City, NY.

28: ABICLE, Tax Seminar, Point Clear, AL.

28-29: GICLE, Law Office Management, Savannah, GA.

31-June 9: KCLE, Trial Advocacy, Lexington, KY.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426

H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly

- Madison House, 1520 H Street, N.W., Washington, DC 20003.
- FLB:** The Florida Bar, Tallahassee, FL 32304.
- FPI:** Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.
- GICLE:** The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.
- GTULC:** Georgetown University Law Center, Washington, DC 20001.
- HICLE:** Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.
- ICLEF:** Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.
- ICM:** Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.
- IPT:** Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.
- KCLE:** University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.
- LSBA:** Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.
- LSU:** Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.
- MCLNEL:** Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.
- MIC:** Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.
- MOB:** The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.
- NCAJ:** National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.
- NCATL:** North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.
- NCCD:** National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.
- NCDA:** National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.
- NCJFCJ:** National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.
- NCLE:** Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.
- NCSC:** National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203
- NDAA:** National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.
- NITA:** National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.
- NJC:** National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.
- NLADA:** National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.
- NPI:** National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).
- NPLTC:** National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

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

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

**JAGC Personnel Section**

*PP&TO, OTJAG*

**Retirements**

(November 1981-January 1982)

*Colonel*

ENDICOTT, James A., Jr. (retired grade: LTC)

MOONEYHAM, John A.  
MUNDT, James A.

*Lieutenant Colonel*

CUMMING, Richard E.  
MULLINS, Jack A.  
STOCKSTILL, Charles J.

**Current Materials of Interest**

**1. Theses.**

An inventory of the TJAGSA library shows the following theses are missing. If you have any of these theses, return them to the

TJAGSA library as soon as possible.

JAGS Dale, H.L.  
th Military assistance to civil  
.D139 authorities. 1971. 19th.

JAGS th .G548	Glasgow, Richard J. A comparative analysis of the rules of liability applicable to governmental and civilian aircraft flights resulting in damages to privately owned land. 1961. 9th.	JAGS th .P589	Picciotti, Romulus A. Postliminium. 1965. 13th.
JAGS th .H726	Holdaway, Ronald M. Voir dire—a neglected tool of advocacy. 1967. 15th.	JAGS th .P716	Platt, Edgar C. Military necessity and the development of the laws of war. 1965. 13th.
JAGS th .L848	Long, John W. The service couple & the Army—an overview. 24th. 1976.	JAGS th .S9215	Strom, Larry J. State motor vehicle no-fault insurance plans. 1976. 24th.
		JAGS th .W7515	Wilson, Norman S. Liability to passengers in military aircraft. 1967. 15th.

## 2. Regulations

<i>Number</i>	<i>Title</i>	<i>Change</i>	<i>Date</i>
AR 27-10	Military Justice	904	8 Jan 82
AR 135-200	Active Duty for Training and Annual Training of Individual Members	7	15 Jan 82
AR 135-215	Officer Periods of Service on Active Duty	901	8 Jan 82
AR 140-10	Assignments, Attachments, Details, and Transfers	911	23 Nov 81
AR 200-2	Environmental Effects of Army Actions	901	23 Dec 81
AR 380-5	DA Information Security Program Regulation		1 Nov 81
AR 600-200	Enlisted Personnel Management System	906	4 Dec 81
AR 600-200	Enlisted Personnel Management System	907	28 Dec 81
AR 630-10	Absence Without Leave Desertion	901	24 Nov 81
AR 635-40	Physical Evaluation for Retention, Retirement, or Separation	901	28 Dec 81
AR 670-1	Wear and Appearance of Army Uniforms and Insignia	901	1 Dec 81

By Order of the Secretary of the Army:

Official:

**ROBERT M. JOYCE**  
*Brigadier General, United States Army*  
*The Adjutant General*

**E. C. MEYER**  
*General, United States Army*  
*Chief of Staff*

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