

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

Consumer Law Notes

Watch Out for Reaffirmation in Bankruptcy

The National Consumer Law Center (NCLC) reports that the number of reaffirmations of debts in bankruptcy is on the rise as a result of aggressive practices on the part of creditors.¹ While legal assistance practitioners do not normally handle bankruptcies for soldiers, reaffirmations are an important topic for preventive law and initial bankruptcy counseling before referral to a civilian practitioner.

A reaffirmation is “[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable” in bankruptcy.² In essence, the debtor is agreeing that the reaffirmed debt will survive the bankruptcy and will not be discharged. In order to protect debtors from reaffirming unadvisedly, the agreement

must meet statutory requirements in the bankruptcy code before it will be enforceable.³ First, the agreement must be made before the discharge in bankruptcy.⁴ Second, the agreement must contain clear and conspicuous notices that it may be rescinded at any time before discharge and that the law does not require the debtor to enter into the agreement.⁵ Third, the creditor must file the agreement with the bankruptcy court.⁶ If the debtor was represented by an attorney in the negotiation of the agreement, that attorney must file an affidavit with the agreement which states that “[the] agreement represents a fully informed and voluntary agreement by the debtor; . . . [the] agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and . . . the attorney fully advised the debtor of the legal effect and consequences of [a reaffirmation agreement and] . . . any default under such an agreement.”⁷ If the debtor was not represented by an attorney during the negotiations, the agreement cannot be approved unless the bankruptcy court finds that the agreement will not be an undue hardship on the debtor or a dependent and that the agreement is in the debtor's best interest.⁸

Reaffirmations have attracted attention through the abusive practices of some established and reputable major consumer creditors.⁹ For example, the Federal Trade Commission (FTC) recently reached a settlement with Sears, Roebuck, and Company (Sears).¹⁰ The FTC claims that Sears “induced consumers who filed for bankruptcy protection to agree to reaffirm their Sears credit account debts, in order to keep their Sears credit card or merchandise.”¹¹ The FTC also alleged that in many of

1. *Abusive Creditor Reaffirmation Practices Require Strong Response*, 15 NCLC Reports, Bankruptcy and Foreclosures Edition 17 (Mar./Apr. 1997) [hereinafter NCLC Reports].

2. 11 U.S.C.A. § 524(c) (West 1997).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* § 524(c)(6)(A). It should be noted that this court approval provision does not apply to the extent that the debt is secured by real property. *Id.* § 524(c)(6)(B). Additionally, it is difficult to think of circumstances where reaffirmation will be in the debtor's best interest. The National Consumer Law Center (NCLC) suggests that:

[O]ne situation in which reaffirmation might be in the debtor's best interest arises when a creditor agrees to compromise a secured claim or agrees to restructure it in order to allow the debtor an opportunity to get payments back on track . . . [T]here are very few other situations in which a consumer legitimately benefits from a reaffirmation.

NCLC Reports, *supra* note 1, at 17 n.1.

9. See NCLC Reports, *supra* note 1, at 17.

these instances Sears misrepresented that the agreements would be properly filed with the bankruptcy court, as required, when in fact they were never filed.¹² The result was that Sears would be collecting money based on agreements that were not legally binding.¹³

This case presents three points which legal assistance practitioners should keep in mind. First, even reputable companies may conduct themselves in a manner that does not comply with the law. Second, this conduct often occurs outside the presence of an attorney. In the context of bankruptcy, this absence of representation gives rise to certain additional protections for the debtor—namely, court approval of the agreement.¹⁴ Third, the bankruptcy code provides “important consumer protections . . . designed to give consumers in dire financial circumstances a fresh start.”¹⁵ By coercing consumers to pay debts they do not legally owe, creditors undermine this important provision of the law.

What should a legal assistance office do about this situation? Primarily, attorneys should be vigilant in their preventive law efforts and put in the hands of soldiers information about bankruptcy rights and obligations. Additionally, legal assistance offices should establish standardized preliminary bankruptcy counseling that includes cautionary advice about the reaffirmation of debts. The advice could contain language such as: “Should you decide to file for bankruptcy, you may be approached by creditors asking you to enter into agreements with them reaffirming your debts. You should not enter into any agreements without consulting with the attorney who is advising you on the bankruptcy.” Providing this advice should minimize the number of soldiers who fall victim to the aggressive reaffirmation efforts of creditors. Major Lescault.

More Bad News on Delinquent Student Loans

A recent issue of *The Army Lawyer* contained a practice note which referred to a report by the NCLC on the increasing use of tax intercepts to collect student loans.¹⁶ The NCLC also reports that the Department of Education (DOE) is mandating wage garnishment for certain delinquent student loans.¹⁷ The DOE mandates that administrative garnishment be sought from the borrower no later than the 225th day after the guaranty agency pays a default claim on a borrower’s loan.¹⁸

The DOE regulations limit the amount that may be garnished to ten percent of the borrower’s disposable pay.¹⁹ “Disposable pay” means “that part of the borrower’s compensation from an employer remaining after the deduction of any amounts required by law to be withheld.”²⁰ Additionally, federal law limits administrative garnishment to twenty-five percent of disposable pay or the amount by which disposable income exceeds thirty times the current minimum wage, whichever is less.²¹ Attorneys, therefore, should use these numbers to calculate the limit that best protects the client.

There are other protections built into the DOE’s administrative garnishment procedure as well. Borrowers who have been involuntarily separated from employment, for example, are protected from wage garnishment until they have been reemployed continuously for a period of twelve months.²² In initiating the procedures for garnishment, the agency must give the borrower at least thirty days notice,²³ the opportunity to inspect the agency’s records concerning the debt,²⁴ and an opportunity for a hearing regarding the debt.²⁵ Perhaps most important, the agency is required to offer the borrower a repayment agreement “under terms agreeable to the agency.”²⁶ This may be an area

10. *Id.* See also Federal Trade Commission News Release, *FTC Settlement with Sears, Roebuck to Safeguard \$100 Million Redress to Consumers* (visited 14 July 1997) <<http://www.ftc.gov/opa/9706/sears.htm>> [hereinafter FTC News]. Note also that the full text of the FTC’s agreement with Sears is available at <<http://www.ftc.gov/os/9706/searsroe.htm>>.

11. FTC News, *supra* note 10.

12. *Id.*

13. *Id.*

14. See *supra* note 8 and accompanying text.

15. FTC News, *supra* note 10.

16. Major Maurice A. Lescault, Jr., *The IRS Helps to Collect Student Loans*, *ARMY LAW.*, July 1997, at 30.

17. *Guaranty Agencies to Begin Wholesale Wage Garnishments*, 15 NCLC Reports, Deceptive Practices & Warranties Edition 14 (Jan./Feb. 1997).

18. *Id.*, citing 34 C.F.R. § 682.410(b)(6)(vii)(A) (1996).

19. 34 C.F.R. § 682.410(b)(10)(i)(A) (1997).

20. *Id.*

21. 15 U.S.C.A. § 1573 (West 1997).

22. 34 C.F.R. § 682.410(b)(10)(i)(G).

where legal assistance practitioners can produce positive outcomes for clients by negotiating effectively with the guaranty agency.

The bottom line is that ignoring obligations based upon student loans is more and more dangerous. Legal assistance practitioners should remain abreast of developments in student loan collections and use the information in their preventive law programs. Moreover, attorneys must know proper procedures for all avenues that a guaranty agency may use to collect from a client. This is the only way that the attorney can properly protect the client's interests. Major Lescault.

Family Law Note

Louisiana First State to Pass Covenant Marriage Statute

On 23 June 1997, the Louisiana State Legislature overwhelmingly passed a bill prescribing a new form of marriage known as "covenant marriage."²⁷ After 15 August 1997, anyone applying for a marriage license in Louisiana must choose between a license for a traditional marriage or a covenant marriage.²⁸ A covenant marriage is defined by the bill as one entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship.²⁹ A covenant marriage restricts the grounds for divorce, should the marriage run into trouble later, to fault grounds of adultery, abuse, abandonment, and imprisonment for a felony.³⁰ The covenant marriage does not completely eliminate the no fault grounds, but the length of separation required for a cove-

nant marriage to dissolve on no fault grounds is two years, as opposed to the six month requirement for a traditional marriage in Louisiana. If there are no children of the marriage, the covenant marriage can also be terminated if the parties are legally separated for one year. The legal separation, however, must be based on one of the fault grounds (adultery, abandonment, abuse, or imprisonment for a felony) with the additional grounds for legal separation of "habitual intemperance" or "cruel treatment."³¹

Couples who choose the covenant marriage must also agree to premarital counseling by a clergy member or other counselor. This counseling must include a discussion of the restrictions of the covenant. Likewise, should a covenant marriage fail, the couple must agree to go through counseling prior to a divorce.³²

Louisiana is the first state to adopt such a statute.³³ Similar attempts to reform the no fault divorce statutes in other states have failed in recent years.³⁴ According to the bill's sponsor, the statute's goal is to reduce the divorce rate by not only making it tougher to get divorced, but also making couples think about and discuss their expectations of marriage prior to taking their marriage vows.³⁵ There is no requirement for counseling prior to marriage or divorce for couples who opt for the traditional marriage license.

The statute is not limited to new marriages entered after the effective date of 15 August 1997. The statute allows for those who already were married under a Louisiana license to convert their traditional marriage to a covenant marriage.³⁶

23. *Id.* § 682.410(b)(10)(i)(B).

24. *Id.* § 682.410(b)(10)(i)(C).

25. *Id.* § 682.410(b)(10)(i)(E).

26. *Id.* § 682.410(b)(10)(i)(D).

27. H.B. 756, H.L.S. 97-1817, Reg. Sess. (La. 1997). The bill passed the House 98-0 and the Senate 37-1.

28. Governor Mike Foster has already indicated that he will sign the bill into law.

29. H.B. 756, H.L.S. 97-1817, § 272 A.

30. *Id.* § 307.

31. *Id.* § 308.

32. The covenant marriage license must include a declaration of intent to enter a covenant marriage which must set out in writing that the relationship is lifelong, that counseling emphasizing the nature and purpose of marriage was received, and that each party commits to seeking marital counseling if marital difficulties arise. This declaration of intent must be signed and notarized.

33. Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bond*, N.Y. TIMES, June 24, 1997, at A1.

34. *Id.*

35. *Id.*

36. H.B. 756, H.L.S. 97-1817, § 275A. This provision requires a married couple to present a declaration of intent which meets the statutory requirements to the office where the original marriage license is filed. Each month, those declarations of intent will be forwarded to the state registrar of vital records.

Whether high divorce rates in the United States result from the ease of divorce under no fault systems remains the subject of heated debate. How the new Louisiana covenant marriage statute works over the next several years will undoubtedly add to that debate. Although the statute makes a covenant marriage voluntary, several religious denominations have already indicated that they will only marry couples who obtain the covenant marriage license.

How will this statute potentially impact on couples where one or both of the parties is a member of the military? Anyone electing to marry in Louisiana after 15 August 1997 may enter a covenant marriage. Military life is certainly one of the most transient of society. If the termination of the marriage is later undertaken in another state, after duly meeting the residency and jurisdictional requirements of that state, the covenant entered into in Louisiana will not prevent the divorce. The divorce under those circumstances may be based on no fault grounds, and couples may file for divorce without the counseling contained in the covenant marriage. Therefore, the greatest impact will be the requirement to carefully consider the responsibilities of marriage before applying for the marriage license. Major Fenton.

Tax Note

Indemnity Payment Must be Included in Gross Income

The Internal Revenue Service (IRS) has privately ruled that a taxpayer must include in his gross income money received from a malpractice claim against his attorney. The attorney incorrectly advised the taxpayer that payments the taxpayer was required to make to his former spouse would qualify as alimony.³⁷ As a result, the taxpayer thought that the payments would be deductible from his gross income. In fact, the payments did not qualify as alimony because the payments did not terminate at the death of the payee spouse.

The taxpayer obtained a divorce from his wife, and the divorce settlement required him to pay his wife a monthly amount of support for a fixed period of time. The agreement also provided that if the former spouse died the payments would be payable to her estate. The taxpayer's attorney incorrectly advised him that the payments would be deductible as alimony.³⁸

The taxpayer filed his tax returns, claimed the alimony deduction, and was audited. The IRS disallowed the alimony deduction because the payments did not qualify as alimony. The taxpayer paid the taxes and sought indemnity from his former attorney's malpractice insurer. The question presented to the IRS was whether the indemnity payment would be included in the taxpayer's gross income.

The taxpayer argued that the payments should not be included in his gross income. In support of this proposition, the taxpayer cited *Clark v. Commissioner*³⁹ and Revenue Ruling 57-47.⁴⁰ Both *Clark* and the revenue ruling found that an indemnification payment was not included in the taxpayer's gross income. The IRS distinguished both *Clark* and the revenue ruling and found that this taxpayer would have to include the indemnification payment in his gross income.

In *Clark*, the taxpayers made an irrevocable election to file a joint return based on the advice of their tax return preparer. If they had filed separate returns, their combined tax liability would have been \$19,941.10 less than the amount they paid by filing joint returns. The Board viewed the excess tax paid as a result of the preparer's negligence to be a loss and held that the indemnification payment was a nontaxable recovery of capital rather than income.⁴¹ Thus, the indemnification payment was not included in their gross income.

In Revenue Ruling 57-47, the tax preparer made an error in calculating the amount of taxes that the taxpayer had to pay. By the time the taxpayer discovered the error, the statute of limitations for amending the return had passed. The IRS concluded that the taxpayer did not have to include the amount recovered from the preparer in his gross income and cited *Clark* for its authority.⁴²

In its private letter ruling, the IRS distinguished both *Clark* and Revenue Ruling 57-47. In *Clark* and Revenue Ruling 57-47 the taxpayers were reimbursed for the taxes they paid that were in excess of the minimum proper federal income tax. In this taxpayer's case, however, he paid the minimum proper federal income tax. This taxpayer's problem relates to the underlying transaction, which is the divorce settlement.

The private letter ruling illustrates once again that in order to qualify for alimony treatment, spousal support payments must, among other requirements, terminate at the death of the payee spouse. Attorneys who do not understand this basic tenet are

37. Priv. Ltr. Rul. 97-28-052 (July 11, 1997).

38. The payments are not entitled to alimony treatment because they do not terminate on the death of the payee spouse as required by I.R.C. § 71(b)(1)(D).

39. 40 B.T.A. 333 (1939), *acq.*, 1957-1 C.B. 4.

40. 1957-1 C.B. 23.

41. *Clark*, 40 B.T.A. 333.

42. Rev. Rul. 57-47, 1957-1 C.B. 23.

probably guilty of malpractice. In cases where a client received incorrect advice concerning the tax treatment of spousal support payments, the client should be advised of the possibility of recovering the amount of any excess taxes, interest, and penalties paid as a result of that incorrect advice. The client should also be advised that any recovery similar to the one in this case will most likely be included in his gross income. Lieutenant Colonel Henderson.

Labor Law Note

Merit Systems Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act

In the past year, the Merit Systems Protection Board (MSPB) has dealt with the first four cases⁴³ in which federal employees seek reemployment rights as the result of prior military service pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴⁴ Two of the four cases involved probationary status federal employees.⁴⁵

The USERRA provides specific rights to federal workers who have been activated to military duty. These rights include reinstatement to their civilian jobs, accrued seniority, continuation of civilian employment status, employer provided health insurance and nonseniority benefits, training, and special protection against discharge except for cause.⁴⁶ The USERRA also protects federal workers and potential federal workers against discrimination because of their active or reserve military membership.⁴⁷

The federal government cannot deny federal employment, reemployment, retention in employment, promotion, or any benefit of employment to a federal employee because he is a member of, applies to be a member of, or has been a member of a uniformed service or because the federal employee performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.⁴⁸ The USERRA also makes it unlawful for a federal agency to seek any reprisal against a federal employee for taking action to enforce his rights under the USERRA. The protection against reprisal also extends to anyone who assists the aggrieved employee in asserting his USERRA rights by testifying or assisting in an investigation involving the agency.⁴⁹

The USERRA sets up a standard which is favorable to federal employees for proving discrimination based upon military status. If a protected activity, such as service in the reserve components, was a motivating factor (not necessarily the only factor) in an adverse personnel action taken by the agency (or in the withholding of a favorable personnel action) against the employee, such action is unlawful, unless the employer can prove that the adverse action (or withholding) would have been taken even in the absence of the protected activity.⁵⁰ Proof can be direct evidence of discriminatory intent or acts or circumstantial evidence similar to that used in Title VII discrimination cases.⁵¹

The USERRA provides that the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor will assist federal employees in investigating federal agencies accused of USERRA violations. The VETS has subpoena and contempt powers to gain access to agency witnesses and documents to complete its investigations.⁵² If a federal employee

43. *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996).

44. Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994) (codified at 38 U.S.C. §§ 4301-33). See also *Restoration to Duty From Uniformed Service*, 60 Fed. Reg. 45,650 (1995) (to be codified at 5 C.F.R. pts. 353, 870, 890).

45. *Jasper*, 73 M.S.P.R. 367; *Wright*, 73 M.S.P.R. 453. Probationary and temporary federal employees are covered under the USERRA. 38 U.S.C.A. §§ 4303(4)(A)(ii), 4311(a), 4324(b) (West 1996). See also 5 C.F.R. § 353.103 (1997).

46. 38 U.S.C.A. §§ 4312-18. See also 5 C.F.R. §§ 353.107-08, 353.207, 353.209, 890.303-05, and 890.501-02.

47. 38 U.S.C.A. § 4311. See also 5 C.F.R. § 353.202.

48. 38 U.S.C.A. §§ 4301-18. "Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, inactive duty training [Reserve Component weekend drill], full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty." *Id.* § 4303(13). See also 5 C.F.R. § 353.102.

49. 38 U.S.C.A. § 4311. See also 5 C.F.R. § 353.202.

50. 38 U.S.C.A. § 4311(b). See also *Gummo v. Village of Depew*, 75 F.3d 98, 104-07 (2d Cir. 1996); *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996); *Novak v. Mackintosh*, 919 F. Supp. 870 (D.S.D. 1996); *Hansen v. Town of Irondequoit*, 896 F. Supp. 110, 114 n.3 (W.D.N.Y. 1995); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Petersen v. Department of Interior*, 71 M.S.P.R. 227(1996); H.R. REP. No. 103-65, at 21 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2457.

51. *Wright*, 73 M.S.P.R. at 455; *Jasper*, 73 M.S.P.R. at 371.

52. 38 U.S.C.A. §§ 4321-22, 4326. See also 5 C.F.R. § 353.210.

requests help from the VETS regarding a potential USERRA violation the VETS will attempt to contact the agency to explain the law. If the VETS investigator's explanation of the law does not cause the agency to comply with the law, the VETS may initiate an investigation of the agency.⁵³ If the investigation establishes a probable violation and the agency refuses to comply, the VETS will refer the case to the Office of Special Counsel (OSC).⁵⁴ If the OSC finds that the case has merit, it will represent the federal employee before the MSPB at no charge to the employee.⁵⁵

Federal employees can also submit their complaints directly to the MSPB, *pro se*, even if they have not sought assistance from the VETS in investigating their complaints, have been turned down by the OSC for representation for "lack of merit," or have not requested representation by the OSC.⁵⁶ There is no requirement that the employee exhaust all of his remedies; thus, investigation by the VETS and representation by the OSC are not prerequisites to filing a complaint with the MSPB.⁵⁷ Currently, there are also no time limits for filing a USERRA complaint with the MSPB. Administrative rules have not been published yet, and the USERRA provides no MSPB filing time limits.⁵⁸ Congress has explicitly stated that the USERRA protections and rights are to be "broadly construed and strictly enforced."⁵⁹

The USERRA establishes a new area of jurisdiction for the MSPB. The Board has the authority to hear military reemployment and discrimination cases involving federal employees who normally would not have a jurisdictional right to present a case before the Board (for example, temporary and probationary employees).⁶⁰ In light of the expansion of the MSPB's jurisdiction, the USERRA requires the Secretary of Defense to inform federal employees and agency managers of the rights, benefits, and obligations created by the USERRA.⁶¹ Furthermore, Congress has designated the federal government as a "model employer" under the USERRA.⁶²

If the MSPB determines that a federal agency violated the USERRA, the MSPB "shall enter an order requiring the agency or employee to comply [with the USERRA] and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance."⁶³ If the employee chose to employ private counsel to represent him in the matter before the MSPB and wins, the attorney may also petition the MSPB for reasonable attorney fees, expert witness fees, and "other litigation expenses."⁶⁴ If the agency prevails, the federal employee, or the OSC (if the OSC represented the worker before the Board), may appeal the decision to the United States Federal Circuit Court of Appeals.⁶⁵ The USERRA does not allow the employer agency to appeal an adverse MSPB decision regarding USERRA rights.⁶⁶

53. 38 U.S.C.A. § 4322(e).

54. *Id.* § 4324 (a)(1).

55. *Id.* § 4324 (a)(2). *See also* 5 C.F.R. § 353.210.

56. 38 U.S.C.A. § 4324 (b)-(c)(1). *See also* 5 C.F.R. § 353.211.

57. *Petersen v. Department of Interior*, 71 M.S.P.R. 227, 233 (1996).

58. *See, e.g., Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997) (eight months between last request for reemployment to agency and MSPB filing); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997) (two and one-half months between separation and MSPB filing); *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997) (less than three months between separation and MSPB filing); *Petersen*, 71 M.S.P.R. at 227 (one month between last request to agency for reemployment and MSPB filing). As of this date, the MSPB has not promulgated regulations regarding USERRA appeals submitted to the Board under its appellate jurisdiction, except as to attorney fees. The Board has the authority to initiate such regulations under its enabling legislation (5 U.S.C. § 1204(h)) and under the USERRA (38 U.S.C.A. § 4331(b)(2)(A)). Agency counsel may be able to argue the equitable defense of laches in extremely untimely cases. *See Jordan v. Kenton County Board of Education*, No. 95-6569, 1996 U.S. App. LEXIS 25304, at *4 (6th Cir. Sept. 6, 1996) (holding that laches barred reemployment rights claim in case of ten-year delay); *Farries v. Stanadyne/Chicago Division*, 832 F.2d 374, 380-82 (7th Cir. 1987) (holding that laches barred reemployment rights claim in case of nine-year delay).

59. *Petersen*, 71 M.S.P.R. at 236. H.R. REP. No. 103-65, pt. 1, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2454, 2456.

60. *See supra* text accompanying note 45.

61. 38 U.S.C.A. § 4333 (West 1996). *See also* 5 C.F.R. § 353.104 (1997) (Federal agencies must notify employees of their rights and obligations under the USERRA).

62. 38 U.S.C.A. § 4301(b).

63. *Id.* § 4324(c).

64. Attorney Fee Rules-MSPB, 62 Fed. Reg. 17,045 (1997) (to be codified at 5 C.F.R. §§ 1201.202(a)(7), 2301.203).

65. 38 U.S.C.A. § 4324(d).

66. *Id.*

The case of *Petersen v. Department of the Interior* best illustrates the USERRA's impact on federal employees. The plaintiff asserted that he was unfairly discriminated against by the Department of the Interior because of his disabled Vietnam veteran status.⁶⁷ He alleged that he was removed from his prestigious park ranger law enforcement position to an office desk job because of the antimilitary attitude of his superiors; that he was subjected to a "hostile work environment" by his coworkers and supervisors; and that he was regularly called names such as "psycho," "babykiller," and "platehead," despite his complaints to his superiors to stop such comments.⁶⁸ The MSPB found that Mr. Petersen had provided sufficient factual allegations to raise the issue that he was denied a "benefit of employment" when the agency removed his law enforcement status and that the broad antimilitary discrimination language of the USERRA provided sufficient basis to allow allegations of a hostile work environment.⁶⁹

In the other three recent cases,⁷⁰ the MSPB held that it had expanded jurisdiction under the USERRA to hear prior military service discrimination cases, including those involving probationary federal employees. All three of the cases were remanded to hearing officers to further develop the factual basis of the plaintiffs' claims. The OSC did not represent the plaintiffs in any of the four reported cases.⁷¹

The USERRA adds another means for federal employees to challenge adverse agency personnel decisions. Federal labor counsel and legal assistance attorneys who advise reserve members should take note of this new and potentially powerful statute which protects the rights of federal employee citizen-soldiers to employment, reinstatement, promotion, and employee benefits. The number of MSPB cases in this area is very likely to grow rapidly as reserve soldiers, sailors, and airmen are called more often to mobilize and to leave their federal employment⁷² for temporary periods of active duty and as federal employee reservists become more aware of their USERRA

rights. Labor counselors should also look for new USERRA regulations which will be promulgated by the Office of Personnel Management, the MSPB, and the OSC. Lieutenant Colonel Conrad.

Operational Law Note

Educating the Soldier-Lawyer: Introducing the Two-Week Operational Law Seminar

"If the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice."⁷³

"Operational law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior SJAs may be as close to the commander as his operations officer or his chief of staff . . . Operational Law and International Law are the future."⁷⁴

Introduction

On 27 October 1997, The Judge Advocate General's School, U.S. Army (TJAGSA), Charlottesville, Virginia, will unveil the first two-week version of the Operational Law Seminar. The current one-week course, taught three times a year, is already considered to be one of the finest and most comprehensive courses on operational law offered anywhere in the world. The fundamental goal of the new course is to expose students to the many facets of operational law⁷⁵ and to develop practical skills through seminars and practical exercises; the time spent in seminars is nearly quadrupled in the new course. Overall, the two-

67. *Petersen v. Department of Interior*, 71 M.S.P.R. 227 (1996).

68. *Id.* at 235.

69. *Id.* at 236.

70. *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997).

71. The OSC, although granted regulatory authority to draft regulations regarding USERRA representation of federal employees, has not promulgated any regulations at this time and has not represented any federal employee in a reported case before the MSPB or the Federal Circuit. See 38 U.S.C.A. § 4331(b)(2)(B).

72. As of 1997, one out of every eight Reserve Component members was a federal employee. Also, 11.6% of the DOD civilian workforce are reservists. John Pulley, *A Role in Reserve*, FED. TIMES, Mar. 31, 1997, at 1, 12, 15-24.

73. Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 36, 37 (1996).

74. Lieutenant General Anthony C. Zinni, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 15, 17, quoted in Warren, *supra* note 73, at 73.

75. Operational law is defined as "that body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. forces across the entire operational spectrum." INTERNATIONAL AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 1-1 (June 1997). This is a deliberately broad definition which accommodates the interdisciplinary, interservice, interagency, international, and interesting practice of law in which judge advocates resolve legal issues stemming from the use of U.S. military forces to accomplish the missions of the nation.

week course will be a solid stepping stone for students to develop expertise in the areas of legal practice that have become essential components of operational success in every recent operation. This note summarizes the development of operational law as a formal part of the curriculum for developing judge advocates, and will describe the structure of the two-week course as it relates to the ongoing evolution of operational law as a discipline.

History

Since the term “operational law” became recognized as an essential component of the military legal community’s lexicon, the development of this broad body of law has been firmly linked to commentary and instruction produced at TJAGSA.⁷⁶ In July 1987, TJAGSA faculty published the first meaningful literature regarding operational law.⁷⁷ In his seminal article, *Operational Law—A Concept Comes of Age*, Colonel David E. Graham defined operational law and explained its future.⁷⁸ Colonel Graham observed that the art of operational law transcends “normally defined legal disciplines,” but he reminded judge advocates that operational law is a “comprehensive, yet structured” approach to serving the needs of the Army.⁷⁹

Even before the publication of Colonel Graham’s article, TJAGSA’s International Law Division⁸⁰ began the complex task of integrating operational considerations into its traditional legal curriculum. In 1987, the International Law Division revised its graduate level program to offer an entire quarter of instruction devoted entirely to operational law.⁸¹ The instruction within the graduate course was centered on a model that featured “five distinct forms of overseas deployments”⁸² and which focused on the discrete areas of law that become applicable during each form of deployment.

In addition to the changes made to the graduate course, the International Law Division developed a new continuing legal education course referred to as the Judge Advocate and Military Operations Overseas (JAMO) Seminar. The faculty designed the course to provide junior judge advocates with the knowledge and materials they would need in the five operational settings which had been integrated into the graduate course curriculum. Using a seminar and practical exercise format, the faculty introduced students to topics such as combat claims, combat contracting, low-intensity conflict, security assistance, and the role of the International Committee of the Red Cross.

After seven JAMO courses, TJAGSA changed the name of the course to the “Operational Law Seminar” in October 1990.⁸³ The name change signified the transition of operational law from a loose collection of legal regimes to an independent discipline of practice and study, but it was not accompanied by any significant substantive change in course structure or content. Shortly thereafter, the course began to change dramatically. In the aftermath of Operations Desert Shield and Desert Storm, the International Law Division added to the seminar additional material which mirrored legal practice in actual operations. By June 1993, the chair of the International and Operational Law Department noted that the seminar had become the only course of its kind in the world. It offered instruction in nearly every area of legal practice within the contemporary operational setting.

Faculty from the International and Operational Law Department surveyed judge advocates and commanders during recent operations to determine their needs. The primary strength of the Operational Law Seminar has been the faculty’s ability to incorporate into the course curriculum the product of these surveys and to adapt the course to meet the needs of judge advocates in contemporary operational settings.

76. The lead role played by TJAGSA in developing and expanding the formal curriculum associated with operational law as a discipline in no way denigrates the contributions of judge advocates in the field. Judge advocates have had critical operational responsibilities since the beginning of the nation. See Warren, *supra* note 73, at 36-42; see also U.S. DEP’T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JAGC, 1775-1975* (1975); MAJOR GENERAL GEORGE S. PRUGH, U.S. DEP’T OF ARMY, *VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973* (1975); Colonel Ted B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19 (1988).

77. Lieutenant Colonel David E. Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW., July 1987, at 9.

78. *Id.*

79. *Id.*

80. Now known as the International and Operational Law Department.

81. The graduate course at TJAGSA is a one year Master of Laws program which is accredited by the American bar Association and is offered to career judge advocates. The program includes courses offered by four teaching departments: the International and Operational Law Department, the Criminal Law Department, the Administrative Law Department, and the Contract Law Department.

82. Graham, *supra* note 77, at 11. Colonel Graham described the five types of deployments as follows: (1) U.S. forces stationed overseas (under a stationing arrangement); (2) deployment for conventional combat missions; (3) deployment for security assistance missions; (4) deployment for overseas exercises; and (5) deployment for nonconventional missions.

83. The name change was approved by The Assistant Judge Advocate General in July 1988, based upon the recognition that operational law had received as a “stand alone” body of law. See Memorandum from Major Mark D. Welton, Senior Instructor, International Law Division, to Commandant, The Judge Advocate General’s School, U.S. Army, subject: Program of Instruction, 8th Operational Law Seminar (17 October 1990) (on file with the International and Operational L. Dep’t, TJAGSA).

Since the closing day of Operation Desert Storm,⁸⁴ however, military operations have become increasingly complex. Much has been written regarding the difficulty of properly preparing commanders and legal advisors for these operations.⁸⁵ The greatest challenge is the diversity of the operations themselves and the importance of the law to nearly every decision made within and about the operational setting.

The Operational Law Seminar kept pace with this challenge by continually adding new material to the curriculum of the course. From August 1994 to January 1997, instruction was added to the seminar in the areas of: (1) civil military operations, (2) intelligence law, (3) environmental law aspects of overseas operations, (4) peace operations, (5) domestic operations, (6) civilian protection law, (7) funding U.S. military operations, (8) the Center for Law and Military Operations Watch, and (9) noncombatant evacuation operations. Additionally, instruction was expanded in the areas of rules of engagement, international legal basis for the use of force, operation plans review, and deployment planning and preparation.

The goal of the seminar is to prepare judge advocates to serve effectively and confidently within the operational setting as operational multipliers. The changes, modifications, and additions to the seminar enabled the faculty to achieve this goal during the past five years. The seminar reached a critical point in the past year as commanders came to rely ever more on the advice of attorneys in operational settings. During this period, the fast-paced operational tempo of the United States Army forced the Judge Advocate General's Corps to deploy many of its junior officers into demanding operational settings. Diverse and complex legal issues confronted these young officers. Frequently, their previous education and experience had done little more than introduce them to such issues. Even the highly regarded Operational Law Seminar could not and had not dealt with these issues in sufficient detail to give these judge advocates the competence and confidence required in the operational setting. In fact, the continuous evolution of the course

content forced the International and Operational Law Department to remove most of the seminars and practical exercises that were critical to a clear understanding of the complex legal issues that were raised during the course lectures. Deciding not to abandon its original goal and charter, the faculty carefully crafted a new course.

The New Two-Week Operational Law Seminar

The most dramatic change between the original seminar and the new seminar is not its length; it is the approach. The new Operational Law Seminar will have nearly a four-hundred percent increase in the number of seminar and practical exercise hours.⁸⁶ The idea is to provide students with more than the academic concepts, rules, and school solutions. As always, the faculty will teach general legal principles, but the seminars and practical exercises will begin where the lectures stop. The practical exercises will be based upon real world scenarios from recent operations. In almost every instance, the formal lecture does not immediately precede the associated seminar. The intent is to allow time for students to interact with each other and the faculty, to complete some assigned readings in preparation for the seminar, and to reflect on the materials presented during the class.

For example, after providing detailed instruction on the Standing Rules of Engagement (SROE),⁸⁷ the faculty will provide each student with a complete copy of the classified SROE, along with electronic messages which are identical to the messages received by staff officers at each level of command before and during an actual deployment. The students will be assigned to small staff groups and tasked to work their way through problems that have surfaced during recent operations. Instead of merely understanding the legal principles that support rules of engagement, each student will understand the judge advocate's role in drafting, changing, and publishing rules of engagement. Students will also learn how to develop and to execute the situational training exercises which have proven to

84. Operation Desert Storm officially came to a close on 28 February 1991, after the signing of a cease-fire by General Norman H. Schwarzkopf. Operation Desert Storm, an international armed conflict, is now regarded as an aberrational operation. Of the dozens of operations executed since that day, all have been characterized as military operations other than war.

85. See Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3.

In the last decade, however, the most frequent application of United States power occurred in diverse operations that repeatedly defied the application of the traditional law of armed conflict. During the course of each of these operations, military lawyers have experienced difficulty finding the overall regime or structure of laws that provides answers for the complex legal issues generated by these new age and nuanced operations.

Id. See also Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff*, ARMY LAW., Aug. 1995, at 5.

86. Seminars and practical exercises have been added or dramatically expanded in the following areas: legal basis for the use of force, status of forces agreements, intelligence law, civilian protection law, deployment claims, OPLAN development, rules of engagement development and training, rules of engagement and staff integration, funding U.S. military operations, and practicing expeditionary law.

87. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) (classified as a SECRET document, including an unclassified portion, Enclosure A, which is intended for wide distribution).

be critical for preparing deploying units in numerous recent operations.

The new course also concentrates instruction and seminar time on areas of practice that have received the greatest attention during recent operations. For example, the after action reports from Operations Restore Hope (Somalia), Uphold Democracy (Haiti), and Joint Endeavor (Bosnia) all demonstrate the extreme importance of competency regarding fiscal, procurement, and funding law. Accordingly, the new course focuses more than an entire day on these issues.

The course will continue the tradition of providing judge advocates with the most useful and comprehensive materials available. Each student will receive the current versions of the Operational Law Handbook, the Operational Law Briefing Papers and Materials Book, and a Handbook on Intelligence Law. Faculty members will use these books as the textbooks during the course and explain how to use these resources during an actual deployment. Seminars and practical exercises will reinforce the utility of the resources provided. The intent is to teach the students not only legal principles, but also where to find the law and how to interpret and to apply it.

Conclusion

The pace, scope, and complexity of current operations demand that judge advocates have the tools required to function effectively on any staff in any type of operation anywhere in the world. Operational law is not a distinct specialty within a potpourri of other legal areas. It is a discipline which incorporates other areas of law and requires competence in a wide range of specific judge advocate missions. The effective practice of operational law requires attorneys who can integrate knowledge of claims, military justice, administrative law, contract law, fiscal law, legal assistance, international law, and the law of armed conflict with the core skills of professional soldiers.⁸⁸ The United States Army is an increasingly expeditionary service. If the Army exists to accomplish a broad spectrum of assigned missions throughout the world, operational law in a deployed environment is the essence of military legal practice. The two-week Operational Law Seminar will provide attorneys with the knowledge, deployable materials, and skills required to serve commanders and soldiers. Major Whitaker and Major Newton.

88. In the words of Lieutenant Colonel Warren, "Operational law also includes proficiency in military skills. It is the *raison d'être* of the uniformed judge advocate. Every judge advocate must be an operational lawyer." Warren, *supra* note 73, at 37.